DIGEST
CANADIAN CASE LAW
1900–1911

COMPILED BY

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Abbreviations used in this Digest.

C.R. [ ] A.C.	Canadian Reports, Appeal Cases.
[ ] A.C.	Law Reports, Appeal Cases.
A.R.	Ontario Appeal Reports.
Alta. L. R.	Alberta Law Reports.
B.C.R.	British Columbia Law Reports.
Can. Cr. Cas.	Canadian Criminal Cases.
Can. Com. R.	Canada Commercial Reports.
Can. Ry. Cas.	Canadian Railway Cases.
C.A.	Court of Appeal (Ont.).
C.C.	Civil Code (Quebec).
C.C.P. } C.P.C. }	Code of Civil Procedure (Quebec).
C.L.J.	Canada Law Journal.
C.L.T.	Canadian Law Times.
C.R.	Court of Review (Que.). Consolidated Rule (Ont.).
C.S.B.C.	Consolidated Statutes, British Columbia.
Cr. Code	Criminal Code of Canada.
E.L.R.	Eastern Law Reporter.
Edw. VII.	Year of Reign of King Edward VII.
Ex.C.R.	Exchequer Court of Canada Reports.
Geo. V.	Year of Reign of King George V.
Imp.	Imperial (Statutes).
L.J.P.C.	Law Journal, Privy Council Cases.
L.T.R.	Law Times Reports.
M.C.	Municipal Code (Quebec).
M.C.C.	Mining Commissioner's Cases (Ont.).
M.M.C.	Martin's Mining Cases.
Man. L. R.	Manitoba Law Reports.
N.B.R.	New Brunswick Reports.
N.B. Eq.	New Brunswick Equity Reports.
N.S.R.	Nova Scotia Reports.
N.W.T.	North-West Territories.
O. } Ont. }	Province of Ontario.
O.A.R.	Ontario Appeal Reports.
O.L.R.	Ontario Law Reports (Current series from 1901).
O.W.N.	Ontario Weekly Notes (current series from 1909).
O.W.R.	Ontario Weekly Reporter (current series from 1902).
O.R.	Ontario Reports.
O.P.R.	Ontario Practice Reports.
Occ. N.	Canadian Law Times, Occasional Notes.
P.E.I.R.	Prince Edward Island Reports.
Pet. P.E.I.R.	Peters' Prince Edward Reports.
P.R.	Ontario Practice Reports.
Q.R.K.B.	Quebec Reports, King's Bench.
Q.R.Q.B.	Quebec Reports, Queen's Bench.
Q.R.S.C.	Quebec Reports, Superior Court.
Que. K.B. } R.J.K.B. }	Quebec Reports, King's Bench.
Que. S.C.	Quebec Reports, Superior Courts.
Que. P.R.	Quebec Practice Reports.
R. de J.	Revue de Jurisprudence (Que.).
R.L. n.s.	Revue de Légal, New Series (Que.).
R.S.B.C.	Revised Statutes, British Columbia.
R.S.C.	Revised Statutes, Canada.
R.S.M.	Revised Statutes, Manitoba.
R.S.N.S.	Revised Statutes, Nova Scotia.
R.S.O.	Revised Statutes, Ontario.
R.S.Q.	Revised Statutes, Quebec.
Sask. L.R.	Saskatchewan Law Reports.
S.C.R.	Supreme Court of Canada Reports.
Terr. L.R.	Territories Law Reports.
T.L.R.	Times Law Reports.
Wak. Nfld. Cas.	Wakeman's Newfoundland Cases.
W.L.R.	Western Law Reporter.
Yuk.	Yukon Territory.

Digest

OF

CANADIAN CASE LAW

1900-1910

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ABSENTEE.

Curator of an absentee brought action to recover amount of a deposit standing in name of latter:—*Held*, that defendants could plead that plaintiff's appointment was tainted with serious irregularities and ask for its annulment. *Plourde* v. *Bank of Montreal* (1910), 11 Que. P. R. 429.

Opening of a succession to which an absentee is called—*Ratification*—*C. C. 104, 105, 106, 107, 607, 608, 641, 689, 1203, 1567—C. C. P. 1038, 1054, 1511, 1535, 1586, 1591.*]—1. He who claims to exercise a right which implies that an absentee is living, is bound to establish that such absentee existed when the right accrued. 2. Art. 105 C. C. applies equally to the person presumed to be an absentee as to the person declared to be one. In other words, the actual heirs are not obliged to consider an absentee whose existence is not proved, and this even when he is not declared to be an absentee. 3. The absentee is not considered as being either living or dead; he who bases his claim upon the fact that the absentee is living must prove it according to the maxim: *actori incumbit onus probandi*. 4. If an absentee be called to a succession, in the absence of proof that he is living, it devolves exclusively to those who would have shared with him or to those who would have succeeded in his stead. 5. By means of representation, one may succeed in the place and stead of an absentee whose existence is not proved. 6. The actual heirs, called to a succession, to the exclusion of an heir of an absentee, is reputed the proprietor; consequently, all transfers of the property made by him are valid, and the purchaser cannot refuse to pay the purchase price or recover what he may have paid because he thinks he is in danger of being evicted. 7. Art. 1038 C. C. P., which requires that all the co-heirs or co-proprietors must be parties in the suit for a partition, only means, when it is an undivided part of a succession, co-heirs or co-proprietors who are present and who are not absentees, inasmuch as the latter, whether presumed or declared absentees, are excluded from the succession. *Cadieux* v. *Deveau* (1909), 16 R. de J. 73.

Service of absentees — *Can they be served on him at the office of the Court?*—*C. P. 85, 361.*]—Article 85 C. P., which provides that whenever one of the parties has, since the commencement of the action, left the province, or has no domicile therein, all orders, rules, notices or other proceedings may be served upon him at the office of the Court, does not apply to the service of articulated facts. Therefore articulated facts served upon an absentee at the prothonotary's office will not be held as admitted, particularly if such absentee's residence is known. *Klipstein & Eagle Mining Co.* (1910), 11 Que. P. R. 411.

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See BILLS OF EXCHANGE—CONTRACT—SALE OF GOODS—VENDOR AND PURCHASER—WORK AND LABOUR.

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See MASTER AND SERVANT — NEGLIGENCE—RAILWAY.

ACCIDENT INSURANCE.

See INSURANCE.

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See CRIMINAL LAW.

ACCORD AND SATISFACTION.

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

Agreement to accept land *in payment of debt — Solicitor's authority — Agent's authority.*]—One C., a commercial traveller in plaintiff's employ, called on defendant and pressed for payment of an overdue promissory note. Defendant offered to give a parcel of land in payment, and C. in company with defendant inspected the land. C. wrote plaintiffs submitting the proposition and giving a specific description of certain land. Plaintiffs wrote a solicitor instructing him to prepare a conveyance therefor. The solicitor, finding that there had been a misdescription in the letter to plaintiffs, accepted a conveyance of the land actually shewn by defendant to C.—Sup. Ct. of B. C. *held* (9 B. C. R. 257), in an action on the note, that plaintiffs were bound as by an accord and satisfaction and could not recover.—Sup. Ct. of Can. affirmed above judgment, holding that the plaintiffs were bound to accept the lot which had been offered to and inspected by their agent in satisfaction of the debt, and could not recover on the promissory note. *Pither* v. *Manley* (1903), 23 C. L. T. 64, 32 S. C. R. 651.

Contract—*Substituted agreement—Consideration.*] — Defendant being indebted to plaintiff, the latter agreed to take in lieu of cash to which he was then entitled, the defendant's written promise to deliver a headstone for $20, which was delivered, and the total claim of plaintiff was thereby reduced to $19.86, the sum sued for. Plaintiff also agreed to accept for this balance another $20 headstone, to be delivered when plaintiff required it. In addition, defendant agreed, if plaintiff required it, to supply a stone of greater value than $20, plaintiff agreeing to pay the excess:—*Held*, that the transaction constituted a new and substituted agreement, binding on both, and supported by a sufficient consideration, and constituted a complete accord and satisfaction of original cause of action. *Morton* v. *Judge*, 40 N. S. R. 457.

Keeping a cheque marked in full is not conclusive evidence of accord and satisfaction, and it may be shewn that the cheque was not accepted in full. *Day* v. *McLea*, 22 Q. B. D. 610, followed. In order to establish accord and satisfaction of a debt by payment of less than the amount due, it must be shewn that such payment was made in pursuance of an agreement for that purpose, or that it was so accepted by the creditor. *McPherson* v. *Copeland* (1909), 1 Sask. L. R. 519, 9 W. L. R. 623.

Saisie-arret in hands of purchaser.] —A defendant is entitled to plead any payment made before the transfer of his debt and which would tend to diminish his original indebtedness in respect of the plaintiff. The delay given to the purchaser to pay the balance of the price of sale does not run, if this amount is seized by a third party and that the seizure is still pending. If sued he is entitled to plead these special facts. *Tammaro* v. *Red Cross Macaroni Co.*, 11 Que. P. R. 71.

ACCOUNT.

Action en reddition de compte — *Advocate — Mandate — Professional services—Pleading.*]—When a declaration does not shew that money paid or remitted to defendant was money intrusted to him by plaintiff to be used in business or invested or used in execution of a commission as agent, but that it was paid voluntarily for professional services, there is no ground for an action *en reddition de compte*. — The allegation of a promise of defendant to furnish a statement of account for professional services, for which sums of money were paid, cannot serve as basis of an action *en reddition de compte*, unless it is coupled with an allegation of administration of property. *Lafond* v. *Beaulne* (1906), 7 Que. P. R. 458.

Action en reddition de compte — *Defence—Res adjudicata — Judgment for account—Setting up in account item adjudicated upon.*]—One who opposes, to demand *en reddition de compte*, the defence that the right of plaintiff is subject to the preliminary reimbursement of a sum of money advanced, and who, upon trial, fails in this defence and is ordered to account, cannot, in rendering an account pursuant to the judgment, set up claim urged in the defence as a credit item in his account. Judgment having passed into *res adjudicata*, while simply declaring against the defence, without specially adjudging whether the claim is well or ill founded, is regarded as having virtually rejected it. *Huot* v. *Huot* (1906), 14 Que. K. B. 522.

Action en reddition de compte — Executors may have their account made up by an expert who has been accepted by all parties. The signature of the latter is sufficient to bind defendants, and the verification by affidavit of such account is equivalent to a signature.—2. The word "*nominativement*" in art. 567, C. P., is not essential, and it is sufficient that the account be rendered by one from whom it is due, and to the one who demands it.—3. Defendants ought to give the details of the account and not only general statements. *Bérê* v. *Bérê* (1909), 10 Que. P. R. 265.

Action for—*Agent's returns—Compromise—Subsequent discovery of error—Rectification—Prejudice.*]—P. was agent to manage the wharf property of W., and receive the rents and profits thereof, being paid by commission. When his agency terminated W. was unable to obtain account from him, and brought an action therefor, which was compromised by P. paying $375, giving $125 cash and a note for the balance, and receiving an assignment of all debts due to W. in respect to the wharf property during his agency, a list of which was prepared at the time. Shortly before the note became due P. discovered that on one of the accounts assigned to him $100 had been paid, and demanded credit on his note for that sum. This W. refused, and in an action on the note P. asserted that the error avoided the compromise, and that the note was without consideration, or in the alternative that the note should be rectified:—*Held*, that, as it appeared that P.'s attorney had knowledge of the error before the compromise was effected, and as, by compromise, W. was prevented from going fully into the accounts and perhaps establishing a greater liability on the part of P., W. was entitled to recover the full amount of the note. *Peters* v. *Worrall*, 22 C. L. T. 198, 32 S. C. R. 52.

Action for—*Company—Board of Directors—Onus—Particulars.*]—In an action *en reddition de comptes* brought by a company against their president, the onus is upon the defendant to establish his allegation that the plaintiffs' board of directors is incomplete. 2. The plaintiffs asked that in default of accounting the defendant should be adjudged to pay a certain sum which they alleged he had received by virtue of certain contracts:—*Held*, that they were not obliged to state at what date and from what persons such sum had been received. *Temiscouata Ry. Co.* v. *Macdonald*, 3 Que. P. R. 462.

Action for—Ferguson, J., *held*, plaintiff entitled to an account of defendant's dealings with properties transferred to him as security for an endorsement. *Hull* v. *Allen* (1902), 1 O. W. R. 151, affirmed by D. C. *ib.* 782.

Action for—*Neglect to file—Order.*]—A plaintiff, who sues upon an account without filing it, and whose declaration is in general terms, will be ordered upon motion of the defendant to file his account, and to serve a copy upon the defendant. *Lachine Rapids Co.* v. *Hemond*, 5 Que. P. R. 138.

Action for—*Practice—Writ of summons—Indorsement — Necessity for statement of claim.*]—Where a writ of summons was indorsed, under O. 3, R. 7, with a claim for an accounting, the sole object of the suit being to obtain an account, the defendant appeared and demanded a statement of claim, which being refused, the defendant, after some lapse of time, moved to dismiss the action for want of prosecution. The motion was refused by the Judge, and the defendant appealed:—*Held*, that the intention of the Rules is to enable a party who is simply seeking an account to obtain it promptly and with little expense, and without pleadings, unless some preliminary question is interposed by defendant. Appeal dismissed. *Palmeter* v. *Palmeter*, 40 N. S. R. 190.

Action for — *Previous demand — Costs.*]—Every action supposes a right in the plaintiff and the violation of that right by the defendant. In order that a man who has a right to an account from another shall have an action *en reddition de compte* against him, it is necessary for him to shew a demand refused by the defendant; and if he sues without having made a demand, and the defendant, when sued, produces his account, the action will be dismissed with costs as premature. *Chanteloup* v. *Fulton*, 16 Que. S. C. 387.

Action for—*Service of account—Dilatory exception.*]—The failure to serve upon the defendant a detailed account at the same time as process in the action, is not ground for an exception to the form, but rather for a dilatory exception, such failure having only the effect of delaying the proceedings until the account has been served. *Dubrule* v. *Leclaire*, 24 Que. S. C. 314.

Administrators' accounts. *See* EXECUTORS AND ADMINISTRATORS—PROBATE—SURROGATE COURT—WILLS.

Alternative condemnation to pay a sum of money in case of failure to account—*Reduction of condemnation prayed for.*]—The plaintiff in an action to account who prays that, in the alternative of failure by the defendant to account, he be condemned to pay a specified sum, is entitled, on establishing the accountability of the defendant,

to a judgment accordingly. Hence, if the defendant, examined as a witness as to his accountability, produces an account and is permitted to offer explanations on it, the Court will not thereby be justified in reducing the alternative condemnation prayed for, to the balance shewn in the account so produced. Such a power vests in the Court only after a regular contestation of an account filed. *McCallum* v. *Bangs* (1910), 37 Que. S. C. 407.

Appeal—*Amount in controversy — Jurisdiction.*] — In an action *en reddition de compte*, where items in the account filed exceeding in the aggregate $2,000 have been contested, the Supreme Court of Canada has jurisdiction to entertain an appeal. *Bell* v. *Vipond* (1901), 31 S. C. R. 175.

Claims and cross-claims — *Legacy — Conversion of shares in company — Reference to Master.*]—The first action was against defendant as executor of his brother, but really against defendant personally. Judgment was given in first action to recover amount of a legacy in favour of plaintiff. The second action was against defendant personally, who was found indebted to plaintiff, the amount recovered in first action being set off:—*Held*, further, that certain shares and policies were not converted but merely held as security. *McCarthy* v. *McCarthy*, 13 O. W. R. 560.

Co-heirs—*Form of action.*]—An heir has no right to sue one of his co-heirs *en reddition de compte*, but the only action which he can bring is an action *en compte et partage*. *Renaud* v. *Delfausse*, 5 Que. P. R. 230.

Contestation —*Maladministration—Exception to form—Demurrer.*]—The party seeking an account may, in his contestation of the account rendered, urge all acts of maladministration committed by the accounting party; and objections to that mode of proceeding should be made by an exception to the form, and not by demurrer. *Blackwood* v. *Mussen*, 4 Que P. R. 432.

Contract accounts. *See* CONTRACT.

Damages—Settlement — Opening up — Reference—Special directions. *Hull* v. *Jackson*, 3 O. W. R. 717.

Disputed accounts between parties referred to clerk of Court. *Croake* v. *Brown* (1823), Wakenham's Nfld. Ca. 407.

Disputed items — *Absence of liquidation.*]—Set-off will not be allowed when the amount of the account which the defendant assumes to set off cannot be determined without a long discussion and contestation of the majority of the items. 2. A defendant in such a case cannot complain of a judgment which allows him a set-off in part, to which he had no right, and properly rejects the remainder of his account. *Pharand* v. *Deslandes*, 24 Que. S. C. 324.

Entries—*Proof of debt — Sufficiency.*]—Where regular entries of sales of goods were made, and invoices were rendered and demands for payment frequently made, and the debtor only questioned one small item of 50 cents, and, promising to pay, asked for delay:—*Held*, that the indebtedness was sufficiently established. *Laporte* v. *Duplessis*, 20 Que. S. C. 244.

Evidence—Books of business — Settlement—Report — Appeal — Reference back. *Brain* v. *Coffen*, 11 O. W. R. 949.

Evidence— Reference — Appeal — Arrangement for payment of creditors—Fraudulent conveyance—Omission from report — Motion to amend—Error of referee. *Lynch* v. *Murphy*, 3 O. W. R. 401.

Evidence of accounts. *See* EVIDENCE.

Executors' accounts. *See* EXECUTORS AND ADMINISTRATORS—PROBATE—SURROGATE COURT—WILL.

Extra-judicial accounts — *Form—Administration—Reformation of account — Action en reddition.*] — The rendering of an account divided into distinct heads of receipts, disbursements, and balances, is only required by law in the case of accounts which are rendered in the cause in pursuance of a judgment. No particular form is necessary for extra-judicial accounts, and it is sufficient if they give such details in regard to their subject as will make it possible to check them. 2. When an account of an administration is rendered, the person to whom it is rendered has no right, upon the ground that it is incomplete or inexact, to bring an action *en reddition de compte;* he should proceed by way of action for reformation of the account. *Beaudry* v. *Prévost*, 22 Que. S. C. 32.

Jurisdiction — *Master and servant — Division of office receipts—Discovery.*]—In a suit for an account the plaintiff stated that he was appointed deputy sheriff by the defendant, under an agreement that he was to have half of the net receipts of the sheriff's office. The defendant stated the agreement to be that the plaintiff was to have half of the fees from writs and executions only. On the probabilities of the evidence the Court found in favour of the defendant's version of the agreement. Of the receipts in which under this finding the plaintiff might be entitled on discovery to share, the fees in one case, amounting to $35, alone remained undivided: — *Held*, that the bill should not be dismissed. *Hawthorne* v. *Sterling*, 24 C. L. T. 241, 2 N. B. Eq. Reps. 503.

Mortgage accounts. *See* MORTGAGE.

Order to supplying merchant to furnish statement of account with one of his dealers, that the proceeds of the year's voyage might be distributed *pro rata* among current suppliers. *Baine* v. *Nichols* (1817), Wakeham's Nfld. Ca. 51.

Partition—*Requête Civile — Amendment —Supreme Court Act, s. 63—Order nunc pro tunc—Final or interlocutory judgment —Form of petition in revocation—Res judicata.*]—On a reference to amend certain ac-

counts already taken, a judgment rendered on the 30th September, 1901, adjudicated on matters in issue between the parties, and, on the accountant's report, homologated on the 25th October, 1901, judgment was ordered to be entered against the appellant for $26,316, on the 30th January, 1902. The appellant filed a *requête civile* to revoke the latter judgment within six months after it had been rendered, but without referring to the first judgment in the conclusions of the petition. It was objected that the first judgment had the effect of res judicata as to the matters in dispute, and was a final judgment *inter partes*:—*Held*, that, whether the first judgment was final or merely interlocutory, the petition in revocation must be taken as impeaching both former judgments relating to the accounts upon which it was based; that it came in time, as it had been filed within six months of the rendering of the last judgment; and that it virtually raised anew all the issues relating to the taking of the accounts affected by the two former judgments. A motion to amend the petition so as to include specifically any necessary conclusions against the judgment of the 30th September, 1901, had been refused in the Court below, and was renewed on the appeal to the Supreme Court of Canada:—Held, that, as the facts set forth in the petition necessarily involved a contestation of the accountant's reports dealt with in the first judgment, the case was a proper one for the exercise of the discretion allowed by s. 63 of the Supreme Court Act, and that the amendment to the conclusions of the petition should be permitted *nunc pro tunc*. *Hill* v. *Hill*, 24 C. L. T. 73, 34 S. C. R. 13.

Partnership — The Court has only to decide whether the plaintiff has the right to a judgment against the defendant, to force him to render an account according to law, from the moment that it appears that the accounting cannot be made in a friendly manner between the parties.—A motion by the plaintiff for particulars of certain allegations in the plea made after plea filed, is premature, and will be dismissed. *Harel* v. *Lemaire* (1909), 10 Que. P. R. 289.

Partnership accounts. *See* PARTNERSHIP.

Pleading—*Account rendered before action.*]—When the rendering of an account, with vouchers and deposit of the balance, is, by the plea, alleged to have been made before the institution of the action, the plaintiff cannot inscribe in law, but must discuss (*débattre*) such account. *Nixon* v. *Nixon*, 24 Que. S. C. 316.

Pleading — *Incidental demand — Omissions from principal demand.*]—Omissions made by the plaintiff in framing an action *en reddition de compte* may, notwithstanding Arts. 516 and 522, C. P., be the subject of an incidental demand. *Roe* v. *Hood*, 4 Que. P. R. 333.

Redemption—Trustee in possession — Master's report—Appeal—D. C. ordered an account on basis of defendant being a trustee in possession—Master to inquire and allow a reasonable amount for waste in taking accounts. *Hull* v. *Allen* (1905), 6 O. W. R. 961.

Reference — *Executor — Trustee — Stated account—Audit by Surrogate Judge —Consent judgment—Effect of—Re-opening account.*]—Under a judgment or order to account the Master may inquire into, adjudge, and report upon settled accounts—and this whether the judgment is by consent or otherwise, and whether the matter be referred to in the pleadings or not; and the audit of an executor's accounts by a Surrogate Judge under R. S. O. 1897, c. 59, s. 72, is to be regarded as a settlement of accounts. *Gibson* v. *Gardner*, 7 O. W. R. 474. Affirmed, 8 O. W. R. 526.

Reference——Motion before statement of claim—Rule 645—Grounds. *Singlehurst* v. *Wills*, 12 O. W. R. 259, 308.

Reference to take—*75 promissory notes —En déconfiture—Saisie arrêt—Commission to examine witnesses—Old French law.*]—Order of reference to take accounts, etc., made pursuant to the powers contained in 3rd and 4th Wm. IV, c. 41, s. 17, notwithstanding the dissent of the respondent's counsel, to the Court referring the same. The firm of S. & W. H. in Lower Canada, being indebted to J. W., transferred 75 promissory notes to a factor, on his own account. At the time of the transfer S. & W. H. were *en déconfiture*. A *saisie arrêt* having subsequently issued by other of the creditors of S. & W. H., the 75 notes in the hands of the factor were attached:—*Held*, by the Judicial Committee, that the transfer, having taken place before execution of the *saisie arrêt* was valid by the French law in force in Lower Canada. A Commission for examination of witnesses in Canada, to prove such *déconfiture*, in the circumstances, refused. *Semble*, by the old French law, prevailing in Lower Canada, all *Ordonnances* not registered, are void. *Hutchinson* v. *Gillespie* (1844), C. R. 1 A. C. 217.

Re-opening — *Delay — Contract.*]—Where accounts (for electric lighting) had been rendered by the plaintiffs during a period of over fourteen months, during which time the defendants would have had at least two opportunities to abandon the contract rather than pay increased rates for the future:—*Held*, that the plaintiffs were not entitled to re-open the accounts on the ground that a wrong principle had been followed by them, in calculating the meter readings. *Royal Electric Co.* v. *Davis*, 16 Que. S. C. 377; affirmed 9 Que. K. B. 445.

Right of action for—*Privity—Pledge of debentures — Subsequent claim on proceeds.*]—A contractor for work to be done for a company who have agreed to pay him by handing over the proceeds of their debentures, which have been transferred for the purpose of securing a loan, the contractor consenting that the lender shall be paid before him out of the proceeds of the debentures, has a right of action for an account against the latter. *Fosbrooke* v. *Murray*, 6 Que. P. R. 122.

Sale of hotel business — Counterclaim for balance of purchase money—Deductions—Resale of assets—License—Trust—Goodwill — Chattel mortgage—Seizure—Sale—Onus. *Boucher* v. *Capital Brewing Co.*, 5 O. W. R. 270, 686, 6 O. W. R. 70. Digested fully under INTOXICATING LIQUOR.

Setting out previous proceedings—*Amendment.*]—The plaintiff in an action *en reddition de compte* will not be allowed to set out at length in his declaration the proceedings in a previous action between himself and the defendant, and such allegations will be struck out upon demurrer. However, as it may be of importance to him to allege such facts in a general way, to justify himself for not having begun his present action earlier, the Court will, *proprio motu*, permit him to amend his declaration by alleging the previous suit and the judgment therein. *Cheval* v. *Senécal*, 4 Que. P. R. 241.

Settlement — Agents — Salary — Errors—Master's report—Appeal. *Robinson* v. *Noxon*, 11 O. W. R. 549.

Stated account—*Agreement not to sue — Conditional statement — Further adjustment of accounts—Recovery on one item—Absence of alternative claim on items—Refusal to amend—Admission of parol evidence —Partnership—Profits.*]—On the dissolution of a partnership the partners signed a statement shewing an amount as due to the plaintiff as his share, and containing a declaration that "for the sake of peace and quiet and to avoid friction and bother," the plaintiff was willing to waive investigation of the firm's books and to agree that the balance as stated should be deemed to be the amount payable by the defendants to the plaintiff:—*Held*, that a promise to pay the amount of the balance so stated to be due should be implied from the admission of liability which the parties had so signed. In an action on the account stated, the defendants alleged that the plaintiff had agreed not to sue upon it, and that the document was merely intended to shew the amount which would be payable to the plaintiff at such time as collections might be made of outstanding debts due to the firm.—*Held*, that these contentions tended to contradict, vary, and annul the terms of the written instrument, and, consequently, did not constitute collateral agreements in respect of which parol evidence would be admissible. Judgment of the Courts below, 1 W. L. R. 97, 2 W. L. R. 379, reversed. *Jackson* v. *Drake* (1906), 26 C. L. T. 315, 37 S. C. R. 315.

Statute of Limitations — *Agents of partners—Reference—Practice — Appeal to Supreme Court of Canada.*]—By agreement between them, the Hamilton Brass Manufacturing Co. were appointed agents of the Barr Cash and Package Carrier Co. for sale and lease of their carriers in Canada, at a price named for manufacture, net profits to be equally divided and quarterly returns to be furnished, either party having liberty to annul the contract for non-fulfilment of conditions. The agreement was in force for three years, when the Barr Co. sued for an account, alleging failure to make proper returns and payments. — *Held*, Girouard and Davies, JJ., dissenting, that the accounts should be taken for the six years preceding the action only.—On a reference to the Master (3 O. W. R. 762), the taking of the accounts was brought down to a time at which the defendants contended that the contract was terminated by notice. The Court of Appeal ordered that they should be taken down to the date of the Master's report:—*Held*, that this was a matter of practice and procedure, as to which the Supreme Court would not entertain an appeal.—Judgment of the Court of Appeal in *Barr Cash and Package Carrier Co.* v. *Hamilton Brass Manufacturing Co.*, 6 O. W. R. 643, reversed. *Hamilton Brass Manufacturing Co* v. *Barr Cash & Package Carrier Co.*, 27 C. L. T. 224, 38 S. C. R. 216.

Tenants in common—As long as the property is undivided, the remedy *en reddition de compte* in respect of revenues collected by the one, is not open in favour of the other; he has only an action *en compte et partage*. *Legatt* v. *Ledoux* (1909), Q. R. 35 S. C. 97.

Time fixed by judgment for rendering—*Damages in default—Death of defendant during time fixed—Revivor—Universal legatee—Payment of costs.*]—On 16th November, 1901, the judgment of the Court required the defendant to render to the plaintiff, within 30 days, an account of a quantity of wood which defendant had to dispose of for plaintiff, and, in case of default to render the account, to pay to plaintiff $9,000, with interest, and costs in any case. On 30th November, 1901, the defendant died, leaving his wife his universal legatee. His decease was not entered on the roll. On 2nd December, 1901, the widow, as universal legatee, paid the costs of the action. On 13th January, 1902, the plaintiff served the judgment on the universal legatee, with a demand for payment of the $9,000 within eight days, in default of which the judgment would be executed against her. On 21st January, 1902, she presented a petition alleging the death of her husband, her capacity of universal legatee, and asking that she should be added as a party to the suit in place of her husband and allowed to proceed in it. The plaintiff answered that the 30 days having expired, the judgment had become final as to the $9,000; that the petitioner had acquiesced in the judgment by paying the costs; and that there was no suit to which the petitioner could be made a party:—*Held*, that the plaintiff had not at the time of the defendant's death acquired a right to the $9,000, since it was not due till after the expiry of 30 days, and then only in default of the account being produced within that time. 2. That the decease of the defendant stopped the running of the 30 days, for a dead man cannot render an account; and it was not a case within Arts. 268, 269, C. P., which say that suits are valid up to the day of service of notice of a party's death, for as against the defendant there had been no suit since his death. 3. That the universal legatee, in paying the costs of the action, acquiesced in the judgment, but did not acquiesce in the default to render an account and to pay the $9,000. 4. That the universal legatee was in a position to take up the suit

at the point where it was at the death of the defendant. 5 *Quære*, as to the effect of the judgment, whether the defendant, if he had lived, could, after the expiry of the 30 days, have demanded and obtained further time to render the account. *Girard* v. *Letellier*, 21 Que. S. C. 192.

Work done and services rendered —Set-off — Counterclaim — Cross-accounts —Costs. *Sjostrom* v. *Gale* (N.W.T.), 2 W. L. R. 332.

ACCOUNT STATED.

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ACCOUNTANT.

See CHARTERED ACCOUNTANT — SOLICITOR.

ACCRETION.

See CROWN LANDS—WILL — WATER AND WATERCOURSES.

ACKNOWLEDGMENT.

See GIFT—INFANT—LIMITATION OF ACTIONS —MORTGAGE.

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See APPEAL — BILLS OF EXCHANGE AND PROMISSORY NOTES—ESTOPPEL — HUSBAND AND WIFE—MASTER AND SERVANT —PARTNERSHIP — VENDOR AND PURCHASER—WAIVER—WATER AND WATERCOURSES—WAY.

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ACTION.

1. ABANDONMENT OF ACTION, 18.
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1. ABANDONMENT OF ACTION.

After pleading exception to form.]— Where a plaintiff abandoned his action after serving a notice in the nature of exception to form, and after depositing the amount required in such case, but before the presentation of such motion, *held*, that Art. 13 of the tariff had no application, and it was necessary to apply Art. 6 for the fee on the appearance and Art. 23 for the fee on exception to form, regarding the latter as having been dismissed. In this case the tariff which applies is that for causes of the 2nd class in the Superior Court. *Maranda* v. *Levis* (1900), 16 Que. S. C. 33.

Against one defendant. *Liscomb Falls Mining Co.* v. *Bishop* (1904), 36 N. S. R. 395.

And tender of costs to defendant. *Turgeon* v. *Sevigny* (1909), 36 Que. S. C. 304, 10 Que. P. R. 205.

Authorization to sue.]—The authorization for a curator to sue should be given in the district in which the abandonment was made, and the Superior Court of another district in which an action is taken has no jurisdiction to order the curator to obtain another authorization. *Lamarche* v. *Wilson* (1910), 11 Que. P. P. 347.

By not proceeding. *Lawson Mine Ltd.* v. *Crawford* (1908), 12 O. W. R. 1156.

By proceeding against other defendants. *Hoffman* v. *Crerar* (1899), 19 C. L. T. 235, 311, 18 Ont. P. R. 473, 19 Ont. P. R. 15.

2. CONSOLIDATION OF ACTION.

Action en garantie—*Principal action*—*Jury*—*Prejudice.*] — A defendant in warranty, not adjudged to intervene in the principal action, and who denies his responsibility to the plaintiff in warranty, is not a party to the principal action, according to the terms of Art. 291, C. P., and a motion on the part of the plaintiff in warranty demanding the consolidation of the two issues so that they may be tried together by a jury will be dismissed. Such a demand should not be granted unless it is evident that no

prejudice will result from it to any of the parties. *Dillon* v. *Canadian Import Co.*, 8 Que. P. R. 123.

Actions against estate — *Representatives — Privilege — Rights of creditors.*]— The Court may, *proprio motu*, unite two default cases against the same estate, and order its representatives to be personally present at the trial, when the claims are, on their face, considerable, and a privilege might attach thereto to the detriment of the other creditors. *Meunier* v. *St. Jean*, 7 Que. P. R. 62.

Actions for salary—*Same defendant—Different contracts of hiring.*] — Several actions for salary against the same defendant based on different contracts of hiring, in which different amounts are claimed, can not be united for trial. *Kelly* v. *Canadian Pacific Ry. Co.*, 7 Que. P. R. 11.

Application of common defendant—Different plaintiffs with different solicitors and interests—Trial of actions together—Application to trial Judge. *Conway* v. *Guelph and Goderich Ry. Co.*, 9 O. W. R. 369, 420.

Application of common defendant—Trial of test action or actions to be tried together. *Webster* v. *Consumers' Gas Co.*, *Dodds* v. *Consumers' Gas Co.*, *Mills* v. *Consumers' Gas Co.*, *Heard* v. *Consumers' Gas Co.*, 9 O. W. R. 363, 417.

Art. 292 C. C. applies only to causes pending and heard at same time. *Harding* v. *Bickerdike*, 4 Que. P. R. 471.

Conduct of proceedings—Cross-actions. — Time — Diligence — Stay of one action. *Cobalt Nipigon Co.* v. *McKim Co.*, *McKim Co.* v. *Cobalt Nipigon Co.*, 9 O. W. R. 257.

Cross-actions — Possession of land — Specific performance of contract—Burden of proof—Stay of one action—Judicature Act, s. 57, s.-s. 12. *Berry* v. *Hall*, *Hall* v. *Berry*, 10 O. W. R. 496.

Damages from same accident.]—When several plaintiffs sue for damages alleged to have been caused by the same defendant and arising out of the same accident, such causes may be united for the purposes of proof, except as to the amount of damages suffered by each claimant respectively. *Cantin* v. *Royal Electric Co.*, 5 Que. P. R. 327.

Different plaintiffs—Same defendant—Common subject—Inconsistent claims—Stay of one action—Setting down for trial. *Fulmer* v. *City of Windsor*, *Bangham* v. *City of Windsor*, 5 O. W. R. 589, 772.

Discretion—*Appeal—Leave.*] — Consolidation of cases is left to the discretion of the Judge, and appellate Courts will not interfere with the exercise of such discretion unless in a case of manifest injury or error. Leave to appeal refused. *North American Life Assurance Co.* v. *Lamothe*, 7 Que. P. R. 177, 14 Que. K. B. 334.

Facts unusual—*Rules 206, 312, 313.*]— On a motion to stay proceedings in a second action until the first action had been finally disposed of, order was made permitting plaintiff to consolidate the two actions as the facts were unusual. *Dominion Improv. & Devel. Co.* v. *Lally* (1909), 14 O. W. R. 933, 1 O. W. N. 146.

Identity of parties—Identity of issues —Stay of proceedings—Consent to be bound by judgment in earlier action. *Hamilton* v. *Hamilton St. Ry. Co.*, 4 O. W. R. 47, 207, 311, 411, 5 O. W. R. 151, 6 O. W. R. 206, 375. See, also, 207.

Identity of parties—Similarity of issues —Counterclaim. *Toronto* v. *Toronto Ry. Co.*, 2 O. W. R. 225, 3 O. W. R. 204, 298, 4 O. W. R. 221, 330, 345, 446, 5 O. W. R. 14, 64, 130, 403, 415, 6 O. W. R. 574, 677, 871.

Motion for—*Separate proceedings.*]—In order to obtain consolidation of several actions a motion must be made in each of them; a single motion will be rejected. *Falardeau* v. *Montreal*, 6 Que. P. R. 360.

Powers of trial Judge—*Previous refusal to consolidate—Reformation of interlocutory orders.*]—The Superior Court sitting at the trial of a case upon the merits, has the power to reform and reverse interlocutory orders previously made therein, and, in the exercise of such power, will order, notwithstanding a previous contrary decision, that the case be united with two other ones involving the same issues, the whole to be tried and decided on the same evidence. *Montreal-Canada Fire Insurance Co.* v. *Thérien*, 34 Que. S. C. 205.

Selection of test actions.] — Forty-four actions were brought by different persons against the defendants for damages caused by the death of relatives in an explosion extending over a large area of the defendants' coal mine, and the plaintiffs applied to consolidate these actions with twenty-nine other actions, one of which had been chosen as a test action. On account of the workmen who were killed not all being of the same class, and also on account of the different conditions in the different parts of the mine where deaths occurred, the defendants contended that the action would not be a fair test of all the others:—*Held*, that the defendants should have the right to select four actions as test actions for those of the same class. *Ellyn* v. *Crow's Nest Pass Coal Co.*, 24 C. L. T. 102, 10 B. C. R. 221.

Stay of one action—*Terms of.*]—On motion to consolidate two actions, the Master directed first action to proceed and if plaintiffs succeeded, defendants to be at liberty to apply for a stay of execution or otherwise as may be just. *Caswell* v. *Lyons*, 13 O. W. R. 258.

Stay of proceedings — Parties — Jury notice. *Murphy* v. *Brodie*, 1 O. W. R. 429, 681, 2 O. W. R. 106, 3 O. W. R. 508.

Stay of proceedings—Different plaintiffs against same defendant. *Bodi* v. *Crow's Nest Pass Coal Co.*, 9 B. C. R. 332.

Test actions—*Plaintiffs in some actions outside jurisdictions — Security for costs — Waiver.*]—Twenty-nine actions by different plaintiffs were commenced against the defendants at one time, and subsequently forty-four similar actions were commenced. One action, known as the Leadbeater action, was ordered to be tried as a test action for the twenty-nine, and afterwards by consent four

actions out of the forty-four were consolidated by order of the full Court with the Leadbeater action, and ordered to be tried as test actions for the whole seventy-three. In the Leadbeater action and in one of the four remaining test actions the plaintiffs resided in the jurisdiction, and in the other three they resided outside the jurisdiction:—*Held*, reserving the decision of Irving, J., that the plaintiffs outside the jurisdiction should not be required to give security for costs. *Silla v. Crow's Nest Pass Coal Co.*, 24 C. L. T. 105, 10 B. C. R. 224.

Trial by jury.]—Joinder of two cases where the parties have made option for jury trial will not be granted. *Schwab* v. *Montreal Light, Heat and Power Co.*, 6 Que. P. R. 50.

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3. Discontinuance of Action.

Before return of writ.]—Plaintiff may discontinue his action before the return, by serving a copy of the discontinuance upon defendant's attorney and by tendering him his costs upon his appearance. In such event, a motion for default against plaintiff, will be dismissed. *Bacon* v. *Lafontaine*, 11 Que. P. R. 64.

Costs—*Offer to pay—Payment—Practice—Judgment on desistement.*]—Where at the time of the discontinuance of an action the plaintiff does not pay the defendant's costs, the defendant has a right to ask the Court for an *acte du désistement*, and, moreover, a judgment upon it, in order to be able to issue execution for the costs. 2. It is not sufficient for the plaintiff to offer to pay the costs; he must shew that his offer has been followed by payment; if the offer is refused, he must pay the amount into Court. *Turgeon* v. *Sévigny*, 10 Que. P. R. 205, 36 Que. S. C. 304.

Counterclaim — *Cause of action.*] — Where the plaintiff discontinues his action after the defendant has delivered a counterclaim, the defendant may proceed with his counterclaim as if it were an action; the plaintiff will then be in the same position as a defendant served with a writ of summons; and if the counterclaim is one which the defendant could assert only by virtue of the plaintiff having come into the jurisdiction and sued the defendant, he should not be allowed to proceed with it as a term of permitting the plaintiff to discontinue. *Dominion Burglary Guarantee Co.* v. *Wood*, 22 C. L. T. 151, 3 O. L. R. 365.

Desistment — *Order — Prothonotary — Jurisdiction — Judgment of Court.*] — The prothonotary has no jurisdiction to give a certificate or make an order upon a desistment; and therefore, when a desistment is filed with the clerk of the Court by a party, the opposite party must apply by way of inscription to the Court, in order to obtain a judgment in accordance with the desistment. *Mageau* v. *Montreal Mutual Assurance Co.*, 24 Que. S. C. 208.

Desistment.]—Party represented by an attorney *ad litem* cannot himself file a desistment from the suit. *O'Rourke* v. *O'Rourke*, 5 Que. P. R. 405.

Desistment from action filed by a party without the consent or knowledge of his attorney will not be rejected on motion unless fraud is proved against the parties. *Gauvreau* v. *Computing Scale Co.*, 6 Que. P. R. 448.

Desistment from judgment — *Amendment — Costs — "Proceeding" — Art. 255, C. P.*]—If a plaintiff desists from a judgment based upon grounds not set up in his declaration, the parties stand in the same position which they occupied prior to the recording of the judgment. The plaintiff may then ask the Court for permission to amend his declaration. The costs of such amendment will be determined by the final judgment. 2. The word "proceeding," as used in Art 255, C. P., concerning discontinuance of suit, refers to and includes any procedure adopted by any party to a suit; a defence is included in that word. 3. It is not absolutely necessary that a party should embody in his declaration of discontinuance, that it is made subject to the payment of costs, inasmuch as that is the condition imposed by law upon which alone it can be made. *Bessette* v. *Equitable Mutual Fire Insurance Co.*, 10 Que. P. R. 201.

Dismissal — *Payment of costs.*]—Article 278, C. C. P., which says that a party who has discontinued cannot begin again before paying the costs of the opposite party in respect of the abandoned demand or proceeding, does not apply to a case where the first suit has been dismissed. In this case the first suit was intended to be against the present defendant, and service upon him was made, but the plaintiff made a mistake as to his name. *Girard* v. *Brais*, 16 Que. S. C. 409.

Dismissal—*Reservation of rights—Practice.*]—After the plaintiff has discontinued his action, a motion demanding its dismissal will be granted, reserving to the plaintiff the right to bring another. *Lacroix* v. *Probst*, 8 Que. P. R. 315.

Hypothecary action.]—A plaintiff in a hypothecary action cannot discontinue as to his principal action and move for costs, on production of a plea by defendant that he is not in possession of the hypothecated immovable, on the ground that at date of institution of the action the defendant was the apparent proprietor in possession. *Pilon* v. *Cantin*, 31 Que. S. C. 51.

Inscription for proof and hearing cannot be made before *acte* is given of the discontinuance. *McKeown* v. *Wright*, 8 Que. P. R. 137.

Inscription for judgment.]—When a discontinuance is filed and served, the only right the defendant has is to demand an act of discontinuance; and an inscription for judgment in pursuance of the discontinuance will be set aside on motion. *Bank of St. John* v. *Dion*, 6 Que. P. R. 227.

Intervention by third party — *Fatal Accidents Act—Judgment.*]—As long as a judgment is not entered upon a discontinuance, third parties can intervene to protect their rights. If a widow who sues for damages for her husband's death, according to

Art. 1056, C. C., desists from her action, the mother of the deceased has the right to intervene in the case. *Gaze* v. *Dominion Bridge Co.*, 8 Que. P. R. 181, 15 Que. K. B. 379.

Leave — "*Proceeding in action*" — *Receiver.*] — Where defendants were added by order of Court and appeared and pleaded: —*Held*, that plaintiffs had not the right, except by leave of the Court or a Judge, to discontinue as against such defendants, especially where defendants claimed a specific right in the property in question, which right would be affected by the action. — Where an agreement had been entered into under which defendants' solicitor was permitted to withdraw the defence pleaded by him and to prepare and deliver a new defence:—*Held*, that this was "another proceeding in the action" after delivery of the defence, which, under O. 26, R. 1, precluded plaintiffs from discontinuing without leave of the Court or a Judge.—*Held*, also, that an order for the appointment of a receiver, made while the first defence was on the record, and which had not been abandoned, and of which neither the defendant F., nor his solicitor, had notice, was irregularly made and must be set aside with costs. *Boak* v. *Higgins*, 32 N. S. R. 494.

Notice—Service of—Rule 173—"Save any interlocutory application" — Inspection of documents—Motion for leave to discontinue — Effect of — Costs. *O'Brien* v. *O'Brien Brewing and Malting Co.* (Y.T.), 10 W. L. R. 694.

Offer to pay costs.]—A discontinuance, not accompanied with an offer to pay the costs, is insufficient and ineffective. *Moon* v. *Bullock*, 6 Que. P. R. 59.

Partial confession of judgment not accepted by plaintiff does not limit plaintiff's control over his action. He may discontinue in whole or in part only. *Moreau* v. *Jodoin*, 10 Que. P. R. 353.

Practice—*Mention of cause—Regularity —Signature—Foreign language—Absence of solicitor's contest.*]—1. The fact that in a desistment, the cause is mentioned for which it is signed by the plaintiff, does not affect its regularity; there is no need of a supplementary pleading. 2. A desistment signed in a foreign language, in this instance in Russian characters, is valid; the onus is upon the opposite party to contest the signature, if he does not believe it to be that of the party discontinuing. 3. A party may file a desistment without the aid or even the consent of his attorney. *Nicholapshick* v. *McGuigan*, 10 Que. P. R. 281.

Practice as to—*Return of writ.* —The provisions of Art. 276, C. P., as to desistment, are not limitative, and the form prescribed by the Article is not obligatory. 2. A plaintiff who desists from his demand before return of the writ, is not obliged to return his action upon the day fixed in order to be in a position to state that he has desisted. 3. A motion for dismissal made after desistment is of no effect. *Lauterman* v. *Vineberg*, 5 Que. P. R. 127.

Right of defendant to prevent — Specific performance—Payment of purchase money into Court by defendant—Right to Judgment. *Lye* v. *McConnell*, 5 O. W. R. 326.

Rule 430—Leave to discontinue—Terms —Stay of action in foreign Court—No action to be brought in any Court for same cause. *Schlund* v. *Foster*, 10 O. W. R. 1095, 11 O. W. R. 60, 175, 314.

Service of notice before return day of writ of summons—*Rights of defendant —Certificate of discontinuance—Costs of defendant — Action for, as damages.*] — The service upon the defendant personally of notice of the discontinuance of an action, before the day of the return of the writ of summons, is valid *ipso facto*, because it is made before the appearance of the defendant, at a time when the action is under the exclusive control of the plaintiff, and the defendant has not yet acquired a right in regard to the action in which he is sued. The obtaining by the plaintiff of a certificate of discontinuance is not one of the conditions which the Code imposes on its validity, since it exacts no particular formality, and the party upon whom notice of discontinuance is served cannot require that it shall be followed by a judgment. Where the plaintiff has occasioned by his action costs which cannot be taxed according to the tariff, and which cannot be ascertained at this stage of the proceedings (before the return day of the writ), the defendant may recover the amount of such costs as damages by direct action against the plaintiff, if he has a good claim thereto. *Lussier* v. *Tellier*, 9 Que. P. R. 113.

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4. Dismissal of Action.

Chambers—*Entry for trial.*]—A Judge sitting in Chambers has power to dismiss an action for want of prosecution notwithstanding that the action has been entered for trial. *Sullivan* v. *Jackson*, 7 B. C. R. 133.

Default of doing an act — *Further order.*]—Upon an appeal from an order of the Master in Chambers upon a motion to dismiss the action for default of an undertaking:—*Held*, per Meredith, C.J., that where an order is made for the doing of an act, or, in the alternative, that the action should be dismissed, and default is made in the doing of the act, the order operates to put an end to the action, and no further order is necessary, and, the action being dead, the Court has no power to relieve from the consequences of such default. On appeal, a Divisional Court, being of opinion that under the circumstances the action should be dismissed, declined to consider the question of the necessity of a further application or the power to relieve from the default. *Crown Corundum and Mica Co.* v. *Logan*, 1 O. W. R. 107, 174, 22 C. L. T. 159, 3 O. L. R. 434.

Default of election under order — Appeal—Extension of time for election after default. *Bank of Hamilton* v. *Anderson*, 2 O. W. R. 1127, 3 O. W. R. 301, 389, 709, 4 O. W. R. 146, 24 C. L. T. 347, 8 O. L. R. 153. Digested under Parties.

Default of statement of claim — Practice—Time—Costs—Leave to proceed—Terms—Amendment. *Thibadeau* v. *Lindsay*, 2 O. W. R. 421.

Delay in delivery of statement of claim—Irregular delivery—Validating order—Terms—Possession of land—Improvements. *City of Toronto* v. *Ramsden*, *City of Toronto* v. *McDonell*, 5 O. W. R. 381, 413.

Delay in going to trial — Excuse — Leave to proceed—Terms—Costs. *Meldrum* v. *Laidlaw*, 5 O. W. R. 87.

Failure of plaintiff to proceed at trial—*Refusal of application to postpone—Rules 255, 256—Appeal—Motion to set aside judgment—Extension of time—Legal holiday.*]—The plaintiff appeared by counsel when the case was called for trial; but was not prepared to proceed, and no affidavit in support of the application for an adjournment being produced, the trial Judge dismissed the action. The plaintiff appealed:—*Held*, that the action was properly dismissed under the provisions of Rule 255 of the Judicature Ordinance, and that before an appeal will lie from such judgment, the plaintiff should apply to the trial Judge to set aside the judgment under the provisions of Rule 256.—*Held*, also, that the trial Judge has power to extend the time for applying under Rule 256.—*Held*, also, that a judgment pronounced in Court on a legal holiday, no objection being raised, is valid. *Burke* v. *Nolin*, 8 W. L. R. 830, 1 Sask. L. R. 185.

Failure to proceed to trial—Breach of undertaking—Excuse for delay—Terms—Costs. *Bayly* v. *Wellington Dressed Meats Co.*, *Hanrahan* v. *Wellington Dressed Meats Co.*, 4 O. W. R. 203, 6 O. W. R. 725.

Insolvency of curator is not a reason justifying the dismissal or suspension of an action. *Lamarche* v. *Wilson* (1910), 11 Que. P. R. 347.

Money paid into Court — *Order permitting withdrawal—Recourse for balance.*]—An action will not be dismissed on motion, after judgment has been rendered permitting the plaintiff to withdraw the sum paid into Court by the defendant to purchase peace, and reserving the recourse of the plaintiff for the balance of the amount claimed. *Laplante* v. *De Lery Macdonald*, 6 Q. P. R. 463.

Motion to dismiss as frivolous and vexatious—*Affidavits—Truth of.*] — Upon an application to dismiss an action as frivolous and vexatious, affidavits of the defendants were allowed to be read, and, not being answered, were taken as true, and the action dismissed by the full Court on appeal from an order refusing the application. *Hofins & Co.* v. *Lenora Mount Sicker Copper Mining Co.*, 7 W. L. R. 156, 13 B. C. R. 226.

Motion to dismiss for failure of plaintiff to attend for examination for discovery—Illness of plaintiff — Medical evidence as to—Undertaking to proceed to trial—Excuse for delay—Increased security for costs. *Appleyard* v. *Mulligan*, 8 O. W. R. 500, 624.

No reasonable cause of action—Dismissal of servant — Mechanics' lien — Company. *Berridge* v. *Hawes*, 2 O. W. R. 619, 741.

Non-payment of costs at appointed time—*Appeal—Time for payment extended—Jurisdiction of Divisional Court.*]—Plaintiff asked for an adjournment of trial. Latchford, J., granted the adjournment on terms that plaintiff pay to defendants the costs of the day within 10 days, otherwise, the action to stand dismissed. Plaintiff failed to get the money paid over by 40 minutes, and defendants sought to take advantage of the technicality. Divisional Court extended the time for payment of costs by one week. Court of Appeal *held*, that the Divisional Court was within their jurisdiction in so doing. Meredith, J.A., dissenting. *Strati* v. *Toronto Construction Co.* (1910), 17 O. W. R. 259, 1 O. W. N. 877, 1000, 2 O. W. N. 172, 22 O. L. R. 211.

Not going to trial—*Joinder of issue.*]—An application for a judgment, as in case of non-suit, was refused where it appeared that the plaintiff had not filed a joinder of issue, though one had been served. *Gallagher* v. *Wilson*, 21 C. L. T. 54, 35 N. B. Reps. 238.

Summary order — *Frivolous action — Habeas corpus to obtain custody of infant—Procedure.*]—An application for the custody of an infant must be by way of motion, summons, or petition, where the only relief sought in an action commenced by writ of summons was the issue of a writ of *habeas corpus*. Wetmore, J., under Rule 151 of the Judicature Ordinance, dismissed the action as frivolous, pointing out there are two methods by which a parent may obtain the custody of his child—by writ of *habeas corpus* and by petition to the Court of Chancery—and that it was improper to institute an action for the issue of the writ, while, in spite of *Casey* v. *Casey*, 15 Gr. 399, and *Munro* v. *Munro*, 15 Gr. 431, the jurisdiction of the Court to grant relief on petition must be exercised under the method pointed out by the practice. *Gray* v. *Balkwill*, 5 W. L. R. 257, 6 Terr. L. R. 283.

Want of prosecution.]—On motion to dismiss for want of prosecution, nothing having been done for a year, order made that plaintiff elect within a week as to what order shall issue. *Lawson* v. *Crawford*, 12 O. W. R. 1156.

Want of prosecution—Cause of action—Abatement—No question but that of costs remaining. *Sheard* v. *Menge*, 8 O. W. R. 449.

Want of prosecution—Death of defendant—Failure of plaintiff to revive—Application of administrator to dismiss—Limitation of actions—R. S. O. 1897 c. 129, s. 11. *Kidd* v. *Kidd*, 11 O. W. R. 553.

Want of prosecution — Delay—Motion to vacate order — Relief — Terms—Costs. *Conmee* v. *Lake Superior Printing Co.*, 7 O. W. R. 610.

Want of prosecution—End of cause of action—Dispute as to—Summary jurisdiction

to dispose of costs in Chambers. *Holdsworth* v. *Gaunt*, 8 O. W. R. 428.

Want of prosecution—Excuse for delay —Merits—*Locus pœnitentiæ*—Terms. *Stratford* v. *Young*, 3 O. W. R. 620, 786.

Want of prosecution—Excuse for delay — Poverty — Negotiations for settlement — Amendment — Statement of claim—Criminal conversation. *Milloy* v. *Wellington*, 3 O. W. R. 37 561, 4 O. W. 82, 6 O. W. R. 437.

Want of prosecution—*Failure to proceed to trial — Peremptory undertaking — Costs.*]—The practice on refusing a rule for judgment, as in case of nonsuit, for not proceeding to trial according to notice, on giving a peremptory undertaking, is to impose costs of the day as a condition. *Jones* v. *Muller*, 37 N. B. R. 585.

Want of prosecution—*Form of motion —Equity practice—Company—Winding-up.*] —An objection on a motion to dismiss for want of prosecution a bill by a shareholder and the company, which subsequently to the commencement of the suit went into liquidation, that the motion should have been for an order that, unless the plaintiff obtained leave to proceed within a limited time, the bill should stand dismissed, overruled. *Partington* v. *Cushing*, 3 N. B. Eq. 322, 1 E. L. R. 493.

Want of prosecution — Frivolous or vexatious action. *Clark* v. *Nisbet*, 7 O. W. R. 361.

Want of prosecution—*Motion—Notice or summons.*]—Rule 169 providing that a motion for the dismissal of the action for want of prosecution shall be by notice, the procedure by summons cannot be adopted. *Dominion Bank* v. *Freedt*, 5 W. L. R. 589, 6 Terr. L. R. 298.

Want of prosecution—*Motion for judgment quasi non-suit.*]—An application for judgment as in case of non-suit, for not proceeding to trial, refused on terms. *Frederick* v. *Gilson*, 36 N. B. R. 364.

Want of prosecution—Motion to dismiss—Leave to proceed—Costs. *Logan* v. *Dewar*, 11 O. W. R. 312.

Want of prosecution—Motion to dismiss—Notice of motion or summons—Discharge of summons—Costs. *Dominion Bank* v. *Freedt* (N.W.T.), 5 W. L. R. 589.

Want of prosecution—Motion to dismiss—Statute of Limitations—Leave to proceed—Terms. *Scott* v. *Hay*, 10 O. W. R. 262.

Want of prosecution.]—Motion to dismiss action for want of possession is an interlocutory application, although the order made thereon may be final. *Gibson* v. *Drennan*, 1 W. L. R. 577.

Want of prosecution—Negotiations for settlement—Several defendants. *Burnham* v. *Hays*, 2 O. W. R. 535.

Want of prosecution—Order for new trial — Failure of plaintiff to set down — Remedy of defendants — Rule 234 — Jury. *Sorenson* v. *Smith*, 7 O. W. R. 725.

Want of prosecution.]—1. A party interested who is bound to continue a suit is not entitled to a *mise en demeure*, the law itself putting him in default to do so. 2. When a continuance of suit is not effected by the party interested, the party remaining in the case may bring an action to compel him to continue the suit, without any previous demand, and is entitled to the costs of such suit. Judgment in Q. R. 21 S. C. 48 reversed as to costs. *Arcand* v. *Yon*, 22 Que. S. C. 502.

Want of prosecution—Refusal to dismiss—Terms—Change of venue — Speedy trial—Costs. *Patterson* v. *Todd*, 8 O. W. R. 868.

Want of prosecution—Rule 433—Application, where action brought down to trial and new trial ordered. *Diamond Harrow Co.* v. *Stone*, 7 O. W. R. 685.

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5. Form of Action.

Exception to — *Delay in presentation — Dismissal — Notice of motion.*] — The plaintiff sued the defendant in the Circuit Court for the sum of $15, the value of a sheep strangled by the plaintiff's dog. The defendant answered by an exception to the form, alleging that he ought to have been first brought *en conciliation*. Regular notice of the deposit and of the day of presentation of the motion was given to the plaintiff. On the day fixed the defendant did not bring on his motion, and several days afterwards he gave a new notice of its presentation:—*Held*, that the motion should have been presented on the day fixed in the first notice, and that the delay in presentation was a sufficient ground for its rejection. *Noel* v. *Garneau*, 17 Que. S. C. 346.

Heirs.] — Arts 135, 174 (3) C. P. C. *Andrews* v. *Frankenburg* (1900), 17 Que. S. C. 313. Digested under Parties.

Personnelle-hypothecaire—*Demurrer.*] —An action to recover a sum of money and to have it declared a charge on land and to have such charge enforced by sale will lie. Although the Code of Procedure does not expressly sanction such an action (*personnelle-hypothecaire*), there is nothing in it opposed thereto, and it is warranted by the constant, immemorial practice in this country. A demurrer will not be struck out because it is extraordinarily long and in the form of a factum. *Belgarde* v. *Carrier*, 3 Que. P. R. 238.

See Pleading—*Exception to Form.*

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6. Limitation of Action. *See* Limitation of Action.

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7. Notice of Action.

Notice of action—Notice by letter — Bad faith. *Gervais* v. *Nadeau* (1900), 3 Que. P. R. 18. Digested under Notary Public.

See Trial.

8. Partnership Action. *See* Partnership.

9. Penal Action. *See* Penal Action.

10. Settlement of Action.

Bona fide settlement.] — This action was brought to determine whether a certain settlement of the original action was valid and binding on the defendants:—*Held*, that it was; that defendant B., as a partner, had power to make the settlement, to engage solicitors, and that defendant D. confirmed this. The settlement was *bona fide* and made after careful consultation with solicitors and counsel. *Can. Bank of Commerce* v. *Donoghue* (1909), 12 W. L. R. 30.

Dismissal.] — Defendant had certain household goods stored in a public building in Toronto Junction. In 1905 the town solicitor notified him to remove his goods, and at his request carted them to the G. T. R. and shipped them to defendant at Prescott, the town solicitor undertaking to pay freight. When goods arrived at Prescott, defendant had moved to Belleville. Here he received notice from G. T. R. that his goods were at Prescott. He notified them that it was their duty to deliver his goods to his proper address, Belleville. Defendant never received his goods, they not being called for at Prescott; they were sent to the lock-up warehouse in Toronto. Defendant brought action against Toronto Junction and G. T. R., and after negotiations was dismissed as against the town on payment of a certain sum. Application was made to Master in Chambers for order dismissing the action. An issue was directed to try the question whether the action was settled:—Held, that there was no settlement. Issue found in favour of defendant, who is entitled to his disbursements if any. *Grand Trunk Rw. Co.* v. *Broom* (1909), 14 O. W. R. 824, 1 O. W. N. 135.

11. Miscellaneous Cases.

Action en complainte—Sale of land—Condition—Possession *annale*—Year's possession—Agreement to purchase — Maintenance of action for. *Beauchemin* v. *Latraverse* (1900), 9 Que. K. B. 56. Digested under Trespass to Lands.

Authority to sue — Death of child — Costs—Arts. 1272, 1292, C. C. Que. *Lefebvre* v. *Dom. Wire Mfg. Co.* (1900), 3 Que. P. R. 224. Digested under Husband and Wife.

Authority to sue.] — The law which authorises the curator to take action on behalf of the insolvent, makes him the representative of all the creditors for the purposes of such action, and at the same time he represents the insolvent; the creditors cannot afterwards, under the pretence of exercising their debtor's rights, take individual actions for the same purpose. *Lamarche* v. *Wilson* (1910), 11 Que. P. R. 347.

Conseil judiciaire — *Disavowal — Common interest.*]—A *conseil judiciaire* has no right to take, in the name of him to whom he has been named conseil, judicial proceedings, even when such conseil has a personal interest in such proceedings. *Beauchamp* v. *Gourde*, Que. R. 20 S. C. 260.

Covenant — Action on — See Landlord and Tenant—Mortgage.

Dilatory exception—*Payment of costs of former action—C. P. 177, 278.*]—Proceedings upon a petition for the interdiction of an habitual drunkard will be suspended until the costs on a previous petition to the same effect, which was dismissed for irregularities, have been paid. *Monti* v. *Amyot* (1910), 11 Que. P. R. 298.

Disavowal—*Direct action for — Act of disavowal—Necessity for—Affidavit—Costs—Demurrer.*]—An act of disavowal is necessary only where disavowal is sought in a pending action, and a direct action for disavowal will not be dismissed, upon a defence in law, for default of production at the record office of an act of disavowal. 2. In any event, the signature to an affidavit at the foot of the petition for disavowal is equivalent to such an act, in a direct action for disavowal. 3. Evidence before determination in law will be ordered upon a defence in law made in a direct action of disavowal by the plaintiff in the original action, against that part of the claim in the action of disavowal which asks costs against the original plaintiff. *Lewis* v. *Richard*, 2 Que. P. R. 426.

Disavowal—*Pending action — Action in disavowal—Exception to form.*]—Where a disavowal is made in regard to a claim which is the subject of a pending action, it must be made in that action; and a direct action in disavowal will be dismissed upon exception to the form. *Gaucher* v. *Bazin*, 6 Que. P. R. 141.

Eliciting judicial pronouncement.]—Actions at law do not lie for the mere purpose of eliciting a judicial pronouncement on a question of law, and the interest plaintiffs must have in them means an interest to have a right enforced or a wrong redressed. Hence, a plaintiff, in an action to rescind a contract, who does not set out an injury or wrong growing out of it, and avers the necessity of resorting to further proceedings, if successful, does not disclose such an interest as is required by Art. 77 C. P. *Montreal Harbour Commissioners* v. *Record Foundry* (1909), 38 Que. S. C. 161.

Fatal Accident Act—Right of administrator to bring action under—Relatives — Rights of time limit. *See Whalls* v. *Grand Trunk Rw. Co.* (1901), 1 O. L. R. 622.

Joinder of defendants—Two separate causes of action—One for negligence—Other for breach of contract—Motion to strike out statement of claim—Order granted—Plaintiff to elect within a week on which action he will proceed. *Vachon* v. *Crown Reserve & Maryland Casualty Co.* (1910), 17 O. W. R. 695, 2 O. W. N. 378.

Leave to sue—Granted by Master in ordinary—Motion to set aside order and to strike out statement of claim—Grounds alleged irregularity—Application dismissed—Leave given plaintiff to amend statement of claim and add insolvent company as party plaintiff—Costs in cause. *Clarkson* v. *Linden* (1910), 17 O. W. R. 689; 2 O. W. N. 379.

Local venue — *Real action* — *Situs of chattels in question.*] — The plaintiffs had begun an action accompanied by a *saisie conservatoire*, claiming $700 as the price of wood seized, and demanding, as a subsidiary matter, that they should also be paid the price of the wood upon the sale of it to be made by the Court:—*Held*, that such action was not a real action, within the meaning of Art. 100, C. C. P., and could not be begun in the place in which the thing seized was situated. *Auger* v. *Moreau*, 20 Que. S. C. 285.

Petitory and possessory actions—*Can a petitory action be taken while a possessory action is still pending?—C. P. 1066.*]—(Confirming Hutchinson, J.). A party cannot take a petitory action while a possessory action taken by the other party is still pending. *Salois* v. *St. Francis Xavier*, 11 Que. P. R. 156.

Prescription — 30 years' possession — Amendment of claim — Exception to form. *Anderson* v. *Smith* (1900), 3 Que. P. R. 56. Digested under LIMITATIONS OF ACTIONS.

Reddition de compte—Demand—Premature action. *Chanteloup* v. *Fulton* (1900), 16 Que. S. C. 387. Digested under ACCOUNT.

Resolution of municipal council — In Quebec—Proceedings to annul. *Patry* v. *Levis* (1900), 16 Que. S. C. 310. Digested under MUNICIPAL CORPORATIONS.

Right to sue — Where plaintiff believed that he had a good cause of action and delayed taking proceedings upon the promise that defendant would pay him, if plaintiff would wait:—*Held*, that "if a man believes bona fide that he has a fair chance of success, he has a reasonable ground for suing, his forbearance to sue will constitute a good consideration." *Callisher* v. *Bischoffstein* (1870), L. R. 5 Q. B. 452, followed. *Drewry* v. *Percival* (1909), 14 O. W. R. 729, 1 O. W. N. 72, 19 O. L. R. 463.

Two separate causes of action.]—Middleton, J., *held*, that an action to recover damages for assault upon one plaintiff, and an action by her mother for loss of her services, could well be joined, as they arose out of the same occurrence.—Ont. Rule 185. *Laister* v. *Crawford* (1910), 18 O. W. R. 308, 2 O. W. N. 547. Reversing 17 O. W. R. 743, 2 O. W. N. 381.

ADDING PARTIES.

See PARTIES.

ADEMPTION.

See PLEADING—WILLS.

ADJOURNMENT.

District magistrate—*Adjournment.*] — A district magistrate has, as has every other magistrate, discretionary power to adjourn a case coming before him or to proceed with it, notwithstanding any arrangement made between the parties or their attorneys. Motion for prohibition refused. *Ex p. Daigneault*, 3 Que. P. R. 128.

See COLLECTION ACT, NOVA SCOTIA—PROHIBITION.

ADJUDICATION.

See EXECUTIONS.

ADMINISTRATION BOND.

See EXECUTORS AND ADMINISTRATORS—PROBATE—SURROGATE COURT—WILLS.

ADMINISTRATION OF ESTATES.

See EXECUTORS AND ADMINISTRATORS—PROBATE—SURROGATE COURT—WILLS.

ADMINISTRATION OF JUSTICE.

See PLEADING—PRACTICE.

ADMINISTRATOR AD LITEM.

See EXECUTORS AND ADMINISTRATORS — JUDGMENT — PROBATE — SURROGATE COURT—WILLS.

ADMIRALTY.

See CONSTITUTIONAL LAW—SHIP.

ADMISSIONS.

See CARRIERS—CRIMINAL LAW—EVIDENCE—EXTRADITION—JUDGMENT — LIMITATION OF ACTIONS — PARLIAMENTARY ELECTIONS—PARTNERSHIP—PLEADING.

ADMIT, NOTICE OF.

See PRACTICE.

ADOPTION.

Ontario law knows nothing of adoption and an agreement by parents to deprive themselves of the custody of their child is not legally binding on them. *Re Davis* (1909), 13 O. W. R. 939, 18 O. L. R. 384.

See CONTRACT—INFANT.

ADULTERATION OF FOODS.

See CONSTITUTIONAL LAW—CRIMINAL LAW—MUNICIPAL CORPORATIONS.

ADULTERY.

Bar to alimony.

See HUSBAND AND WIFE.

Bar to dower.

See DOWER.

Divorce on grounds of.

See DIVORCE.

See, also, CRIMINAL CONVERSATION—LIMITATION OF ACTIONS.

ADVANCEMENT.

See WILLS.

ADVERSE ACTION.

See MINES AND MINERALS.

ADVERSE CLAIM.

See MINES AND MINERALS.

ADVERSE POSSESSION.

See LIMITATION OF ACTIONS.

ADVERTISEMENT.

See CONTRACT — EXECUTION — EXECUTORS AND ADMINISTRATORS — MEDICINE AND SURGERY — MUNICIPAL CORPORATIONS —TRADE NAME.

ADVOCATE.

See SOLICITOR.

AFFAIRES COMMERCIALES.

See SALE OF GOODS.

AFFIDAVITS.

Affidavits for conservatory attachment—*Grounds of belief—Donation—Debt—Demand.*] — An affidavit for conservatory attachment, founded upon belief, must state the grounds of such belief. 2. Where a conservatory attachment is based upon a donation, the affidavit, and not only the declaration, must shew that the debt is due and exigible, and that the deed of donation has been registered, and must also state that a demand of payment has been made of the moneys claimed in virtue of such donation. *Lefebvre* v. *Castonguay*, 4 Que. P. R. 431.

Arrest.]—An affidavit for *capias* alleging that it is probable that the defendant is immediately to leave the province, but not stating the grounds of deponent's belief, is uncertain and insufficient. *Shuman* v. *Goodman* (1909), 10 Que. P. R. 256.

Attachment of debts.]—It was agreed that the issue should be determined in a summary way upon affidavits:—*Held*, that the claimant, being really the plaintiff in an issue, was entitled to file affidavits in reply to those filed by plaintiff in the action. *Bryson* v. *Rosser* (1909), 10 W. L. R. 317; 18 Man. R. 658.

Commissioner, who was appellant's attorney in the Court below, may receive an affidavit on review from a magistrate's Court. *Northrup* v. *Perkins*, 37 C. L. J. 706.

Commissioner's qualifications.] — The official qualification of a person who has witnessed the signature of a person to an affidavit, and couched in the following words: "Commissioner, Superior Court, district of Joliette," is, on its face, apparently sufficient. If the description of the qualification of a commissioner who receives an affidavit is really insufficient, the seizing party should raise the point by an exception to the form, and not by motion to reject the opposition. *Drainville* v. *Savoie & Drainville* (1910), 11 Que. P. R. 437.

Criminal information — *Libel* — *Affidavit in reply—Practice.* *R.* v. *Whelan* (1862), 1 P. E. I. R. 220.

Cross-examination on — *Motion for injunction.*] — Counsel for the defendant objected to the plaintiff's affidavit being read, as he had served notice asking that the plaintiff be produced for cross-examination on his affidavit, but the plaintiff had objected to being cross-examined:—*Held*, that Rules 385 and 429, taken together, compel the production for cross-examination of a deponent on his affidavit, if required by the opposite party, before such affidavit can be used. *Russell* v. *Saunders*, 20 C. L. T. 251, 7 B. C. R. 173.

Cross-examination on.]—Rules 385 and 429 taken together compel the production for cross-examination of a deponent on his affidavit if required by the opposite party before such affidavit can be used. *Westphalen* v. *Edmonds*, 7 B. C. R. 175.

Evidence by. *See* EVIDENCE.

Filing—*Mistake — Effect of — Quo warranto—Exception à la forme.*]—An affidavit accompanying a petition for a writ of quo warranto is void if it is received by an unauthorized person—in this case a deputy-clerk of the Circuit Court—and renders the writ itself void; and the defendant may set up the invalidity by way of exception to the form. *Lavoie* v. *Jeffrey*, 16 Que. S. C. 363.

Foreign notary public.]—An Affidavit sworn before a foreign notary public, other than an English notary, cannot be used in the Quebec Courts. *Amero* v. *Gifford*, 9 Que. P. R. 17.

Jurat—*Commissioner.*]—Where the affidavit for an opposition was sworn before a person describing himself as "C. C. S. D. *pour le district de Montréal*," no such official being known to the Court or entitled by law to receive affidavits, the affidavit was held null, and the opposition, not being supported by affidavit as required by law, was dismissed. *Lachance* v. *Lachance*, 17 Que. S. C. 395.

Juror's.]—Inadmissible to set aside verdict. *R.* v. *Lawson* (1881), 2 P. E. I. R. 403.

Made in England.]—Must be authenticated in P. E. I. —— v. *Irving* (1851), 1 P. E. I. R. 38.

Marksman—*Certificate of Commissioner.*]—The affidavit on which a rule *nisi* for a certiorari was granted was made by a marksman. Objection was taken on shewing cause that the certificate of the commissioner before whom the affidavit was sworn was not a compliance with Rule 1 of Hilary Term 11 V., in that the word "fully" was used instead of "perfectly" in the clause "who seemed perfectly to understand same":—*Held*, a sufficient compliance with the Rule. *Ex p. Allain*, 20 C. L. T. 87, 35 N. B. R. 107.

Oath of facts.]—Affidavits are not verified by a bold general statement that the allegations in a pleading are true. They should contain a statement under oath of facts or circumstances which, taken together, prove the allegations to be true, from which the Court or Judge may be satisfied that the party applying has a *prima facie* case for the defendants to answer. *In re Hodges Winsloe* (1872), Pet. P. E. I. R. 254.

Oaths. *See* OATHS.

Of documents. *See* DISCOVERY — EVIDENCE.

On production. *See* DISCOVERY — EVIDENCE.

Opposant—*Authorized agent of.*]—It is not necessary that the person who swears to the affidavit in support of an opposition should declare that he is authorized to that effect, or that he is the agent of the opposant. *Drainville* v. *Lavoie & Drainville* (1910), 11 Que. P. R. 437.

Practice.]—Swearing before solicitor for affidavit—Necessity for independent commissioner—Determination of question whether commissioner acting as solicitor—Authority of commissioner. *Gougeon* v. *Thompkins* (N.W.T.), 1 W. L. R. 114.

Supporting application to set aside special jury on grounds of partiality of officer returning it. *McLean* v. *Whelan* (1856), 1 P. E. I. R. 135.

Sworn before attorney in cause.]—Affidavit sworn by plaintiff before an attorney in the cause to prove damages in an action in ejectment by default is irregular, and the *délibéré* will be discharged. *Haddey* v. *Shields* (1906), 8 Que. P. R. 30.

Sworn before notary public for Ont.]—Affidavits taken by a "notary public for the prov. of Ont.," have no validity before the Courts of Quebec. *McNee* v. *Marchesseault* (1906), 8 Que. P. R. 102.

AFFIDAVIT ON PRODUCTION.

See DISCOVERY.

AFFILIATION.

See INFANT.

AFFREIGHTMENT.

See CARRIERS—RAILWAY—SHIP.

AGENCY.

See PRINCIPAL AND AGENT—SALE OF GOODS —VENDORS AND PURCHASERS.

AGENTS D'IMMEUBLES.

See PRINCIPAL AND AGENT.

AGISTMENT.

See ANIMALS.

AGREEMENT.

See CONTRACTS.

For lease. *See* LANDLORD AND TENANT.

For sale of goods. *See* SALE OF GOODS.

For sale of lands. *See* VENDOR AND PURCHASER.

Agents commission on. *See* PRINCIPAL AND AGENT.

School agreements. *See* SCHOOLS.

To bequeath property. *See* SPECIFIC PERFORMANCE.

AGRICULTURAL SOCIETY.

See COMPANY.

AIDING AND ABETTING.

See CRIMINAL LAW.

AID TO RAILWAY.

See RAILWAY.

AIR.

See EASEMENT — NUISANCE — SERVITUDE.

AIR GUN.

Sale of air gun to minor who injured plaintiff — Liability of vendor. *Fowell* v. *Grafton* (1910), 15 O. W. R. 790, 20 O. L. R. 639. Digested under NEGLIGENCE.

ALBERTA ACT.

See CONSTITUTIONAL LAW.

ALBERTA ASSIGNMENTS ACT.

See BANKRUPTCY AND INSOLVENCY.

ALDERMEN.

See JUSTICE OF THE PEACE — MUNICIPAL ELECTIONS—MUNICIPAL CORPORATIONS.

ALE AND BEER HOUSE.

See INTOXICATING LIQUORS.

ALIENATION OF AFFECTIONS.

See HUSBAND AND WIFE.

ALIENATION, RESTRAINT OF.

See WILL.

ALIENES.

See LUNATIC.

ALIENS.

1. ALIEN LABOUR, 37.
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6. DEATH OF. *See* NEGLIGENCE.
7. LUNATIC. *See* LUNATIC.

1. ALIEN LABOUR.

Advertisement for labourers — *Promise of employment.*] — The defendants had published in a Seattle newspaper this advertisement:—"Wanted, first-class machinists. Apply Vancouver Engineering Works, Ltd., Vancouver, B.C."—*Held*, that the advertisement did not contain a promise of employment within the meaning of the Alien Labour Act, as amended by 1 Edw. VII., c. 13, s. 4. *Downie* v. *Vancouver Engineering Works*, 24 C. L. T. 284, 10 B. C. R. 367, 8 Can. Cr. Cas. 66.

Conviction—*County Court Judge.*] — A Judge of a County Court has no jurisdiction to convict for an offence under the Act to restrict the importation and employment of aliens, 60 & 61 Vict. c. 11 (Can.), and the amending Act, 1 Edw. VII. c. 13, where the offence was not committed within his territorial jurisdiction. The objection that the Act was *ultra vires* was raised but not decided. *R.* v. *Forbes, Ex p. Chestnut* (1906), 37 N. B. R. 402, 1 E. L. R. 437.

Importation of alien labour—*Convictions of distillery company.*]—Previous contract — "Citizen" — "Resident"—Skilled workmen—New industry — Quashing conviction—Costs. *R.* v. *Corby Distillery Co.*, 9 O. W. R. 762.

Importing alien labourer — "*Knowingly*"—*Conviction—Amendment — Evidence of alienage—Person born abroad of British parents.*]—Conviction of the defendant for that he did unlawfully prepay the transportation and assist and encourage the importation and immigration of an alien and a foreigner from the United States into Canada under contract and agreement made previous thereto to perform labour and service in Canada by working at a factory, quashed as clearly bad on its face, inasmuch as the conviction did not state that the defendant "knowingly" did the acts charged, nor in fact did the information charge him with having "knowingly" done them, as required under 1 Edw. VII. c. 13, s. 3:—*Held*, also, that this omission from the information and conviction of one of the essential elements of the offence was not a mere irregularity and informality or insufficiency within the meaning of s. 889 of the Criminal Code. It was not a matter of form merely, but of substance, and a fatal and incurable defect in the conviction. *Semble*, also, that the person imported by the defendant was not an alien, but a British subject, the presumption from the only facts in evidence being that he was born of British parents residing in the United States. *R.* v. *Hayes*, 23 C. L. T. 88, 5 O. L. R. 198, 2 O. W. R. 123, 6 Can. Cr. Cas. 357.

Importation of foreign labour—*Act of agent and liability—Alien labourer—Residence in one foreign country, domicile in another—Statutes—"Skilled labour for the purpose of a new industry."*]—A person who, as the agent of a company, procures the immigration into Canada of an alien labourer, in violation of the Alien Labour Act, is guilty of the offence created, and liable for the fine imposed therein, as if he were a principal acting for himself. 2. It is a violation of the Alien Labour Act to import, or assist in importing, an alien labourer who resides in a foreign country that enacts and retains in force laws of a similar character, even though such labourer

should be a citizen of and have his domicile in another foreign country that does not enact and retain in force such laws. 3. Skilled labour for the purpose of a new industry in s. 9 (b) of R. S. C. c. 97, includes all skilled labour and is not limited to special skilled labour not to be found in Canada. Hence, when a manufactory of steel cars is established, as a new industry in Canada, rivetters may be imported from the United States for the purpose, if, in consequence of an unusual demand, they cannot be otherwise obtained, though rivetters are employed in other industries in Canada. *Francq* v. *Disney*, Q. R. 17 K. B. 488; *R.* v. *Disney*, 14 Can. Crim. Cas. 152.

Penalty—*Action for.*]—The plaintiff in an action brought to recover the penalty provided by the Alien Labour Act (60 & 61 V. c. 11, 1 Edw. VII. c. 13) is bound to give security for costs. *Laurin* v. *Raymond*, 7 Que. P. R. 209, 29 Que. S. C. 101.

Penalty—*Action for—Consent of Judge.*]—Section 2 of the Alien Labour Act, R. S. C. 1906, ch. 97, forbids the importation of workmen, and provides a penalty; and sec. 4 provides that the penalty may, with the written consent of any Judge of the Court in which the action is intended to be brought, be sued for and recovered as a debt by any person who first brings his action therefor:—*Held*, that an action brought by M., pursuant to the consent of a Judge obtained upon the application of M. Bros., did not come within the section, and must be dismissed. *Murray* v. *Henderson* (1910), 14 W. L. R. 170, 19 Man. 649.

Penalty—*Recorder's Court — Jurisdiction —Limitation of actions—Period of prescription.*]—Penalties concerning the importation and employment of aliens mentioned in 1 Edw. VII. c. 13, s. 1, may be recovered before the recorders, subject to the formalities therein mentioned. The prescription of an action, suit, or information for any penalty is of two years, according to s. 930 of the Criminal Code. *Montreal Harbour Commissioners* v. *Recorder's Court* (1906), 8 Que. P. R. 63, affirmed.

Written consent of Judge to prosecution—*Requisites of consent.*]—Appeal by defendant from a conviction by a magistrate (acting with the written consent of the junior Judge of the County of Carleton) for unlawfully and knowingly assisting the importation of an alien and foreigner into Canada under contract and agreement made previous to his importation to perform labour and services in Canada contrary to 60 & 61 V. c. 11 (D), as amended by 61 V. c. 2 (D.), and 1 Edw. VII. c. 13 (D.):—*Held*, the written consent did not comply with the intention of the statute, as it should contain a general statement of the offence alleged to have been committed, mentioning the name of the person in respect of whom the offence is alleged to have been committed, and the time and place, with sufficient certainty to identify the particular offence intended to be charged. Conviction quashed. *R.* v. *Breckenridge*, 6 O. W. R. 501, 10 O. L. R. 459.

2. Chinese Immigration.

Chinese Immigration Act, 1900—*Deportation of Chinamen—Habeas corpus.*]—*Held*, that where a Chinaman, who contracts with a transportation company for his passage from China through Canada to the United States, on the understanding that if he is refused admittance to the States he will be deported to China by the company, is refused admittance to the States and is being deported, he will not be granted his discharge on habeas corpus proceedings, as the contract is not illegal, and under the Chinese Immigration Act, 1900, deportation is proper. *In re Lee San*, 24 C. L. T. 162, 10 B. C. R. 270.

Wing Toy v. *Can. Pac. Rw. Co.*, 13 Que. K. B. 172.

Chew v. *Can. Pac. Rw. Co.*, 5 Que. P. R. 453, 6 Que. P. R. 14.

Deportation — Chinese Immigration Act — Infraction — Deportation before conviction—Power of Minister of Trade and Commerce. *R.* v. *Dutton*, *Re Woo Jin*, 5 E. L. R. 543.

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3. Deportation of Aliens.

Convict—*Immigrant passenger—Canadian domicile.*]—The applicant came to Canada from the United States of America on the 27th February, 1910. She then resided in the city of Vancouver continuously for more than three years. On the 4th March, 1910, she was convicted in Vancouver of being an inmate of a house of ill-fame. She then went on a visit to the State of Washington, and, on attempting to return to Canada, was arrested and ordered by the Immigration authorities to be deported:—*Held*, on a motion for a habeas corpus, that she came within sec. 3 (*d*) of the Immigration Act, as an immigrant passenger who had been convicted of a crime involving moral turpitude; and did not come within the exception, not being a Canadian citizen and not having a Canadian domicile, as defined by sec. 3. A person claiming a Canadian domicile must shew this to have been acquired "after having been landed in Canada," within the meaning assigned to "landed" by sec. 2 (*p*). *Re Murphy* (1910), 15 W. L. R. 381.

Dominion statute—*Intra vires.*]—*Held*, that s. 6 of Dom. statute 60 & 61 V. c. 11, as amended by 1 Edw. VII. c. 13, s. 13, is *intra vires* of Dom. Parliament. The Crown undoubtedly possessed power to expel an alien from the Dom. or to deport him to the country whence he entered it. The above Act, assented to by the Crown, delegated that power to the Dom. Gov., which includes and authorizes them to impose such extra-territorial constraint as is necessary to execute the power. Judgment of Anglin, J., *Re Cain*, *Re Gilhula*, 10 O. L. R. 469, 6 O. W. R. 124, 41 C. L. J. 573, reversed. *Atty.-Genl. for Can.* v. *Cain*, *Atty.-Genl. for Can.* v. *Gilhula*, [1906] A. C. 542.

Right of exclusion and deportation — *Foreign law — Finding of fact — Review by Appellate Ct.—International law—Trespass in foreign country—Wrongful entry.*]

—The Court on appeal will not disregard the finding of Judge who tries a question of fact without a jury on *viva voce* evidence, and substitute for it a finding which they may think should have been made, unless they are satisfied the Judge was wrong, and the onus of shewing that is on party moving. If question is left in doubt the presumption that the Judge was right is not dispiaced.—The civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law. Therefore the plaintiff, an alien, being unlawfully within U. S. territory in violation of an Act of Congress, and liable to be deported, has no right of action in this Court against an officer of U. S. for his arrest in, and deportation from, that country.—Foreign law is a matter of fact to be ascertained by evidence of experts skilled in such law. Where evidence is unsatisfactory and conflicting, the Court will examine decisions of the foreign Courts, and text writers referred to in order to arrive at a satisfactory conclusion upon the question of foreign law; C. S. N. B. 1903, c. 127, s. 60.—By international law, and apart from any civil enactment, a sovereign state has the right at its pleasure to exclude or deport any alien from its dominions; therefore no action will lie in a British Court against an official exercising that right at the command and on behalf of the state of which he is the servant. *Papageorgiouw* v. *Turner*, 37 N. B. R. 449, 1 E. L. R. 387.

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4. NATURALIZATION OF ALIENS.

Allegiance — *Commissioner of Superior Court—Public officer—Failure to take oath —Effect on proceedings.*] — A commissioner of the Superior Court is not a public officer within the meaning of Arts. 599 *et seq.*, R. S. Q., and is not obliged to take the oath of allegiance; and if he were, his failure to take the oath would not invalidate proceedings signed by him. *Lamalice* v. *Electric Printing Co.*, 4 Que. P. R. 266.

Allegiance—*Renewal of—Commissioners —Accession of sovereign.*]—*Quære*, whether the commissioners of the Superior Court for the district of Quebec are obliged to take the oath of allegiance or to renew it on the accession of a new sovereign. *Lamalice* v. *La Compagnie d'Imprimerie Electrique*, 4 Que. P. R. 63.

British Columbia Naturalization Act, ss. 13, 14, 15, 19.]—Under above sections that certificate of naturalization should not be granted by officials authorized to take oaths of aliens applying for naturalization, unless evidence is taken of at least two credible, Canadian-born subjects, shewing that applicant is a person of good character, the time he has resided in Canada, his intention to remain in Canada, the evidence to be taken in writing and filed with the clerk of the Court. *Re Fukuichi Aho* (B.C.), (1909), 9 W. L. R. 652.

British Columbia Provincial Elections Act—*Powers of Provincial Legislature—B. N. A. Act.*]—Section 91, s.-s. 25, of the British North America Act reserves to the exclusive jurisdiction of the Dominion Parliament the subject of naturalization—that is, the right to determine how it shall be constituted. The Provincial Legislature has the right to determine, under s. 92, s.-s. 1, what privileges as distinguished from necessary consequences, shall be attached to it. Accordingly, the British Columbia Provincial Elections Act (1897, c. 67), s. 8, which provides that no Japanese, whether naturalized or not, shall be entitled to vote, is not *ultra vires*. Judgment in 21 Occ. N. 424, 8 B. C. R. 76, reversed. *Cunningham* v. *Tomey Homma*, [1903] A. C. 151.

Powers of County Court Judge.]—By amendments of 1903 to Naturalization Act, the scope of the Judge's duty, as limited by decision in *In re Webster*, 7 C. L. J. 39, is changed, and the Judge, upon an opposition being filed, or an objection taken in open Court to granting of certificate, has power to take any necessary measures to satisfy himself as to the truth of facts stated by applicant, and of his fitness to become a British subject. *Re Malsufuro*, 8 W. L. R. 37; *In re Saddjiro Malsufuro*, 13 B. C. R. 417.

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5. CIVIL RIGHTS OF ALIENS.

Jurisdiction of Quebec Courts — *Property in Quebec — Service of process — Subject of action.*] — Quebec Courts have jurisdiction in an action for an account against an alien, who has been regularly served with process at a place therein where he owns property. The fact that he resides in a foreign country, when he owns property in Que., does not oust the jurisdiction of the Courts, even when the action for account has its foundation in a claim by plaintiff for administration of estate of her deceased mother, who at time of her death owned property both in this province and in such foreign country, and who at such time resided in such foreign country. *De Bigaré* v. *De Bigaré*, 14 Que. K. B. 26.

Right to sue qui tam for penalty—*Non-registration of partnership.*]—An alien has no right to institute a *qui tam* action in his own name and in the name of His Majesty to recover a penalty from the members of a partnership who have not registered the declaration required by law. *Bauer* v. *Dinning*, 9 Que. P. R. 335.

See EVIDENCE—PARTNERSHIP—TRADE NAME.

ALIMENTARY ALLOWANCE.

Duty of son to support father—*Alimentary allowance — Offer to receive at home—Asylum.*]—When a father is in need of support, and his son is in a condition to furnish it to him, the latter cannot refuse to do so on the ground that his father lives with persons whom the son does not consider respectable. 2. A son who is liable to furnish support for his father has no right to offer, in place of such support, to receive him in his house and at his table, or to

place him in an asylum, when he has not been declared a lunatic. *Ouimet* v. *Ouimet*, 21 Que. S. C. 479.

Husband in gaol.]—A married woman, common as to property, whose husband is in gaol, may, with his authorisation, institute an action for an alimentary allowance. She may also claim such allowance on behalf of her minor children without having been appointed tutrix to them. *Connolly* v. *Connolly*, 9 Que. P. R. 309.

Liability of relatives by marriage.]—The remedy of a party claiming an alimentary allowance is limited, by virtue of art. 167, C. C., as regards descendants by marriage to living sons-in-law, and does not extend to the husband of a granddaughter. *Deschênes* v. *Morin*, 10 Que. P. R. 90, 35 Que. S. C. 95.

Liability of step-son.]—A child, issue of a prior marriage, cannot be sued for an alimentary allowance by the widow of his father. *Oliver* v. *Woodfine*, 7 Que. P. R. 444.

Obligation to pay—*Petition for discharge—Remedy by action.*] — The person liable to pay an alimentary allowance, and seeking relief therefrom, must proceed by action, not by petition.—One who contests a petition for such relief should not do so by inscription in law, and if he does so, he will be allowed only costs of an oral contestation. *Michaud* v. *Moreau*, 9 Que. P. R. 330.

Petition to proceed in forma pauperis — *Dismissed* — *New petition* — *New facts.*] — A petition to proceed *in forma pauperis* for alimentary allowance, shortly after the dismissal of a former one to the same effect, must disclose new facts which have arisen since the judgment, to justify its being granted. *Guilbert* v. *St. Jean*, 9 Que. P. R. 359.

Reduction — *Action* — *Petition.*]—The reduction of an alimentary allowance granted by a judgment must be demanded by an action, and not by a petition in the cause in which the judgment was rendered. *McCraw* v. *Vaillancourt*, 7 Que. P. R. 396.

See HUSBAND AND WIFE.

ALIMONY.

See HUSBAND AND WIFE.

ALLEGIANCE.

See ALIENS.

ALLOCATUR.

See COSTS.

ALLOTMENT OF SHARES.

See COMPANY.

ALLUVIAL DEPOSIT.

See WATER AND WATERCOURSES.

ALMS HOUSE.

See MUNICIPAL CORPORATIONS.

ALTERATION OF PROMISSORY NOTE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES—CRIMINAL LAW.

ALTERING VOTERS' LISTS.

See CRIMINAL LAW—ELECTIONS.

AMALGAMATION.

See COMPANY—RAILWAY.

AMBIGUITY.

See DEED — INFANT — VENDOR AND PURCHASER—WILL.

AMENDMENT.

Of conviction. *See* CRIMINAL LAW—INTOXICATING LIQUORS.

Of indictment. *See* CRIMINAL LAW.

Of pleadings. *See* PLEADINGS.

ANCIENT LIGHTS.

See EASEMENT.

ANCILLARY PROBATE.

See EXECUTORS AND ADMINISTRATORS — INSURANCE.

ANGLICAN CHURCH.

See CHURCH.

ANIMALS.

Agister of Animals—*Death of animals—Evidence—Exposure to cold.*]—The plaintiff, on the afternoon of the 24th April, delivered to the defendant, for agistment, a healthy colt, 10 months old; the colt died on the night of the same day or early the next morning, and the plaintiff sued the

defendant for negligence, alleging that it was improper to leave the colt in a shed for the night. The evidence shewed that there were 5 degrees of frost that night:—*Held*, in the absence of any clear evidence as to the cause of death, and accepting expert evidence that 5 degrees of frost would not affect a 10 months' old colt, that there was no negligence on the part of the defendant within the authorities reviewed in the judgment. *O'Connor* v. *Reid* (1910), 13 W. L. R. 401.

Agistment — *Absence of agreement.*] — Had defendant a lien upon certain cattle for their keep the ownership not being disputed? —*Held*, that he had not, as (1) there was no express lien, (2) there is no common law lien in favour of agisters, nor (3) is there any lien by implication of law. Judgment for plaintiff. *Morrison* v. *Bryan*, 12 W. L. R. 415.

Agistment of cattle—*Loss of*—*Reasonable care*—*Price paid*—*Custom of locality*—*Negligence.*]—Although one who takes animals to pasture them should give them the care of a "*bon père de famille*," the extent of this obligation is, nevertheless, dependent on the price paid for such pasturage, and the custom of the locality. Therefore, it is unreasonable to expect that for a moderate price a man should watch the animals constantly; and if one of them disappears, it is the owner who should bear the loss, at least, unless he can prove negligence on the part of the owner of the land. *Nadon* v. *Pesant*, 26 Que. S. C. 384.

Animal Contagious Diseases Act (Can.), 1903, is *intra vires* of the Parliament of Canada. *Brooks* v. *Moore* (1907), 13 B. C. R. 91.

Animals killed on railway tracks. *See* RAILWAYS, I.

Bees, escape of—*Injury to neighbour.*] —Defendant placed a large number of hives of bees upon his own land within 100 feet of plaintiff's land. While plaintiff was at work with two horses upon his own land the bees attacked and stung the horses so that they died and also stung and injured plaintiff. In an action to recover damages for his loss and injury, the jury found, *inter alia*, that the bees were in ordinary flight at time of occurrence; that they were defendant's bees; and that defendant had reasonable grounds for believing that his bees were, by reason of the situation of his hives, or their numbers, dangerous to persons or horses upon the highway or elsewhere than on defendant's premises: — *Held*, that the doctrine of *scienter*, or notice of mischievous propensities of bees, had no application, nor could the absence of negligence, other than as found by jury, relieve defendant; it was his right to have on his premises a reasonable number of bees, so placed as not unfairly to interfere with rights of his neighbour, but if the number was unreasonable, or if they were so placed as to interfere with his neighbour in the fair enjoyment of his rights, then what would otherwise have been lawful became an unlawful act; the finding of jury meant that the bees, because of their number and situation, were dangerous to plaintiff and defendant was liable for injury flowing directly from his unlawful act. Judgment of Magee, J., affirmed. *Lucas* v. *Pettit* (1906), 12 O. L. R. 448, 8 O. W. R. 315.

Carriage of animals. *See* RAILWAYS.

Castration of a stallion running at large contrary to the provisions of the Entire Animals Ordinance is a "maiming" of the stallion within the meaning of s. 510 (B. b.) of the Criminal Code. The fact that the owner of the stallion had expressed an intention to castrate it was held to be no justification of the unauthorised act of the defendant. The interference by the stallion with the defendant's mares also running at large was also held to be no justification, the defendant being in such case at best a mere licensee of the land over which the mares grazed: *McLean* v. *Rudd*, 1 A. L. R. 505, followed. The proper test in such a case is the question, Did the defendant do what he did honestly believing the act to be necessary for the protection of his property? Proof of actual malice is not necessary under this section, but although the word "maliciously" is not used, legal malice, such as would establish that *mens rea*, without which there can be no criminal intent, must be proven. The fact that the defendant committed the act without any attempt to avail himself of the provisions of the Ordinance relating to impounding stallions, and the evidence adduced not shewing that he honestly believed the act necessary to protect his property:—*Held*, that legal malice was sufficiently proven. *R.* v. *Kroesing*, 2 Alta. R. 275, 10 W. L. R. 649, 16 Can. Cr. Cas. 312.

Cattle trespassing on land — *Escape from highway* — *Fences* — *Municipal by-law* —*Municipal Act, ss. 643 (b), 644 (d).*]—Sub-section (*b*) of s. 643 and s.-s. (*d*) of s. 644 of the Manitoba Municipal Act must be read as supplementing each other: and the power by by-law to limit or take away altogether the right to recover damages for loss sustained by cattle trespassing cannot be held to extend to cases where the cattle trespass from a highway whereon by law they ought not to be. Judgment of Cumberland, Co. C.J., affirmed. *Jack* v. *Stevenson* (1910), 13 W. L. R. 486, 19 Man. L. R. 717.

Cattle trespassing on land — *Fences* — *Common law right* — *Municipal by-law* — *Municipal Act, s. 644 (d).*] — At common law the owner of animals must keep them from trespassing upon the lands of other persons, even though such lands are unfenced. By s.-s. (*d*) of s. 644 of the Municipal Act, a municipality may pass a by-law for limiting the right to recover damages for any injury done by cattle, etc., trespassing upon land, to cases in which the land is enclosed by a fence of the nature, kind, and height required by the by-law. A by-law of a rural municipality declared that it should be unlawful for any person to permit his cattle, etc., to run at large in the municipality, and no one should be at liberty to claim damages against the owner of the cattle, "unless he shall have surrounded his lands and premises with

a lawful fence as defined by by-law of this municipality." No by-law was proved which shewed what should constitute a lawful fence. The plaintiff's land was not fenced at all, and the defendant's cattle came on and did damage:—*Held*, that the plaintiff's common law right had not been taken away by the by-law, and he was entitled to recover damages from the defendant. Judgment of Prud'homme, Co. C.J., reversed. *Dalziel* v. *Zastie* (1910), 13 W. L. R. 488, 19 Man. L. R. 353.

Contagious diseases.] — Plaintiff not knowing a cow was affected with tuberculosis sold it to defendant, half cash and half on time:—*Held*, that the sale was illegal under s. 2 of the Dom. Animals Contagious Diseases Act, and plaintiff could not recover balance of purchase money. *North* v. *Martin*, 7 E. L. R. 439.

Cruelty to animals. *See* CRIMINAL LAW.

Dog—*Injury to child—Contributory fault.*] —The respondent's son, aged thirteen, was provoking or exciting a bull-dog owned by the appellant, by stamping on the floor and calling him by name, when the appellant's daughter, aged nineteen, opened the door and allowed the dog to fly at the child and bite him:—*Held*, that the appellant was responsible for the injuries inflicted on the boy, notwithstanding the fact that he had irritated the dog, a child of that age not being expected to shew the prudence and thoughtfulness which would be expected and required from an adult under similar circumstances. *Bernier* v. *Généreux*, Que. R. 12 K. B. 24.

Dog—*Wilfully killing—Compensation to owner.*]—1. On a summary conviction under Code s. 537 for wilfully killing a dog, the whole penalty, which is not to exceed $100 "over and above the amount of injury done," belongs to the Crown, and there is no jurisdiction to award damages to be paid to the owner of the dog. 2. Where the adjudication was that the defendant pay the fine of $1 and costs and further pay the owner $20 damages for the loss of the dog, the summary conviction will be amended by striking out the award of damages. 3. An amended conviction imposing a fine of $21 is bad as not conforming with the adjudication. 4. Code s. 539, which empowers the magistrate in certain cases to award compensation up to $20 to the person aggrieved, does not apply to the offence of killing a dog for which Code s. 537 provides a punishment. *R.* v. *Cook*, 16 Can. Cr. Cas. 234.

Escape from field upon railway — *Defective fence — Liability of neighbour for.*]—The owner in default in respect of maintenance of his part of line fence between two adjoining farms is responsible for loss of animals of his neighbour, which, passing through a breach in the fence, reach a railway where they are killed by a train. *Paradis* v. *Parks*, 32 Que. S. C. 263.

Fences—*Animals at large—Liability of owner of lands insufficiently or dangerously enclosed.*]—Owner of a mare allowed her to run at large, and straying on to lands of defendant, was killed, as the result of coming into contact with a single strand of barb wire stretched on posts about defendant's property:—*Held*, that plaintiff could not recover damages from defendant; that at most plaintiff could not stand in a better position than that of a bare licensee; and that owners of animals in Alta. allowing them to run at large, must take the risk of accidents from ill-constructed or insufficiently constructed fences.—*Semble*, that owner of unenclosed or insufficiently enclosed lands would be liable for damages resulting to estrays by reason of a dangerous trap (*e.g.*, an unenclosed well) on his property. *McLean* v. *Rudd*, 1 Alta. L. R. 505, 9 W. L. R. 283.

Harbouring vicious dog.]—A wife, separate as to property, is liable for damages caused by her husband's vicious dog when harboured at their common domicile, although it is her private property, particularly when it is proved that the dog was harboured with her full consent and approval, notwithstanding that she had full knowledge of the dangerous character of the dog. *Hugron* v. *Statton* (1900), 18 Que. S. C. 200.

Horse on highway—*Dangerous animal —Injury to child.*]—The defendant's horse being on the highway, a boy of twelve years of age approached to catch him by taking hold of a rope then around his neck, when the boy was kicked and injured. There was no evidence that the defendant knew that the horse was accustomed to stray or had any vicious propensity, nor was the horse shewn to have such fault, and there was evidence that the horse had been interfered with by several boys, of whom the injured boy was one, and that the latter had more than ordinary intelligence and fully understood the risk he ran. In an action by the boy and his father:—*Held*, that they could not recover. *Patterson* v. *Fanning*, 2 O. L. R. 462, distinguished. *Flett* v. *Coulter*, 23 Occ. N. 111, 5 O. L. R. 375, 1 O. W. R. 775, 2 O. W. R. 142.

Horse—*Payment for keep.*]—The obligation, *quasi-contractual*, to reimburse money expended upon the chattel of another person (in this case a horse), arises from the fact of ownership of the chattel, which it is necessary to prove against one from whom reimbursement is sought. *Richard* v. *Stevenson* (1906), 28 Que. S. C. 188.

Horse — *Runaway.*] — An owner's responsibility for his animal, recognized by art. 1055 C. C., arises from fault, but such fault is presumed to exist until proved to the contrary by the owner. Therefore, the proprietor of a runaway horse is not responsible for the resulting damages if it is proved that the horse was frightened by fortuitous event and without fault on his owner's part. *Birmingham* v. *Gallery*, 36 Que. S. C. 481.

Horses infected with disease — *Animal Contagious Diseases Act, R. S. C. 1906, ch. 75, sec. 38—Absence of evidence to shew knowledge of vendor — Illegal contract — Lien-notes — Action on Compensation-money — Amendment — Money had and received — Damages — Costs — Warranty.*] — The Animal Contagious Diseases Act, R. S. C. 1906, ch. 75, was passed for the protection of the public:

and by sec 38 Parliament intended to prohibit the sale of an animal infected with disease, whether the vendor knows it to be so infected or not.—And where lien-notes were given by the defendant for the purchase-price of two horses which were, at the time of sale, infected with glanders, and which, after they came into the defendant's possession were killed by the government veterinary surgeon: — *Held*, that the contract of sale was illegal, although there was no evidence that the plaintiff knew of the disease, and the lien-notes were void; and an action upon the notes was dismissed; but the plaintiff was allowed to amend and to claim and recover the sum of $200 received by the defendant for compensation-money from the government, as money had and received by the defendant for the plaintiff's use.—There being no contract, the defendant was not entitled to damages, but was entitled to the costs of the action, to be set off *pro tanto* against the $200:—*Held*, also, upon the evidence, that the defendant failed to prove a warranty. *Nickle* v. *Harris* (1910), 14 W. L. R. 515, 3 Sask. L. R. 209.

Infectious disease — *Opportunity for inspection.*]—The rule *caveat emptor* only protects the vendor against damages resulting to him by decrease in the actual value of the articles sold, but where there is collateral damage to person or property of the purchaser occasioned by a defect in the article sold, which is known to the vendor, the rule *caveat emptor* will not protect him. A vendor of horses, some of which are horses affected with a contagious disease, is not liable to the purchaser for damage occasioned to the sound horses by reason of their mingling together when delivered, where the purchaser has an equal opportunity with the vendor of inspecting the animals before delivery. Collateral damages, however, which flow from the negligence of the vendor in not warning the purchaser of the existence of the contagious disease in some of the horses, such as the cost of keeping the horses in quarantine, etc., are chargeable to the vendor. *Urch* v. *Strathcona Horse Repository*, 2 Alta. R. 183, 10 W. L. R. 475.

Injury by — *Liability of owner.*] — Owner of an animal, being liable for injuries caused by the animal, is presumed to be at fault, but he may escape liability by shewing that the injury was due to the fault of the victim. *Martin* v. *Hogg*, 3 E. L. R. 209, 31 Que. S. C. 529.

Injury by vicious animal—*Liability of owner.*]—Owner of an animal is responsible for damage caused by it, at any rate until he proves that he could not have prevented the damage. Therefore, he is responsible for injuries from a bite of a vicious horse, which he should have caused to be muzzled. *Matte* v. *Meldrum Bros. Co.*, 33 Que. S. C. 396.

Injury to plaintiff by bite from defendant's pet raccoon — *Liability* — *Dangerous animal—Scienter.*] — Unless an animal is shewn to be harmless by its very nature, or to belong to a class that has become so by what may be called "cultivation," it falls within the class of animals as to which the rule is, that a man who owns and keeps one must take the responsibility of keeping it safe. *Fillburn* v. *Peoples Palace Co.*, 25 Q. B. D. 258, followed. In this case, where the plaintiff was bitten by a pet raccoon kept by the defendant, which came upon the plaintiff's premises, it was immaterial whether the animal was a dangerous one, or whether the defendant had any knowledge. The defendant being the owner of the animal, and it having caused damage, the defendant was liable therefor. *Andrew* v. *Kilgour* (1910), 13 W. L. R. 608, 19 Man. L. R. 545.

Killed on tracks. *See* RAILWAYS.

Lien on horse under Livery Stable Keeper's Ordinance—*Purchase by livery stable keeper—Destruction of lien—Animals subject to lien-note for price — Claim by vendor—Replevin—Bona fide purchaser for value without notice.*]—The plaintiff sold a pair of horses to M., taking a lien-note for the price, $225, and registering it under the Ordinance respecting hire receipts and the conditional sale of goods. Afterwards M. took the horses to the defendant's livery and sale stable for sale, and kept them there four days, after which he sold them to the defendant for $75:—*Held*, upon the evidence, that the defendant had the horses, not as the keeper of a feed stable, but as owner; that the plaintiff never repossessed them; that the defendant had no lien under the Livery Stable Keeper's Ordinance, and that the horses were not sold to the defendant by M. in the ordinary course of his business, and therefore the defendant was not a *bona fide* purchaser for value without notice; and the plaintiff was entitled to judgment for the return of the horses. Judgment of McLorg, Dist. Ct. J., reversed. *McRorie* v. *Seward* (1910), 13 W. L. R. 552, 3 Sask. L. R. 69.

Municipal by-law — *Cattle "running at large"—Highway.*] — Where cattle have escaped from their owner's premises to the highway, and there is no default or negligence on part of owner, who makes suitable efforts to recover them, they are not "running at large" within meaning of a municipal by-law. *Spurr* v. *Dominion Atlantic Rw. Co.*, 40 N. S. R. 417.

Owner of animal is liable for injury caused by it to a person in voluntary charge of it, when it is shewn that a necessary and customary appliance for leading it, supplied by the owner, was not of sufficient strength. If the person so in charge saw the appliance before taking charge and declared it to be sufficient, the case is one of contributory negligence and the damages will be reduced accordingly. *Grenier* v. *Wilson*, 32 Que. S. C. 193.

Right to run at large—*Animal killed on unfenced land of stranger — Liability — Common law — Custom — Statutes.*]—The plaintiff's and defendant's farms, both unfenced, were separated by a highway. The plaintiff's mare strayed on to defendant's land, ate some poisoned wheat designed for vermin, and died:—*Held*, that the defendant was not liable for the loss of the mare,

which had no right to be on the defendant's land. *Ponting* v. *Noakes*, [1894] 2 Q. B. 281, specially referred to. The common law has not been so modified in Saskatchewan by custom and legislation that it can be said to be lawful for cattle and horses to range at large in unfenced property. *Kruse* v. *Romanowski* (1910), 14 W. L. R. 696, 3 Sask. L. R. 274.

Sale of diseased horses — *Scienter — Mens rea — Animals' Contagious Diseases Act, 1903—Evidence — Objections to.*]—Section 7 of the Animals' Contagious Diseases Act, 1903, provides "that every person who sells . . . any animal affected or labouring under any infectious or contagious disease . . . shall for such offence incur a penalty not exceeding $200":—*Held*, that knowledge on the part of the defendant that the animal sold was diseased was not necessary to make him liable to conviction. *Betts* v. *Armstead*, and *Pain* v. *Boughtwood*, referred to. Objections to evidence discussed. *R.* v. *Perras* (1904), 6 Terr L. R. 58, 9 Can. Cr. Cas. 364.

Service of mare—*Negligence of owner of stud horse—Notice as to risk.*]—Owner of a stud horse on hire is bound to see that the service of mares takes place in a safe and natural manner, and, notwithstanding notice to the public that such service is at the risk of owners of mares, he is liable in damages for a mare killed, while being covered, by false penetration through want of proper care by those in charge of the animals. *Robidoux* v. *McGerrigle*, 35 Que. S. C. 174.

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

Shooting dog — *Trespass for shooting dog.*]—Master liable for acts of servant done in course of employment; if from facts master's concurrence can be presumed trespass lies, and in the absence of such presumption case against master is the proper remedy. *Swabey* v. *Palmer* (1869), Pet. P. E. I. R. 202.

Shooting dog at large.] — Defendant shot plaintiff's dog while at large. He knew the owner of the dog and saw him within call. The dog was doing no injury and defendant did not apprehend that he would:—*Held*, that R. S. N. S. (1900), c. 61, s. 2, as amended by (1908), c. 63, exonerated defendant, but as his act was one of wanton cruelty costs were refused defendant. *Fraser* v. *Sinclair* (1909), 7 E. L. R. 408; 8 E. L. R. 3.

Stud book — *Wager.*]—The parties deposited with H. $1,250, of which the defendant contributed $1,000 and the plaintiff $250, and signed a document in which it was set forth that the money was to be held by H. until the determination of the question whether a certain horse in the possession of the defendant (describing it) was the same horse as described in the British Hackney Stud Book as "Towthorpe Rupert;" the question to be decided by a report from that book. "Should such report shew that the horse . . . be the horse described in the . . . book, the whole $1,250 shall be paid to" the defendant. "Should the said report shew that the said horse . . . is not the horse described . . . in the . . . book, the said money shall be paid to" the plaintiff:—*Held*, a wager. *Evans* v. *Robert* (1910), 13 W. L. R. 380.

Trespass upon highway—*Liability of owner for damage upon adjoining land.*] —Where cattle are permitted to trespass upon the public highway, the owner is liable for damage which they may cause upon the land of an adjoining proprietor into which they stray, and in such case it is not a sufficient defence that plaintiff's fence was not a lawful fence, or that there was a custom among inhabitants of district to fence against cattle. *Smith* v. *Boutilier*, 42 N. S. R. 1, 3 E. L. R. 196.

Vicious animal—*Liability of owner.*]—Plaintiff sought to recover damages from defendant for injuries to plaintiff's ox caused by defendant's oxen, which were at time upon highway in violation of a by-law of municipality:—*Held*, that without proof of *scienter* defendant could not be held liable. *Naas* v. *Eisenhauer*, 3 E. L. R. 109, 41 N. S. R. 424.

Above case distinguished in *Messenger* v. *Stevens* (1910), 9 E. L. R. 91.

ANIMALS CONTAGIOUS DISEASES ACT.

See ANIMALS — CONSTITUTIONAL LAW — CRIMINAL LAW—SALE OF GOODS.

ANNEXATION.

See, In Re Cape Breton (1846), C. R. 1 A. C. 275. Digested under CONSTITUTIONAL LAW.

See MUNICIPAL CORPORATIONS.

ANNUITY.

Ademption — *Evidence.*] — A testator gave by his will to each of two daughters an annuity for life of $6,000. After making the will he gave to one daughter absolutely bonds sufficient to produce an income of a little more than $1,200 a year, and by a codicil reduced her annuity by that amount. He subsequently also gave to the other daughter absolutely bonds sufficient to produce an income of a little more than $1,200 a year, and instructed his solicitor to alter his will so as to reduce her annuity by that amount. He died suddenly, and the will was not altered:—*Held*, that the doctrine of ademption applied, and that, notwithstanding the different natures of the two gifts, and even without the evidence of intention, the second daughter's annuity must be treated as reduced *pro tanto*.—*Held*, also, however, that the evidence of intention was admissible and was conclusive. Judgment of Ferguson, J.,

1 O. L. R. 364, 21 Occ. N. 187, affirmed. *Tuckett-Lawry* v. *Lamoureux*, 22 C. L. T. 174, 3 O. L. R. 577, 1 O. W. R. 295.

Agreement—*Charge on land — Registration—Notice.*]—Testator by will directed his executor to pay his widow an annuity for support and maintenance of one of his sons until he became of age; but, if there were not sufficient funds therefor, it was to be a charge on separate parcels of land severally devised to three of his other sons. There were sufficient funds in executors' hands for payment of this annuity, but by an agreement, for valuable consideration, made between widow and said devisees of the lands, it was agreed that the annuity should not be paid out of such moneys but should be a charge upon such lands, the intention being that such moneys should be kept in hand for payment of a legacy to be paid to the first named son on his attaining his majority. A sale was subsequently made by one of the sons of the parcel of land devised to him. The purchaser, being informed as to an agreement having been entered into, but being at the same time told that it in no way affected the land, but merely created a personal obligation to pay the annuity, made no further inquiry with regard to it.—*Held*, that purchaser could not be deemed to have purchased the land with notice of contents of the agreement so as to be affected thereby.—Notice at law under the Registry Act discussed. *Coolidge* v. *Nelson*, 20 C. L. T. 225, 31 O. R. 646.

Charge on land—*Action to recover arrears—Payments—Evidence of — Interest—Report—Appeal — Further directions — Sale in default of payment.*]—Plaintiffs brought action to recover arrears claimed to be due in respect of an annuity of $225, which Wm. Hayward, under whom defendants claimed, covenanted by deed to pay his father, whose personal representatives the plaintiffs were. The Master made a report as to amount due plaintiffs.—Meredith, C.J.C.P., held, that while payments were made in cash and produce on account of the annuity, yet the evidence did not warrant the finding of the Master that the instalments which became due prior to the 1st of October, 1909, were paid. That the amount found due by the Master should be increased to $2,000. That the cross-appeal should be dismissed. That appellants were not entitled to interest. No costs of appeal or cross-appeal to either party. On further directions, *held*, that there should be judgment for payment of the $2,000 and the costs provided for by the original judgment, and for the subsequent costs (not including costs of the appeal), and in the usual form for sale of the lands in default of payment. *Ferguson* v. *Hayward* (1910), 17 O. W. R. 961; 2 O. W. N. 472.

Charge on land — *Devise subject to Charge.*]—Release by deed from annuitant to devisee — Merger of extinguishment of annuity — Mortgage — Assignment of annuity —Rights of assignee. *Re Carroll*, 11 O. W. R. 179.

Charge on land—*Legacy—Payment and release—Assignment of, notwithstanding — Fraud of solicitor—Charge valid in favour of innocent assignee—Subsequent purchaser for value without notice—Registry Act no aid to defendant—Protects plaintiff — Judgment enforcing charge for $1,200 with interest and costs—Day fixed for payment—Sale in default.*]—*Foster* v. *MacKinnon*, L. R. 4 C. P. 704, discussed. *Wigan* v. *Eng. & Scottish Law Life Assce. Assoc.*, [1909] 1 Ch. 291, approved. *Johnston* v. *Reid*, 29 Grant 293, referred to. *McVicar* v. *Nicholson* (1910), 17 O. W. R. 881; 2 O. W. N. 420.

Charge on land—*Life tenant and remainderman — Apportionment.*] — Where an annuity is charged on lands, and, subject thereto, a life estate is devised to one party and the remainder to others, the case falls within the rule that the periodic payments of the annuity are to be treated, "partly as interest which the tenant for life had to pay and partly as principal for which she would have charge on the inheritance in the proportion which the value of the life estate bore to the value of the reversion": *Whitesell* v. *Reece*, 5 O. L. R. 352, 2 O. W. R. 160, *Jones* v. *Meson*, 39 Ch. D. 337; and this although the testator, in his life time, made provision for the payment of a portion of the annuity by conveying a parcel of land to one of the remaindermen and taking a mortgage back payable $60 a year until the death of the annuitant. Britton, J., in *Reece* v. *Whitesell*, 6 O. W. R. 566.

Creation of fund for—*Right to resort to corpus.*]—The testator by his will made certain specific bequests and devises, and then gave to his executors all the residue of his property, real and personal, in trust to provide means to pay the expenses of administration, to pay debts, and to pay the bequests thereinafter made, with power to the executors to sell lands, etc., "to deposit at interest, lend on security of mortgages, or invest in the Dominion funds any balance that may be on hand at any time, to form a fund to keep up the yearly payments to my sisters . . . namely, to pay to each one of my sisters . . . $250 a year, or, if there be not so much available in any year, then to divide equally between them what may be available and make up the deficiency to them when there are funds to do it with, and to pay to any of them who may have greater need on account of ill-health or misfortune a greater sum than the others, and a greater sum than $250." The will then directed the executors, after sufficient funds had been invested to keep up the payments to the sisters, to pay certain specific sums to four named persons, or in like proportions to each of them, "if there be not enough to pay them in full," and "to pay to the children of my brother . . . whatever may remain of the estate:"—*Held*, that the sisters of the testator had the right to resort to the corpus of the fund provided for the payment of their annuities, if the income was sufficient. *Mason* v. *Robinson*, 8 Ch. D. 411, and *Illsley* v. *Randall*, 50 L. T. N. S. 717, followed. *Re McKenzie*, 23 C. L. T. 15, 4 O. L. R. 707, 1 O. W. R. 739, 2 O. W. R. 1076.

Purchase of—*Assets of estate.*]—Motion under Rule 938 for directions to executors of a will as to the distribution of the estate among the residuary legatees and as to pro-

viding for the payment of annuities bequeathed by the will:—*Held*, that the parties interested in the residue were entitled to have sums set apart to answer the annuities from time to time, as sufficient assets should be in the hands of the executors, or to have sums applied in the purchase of government annuities in the same way from time to time, as should seem most expedient to the Master if the parties (including the annuitants) differed. *In re McIntyre*, 21 C. L. T. 380

Right to rank on estate—*Annuitant—Attachment of Debts—Assignments Act.*]—An insolvent made an assignment to the defendant for the benefit of creditors, pursuant to R. S. O. 1897, c. 147. Previous to the assignment the defendant had covenanted with the plaintiffs to pay to J. R. $100 per quarter on the first day of each quarter during her natural life:—*Held*, that the growing payments were in the nature of contingent debts; and that the plaintiffs were not entitled under R. S. O. c. 147 to rank upon the estate of the insolvent for the present value of such payments. *Grant* v. *West*, 23 A. R. 533, and *Mail Printing Co.* v. *Clarkson*, 25 A. R. 1, followed. *Semble*, that such claims are not subject to attachment under the garnishee provisions of the English Judicature Act and Rules, as accruing debts. *In re Cowan's Trust*, 14 Ch. D. 638, has been disapproved in *Webb* v. *Stenton*, 11 Q. B. D. 518. *Carswell* v. *Langley*, 22 Occ. N. 97, 3 O. L. R. 261, 1 O. W. R. 107.

Sheriff — *Bond — Revenue of office.*] — Pursuant to the terms of his appointment a sheriff and two sureties gave a bond to his predecessor in office to pay him an annuity "out of the revenues of the said office":—*Held*, that fees received by the sheriff as returning officer at elections of members of Parliament, and commission earned by him as assignee for the benefit of creditors, formed part of the revenues of the office, and that as far as the revenues of each year so ascertained extended, after deducting necessary disbursements connected with the office during such year, the annuity for that year was payable. *Smart* v. *Dana*, 5 O. L. R. 451, 2 O. W. R. 287, 24 C. L. T. 436.

Sheriff—*Bond—Condition on appointment to office — Resignation of office—Re-appointment—Subsequent breaches—Liability—Res judicata.*]—The plaintiff resigned his office of sheriff, and the defendant was appointed in his place under a commission containing a condition that he should pay the plaintiff "out of the revenues of the said office" a certain sum for his life; and he gave a bond to the plaintiff for the due fulfilment of the condition. Finding that the revenues were not sufficient to pay the amount, the defendant resigned his office, and soon afterwards was re-appointed under a commission without any such condition. In an action on the bond, the plaintiff obtained judgment for the amount of the penal sum, and damages were assessed for the breaches up to the time of the defendant's resignation. A petition was subsequently presented by the plaintiff, asking for assessment of damages for alleged breaches since the re-appointment and for execution. On the trial of an issue as to whether the plaintiff was entitled to execution for any further damages:—*Held*, that want of good faith was not to be imputed to the Crown, who had the right to permit, and did permit, the defendant's resignation and by accepting it made it effectual, and thereby discharged the condition and all further liability on the bond; that the condition was attached to the first commission, and the annuity was payable only during the occupancy of the office thereunder, and when that commission was gone there ceased to be any contract to pay it. *Semble*, that there was no implied obligation on the defendant's part to refrain from invoking the consideration of the Crown to relieve him from the obligation it had imposed upon him: *Held*, also, that the question was not *res judicata* by the principal judgment, and that the judgment upon the issue was appealable as a final judgment as to matters set up as a defence to further liability in respect of alleged breaches subsequent to the new appointment. *Smart* v. *Dana*, 3 O. W. R. 89, 5 O. W. R. 387, 9 O. L. N. 427, 23 C. L. T. 170, 25 Occ. N. 456.

Shrinkage in rate of interest — Encroachment on corpus — Remainderman — Vested estates—Right to devise. *Re Crawford*, 5 O. W. R. 12.

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1. Appeals Generally.

Loss of record is not sufficient reason to strike out an inscription in review. *Dupéré* v. *London & Lancashire Life Assce. Co.*, 11 Que. P. R. 198.

Questions of fact.] — Where disputed questions of facts are left to the jury, and the Judge's charge distinctly leaves the matter to them to find for plaintiff if they believe his evidence, and for defendant if they believe defendant's evidence, and there is evidence to support a finding either way, the verdict will not be disturbed on appeal. *Brenan* v. *Hopkins* (1909), 39 N. B. R. 236.

Question of fact.]—Where the whole question in an action was one of fact, and there was ample evidence to satisfy findings of trial Judge, *held*, that his findings should not be interfered with. *Holland* v. *Franke* (1909), 14 O. W. R. 687. *Cooper* v. *James* (1909), 14 O. W. R. 925, 1 O. W. N. 151.

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2. Alberta—Appeal to Supreme Court.

Extending time for giving notice—*Delay in moving.*]—Where intending appellant had allowed 3 months to elapse from expiry of time for giving notice of appeal before moving for an extension of time, and no important principle of law was involved, and amount of judgment was small:—*Held*, that the trial Judge had properly exercised his discretion in refusing to extend time for giving notice of appeal. *Ross* v. *Robertson*, 7 O. L. R. 484, distinguished. *Hill* v. *Barvis*, 1 Alta. L. R. 514, 9 W. L. R. 274.

Leave to appeal.]—Under c. 7 of the Acts of Alberta of 1908, s. 6, if leave to appeal is given by the Judge, an appeal may be taken from the judgment of a single Judge on an application to cancel liquor license under s. 57 of Liquor License Ordinance. *In re Richelieu Hotel License* (1909), 2 Alta. L. R. 64. See 10 W. L. R. 402.

Notice of appeal to Court en banc —*Form of — Motion to set aside findings of jury and judgment—Order for trial without jury—Subsequent order for trial with jury — Rule 170 — Irregularity — Waiver —Appeal—Motion for new trial—Affidavits as to recovery of plaintiff after trial — Affidavit as to discovery of fresh evidence— Refusal to receive — Parties — Action for negligence against two defendants — Joint cause of action — Election — Quantum of damages — Excess — Jury — Counsel stating amount claimed to jury—Negligence—Findings of jury—Public Works Health Act — Duty to provide hospital and medical treatment for employees on construction works— Breach of duty—Evidence — Application of Act to accidents—Point of law not raised at the trial—Material evidence not before the Court—Evidence to connect breach of statutory duty with injury to plaintiff.*]—1. The jury at the trial having answered the questions put to them by the trial Judge, and judgment having been entered, on their findings, for the plaintiff against the defendant company, and for the other defendant, dismissing the action as to him, the defendant company served a "notice of appeal" to the Court *en banc* "from the verdict of the jury . . . and to set aside the judgment . . . and for judgment herein for the defendant company or for a new trial":—*Held*, that, under the Rules in force in Alberta, "appeal" is the appropriate designation of a motion attacking a verdict or finding as well as a judgment or order; and that no substantial objection existed to the form of the notice of appeal. 2. An order having been obtained by the plaintiff to set the cause

down for trial, without mention being made of a jury, and it having been set down accordingly, the plaintiff made an application for an order that the action be tried by a jury, and an order was made accordingly by the Judge at the trial, who gave leave to appeal from his order, on the ground that the action having been once set down for trial without a jury, there was no jurisdiction to make a subsequent order for trial with a jury:—*Held*, that Rule 170 of the Judicature Ordinance, 1898, was the only provision governing the matter, and, as the action was one arising out of tort and the damages claimed exceeded $500, that Rule applied; but the opening words of the Rule, "on the application to set a cause down for trial," did not prevent a Judge from exercising the powers conferred by the Rule at another time, having regard to the provisions of Rules 538 and 548.—*Semble*, also, that if the order for trial by jury was wrong, it was merely an irregularity, and such an irregularity as could be taken advantage of only within a reasonable time, and before the defendants had taken any fresh step with knowledge of the irregularity (Rule 539); and the appellants, although they obtained leave to appeal, having gone to trial without renewing at the trial their objection to a trial with a jury, and not having served notice of appeal until after verdict, had waived their right; and their appeal from the order should be dismissed. —3. The action being for damages for personal injuries sustained by the plaintiff, and judgment having been given for him against the defendant company for $5,000: —*Held*, that no weight should be given to an affidavit filed on behalf of the defendant company suggesting, upon hearsay, that since the trial the plaintiff had been successfully operated upon, and that his leg, which had been broken, would be a useful leg, and therefore that upon a new trial the damages might be reduced.—4. Upon the argument of the appeal, the defendant company applied for leave to read affidavits to shew that the plaintiff had never been in the employment of the contractors who were doing the work of construction of the railway at the place where the plaintiff was injured:—*Held*, that the facts set out in these affidavits, so far as they might have been given as evidence on the trial, were not "matters which occurred after the date of the decision from which the appeal is brought:" Rule 107; and therefore the affidavits were to be considered only as proposed additional material in support of a motion for a new trial; and, as it was not shewn that fresh evidence had been discovered which could not, with reasonable diligence, have been discovered before the trial, and which was so conclusive as to make it practically certain that the verdict would have been different had it been adduced at the trial, the affidavits should not be admitted. —5. The action was brought, not for negligence causing the breaking of the plaintiff's leg, but for negligence in the treatment of the plaintiff when injured, it being alleged that the defendant company and the other defendant, their medical or surgical officer, or one of them, were or was responsible for the treatment which resulted in the plaintiff's leg not being properly restored:—*Held*, that the trial Judge was not bound to compel the plaintiff to elect against which of the defendants he would proceed.—6. The plaintiff was 32 or 33 years old, a labourer on public works, ranches and farms. The evidence as to the condition of his leg shewed that the bones were not in alignment, and that the leg was not as strong and useful as before. To make it so, the leg would have to be broken again and reset, and even then it would be an inch shorter than the other:—*Held*, that $5,000 damages could not be considered so excessive that the jury could not reasonably award that amount.—7. Counsel for the plaintiff stated to the jury the amount of damages claimed, $10,000:—*Held*, that no injustice had arisen from the jury having knowledge of the amount claimed.—*Semble*, that it is proper for counsel for the plaintiff in his address to the jury to name a sum which he asks them to award, and there is no difference between making such a claim orally and reading from the statement of claim.—*Tinsley* v. *Canada West Coal Co.*, 9 W. L. R. 706, doubted.—8. The jury found that the plaintiff's injury was the result of negligence on the part of the defendants, consisting in the failure of the defendant company to comply with the terms of the Public Works Health Act regarding the providing of a suitably equipped hospital, a duty authorised physician and attendants; and that the plaintiff was employed in the construction of the railway:—*Held*, that there was evidence sufficient to support the findings.—9. It was contended that the Public Works Health Act was, in the words of sec. 2, "for the preservation of health and the mitigation of disease," amongst the employees, and that there was no obligation upon the defendant company to make any provision for accidents.—*Held*, that this point of law, raised for the first time on the appeal, might had it been raised at the trial, have been shewn, by evidence of additional facts, not to be material for the purpose of the present case, and it was too late for the defendants to ask this Court to give any effect to it.— Stuart, J., concurred with the other members of the Court in dismissing the appeal, but with some doubt whether there was any evidence from which a jury could reasonably conclude that the omission of the statutory duty charged against the defendants really caused the defective condition in the plaintiff's leg.—Judgment of Harvey, J., affirmed. *White* v. *Grand Trunk Pac. Ry. Co. & Hislop* (1910), 13 W. L. R. 158.

Order upon appeal — *Pronounced but not issued—Application by way of cross-appeal—Indulgence—Variation of judgment below.*]—Upon the defendant's appeal from the judgment at the trial in favour of the plaintiffs, declaring them entitled to a limited lien, in an action to enforce a mechanic's lien, the Court, in dismissing the appeal, expressed the opinion that the plaintiffs were entitled to a general lien, but, as the plaintiffs had not moved to vary the judgment, the order pronounced by the Court simply dismissed the defendant's appeal. The formal order not having issued, the plaintiff applied to vary the judgment at the trial, and the Court directed that it should be varied accordingly. *Scratch* v. *Anderson* (1910), 13 W. L. R. 113.

Right of appeal to Court en banc— *Award made by Judge — Edmonton city charter — Arbitration Act — Judge's Orders Enforcement Act—Enforced statutory arbitration—Remedy by action.*]—H. attempted to

appeal to the Court *en banc* from an award made by Harvey, J., under the provisions of the Edmonton charter, fixing compensation for lands expropriated. The charter gives no appeal and makes no reference to the Arbitration Act:—*Held*, that the award was not an order of a Judge within the meaning of ch. 7 of the statutes of 1908, "An Act respecting the Enforcement of Judge's Orders in Matters not in Court;" that the Arbitration Act does not apply to an enforced statutory arbitration, the charter not declaring that the proceedings under it shall be deemed a submission; and that no appeal lay by virtue of these statutes or otherwise to the Court *en banc*.—*Semble*, that the only method by which H. could impeach the award was by action based upon the equitable grounds of fraud, misconduct, or mistake. *Re Humberstone & Edmonton* (1910), 14 W. L. R. 492.

Security for costs—*Form of order imposing terms—Stay of proceedings—Powers respectively of trial Judge, single Judge, and Court en banc—Extending time for giving security after lapse.*]—Where a Judge makes an order for security for costs of appeal under Rule 502, he has not power to impose a term that in default of security being furnished the appeal shall stand dismissed without further order. A stay of proceedings upon terms under Rule 510 can only be granted by trial Judge or Court of Appeal itself, and the parties cannot, by consent, give jurisdiction to any other single Judge to make such order or fix such terms.—Consequently, where a single Judge, other than the trial Judge, directed that appellants should give security on or before 15th Sept., 1908, "and in default thereof the appeal stand dismissed without further order," *held*, that, notwithstanding the expiry of the time, a Judge had power to make an order extending time for giving security under terms of Rule 548. *North-West Thresher Co.* v. *Andrews*, 1 Alta. L. R. 425, 9 W. L. R. 282.

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3. British Columbia—Appeal to Supreme Court.

Amending Judge's notes of evidence.]—On hearing an appeal from a County Court Judge, counsel for appellant applied to introduce further evidence alleged to have been omitted from Judge's notes of evidence taken at trial. The Court refused application, holding that where a party desires to introduce, on an appeal, evidence alleged to have been omitted from Judge's notes of evidence, he should first apply to Judge to amend his notes. *Rendell* v. *McLellan*, 23 C. L. T. 57, 9 B. C. R. 328.

Amount involved — *Mechanics' Lien Act, ss. 23, 24.*]—An appeal from the judgment of a County Court Judge for the enforcement of a mechanics' lien for $172.05 was dismissed for want of jurisdiction, "the amount claimed to be owing" having been adjudged to be less than $250, sec. 24 of the Mechanics' Lien Act; and there being no adjudication under sec. 23. *Gabrielle* v. *Jackson Mines Limited*, 2 M. M. C. 399, followed. *Gillis Supply Co.* v. *Allan* (1910), 14 W. L. R. 458.

Appeal book—*Paging.*]—Pages of appeal books should be numbered at top of pages. *Haggerty* v. *Lenora Mount Sicker Copper Mining Co.*, 22 C. L. T. 106, 9 B. C. R. 6.

Costs—*Appeal partly successful.*]—Appellant who is substantially successful is entitled to costs of appeal. The fact that a respondent is successful in some parts of an appeal is not sufficient to deprive appellant, who is substantially successful, of his costs. *Centre Star Mining Co.* v. *Rossland Miners' Union*, 24 C. L. T. 198, 10 B. C. R. 48.

County Court appeal — *Time — Pronouncing of judgment — Replevin.*]—Time for taking an appeal from an ordinary judgment of a County Court to the Full Court commences from date of delivery of judgment, and not from date of taking out formal order. — A judgment in replevin is not a special judgment under Order XXIII., Rule 1. *Kirkland* v. *Brown*, 7 W. L. R. 786, 13 B. C. R. 350.

Decision of County Court on appeal from magistrate's Court.] — An appeal does not lie, even by leave, to Supreme Court of B. C. from order of a County Court Judge made on appeal to him from a decision or conviction of a magistrate under Provincial Summary Convictions Act. *In re Lambert*, 7 B. C. R. 396.

Entry of appeal—*Extension of time.*]—An appeal was not entered in time for the sittings of Full Court for which the notice of appeal had been given, and an application was made to extend time and for leave to enter appeal for next sittings:—*Held*, that when Full Court is sitting, such an application is properly made to it. *Mecredy* v. *Quann*, 9 B. C. R. 117.

Interim injunction—*Trial begun.*]—A motion to dissolve an interlocutory injunction was refused. Notice of appeal was given before trial, but when appeal came on to be heard the trial had commenced, though it had not been concluded. Court refused to interfere. *Dunlop* v. *Haney*, 7 B. C. R. 455.

Introducing fresh evidence on appeal—Motions by appellants to admit in Full Court further evidence on hearing of appeal from a judgment at trial were dismissed:—*Held*, that an application to admit further evidence which might have been adduced at the trial, should be supported by the affidavit of the applicant indicating evidence desired to be used, and setting forth when and how applicant came to be aware of its existence, what efforts, if any, he made to have it adduced at trial, and that he is advised and believes that if it had been so adduced, the result would probably have been different. *Marino* v. *Sproat*, 23 C. L. T. 31, 9 B. C. R. 335.

Judge by consent trying issue summarily is in effect an arbitrator and no appeal will lie from his decision. *Harris* v. *Harris*, 8 B. C. R. 307.

Jurisdiction in habeas corpus.]—*R.* v. *Rahamat Ali* (1910), 14 W. L. R. 169.

Motion for judgment — *Reference by trial Judge.*]—At the conclusion of the trial of an action for damages for personal in-

juries, the trial Judge did not see fit to enter any judgment on the findings of the jury, but left the parties to move the full Court as they might be advised. Both parties accordingly moved the full Court for judgment, the arguments being confined to the question of the liability of the defendant company:—*Held, per* Walkem, Drake, and Irving, JJ., that the full Court is an appellate Court and has no jurisdiction to hear a motion for judgment on the findings of a jury referred to it by a trial Judge. *Per* Martin, J., (dissenting) that, as the question of jurisdiction was not raised by counsel nor by the Court, the case should be dealt with on its merits, and that judgment should be entered in favour of the defendant company. *McKelvey* v. *Le Roi Mining Co.*, 22 C. L. T. 42, 8 B. C. R. 268.

New point raised on appeal—*Question of fact.*]—D., with others jointly indebted to plaintiff, on certain promissory notes in relation to transfer of a business as a going concern, did not, in his pleadings, nor at trial, until the close of evidence for both sides, raise the point that he claimed a lien on certain merchandise in stock which was sold by plaintiff, the proceeds of which ought to have been, but were not, applied in reduction of the debt:—*Held*, that where a point is one of fact, or of mixed law and fact, it cannot be raised in Court of Appeal for the first time unless the Court is satisfied that by no possibility could evidence have been given which would affect the decision upon it; but where the point is wholly one of law, such, for instance, as construction of statute, it may be raised for the first time on appeal, subject to such terms, if any, as the Court may see fit to impose. *Stone* v. *Rossland Ice and Fuel Co.* (1906), 12 B. C. R. 66, 3 W. L. R. 55.

Notice of appeal—*Extension of time for —Waiver — Security for costs.*]—Court has no jurisdiction to extend time limited by s. 76 of B. C. Supreme Court Act, as amended by Acts of 1899, c. 20, for giving notice of appeal. Respondent by applying for security for costs of appeal does not waive his right to object that appeal was not brought in time. *Lung* v. *Lung*, 8 B. C. R. 423.

Notice of appeal—*Particulars.*]—Points not argued, although included in notice of appeal, will be considered as abandoned. Grounds of appeal should be so particularized that the opposite party will know beforehand what he has to meet, and when "misdirection" is alleged, particulars should be stated. *Warmington* v. *Palmer*, 22 C. L. T. 126, 8 B. C. R. 344.

Notice of appeal — *Sittings—Time.*]—Final judgment was pronounced and entered on 27th February; notice of appeal for January sitting of Full Court was given on 24th Oct. A sitting of Full Court commenced, according to the statute, on 3rd Nov.:—*Held*, that appeal was brought in time. *Traders National Bank of Spokane* v. *Ingram*, 24 C. L. T. 198, 10 B. C. R. 442.

Petition to cancel water record—*Water Clauses Consolidation Act, s. 36 — Re-trial—Viva voce examination of witnesses —Change of venue—Proper registry—Forum.*]—The right of appeal upon petition to cancel a water record under s. 36 of the Water Consolidation Act is in effect a right to a re-trial before a Judge of the County Court or a Judge of the Supreme Court; and the appropriate method of dealing with questions of fact on that appeal is by examination and cross-examination of witnesses *viva voce*. *Ross* v. *Thompson*, 10 B. C. R. 177, followed. —There is jurisdiction to change the place of hearing of the appeal or trial; and an application may be heard at Victoria, although the petition was filed in the Vancouver registry. *Wallace* v. *Flewin*, 11 B. C. R. 328, 2 W. L. R. 13.

Place of hearing—*Notice of appeal — Striking out—Forum.*]—Under B. C. Supreme Court Act, as amended in 1902, an appeal in a Victoria case can be heard by Full Court sitting in Vancouver without consent. Per Drake, J.:—A single Judge has jurisdiction to order a notice of appeal to Full Court to be struck out. *Raser* v. *McQuade* (No. 2), 11 B. C. R. 169.

Preliminary objection—*Failure to set down.*]—Failure to set down an appeal is an irregularity only, within s. 83 of Supreme Court Act of B. C. No preliminary objection will be heard unless proper notice has been given under same section. *Baker* v. *Kilpatrick*, 7 B. C. R. 127.

Preliminary objection — *Notice of.*]—Notice of a preliminary objection to an appeal to Full Court must be served at least one clear day before time set for beginning of sittings. *McGuire* v. *Miller*, 9 B. C. R. 1.

Preliminary objection — *Mistake in appeal book.*]—An objection to the hearing of an appeal on the ground that appeal books are defective and erroneous is not a preliminary objection within s. 83 of Supreme Court Act of B. C. *Rogers* v. *Reed*, 20 C. L. T. 219, 7 B. C. R. 139.

Refusal to entertain — *Interlocutory order — Action decided pending appeal — Costs.*]—An appeal from an interlocutory order, and, pending the appeal, the action had been tried and decided. Full Court ordered the appeal be struck off the list, refusing to accede to request of appellant's counsel, who wanted appeal to go on to decide question of costs. *Fawcett* v. *Can. Pac. Ry. Co.*, 22 C. L. T. 39, 8 B. C. R. 219.

Reversing findings of facts — *Trial without jury—Commission evidence—Company—Contract—Ultra vires.*]—In action in Yukon for damages for breach of contract, tried without a jury, the evidence for defence being evidence taken on commission, the Judge held the contract sued on was made with defendant Co. and not with one Munn as alleged by defence, and gave judgment for plaintiffs:—*Held*, reversing the finding and allowing appeal, that the Judge had failed to appreciate the commission evidence. Per Drake, J., that the question of *ultra vires*, not having been revised in the Court below, was not open on appeal. *McKay* v. *Victoria Yukon Trading Co.*, 22 C. L. T. 169, 9 B. C. R. 37.

Right of appeal—*Award—Workmen's Compensation Act.*]—No appeal lies to B.

C. Supreme Court from an award of an arbitrator appointed by a Supreme Court Judge under clause 2 of schedule II. to Workmen's Compensation Act, 1902. *Lee v. Crow's Nest Pass Coal Co.*, 11 B. C. R. 323, 1 W. L. R. 527.

Right of appeal—*Decision of Judge on appeal from Court of Revision—Preliminary Objection—Costs.*]—See *In re Vancouver Incorporation Act and Rogers*, 23 C. L. T. 72, 9 B. C. R. 373.

Right of appeal — *Divorce—Jurisdiction of Full Court.*]—Full Court of Supreme Court of British Columbia possesses no jurisdiction to hear appeals, final or interlocutory, in divorce matters. *Scott* v. *Scott*, 4 B. C. R. 316, followed. *Brown* v. *Brown*, 14 B. C. R. 142, 10 W. L. R. 15.

Right of appeal—*Election to take judgment in lieu of issue—Effect of.*]—Plaintiff's counsel, on motion for judgment after trial, was given option of having an issue ordered as to a point on which evidence was not sufficiently directed, or of taking judgment against one defendant with costs and dismissing action against other defendant without costs, and elected to take the latter course:—*Held*, reversing 7 B. C. R. 189, that such judgment was not in effect a compromise and was therefore appealable. *Sun Life Assurance Co.* v. *Elliott* (1900), 21 C. L. T. 154, 31 S. C. R. 91.

Right of appeal—*Order quashing conviction—Criminal Code—Crown office rules.*]—No appeal lies to Full Court from decision of single Judge quashing a conviction under Criminal Code.—Discussion as to "Crown Office Rules." *R.* v. *Carroll*, 14 B. C. R. 116, 9 W. L. R. 655, 14 Can. Crim. Cas. 358.

Right of appeal—*Party interested — Who is—Rivers and Streams Act, s. 12.*]—S. 12 of Rivers and Streams Act provides that if a "party interested" is dissatisfied with a judgment of County Court Judge he may appeal to Supreme Court:—*Held*, that "party interested" means one who was a party to the proceedings before the Judge appealed from. *In re Smith*, 23 C. L. T. 58, 9 B. C. R. 329.

Right of appeal—*Special commissioner—County Judge—Consent.*]—Special commissioner appointed under Bennett-Atlin Commission Act, 1899, cannot confer right of appeal to parties to a dispute tried before him by purporting to sit as a County Court Judge. *Johnson* v. *Miller*, 7 B. C. R. 46.

Right to intervene—*Water record.*]—Any one affected by a decision appealed from under s. 36 of Water Clauses Consolidation Act, may be let in on the hearing of appeal, even though the month for giving notice of appeal has expired. Such person may make his application on hearing of appellant's motion for directions. *In re Water Clauses Consolidation Act*, 21 C. L. T. 192, 8 B. C. R. 17.

Security for costs—*Stay of proceedings.*]—An order for security for costs for appeal to Full Court should provide for a stay of proceedings until security is given. *Kettle River Mines, Limited* v. *Bleasdell*, 22 C. L. T. 103, 8 B. C. R. 350.

Security for costs of appeal—*Practice—Delay in applying.*]—Order LVIII., Rule 15 A.—Discretion—Appeal. *Piper* v. *Burnett* (B.C.), 10 W. L. R. 647.

Small Debts Court—*Appeal from—Finality of.*]—Appeal to Full Court from a judgment in County Court on appeal from Small Debts Court:—*Held*, that the appeal given by s. 29 of Small Debts Court Act to either a Judge of Supreme Court or to County Court, is final. *Larsen* v. *Coryell*, 24 C. L. T. 413, 11 B. C. R. 22.

Stay of execution pending appeal—*Order 58, R. 16—Security for costs—Discretion.*]—Under Order 58, R. 16, of Supreme Court Rules, 1906, the granting of a stay of execution pending appeal to be taken, is a matter of discretion to be exercised upon facts of each particular case. *Reynolds* v. *McPhail*, 13 B. C. R. 159.

Stay of proceedings — *Security for costs—Payment of costs forthwith on undertaking to return if appeal successful.*]—Defendant applied for a stay of proceedings pending appeal to Full Court. An order for a stay is not an indulgence. Stay granted on defendant furnishing security for costs of appeal, damages awarded *mesne* profits, paying costs of action, and of this application forthwith after taxation. Usual undertaking to return, if appeal succeeds. *Alexander* v. *Walter*, 11 W. L. R. 26. See 10 W. L. R. 441.

Summary Convictions Act — *Case stated—Transmitting case to district registry—Condition precedent.*]—Appeal by way of case stated under Summary Convictions Act. Appellant had not filed the case in proper District Registry (New Westminster), as required by s. 86 of the Act, but he did, according to leave obtained, file the case in Vancouver Registry:—*Held*, when appeal came on for hearing, that the transmission of the case to proper registry, as required by s. 86, is a condition precedent to jurisdiction conferred by ss. 90 and 92, and, as that provision of s. 86 had not been complied with, Courts could not entertain appeal. *Morgan* v. *Edwards*, 29 L. J. M. C. 108, followed. *Cooksley* v. *Nakashiba*, 21 C. L. T. 492, 8 B. C. R. 117.

Time — *Commencement of.*]—Time for bringing appeal from a trial judgment runs from date of signing, entry, or perfection thereof, as case may be, and not from date of pronouncement. *International Financial Society* v. *City of Moscow Gas Co.*, 7 Ch. D. 241, discussed. *Short* v. *Federation Brand Salmon Canning Co.*, 7 B. C. R. 35.

Time—*Date of decision—Entry of order.*]—An order deciding a garnishee issue was

dated 26th March, settled by the Judge on 15th July, and entered on 25th July. Notice of appeal was served on 19th July:—*Held*, that appeal was brought in time. *Manley* v. *Mackintosh*, 10 B. C. R. 84.

Time—*Depositing appeal books—Extension — Application — Forum.*]—Appeal books were not deposited in time, and, on application to extend time, Full Court was asked to express opinion whether such applications should be made in Chambers or to Full Court:—*Held*, that application should be made as soon as possible and to a Judge in Chambers, if Full Court was not sitting at time. If Full Court was sitting at the time, the better course would be to apply there in first instance. Application was allowed and case set at foot of list. *Haley* v. *McLaren*, 20 C. L. T. 267, 7 B. C. R. 184.

Time—*Extension after expiry—Jurisdiction.*]—On appeal the question of Court's jurisdiction to extend time limited for appeal after time limited had expired came up, and counsel for appellant wished to argue that the Court had such jurisdiction and that the decision in *Sung* v. *Lung*, 8 B. C. R. 423, was wrong. Court announced that if it became necessary to decide the point, all the Judges would be summoned to hear argument—A decision on the point was not necessary, so it was not argued. *Noble Five Mining Co.* v. *Last Chance Mining Co.*, 23 C. L. T. 252, 9 B. C. R. 514.

Time — *Notice — Service — Filing.*]—Under s. 79 of Supreme Court Act, the provision as to 14 clear days applies to service and not to filing of notice of appeal. *Archibald* v. *McDonald*, 7 B. C. R. 125.

Verdict of jury—*Acquittal for perjury at trial of action.*—For perjury alleged to have been committed by the defendant at the trial of this action, he was tried and acquitted before the hearing of an appeal in the action, and, on the appeal, his counsel moved the full Court to be allowed to read the verdict of the jury in the criminal trial. The motion was refused. *Borland* v. *Coote*, 24 C. L. T. 383, 10 B. C. R. 493.

Water Clauses Consolidation Act, 1897, ss. 36, 39—*"Decision" — Time for taking appeal—Jurisdiction.*] — In a proceeding under Water Clauses Consolidation Act, 1897, before a County Court Judge, on appeal from Water Commissioner, respondents objected, *inter alia*, to jurisdiction of County Court Judge, who overruled objection and proceeded with hearing, reserving his decision on petition generally. Respondents appealed within 21 days given in s. 39 as time within which an appeal must be taken from a decision of any Supreme or County Court Judge on any proceeding under Act:—*Held*, that term "decision" as used in s. 39 means final disposition of whole case before the Judge, on appeal from Water Commissioner. *Hole* v. *Roe*, 7 W. L. R. 160, 13 B. C. R. 215.

Yukon appeal—*Final judgment — Right of appeal—Leave to appeal to Privy Council—Costs.*]—In action by executors against appellant to recover certain sums of money due to their estate, the Judge of Territorial Court, at request of plaintiffs, selected one of the items, and adjudicated on evidence taken that action in respect thereof be dismissed:—*Held*, that this was, within meaning of Yukon Territorial Act, 1899, s. 8, a final judgment in respect thereof, notwithstanding that the remaining items in suit were referred, and the costs were reserved. No appeal therefrom to B. C. Court lay after expiration of 20 days. Special leave having been granted to appeal from a decree of the Supreme Court of Can. on a petition stating that the construction of said statute was a matter of general public importance, without stating that it had been repealed:—*Held*, that, as the omission was immaterial and *bona fide*, appellant should not be deprived of his costs. Judgment in *Belcher* v. *McDonald*, 33 S. C. R. 321, reversed. *McDonald* v. *Belcher*, [1904] A. C. 429.

Yukon cases—*Amount in controversy—Counterclaim.*]—Appeal from a judgment in Territorial Court of Yukon. Plaintiffs sued for $408 damages sustained by their steamer as result of collision with defendants' steamer. Defendants counterclaimed for damages. At trial plaintiffs' claim was dismissed, and defendants on their counterclaim were given judgment for $735. Plaintiffs appealed:—*Held*, that appeal must be limited to the judgment on counterclaim, as claim was not for an appealable amount. *Can. Devel. Co.* v. *Le Blanc*, 21 C. L. T. 600, 8 B. C. R. 173.

Yukon cases — *Extensions of time — Terms—Appeal books.*]—The Court may extend on terms the time for appealing to Full Court from Territorial Court of Yukon. Respondent is entitled to a copy of appeal book. *Banks* v. *Woodworth*, 7 B. C. R. 385.

Yukon cases—*62 & 63 V. c. 1, s. 7—Application to pending cause.*]—Act 62 & 63 V. c. 11, gives right of appeal to Judges of Supreme Court of B. C. sitting together as Full Court in cases from Yukon, as therein specified.

Applies to an action pending when the Act came into force, but tried and decided afterwards. *Courtenay* v. *Can. Devel. Co.*, 21 C. L. T. 61, 7 B. C. R. 377.

Does not apply to a case tried before Act came into force and decided after. *Can. & Yukon Prospecting & Mining Co.* v. *Casey*, 7 B. C. R. 373.

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4. British Columbia—Appeal to County Court.

From summary conviction — *Notice of appeal—Description of offence.*]—Notice of appeal from conviction for playing in a common gaming house, which describes the offence for which appellant was convicted as "looking on while another was playing in a common gaming house," is insufficient. *R.* v. *Mah Yin*, 9 B. C. R. 319.

Magistrate's conviction—*Entry — Recognizance.*]—Appeal from a summary conviction cannot be received or heard unless recognizance required by s. 71 (c) of Summary Convictions Act has been entered into

on or before day on which appeal is entered for hearing. *R.* v. *King*, 7 B. C. R. 401, 4 Can. Cr. Cas. 128.

Procedure on appeal—*Water Clauses Consolidation Act—Gold Commissioner.*] — Appeal under s. 36 of Water Clauses Consolidation Act, from decision of Gold Commissioner to County Court Judge, is a trial *de novo*. *In re Ross & Thompson*, 24 C. L. T. 34, 10 B. C. R. 177.

Small Debts Court—*New witness.*] — Appeal from the Small Debts Court is by way of rehearing, and witnesses may be called although not called at trial. *Malkin* v. *Tobin*, 7 B. C. R. 386.

Summary Convictions Act, B.C.] — Necessity for entry of appeal. *Gibson* v. *Adams* (B.C.), 2 W. L. R. 72.

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5. Exchequer Court of Canada—Appeal to.

Salvage action — *Judgment of local Judge in Admiralty—Practice—Remission for further evidence.*] — Under provisions of Rules 159, 162, of general Rules and Orders regulating practice and procedure in Admiralty cases in Exchequer Court of Can., the Court, in entertaining appeal from a decision of local Judge in Admiralty in a salvage case, may direct further evidence be taken before local Judge in order to dispose of an issue raised on appeal. In such a case the appeal is by way of rehearing. *Vermont S.S. Co.* v. *"Abby Palmer,"* 24 C. L. T. 387, 9 Ex. C. R. 1.

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6. Manitoba—Appeal to Court of Appeal.

Notice in lieu of cross-appeal — *Validity as against party not appealing—Rule 652 (a)—Practice.*]—Rule 652 (a) of King's Bench Act, R. S. M., 1902, c. 40, does not apply when the party against whom respondent in appeal seeks relief is not appellant. It is not sufficient in such a case for respondent to serve upon such non-appealing party a notice under said Rule, but he must set down a substantive cross-appeal. *Bent* v. *Arrowhead Lumber Co.*, 18 Man. L. R. 277, 9 W. L. R. 301.

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7. Manitoba—Appeal to Court of King's Bench.

Admitted facts—*Review of evidence.*]—Although accepting the findings of the trial Judge as to the credibility of the witnesses, the Court in appeal may review the evidence and reverse the decision arrived at as to the legal conclusions to be drawn from the admitted facts. *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267, commented on and distinguished. *Gilmour* v. *Simon*, 15 Man. L. R. 205, 1 W. L. R. 417.

From judgment of County Court— *Order to amend — Finality.*] — Order of County Court Judge at trial of action giving plaintiff leave to amend his particulars of claim pursuant to s. 330 of the County Courts Act, R. S. M., c. 33, and providing that defendant should have 15 days to put in a dispute note, and that in default judgment might be signed for plaintiff for full amount claimed, is a final order or judgment from which appeal lies to Court of Queen's Bench, under s. 315, as amended by 59 V., c. 5, s. 2. *Brenchley* v. *McLeod*, 20 C. L. T. 21, 12 Man. L. R. 647.

From judgment of stipendiary magistrate, N.W.T. — *Irregularity — Value of subject-matter.*]—Objection on ground of irregularity in proceedings leading up to appeal cannot be taken on argument of appeal. —In determining the value of subject-matter in dispute, upon which right of appeal is made to depend, the proper course is to look at judgment as to extent that it affects the interest of party prejudiced by it, and seeking to relieve himself from it by appeal.— In action attacking a conveyance as fraudulent against creditors, evidence shewing that there was actual sale from debtor to claimant, and that even if there was any fraudulent intent on part of former, the latter bought *bona fide*, the conveyance was held valid. *Steele* v. *Ramsay*, 1 Terr. L. R. 1.

From judgment of trial Judge — *Question of fact—Reversal.*]—Under Manitoba Queen's Bench Act, 1895, s. 48, and Rules 638, 640, Full Court *in banco* is a Court of Appeal from the decision of a Judge on questions of fact as well as of law, and must weigh conflicting evidence and draw its own inferences and conclusions, making due allowance for circumstance that it has not seen or heard the witnesses. *The Glannibanta*, 1 P. D., at p. 287; *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704; *Smith* v. *Chadwick*, 9 App. Cas. 187; *North British and Mercantile Ins. Co.* v. *Tourville*, 25 S. C. R. 177, followed. In this case the finding of trial Judge was reversed by a Court of three Judges, one of whom dissented. *Creighton* v. *Pacific Coast Lumber Co.*, 19 C. L. T. 285, 12 Man. L. R. 546.

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8. New Brunswick—Appeal to Supreme Court.

Application to review judgment — *Time for applying—Affidavit—Notary public —Intituling—Laches — Jurisdiction.*] — An affidavit taken out of the province by a notary public may be read on an application for review under C. S. N. B. 1903, c. 122, s. 6.— Affidavits on review should not be intituled in any Court, but if intituled in a Court, the intituling may be treated as surplusage. —The order for hearing of a review need not be made within thirty days from the date of the certificate of the return. It is sufficient if the application for the order is made within thirty days from the receipt by the applicant of the copy of the proceedings.— The thirty days allowed by s. 6, c. 122, to apply for review of a judgment in a civil cause tried in any inferior Court, after obtaining a copy and minute of the proceedings, does not apply only to a copy obtained under an order of a Judge of the Supreme or County Court, but to any copy applied for

and furnished by the trial Justice under the section. *Lunt* v. *Kennedy*, 2 E. L. R. 295, 37 N. B. R. 639.

Contradictory evidence — *Finding of trial Judge — Documentary evidence — Weight.*]—Where cause is tried without jury, and Judge finds facts on contradictory evidence, the onus of proving the Judge wrong is on party moving, and, if he fails to satisfy the Court of this, his motion must fail.—In such a case the Appellate Court has same jurisdiction as trial Judge, and where facts found are largely based on written evidence, they should disregard his finding if, in their opinion, it is against weight of evidence. *Adams* v. *Alcroft*, 37 N. B. R. 332.

County Court appeal — *Interference—Assumed findings of fact—Rejection of evidence — Absence of prejudice.*]—On appeal from judgment of County Court, where the Judge has tried cause without a jury and entered a judgment for respondent, and the return does not contain a statement of his findings on facts, it will be assumed by appellate Court that he found the facts in favour of respondent, and judgment will not be disturbed if there is evidence to justify such finding. A judgment will not be reversed on appeal on ground that evidence was improperly rejected if record shews that party offering evidence could not have been prejudiced by the rejection. *Johnson* v. *Jack; Johnson* v. *Bank of Nova Scotia*, 35 N. B. R. 492.

County Court appeal — *Motion to set aside verdict—Grounds—Appeal—Nonsuit.*]—On a motion against a verdict in a County Court, it is not necessary to serve a statement of the grounds of the motion and the authorities relied upon.—The Supreme Court, on appeal, may order a nonsuit to be entered, though no leave has been reserved at the trial. *Miller* v. *Gunter*, 36 N. B. Reps. 330.

County Court appeal—*Right of appeal—Neglect to move for new trial.*]—The Court will not refuse to hear appeal because appellant neglected to take out a summons for a new trial in County Court until time had expired for which signing of judgment had been stayed, and did not ask for a further stay or offer any excuse for delay, no term having elapsed. *Read* v. *McGivney*, 36 N. B. R. 513.

Entry of verdict against finding—*Evidence.*]—On appeal, where it appears that, by reason of misdirection or an erroneous application of law, a verdict is wrongfully entered, the Court will not order a verdict to be entered against the finding, though they should be of opinion that it should be so entered on the evidence. *Patterson* v. *Larsen*, 37 N. B. R. 28.

Findings of fact—*Equity Judge—Review.*]—In an equity appeal, where Judge in Equity, in opinion of appellate Court, disregarded or did not give due weight to evidence of witnesses taken under commission, the Court may review his findings on facts as well as law. *Fairweather* v. *Lloyd*, 36 N. B. R. 548.

Grounds for appeal — *Costs — New trial.*]—It is not a ground for appeal from order for new trial of County Court action because verdict was against weight of evidence, that costs should not have been imposed in granting new trial. *Macrae* v. *Brown*, 36 N. B. R. 353.

Matrimonial cause — *Adultery—Credibility of witnesses—Question for trial Judge.*]—In Court of Divorce and Matrimonial Causes the amount of credence to be given to witnesses is entirely for Judge who hears case. Therefore on trial of a libel filed by wife for a divorce *a vinculo matrimonii* on ground of adultery of husband, when presiding Judge accepted evidence of a single witness to prove adultery, as to which fact she was not corroborated, though on other matters she was, and entirely rejected the uncontradicted statements of several witnesses called to prove immoral conduct on part of wife:—*Held*, that he had a right so to do, and Court on appeal would not on that account disturb decree. *Bell* v. *Bell*, 34 N. B. R. 615.

Motion against verdict — *Statutory requirements — Type-written notice.*] — The Court refused to hear a motion where the applicant had not complied with 60 V. c. 24, s. 366 (N.B.), by printing his notice of motion, which was more than 5 folios in length. A type-written notice does not comply with the statute. Time was given to print the notice. *Wilmot* v. *Macpherson*, 36 N. B. Reps. 327.

Notice of appeal—*Extension of time—Affidavit.*]—An application for enlargement of time for giving notice of motion against a verdict, etc., under C. S. N. B., 1903, c. 111, s. 372, on ground that transcript of stenographic report of trial had not been filed, should be supported by an affidavit shewing the transcript is necessary to enable counsel to prepare notice. *McCutcheon* v. *Darrah*, 37 N. B. R. 1.

Order of Judge of Supreme Court in review from city Court—*Finality.*]—An order in review made by a Judge of Supreme Court under C. S. N. B., c. 122, s. 6, is final. *Smith* v. *Kennie*, 30 N. B. R. 226, followed. *Hallett* v. *Allen*, 38 N. B. R. 349, 4 E. L. R. 184.

Question of fact—*Affirmance of judgment—Partnership.*]—Judgment of Barker, J., 3 N. B. Eq. R. 68, affirmed. *Leighton* v. *Hale*, 2 E. L. R. 136, 37 N. B. R. 545.

Questions of fact — *Judge's charge.*]—Where disputed questions of fact are left to the jury, and the Judge's charge distinctly leaves the matter to them to find for the plaintiff if they believe his evidence, and for the defendant if they believe the defendant's evidence, and there is evidence to support a finding either way, the verdict will not be disturbed on appeal. *Brenan* v. *Hopkins*, 39 N. B. R. 236.

Review—*Affidavit — Agent of party — Amount involved—Forum for review — Finality of order.*]—The affidavit that substantial justice has not been done, made on re-

view proceedings from a judgment of the Small Debts Court of Fredericton, may be made by the attorney or agent of the party reviewing under 45 V. c. 15, s. 1. There is no authority under C. S. N. B. c. 60, or amending Acts, to review the finding of a justice or the jury on a question of fact where the amount involved in the suit does not exceed $40 in debt and $8 in tort. The Judges of the Supreme and County Courts are of co-ordinate jurisdiction in matters of review under c. 60, and orders made within their authority are final. *Rex* v. *Wilson, Ex p. McGoldrick*, 36 N. B. Rep. 339.

Right of appeal—*County Court—Decision of Judge.*]—Where questions of fact, which have not been passed upon by Judge below, are not involved, appeal will lie directly to Supreme Court from a decision of County Court Judge. *Patterson* v. *Larsen*, 36 N. B. R. 4.

Right of appeal.]—A party aggrieved by a decree of a Judge of Probate may appeal therefrom, although he did not appear in the Court below. *Re Welch*, 36 N. B. R. 628.

Time for appealing.]—An order extending the time for appeal made *ex parte* is not a nullity, and, if not set aside, the Court will hear an appeal taken under it. *Re Welch*, 36 N. B. R. 628.

Time for appeal—*Solicitor's mistake—Death of respondent.*]—Upon the death of one of several defendants to a suit in the Supreme Court in Equity the plaintiff may continue the suit by applying for administration *ad litem* or by application to the Equity Court under s. 116 or s. 119 of the Supreme Court in Equity Act, C. S. 1903, c. 112, and therefore where one of several defendants died after judgment of the Supreme Court *en banc* confirming a decree of the Equity Court dismissing the plaintiff's bill with costs, and the plaintiff delayed his appeal to the Supreme Court of Canada for eight months thereafter on the ground that no administration had been taken out:—*Held*, this was no excuse for the delay and the judgment of McLeod, J., refusing to allow the appeal under s. 71 of the Supreme Court Act, R. S. C. 1906, c. 139, was confirmed. *Held* also, that the mistake of the solicitor as to the procedure on defendant's death even though supported by opinion of counsel, was not a sufficient excuse. Per McLeod, J.:—The plaintiff (appellant) could have filed a suggestion and proceeded under s. 85 of the Supreme Court Act, R. S. C. 1906, c. 139. *Harris* v. *Sumner*, 39 N. B. R. 456.

Trial without jury—*Verdict involving finding of disputed facts — Assumption by Court.*]—Where on trial without a jury Judge makes no distinct finding on certain disputed facts, but orders a verdict to be entered for plaintiff, which involves finding of those facts in plaintiff's favour, the Court, on appeal, will assume they have been so found, if evidence justifies a finding to support verdict. *Hampstead Steamship Co.* v. *Vaughan Electric Co.*, 38 N. B. R. 418, 4 E. L. R. 544.

9. New Brunswick—Appeal to County Court.

Conviction for wilfully destroying line fence—*Title to land.*]—Jurisdiction of magistrate. *R.* v. *O'Brien, Ex p. Roy*, 3 E. L. R. 425.

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10. North-West Territories—Appeal to Supreme Court.

Appeal from conviction—*Notice of appeal signed by clerk of advocate for appellant.*]—Want of authority—Appeal quashed—Costs. *Scott* v. *Dalphin* (N.W.T.), 6 W. L. R. 371.

Costs—*Leave to appeal — Time to inscribe.*]—Rules 500 and 501 of Judicature Ordinance are independent of each other; Rule 501 does not apply to appeal as to costs; by virtue of Rule 500, appeal as to costs lies irrespective of any limitation contained in Rule 501, (1) without leave, where, by law, the costs are not—and (2) with leave, where, by law, the costs are—left to the discretion of Court or Judge. Where, therefore, grounds of appeal were that Judge had ordered costs to be paid out of a fund, out of which he had no power to order them to be paid:—*Held*, that leave to appeal was not necessary. Time for inscribing appeal and enlargement of time, discussed. *In re Demaurez*, 4 Terr. L. R. 281.

Criminal Code—*Summary trial—Appeal—Jurisdiction.*] — Since before 1895 two justices of the peace in the North-West Territories had jurisdiction to try offences under paragraphs *(a)-(f)* of sec. 783 of the Criminal Code, 1892, and there was no appeal from their decision, the extension in that year of this jurisdiction to two justices in any province, subject to appeal where the trial was had before them by virtue only of the new enabling clause, did not extend the right of appeal to the North-West Territories. The Alberta Act since it continued the law theretofore in force made no change in this respect. *R.* v. *Pisoni*, *R.* v. *Taylor*, (1906), 6 Terr. L. R. 238.

Criminal law—*Appeal from refusal of trial judge to reserve case—Application not made at trial—Discretion of trial Judge.*]—On the trial of the accused before a Judge without a jury his counsel objected that the accused was entitled to be tried by a jury, but the objection was overruled and the trial proceeded, no application being made for a reserved case. The accused was convicted and sentenced, and two days afterwards an application was made to the trial Judge to reserve a case for the Court of Appeal. The application was refused. *Held*, than an appeal from the refusal of the trial Judge to reserve a case on a question of law arising during a criminal prosecution lies only when the application is made at the trial, and although after the trial the Judge might still, in his discretion, reserve a case, yet if he refused, no appeal lay. *R.* v. *Toto* (1904), 6 Terr. L. R. 89.

Ground not taken below—*Notice of appeal.*]—On appeal to Court *in banc*, counsel for defendants having sought to raise for first

time the point that, although there had been a dedication of land in question as a highway, such dedication was made and accepted subject to such obstructions as existed upon it at time of dedication, the Court considering that the point was not covered by any of the grounds stated in defendants' notice of appeal:—*Held*, that defendants were not at liberty to raise the point at this stage. *Edmonton* v. *Brown*, 1 Terr. L. R. 454.

Leave to appeal—*Powers of Court in banc—New trial—Neglect to give evidence.*]—Judicature Ordinance, R. O. 1888, c. 58, s. 435, provides that "no appeal shall lie from judgment or order of a single Judge or of a Judge of the Court to Court *en banc*, without the special leave of Judge or Court whose judgment or order is in question, unless the title to real estate or some interest therein is affected, or unless matter in controversy on appeal in matters of contract exceeds $500 and in matters of tort exceeds $200, exclusive of costs; or unless matter in question relates to taking of an annual or other rent, customary, or other duty or fee, or a like demand of a general or public nature affecting future rights:"—*Held*, that, where a trial Judge had not granted leave to appeal in a case in which, by virtue of this section, leave to appeal was necessary, the Court *en banc* had no jurisdiction to entertain an appeal, or to give leave to appeal, even; *semble*, had it appeared that the Judge had said that the applicant might apply to the Court *in banc* for leave. *Semble*, where a party fails in his case by reason of his neglecting to give necessary evidence, of which at the time of the trial he had knowledge, he should be allowed a new trial to permit him to supply the evidence, only under special circumstances. *Chalmers* v. *Fysh*, 1 Terr. L. R. 434.

Notice of appeal—*Amendment — New trial.*] — An amendment was allowed to a notice of appeal so as to ask expressly for a new trial, but only on the grounds stated in the notice of appeal. An amendment so as to set up the ground, not stated in the notice, of the improper admission of evidence taken on commission, was refused as it did not appear from the Judge's notes that objection was made at the trial though the commissioner had noted the objection. New trial on ground that the verdict was perverse was refused. *Mercer* v. *Fonseca*, 2 Man. L. R. 169, followed. *Edmonton* v. *Thomson*, 1 Terr. L. R. 342.

Notice of appeal—*Amendment—Special leave.*]—Notwithstanding that the case is of such a character as to require special leave to appeal, the Court *en banc* has power to amend notice of appeal by adding a ground not taken when leave was granted; such an amendment is a matter for exercise of discretion of Court, and such discretion will not in such a case, be exercised without very great precautions. *Western Milling Co.* v. *Darke*, 2 Terr. L. R. 40.

Notice of appeal—*Amendment of.*]—As a general rule on argument of appeal leave to amend notice of appeal will be given for purpose of correcting errors of dates and other trifling matters and on special terms. *Seesmith* v. *Murphy*, 1 Terr. L. R. 311.

Notice of appeal—*Time for.*]—Rule 460 of the Judicature Ordinance, C. O. 1898, c. 21, providing for two clear days' notice of motion, except by special leave, applies to motions to the Court *en banc*. An order stopping the registration of a tax sale transfer and Judge's order confirming the sale, as provided for by s. 97 of the Land Titles Act, also acts as an order extending the time for registration of the transfer, as provided for by s. 95 of the Act. An appellant is excused for not having proceeded with the appeal by the fact that the original documents from which the appeal book is to be prepared have remained in the respondent's possession, he having neglected to file them in the Land Titles Office, as directed by the order appealed from. *Re Donnelly*, 5 Terr. L. R. 270.

Objection to regularity.]—An objection on the ground of irregularity in the proceedings leading up to an appeal, cannot be taken on the argument of the appeal. *Steele* v. *Ramsay*, 1 Terr. L. R. 1, 3 Man. L. R. 305.

Right of appeal—*Amount in controversy.*]—Plaintiff sued for $617.85, and defendants with their defence, while denying liability, brought into Court $367 as being sufficient to satisfy plaintiff's claim; the trial Judge found plaintiff entitled to $543.22 and applied the $367 in Court, leaving, with an adjustment of interest, a balance due to plaintiff of $182.43:—*Held*, that amount in controversy exceeded $200, and defendant was entitled to appeal without special leave. *McDougall* v. *McLean*, 1 Terr. L. R. 436.

Security for costs of—*Grounds for ordering.*]—Poverty of appellant—Disposition of property. *Dakota Lumber Co.* v. *Rinderknecht* (N.W.T.), 1 W. L. R. 481, 2 W. L. R. 86, 275.

To Court en banc—*Preliminary objections.*]—Order appealed from not issued—Irregularity — Waiver—Objection not taken on settlement of appeal case—Effect of order for leave to appeal. *Bank of Hamilton* v. *Leslie* (N. W. T.), 3 W. L. R. 394.

To single Judge—*Appeal from justices' conviction.*] — The conditions, practice and procedure in respect of appeals from summary convictions made under the laws enacted by the Legislative Assembly are those which that Assembly has prescribed, and an appeal cannot be heard unless all the statutory requirements imposed as conditions of the right of appeal have been complied with. *R.* v. *McLeod*, 4 W. L. R. 124, 4 Terr. L. R. 513, 3 Man. L. R. 305.

Value of subject-matter.]—In determining the value of the subject-matter in dispute, upon which the right of appeal is made to depend, the proper course is to look at the judgment as to the extent that it affects the interest of the party prejudiced by it, and seeking to relieve himself from it by appeal. *Macfarlane* v. *Leclaire*, 15 Moo. P. C. 181, 8 Jur. N. S. 267, 10 W. R. 294, followed. *Steele* v. *Ramsay*, 1 Terr. L. R. 1.

11. Nova Scotia — Appeal to Supreme Court.

Collection Act—*Appeal to County Court—Notice of appeal—Prohibition.*]—Under provisions of the Collection Act, R. S. N. S. 1900, ch. 182, s. 32, "notice of appeal must be served upon solicitor for respondent or upon respondent personally within 10 days of the date of the decision appealed from." No notice was given within 10 days and Judge of County Court subsequently made an order *ex p.* extending the time. Appellant failed to prosecute his appeal within the period of 30 days prescribed by s. 33 as amended by Acts of 1901, ch. 15, and a writ of prohibition was applied for:—*Held*, that the Judge had power on proper application to extend time for giving notice of appeal, but that such application should be made within the period of 10 days prescribed by s. 31. Also, that it was not within the power of the Judge to adjourn the matter to a date beyond the thirty days and then make an adjudication, and that the writ of prohibition should go. *McLure* v. *Parker*, 39 N. S. R. 413.

County Court appeal—*Findings of jury—Necessity for intermediate application.*]—Appeal was taken directly to Supreme Court of N. S. from findings of jury in case tried in County Court:—*Held*, following *Belden* v. *Freeman*, 21 N. S. R. 106, that there should have been an application in first instance to Judge of County Court for a new trial, and the appeal should have been from his decision on that application, and present appeal should be quashed. *White* v. *Hissir*, 35 N. S. R. 432.

Grounds of appeal—*Findings of jury.*]—Main defence to an action on a bond was that it was materially and fraudulently altered after it was signed. Questions were submitted to jury, answers to which were in plaintiff's favour, and were in accordance with weight of evidence:—*Held*, that findings would not be disturbed except upon clear and necessary grounds, and that, in absence of such grounds, defendant's appeal must be dismissed with costs. *Kennedy* v. *McDonald*, 42 N. S. R. 22.

Questions of fact—*Findings of trial Judge—Sale of fish—Condition as to quality.*]—Where matters in issue between parties, in an action for damages for refusal to accept a "catch" of fish sold by plaintiff to defendant, were entirely matters of fact, and evidence was very contradictory, and trial Judge accepted as true the version of plaintiff and his witnesses as being more consonant with reason and probabilities of mode of dealing between parties, the Court refused to disturb findings and dismissed defendant's appeal with costs. *Rafuse* v. *Ernst*, 42 N. S. R. 173.

Questions of fact.]—Court has power to review findings of trial Judge on questions of fact. *McInnes* v. *Ferguson*, 32 N. S. R. 516, followed. *McCurdy* v. *Grant*, 32 N. S. R. 520.

Reversal of finding of Judge on facts—*Trial.*]—In action to recover balance of $100 alleged to be due on account of two lots of land sold by plaintiff to defendant, evidence satisfied majority of Court that whole amount which defendant agreed to pay had been paid either to plaintiff or to her duly authorized agent:—*Held*, that the judgment of trial Judge in plaintiff's favour must be reversed. *McKinnon* v. *Petrie*, 38 N. S. R. 41.

Right of appeal—*Decision of Commissioner of Mines—Quashing appeal—Judgment—Estoppel—Mandamus.*]—Where an appeal from a decision of Commissioner of Mines for N. S., on application for lease of mining land, is quashed by Supreme Court of N. S., on the ground that it was not a decision from which appeal could be asserted, the judgment of Supreme Court is final and binding on applicant, and also on Commissioner, even if he is not a party to it. Quashing of appeal would not necessarily be a determination that a decision was not appealable, if ground had not been stated. In present case the quashing of appeal precluded Commissioner or his successor in office from afterwards contending that the decision was appealable. If Commissioner, after such appeal is quashed, refuses to decide again upon application for a lease, applicant may compel him to do so by writ of mandamus. *Drysdale* v. *Dominion Coal Co.*, 24 C. L. T. 166, 34 S. C. R. 328.

Right of appeal—*Order in Chambers—Discretion of Judge—Refusal to allow cross-examination.*]—On application in Chambers to set aside, as false, frivolous, and vexatious, defendant's pleadings to action brought against him as acceptor of a bill of exchange discounted by plaintiffs, defendant applied for leave to cross-examine manager of plaintiffs on affidavit upon which the motion was founded:—*Held*, that the matter was one within discretion of Judge in Chambers and there was no appeal from his refusal to permit the cross-examination. *Bank of Montreal* v. *Bent*, 34 N. S. R. 489.

Right of appeal—*Order of County Court Judge on appeal from conviction.*]—Appeal lies to Supreme Court of N. S. from a County Court judgment or decision in respect to an order, judgment, or conviction of a justice of the peace taken by way of appeal to County Court. *R.* v. *Dominion Coal Co.*, 2 E. L. R. 267, 41 N. S. R. 137.

Right of appeal—*Waiver—Enforcement of judgment.*]—Plaintiff recovered judgment for damages against defendant, taxed costs, and made a demand under threat of issuing an execution for amount of damages and costs. Defendant paid amount. Subsequently plaintiff appealed from judgment, asked for an increase of damages:—*Held*, that it was not competent for plaintiff, after obtaining the fruits of the judgment, to assert an appeal. *Flinn* v. *Keefe*, 24 C. L. T. 137.

Security for costs of—*Insolvent appellant.*]—Motion for security for costs of appeal, made on ground that appellant was insolvent and that plaintiff's judgment was

still unsatisfied, was dismissed with costs, to be set off against costs in cause. *Dixon* v. *Dauphinee*, 34 N. S. R. 546.

Security for costs on appeal—Both parties resident out of jurisdiction. *Liebler* v. *Harkins*, 3 E. L. R. 537.

Stay of proceedings—Refusal. *Dartmouth* v. *Dartmouth Rolling Mills*, 1 E. L. R. 263.

When Appeal Court will review findings of fact. *Bent* v. *Morine*, 3 E. L. R. 108.

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12. ONTARIO—APPEAL TO COURT OF APPEAL.

i. *From Divisional Court*, 79.
ii. *From Single Judge*, 92.
iii. *From Ontario Railway and Municipal Board*, 98.
iv. *From County Courts*, 99.
v. *From Masters' Orders*, 99.
vi. *From Drainage Referee*, 100.
vii. *From Magistrates*, 100.

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i. *From Divisional Court.*

Absence of special circumstances—*Remuneration for services to deceased persons—Quantum meruit.*]—Action by one son against his brother, executor of his mother's will, to enforce an alleged oral agreement with his mother to convey to plaintiff one-half of her farm for her support and maintenance, to set aside her will made through undue influence, or in the alternative for an allowance for care, support and expense in maintaining his mother. Trial Judge dismissed action. Divisional Court directed judgment to be entered for an allowance. As no special features, leave to appeal to Court of Appeal refused. *McKenzie* v. *McKenzie*, 13 O. W. R. 869.

Affirming order refusing to quash municipal by-law—*Reduction of liquor licenses in city—Ontario Liquor License Act.*] —Leave to appeal from 13 O. W. R. 954, refused. *Re Brewer and Toronto; Re Robinson and Toronto*, 13 O. W. R. 1087; 19 O. L. R. 411.

Amount in controversy less than $1,000 exclusive of costs — *Action to foreclose mortgage—Redemption—Motion to quash appeal—Judicature Act, ss. 51; 76 (1) (b)—5 Edw. VII. c. 11, s. 2.*]—After mortgagee had taken foreclosure proceedings, the mortgagor desired to redeem.—Divisional Court *held*, (16 O. W. R. 149, 1 O. W. N. 796), that the mortgagee was entitled to charge in its accounts the following $325 as compensation for crops put in prior to redemption proceedings, $350 paid to retire vendor's liens on certain fixed machinery, $78.75 insurance and interest on certain sums:—*Held*, also, that the mortgagee could not charge for the following: $25 for insurance paid without justification, and $124 paid for care of mortgaged property.—Plaintiff moved to quash an appeal to Court of Appeal from above judgment:—*Held*, that where the respondent seeks to invoke the power of the Court of Appeal under s. 51 of the Judicature Act, the proper practice is to move the Court to quash the appeal at the earliest moment after it has been lodged. Upon the motion coming on to be heard, the Court may direct the motion to stand for argument along with the appeal. But it is equally proper, and sometimes more convenient and less expensive to the parties, to dispose of it when brought on pursuant to the notice. And where, before the time for entering the appeal for hearing at the September sittings of the Court had elapsed, i.e., on the 10th August, the respondents served notice of motion to quash returnable on the first day of the sittings, the Court heard and granted the motion; Meredith, J.A., dissenting. *International Wrecking Co.* v. *Lobb* (1887), 12 P. R. 207, followed. Per Meredith, J.A., that, as the appellant had failed to set his proposed appeal down for hearing, there was no appeal to quash; and that, as s. 51 does not provide for a motion to quash, the Court has no power to create a practice providing for such a motion. The appeal was from an order of a Divisional Court, and it was quashed upon the ground that the sum in controversy was less than the sum or value of $1,000, exclusive of costs: Judicature Act, s. 76 (1) (b). And *held, per curiam*, that the word "costs" in that section means the costs incurred in the litigation; and, although the costs of a mortgage action stand on a different footing, speaking generally, from the costs of other actions, the costs taxed to the mortgagees by the Master, and included in his report in an action for foreclosure, were to be excluded in ascertaining the amount in controversy upon an appeal from an order varying that report. *Federal Life Assurance Co.* v. *Siddall* (1910), 22 O. L. R. 96, 17 O. W. R. 63, 2 O. W. N. 104.

Amount involved under statutory limit—*No special reasons for treating case as exceptional.*]—Leave to appeal from Divisional Court (1909), 14 O. W. R. 42, 19 O. L. R. 31, refused, there being no special reason for taking case out of general rule forbidding more than one appeal when amount involved is under statutory limit. *Gaiser* v. *Niagara* (1909), 14 O. W. R. 142.

Amount involved small — *No special reasons for treating case as exceptional.*]—Dismissal of servant—Questions of fact — Leave refused. *Fitzgerald* v. *Charlton*, 13 O. W. R. 43.

Amount involved—*Small—Test case — Can. Ry. Act, R. S. C. 1906, c. 37, s. 298.*]—Leave to appeal from order of a Divisional Court, 14 O. W. R. 144, 18 O. L. R. 466, granted, this being to some extent a test case and to be confined to question as to liability under above section. *Campbell* v. *Can. Pac. Rw. Co.* (1909), 14 O. W. R. 349.

Amount involved—*Wrongful distress.*] —Where landlord levied wrongful distress when there was no rent due, judgment was given tenant for double value of goods seized: 14 O. W. R. 802, 19 O. L. R. 540. On a motion to appeal to the Court of Appeal, it was held that there were no good grounds for treating this case as exceptional; the amount involved being under $500, and the question of law is not a matter of sufficient doubt to

justify prolonging the litigation, and for the Court to take away the right to double value would be to appeal the statute. Motion refused with costs. *Webb* v. *Box* (1910.) 15 O. W. R. 205, 20 O. L. R. 220.

Claim and counterclaim — *Form of judgment—Costs—O. J. Act, ss. 72, 76 (1) (e), (g).*]—Leave to appeal to the Court of Appeal from order of Divisional Court affirming order of a Judge directing judgment to be entered for plaintiff with costs and for defendant on his counterclaim with costs, was granted under s. 76 (1) (e) and (g) of Ont. Judicature Act, where Divisional Court had given leave to appeal from order, so far as it was open to that Court to do so, under s. 72 of same Act, and leave was sought in order to settle questions as to proper form of judgment and as to costs where a defendant proves a set-off to an amount exceeding plaintiff's claim, having pleaded it in form as a counterclaim. *Gates* v. *Seagram*, 17 O L. R. 493, 12 O. W. R. 1192.

County Court appeal.]—Jurisdiction of Divisional Court. *Christie* v. *Cooley*, 6 O. W. R. 214.

Fact—*Reversal of trial Judge's finding.*]—Upon an appeal from the findings of a Judge who has tried a case without a jury, the Court appealed to does not and cannot abdicate its rights and its duty to consider the evidence. And if it appear from the reasons given by the trial Judge that he has misapprehended the effect of the evidence or failed to consider a material part of it and the evidence which has been believed by him, when fairly read and considered as a whole, leads the Appellate Court to a clear conclusion that the findings of the trial Judge are erroneous, it becomes the plain duty of the Court to reverse the findings. In an action to recover damages for the destruction of property of the plaintiff by fire alleged to have been started by sparks from a locomotive of the defendants, the trial Judge, MacMahon, J., found in favour of the plaintiffs.—*Held*, by a Divisional Court, reversing the finding, which was based upon a misapprehension of the evidence, that the plaintiffs had failed to meet the onus cast upon them by the law to prove that the fire which caused the damage came from the defendants' engine. In every case there must be evidence from which it can fairly be inferred, not simply guessed, that the damage was caused by the defendant. *Beal* v. *Michigan Central Rw. Co.* (1909), 19 O. L. R. 502; 14 O. W. R. 778; 1 O. W. N. 80.

Failure to set down—*Extension of time.*]—Special circumstances. *Hull* v. *Allen*, 7 O. W. R. 712.

Judicature Act, *s. 76 (g)*—*Workmen's Compensation Act — Agreement — Acceptance of benefits — Special circumstances.*]—Leave to appeal to Court of Appeal from order of Divisional Court, 13 O. W. R. 381, refused. *Fisher* v. *International*, 13 O. W. R. 654.

Jurisdiction to hear appeal from Divisional Court on appeal from District Court.]—An appeal from Divisional Court on appeal from a District Court does not lie to the Court of Appeal, even though the amount involved exceeds $1,000. There is but one appeal in all cases within the jurisdiction of District Courts. Provisions of Unorganized Territory Act, ss. 9, 10, and Judicature Act, ss. 50, 74, 75, 76, and 77, considered. *Drewry* v. *Percival* (1910), 15 O. W. R. 617; 20 O. L. R. 489.

Leave to adduce further evidence.]—*Dodge* v. *Smith*, 1 O. W. R. 46, 803, 2 O. W. R. 561.

Leave to appeal—*Absence of special grounds.*]—Non-repair of highway — Injury to pedestrian—Action not brought in time—Misfeasance—Nuisance. *Moor* v. *Toronto*, 10 O. W. R. 284.

Leave to appeal—*Action against municipal corporation for non-repair of highway.*]—Notice of accident—Reasonable excuse for not giving—Grounds for leave—Previous decision. *Morrison* v. *Toronto*, 7 O. W. R. 607.

Leave to appeal—*Alimony—Lunatic — Admission to asylum — Removal—Summary judgment.*]—Leave to appeal from judgment of Divisional Court, 2 O. L. R. 541, 21 C. L. T. 560, affirming decision of Meredith, C.J., 2 O. L. R. 289, 21 C. L. T. 525, holding that plaintiff was not entitled to alimony, and (2) that motion by plaintiff for summary judgment under Rule 616, was properly dismissed, was refused by Court of Appeal. *Hill* v. *Hill*, 22 C. L. T. 107, 3 O. L. R. 202.

Leave to appeal—*Amount in dispute.*]—Special circumstances—Justice of the case. *Cronkhite* v. *Imperial Bank of Canada*, 9 O. W. R. 684.

Leave to appeal—*Amount in dispute.*]—Special circumstances. *Wood Bros.* v. *Western Commission Co.*, 12 O. W. R. 879.

Leave to appeal—*Amount involved.*]—Review of judgments below—Chattel mortgage—Renewal—Validity — Time—Computation of year. *McCann Milling Co.* v. *Martin*, 10 O. W. R. 1053.

Leave to appeal—*Amount involved.*]—Action for salary of servant of municipality—Salary accrued since action—Abandonment of right to—Absence of special circumstances—Leave refused. *Ward* v. *Toronto*, 12 O. W. R. 394.

Leave to appeal—*Appeal as of right on one branch.*]—Amount involved—Divergence of judicial opinion. *Bentley* v. *Murphy*, 1 O. W. R. 273, 726, 845, 2 O. W. R. 1014.

Leave to appeal—*Attachment of debts.*]—Small amount involved. *McDonald* v. *Sullivan*, 1 O. W. R. 721, 723, 784, 840.

Leave to appeal—*Discovery.*]—Examination of plaintiff—Libel—Qualified privilege—Malice. *McKergow* v. *Comstock* (1906), 7 O. W. R. 558.

Leave to appeal—*Extending time.*]—Delay—Costs. *Molsons Bank* v. *Eager*, 6 O. W. R. 93, 180, 595.

Leave to appeal——*Extension of time.*]—Parties — Service of writ of summons. *Metallic Roofing Co. of Canada* v. *Local Union No. 30, Amalgamated Sheet Metal Workers' International Association*, 1 O. W. R. 373, 644, 2 O. W. R. 183, 266, 819, 844, 5 O. W. R. 95, 709, 6 O. W. R. 41, 283, 10 O. L. R. 108.

Leave to appeal—*Grounds—Conflict of judicial decisions.*]—Municipal corporation—Misfeasance—Dangerous condition of highway—Statutory limitation of action. *Dickson* v. *Haldimand*, 2 O. W. R. 968, 3 O. W. R. 52.

Leave to appeal—*Grounds — Municipal by-law.*]—Where motion to quash a municipal by-law was refused by the Judge who heard it, and his order affirmed by Divisional Court, an application for leave for a further appeal was dismissed:—*Held*, that under Judicature Act, s. 77, upon such an application for leave, it must appear that there is some reasonable ground for doubting the soundness of the judgment, and in addition thereto that special reasons exist for taking a case out of the general rule which forbids more than one appeal to same party. *In re Reddock and Toronto*, 20 C. L. T. 399, 19 P. R. 247.

Leave to appeal—*Grounds—Order setting aside judgment.*]—Divisional Court having set aside a judgment signed by plaintiffs for default of defence in action on bond, upon two grounds, viz., (1) that a motion for judgment was necessary, and (2) that statement of claim had never been legally served upon defendants, the posting up thereof in the office not being service because of omission to file an affidavit of service of writ before so doing:—*Held*, that leave to appeal should not be granted unless plaintiffs could make a plausible attack upon both grounds, for if only one were demolished, the other would support the judgment, and leave to appeal is not given merely to settle a point of practice the decision of which would not affect the judgment complained of.—And in this case the service of statement of claim could not be supported, having regard to Rule 574, and it was in the discretion of Court below to give effect to the objection to its regularity, notwithstanding defendants' delay in moving against judgment. *Appleby* v. *Turner*, 20 C. L. T. 253, 19 P. R. 175.

Leave to appeal—*Grounds for appeal.*]—Fraudulent conveyance—Action on behalf of creditors to set aside—Lands conveyed by grantee in exchange—Right of creditors to resort to for payment of their claims — Equitable rights. *Pringle* v. *Olshinetsky*, 12 O. W. R. 35.

Leave to appeal.]—Grounds of appeal—Judicature Act, s. 76 (1) (*g*). *Crown Bank of Canada* v. *Brash* (1906), 8 O. W. R. 483.

Leave to appeal—*Grounds for appeal.*]—Merits—Contract—Sale of engine—Agency—Security—Mortgage—Discharge. *Finn* v. *Dyment Foundry Co.*, *McLachlan* v. *Dyment Foundry Co.*, 12 O. W. R. 557.

Leave to appeal — *Important question in law.*]—Construction of statute — Small amount in controversy. *Mason* v. *Lindsay*, 1 O. W. R. 561, 583.

Leave to appeal—*Important questions.*]—Special reasons for treating case as exceptional. *Kirkton* v. *British America Assce. Co.*, 10 O. W. R. 754.

Leave to appeal—*Judicature Act, s. 76 (e), (g)*—Form of judgment—Claim and counterclaim—Set-off—Costs. *Gates* v. *Seagram*, 12 O. W. R. 1192.

Leave to appeal—*Judicature Act, s. 76 (g).*]—Question of general interest—Act respecting Traction Engines on Highways. *Goodison* v. *McNab*, 12 O. W. R. 775.

Leave to appeal—*Judgments on different branches of case — Special circumstances.*]—In action which at trial resolved itself into two branches, (1) the status of some of parties, and (2) testamentary capacity of testator and validity of the will propounded, trial Judge dealt with validity of will only, and, on an appeal, Divisional Court dealt with question of status only:—*Held*, upon an application for leave to appeal to Court of Appeal, that, although applicants had the judgment of two tribunals against them they had opinion of one Court only in respect of either branch of the case, and, in view of value of estate and the important consequences to them, sufficient special circumstances were shewn to entitle them to leave to appeal. *Kidd* v. *Harris*, 22 C. L. T. 131, 3 O. L. R. 277, 1 O. W. R. 141.

Leave to appeal—*Large sum involved.*]—Debatable question of law. *Toronto* v. *Toronto Rw. Co.*, 2 O. W. R. 225, 3 O. W. R. 204, 298, 4 O. W. R. 221, 330, 345, 446, 5 O. W. R. 14, 64, 130, 403, 415, 6 O. W. R. 574, 677, 871.

Leave to appeal—*Local option by-law.*]—Motion to quash—Special grounds for permitting second appeal. *Re Duncan & Midland*, 10 O. W. R. 551.

Leave to appeal.] — Malicious arrest. *O'Donnell* v. *Canada Foundry Co.*, 4 O. W. R. 402, 5 O. W. R. 215, 477.

Leave to appeal—*Master and servant.*]—Injury to servant — Negligence—Defect in machinery—Notice or knowledge — Contributory negligence — Workmen's Compensation Act—Amendment—Court supplementing findings of jury—Grounds of appeal. *Gordanier* v. *Dick Co.*, 2 O. W. R. 1051, 3 O. W. R. 372, 599.

Leave to appeal—*Mechanics' lien.*]—Action to enforce—"Lands enjoyed with building." *Wentworth Lumber Co.* v. *Coleman*, 3 O. W. R. 618.

Leave to appeal—*Mortgage—Tender — Rate of interest—Costs.*]—Leave to appeal refused. *Middleton* v. *Scott*, 22 C. L. T. 369, 4 O. L. R. 459, 1 O. W. R. 536, 632.

Leave to appeal order on appeal from decision of Mining Commissioner, directing new trial—*Mines Act, 8 Edw. VII. c. 21, s. 152.*]—Grounds for appeal—Discretion. *Re Smith & Hill*, 12 O. W. R. 1258.

Leave to appeal order quashing local option by-law—*8 Edw. VII. c. 54, s. 11.*] —Order of Minister that no license issue—Needless appeal—Refusal of leave. *Re Hickey and Town of Orillia*, 12 O. W. R. 650.

Leave to appeal order refusing to quash conviction.] — Special grounds — Municipal by-law. *R.* v. *Laforge* (1906), 8 O. W. R. 551.

Leave to appeal order reversing order quashing municipal by-law—*Special grounds.*]— Passage of local option by-law procured by treating. *Re Gerow & Pickering* (1906), 8 O. W. R. 497.

Leave to appeal order reversing judgment at trial.] — *Hogaboon* v. *Hill* (1906), 8 O. W. R. 979.

Leave to appeal — *Order striking out jury notice—Powers of Judge in Chambers —Conflicting decisions.*]—In action on covenant upon two mortgages, defence was that defendant had been induced to execute them by false and fraudulent representations. Defendant filed and served a jury notice, which was struck out by a Judge in Chambers, whose order was affirmed by Divisional Court. A motion by defendant for leave to appeal to Court of Appeal was refused:—*Held*, that the order sought to be appealed against involved no question of law or practice on which there had been conflicting decisions or opinions by the High Court, or by Judges thereof. R. S. O. c. 51, s. 77, s.-s. (4), cl. (c). The power of a Judge in Chambers to strike out a jury notice has never been doubted. *People's Building & Loan Assoc.* v. *Stanley*, 22 C. L. T. 254, 4 O. L. R. 90, 1 O. W. R. 399, 469, 572, 592, 2 O. W. R. 122.

Leave to appeal — *Practice—Scale of costs—Conflicting decisions.*]—Leave to appeal to Court of Appeal from order of Divisional Court granted in a case in which scale of costs taxable was in question, point being one of considerable practical importance, and there being differences of opinion in cases already decided. *Stephens* v. *Toronto Ry. Co.*, 8 O. W. R. 551, 13 O. L. R. 107.

Leave to appeal — *Promissory note — Presentment.*] — Notice of dishonour. See *Wiedeman* v. *Guittard*, 22 C. L. T. 129.

Leave to appeal — *Public schools — Selection of school site—Grounds of appeal.*] —Motion for leave to appeal from order of Divisional Court allowing appeal from order of Judge in Chambers and granting a mandamus to a township corporation requiring them to pass a by-law for issue of debentures for $1,000 for purchase of a school site and erection of a school house:—*Held*, that the circumstance of first order having been made in Chambers, and the additional fact that applicants for leave to appeal were respondents in Divisional Court, and would have been entitled to appeal as of course if motion had been heard in first instance by a Judge sitting in Court, were material factors —when coupled with reasons of a substantial kind for questioning judgment complained of —in affecting discretion to be exercised. An important question was raised as to the true construction of a somewhat obscurely phrased section of Public Schools Act. Plausible grounds of objection to construction placed by Divisional Court upon the legislative provisions in question were presented. Questions relating to validity or invalidity or binding effect or otherwise of an award purporting to be made in pursuance of these provisions were also involved; and the matter was of some public interest. Leave granted upon the usual terms. *In re Cartwright School Trustees & Township of Cartwright*, 22 C. L. T. 288, 4 O. L. R. 278, 1 O. W. R. 387, 447, 2 O. W. R. 340.

Hunter v. *Boyd*, 1 O. W. R. 79, 2 O. W. R. 724, 1055.

Leave to appeal — *Question of costs—Solicitor—Payment by salary—Taxation of costs against opposite party—Right to costs —Municipal corporation—By-law.*]—Solicitor of municipal corporation was appointed under terms of a by-law which provided for his receiving a yearly salary of $1,800 for all services performed by him, including costs of litigation incurred on behalf of corporation, and any costs awarded to the corporation were to be paid over to city treasurer. This by-law was amended by a by-law providing that all costs payable to the corporation in any action should be paid to the solicitor as part of his remuneration, in addition to his salary. After passing of the amending by-law the corporation claimed to have the right to tax profit costs in an action against the corporation, which had been dismissed with costs by a judgment given before passing of such amending by-law.—Leave to appeal to Court of Appeal from order of Divisional Court (22 C. L. T. 408, 4 O. L. R. 656) refusing to allow such profit costs, having been moved for:—*Held*, that, having regard to the litigation and decisions on the subject, leave should not be granted.—*Semble*, that the date of the judgment governed plaintiff's liability to costs. *Ottawa Gas Co.* v. *Ottawa*, 23 C. L. T. 87, 5 O. L. R. 246, 6 O. L. R. 187, 1 O. W. R. 647, 697, 2 O. W. R. 579.

Leave to appeal—*Question of practice.*] —Use of company's name as plaintiff in actions—Discretion. *Saskatchewan Land and Homestead Co.* v. *Leadley*, 2 O. W. R. 745, 850, 917, 944, 1075, 1112, 3 O. W. R. 133, 191, 4 O. W. R. 39, 378, 5 O. W. R. 449.

Saskatchewan Land and Homestead Co. v. *Moore*, 2 O. W. R. 916, 944, 1075, 1112, 4 O. W. R. 39, 378.

Leave to appeal — *Question of substance.*]—Joinder of plaintiffs and causes of action. *Hinds* v. *Town of Barrie*, 1 O. W. R. 775, 2 O. W. R. 995.

Leave to appeal—*Railway.*]—Collision at crossing—Question of law—Duty to look for trains. *Wright* v. *Grand Trunk Ry. Co.*, 5 O. W. R. 802, 6 O. W. R. 175.

Leave to appeal—*Reversal of judgment of trial Judge.*]—Grounds of appeal—Special circumstances—Damages—Restoration of roadbed of highway. *Cummings* v. *Dundas*, 9 O. W. R. 624.

Leave to appeal—*Security for costs.*]—Discretion — Peculiar circumstances — Solicitor. *Allen* v. *Crozier*, 2 O. W. R. 485, 736, 805.

Leave to appeal — *Small amount involved.*]—No special circumstances—Leave refused. *Vivien* v. *Kehoe* (1906), 8 O. W. R. 955.

Leave to appeal — *Special circumstances.*]—Absence of. *Scott* v. *Ellice*, 2 O. W. R. 880, 4 O. W. R. 38, 93.

Leave to appeal — *Special circumstances.*]—Amount in controversy. *Chicago Life Insurance Co.* v. *Duncombe*, 10 O. W. R. 465.

Leave to appeal — *Special circumstances* — *Defamation* — *Misdirection* — *Evidence* — *Damages* — *Discretion.*]—Upon motion by defendant for leave to appeal from order of Divisional Court affirming judgment at trial, upon verdict of jury awarding plaintiff $100 damages for libel:—*Held*, that defendant had failed to shew special circumstances. Verdict was small, and jury seemed to have arrived at it upon a charge to which the only exception urged was a reference to a former action, and, if Judge erred in not passing that over, there was nothing to shew that any substantial wrong was occasioned by it. Weight of authority was against the proposition that a defendant in a libel action may set up in mitigation of damages acts and doings of plaintiff arising long after alleged libel, and not having reference to it; but the matter was to some extent one for exercise of discretion by trial Judge, and leave to appeal ought only to be given in exceptional cases. *Downey* v. *Stirling*, 21 C. L. T. 155.

Leave to appeal — *Special circumstances.*]—Dispensing with security. *Kidd* v. *Harris*, 1 O. W. R. 141, 3 O. L. R. 277.

Leave to appeal — *Special circumstances.*]—Order relating to discovery. *McKenzie* v. *McLaughlin*, 1 O. W. R. 80.

Leave to appeal—*Special grounds*—*Assessment of bridge.*] — Assessment Act—*Ultra vires*—Bridge constructed under Dominion legislation, over navigable waters. *Belleville Bridge Co.* v. *Ameliasburg*, 10 O. W. R. 1080.

Leave to appeal—*Special grounds*—*Assessment and taxes.*]—Leave to appeal from order of Divisional Court, 12 O. L. R. 236, refused by Court of Appeal, amount in question being only $425, and the matter in dispute, viz., whether plaintiff was liable to assessment and taxation in respect of income derived from dividends upon stock of Ottawa Electric Rw. Co., not being one affecting rights of the whole body of shareholders. *Goodwin* v. *Ottawa* (1906), 12 O. L. R. 603, 8 O. W. R. 541.

Leave to appeal.]—Special grounds — Merits—Jurisdiction of Division Court. *Re Wilkes* v. *Home Life Assoc.*, 3 O. W. R. 589, 675, 744.

Leave to appeal — *Status of judicial officer.*]—Divisional Court reversed order of Judge in Chambers, which stayed proceedings in these actions and dismissed motion for reference to Drainage Referee as an official Referee. Divisional Court decided that Drainage Referee was an official Referee for purposes of Arbitration Act: —*Held*, that leave to appeal should be granted on ground that the decision involved the status, jurisdiction, and authority of a judicial officer, and the validity of proceedings which might be taken by him under the order of Divisional Court. *McClure* v. *Brooke*, 22 C. L. T. 254, 4 O. L. R. 102, 1 O. W. R. 274, 324, 835.

Leave to appeal — *Surrogate Court appeal.*]—Selection of Trust Co. as administrator—Further appeal to Court of Appeal. *Re Burgess* (1906), 7 O. W. R. 454.

Leave to appeal—*Taxation of costs*—*Several causes of action*—*Judgment.*]—Application by defendant for leave to appeal from order of Divisional Court dismissing appeal from order of Judge in Chambers upon appeal from taxation of costs. Action was for slander. Statement of claim contained 4 paragraphs setting forth the slander in various ways. There was a verdict and judgment with costs for plaintiff on two paragraphs, and same for defendant on other two. Defendant contended that general costs should be apportioned throughout. But taxing officer taxed to plaintiff the general costs of cause, less costs applicable to paragraphs on which he failed, and to defendant costs of issues arising on latter, and his ruling was affirmed:—*Held*, not a case in which leave to appeal should be granted. There is no good reason why a judgment framed as was the judgment here, should not lead to the same result as the former Rule of Court. *Sparrow* v. *Hill*, 8 O. R. D. 479. *Jenkins* v. *Jackson*, [1891] 1 Ch. 89, referred to. *Davis* v. *Hord*, 22 C. L. T. 285, 4 O. L. R. 466, 1 O. W. R. 418, 471.

Leave to appeal—*Third party notice.*]—Leave to appeal from order of Divisional Court, setting aside a third party notice, was refused by a Judge of Court of Appeal in Chambers:—*Held*, that Divisional Court had not placed a construction of general application upon words "or any other relief over" in Rule 209, but had merely decided their bearing upon the facts of this case, which were of a nature not likely to be of common occurrence; there was nothing special in the case beyond fact that Divisional Court of three Judges had differed from the view of another Judge of the High Court and of a local Judge; and amount involved was comparatively small.—Moreover, the decision of Divisional Court did not deprive defendants of benefit of alleged dealings with proposed third parties as a defence to plaintiffs' action, and if defence should be successful there would be no occasion for seeking relief over.—*Semble*, that even if leave to appeal were granted, it would not be on technical grounds, but only on construction of Rule.

Windsor Fair Grounds & Driving Park Association v. *Highland Park Club*, 20 C. L. T. 164, 19 P. R. 130.

Leave to appeal — *Trifling amount — Question of fact—End to litigation.*]—Motion by plaintiff for leave to appeal from order of Divisional Court, 5 O. W. R. 298, reversing judgment of Anglin, J., 4 O. W. R. 121. Leave to appeal refused, judgment being for $75 only, and could not be increased even were proposed appeal successful. Question was whether there were special reasons for treating the case as exceptional and allowing a further appeal: 4 Edw. VII. c. 11. s. 76 (1) (g). *Clipsham* v. *Orillia*, 5 O. W. R. 786, 9 O. L. R. 713.

Leave to appeal—*Trifling amount involved.*]—Unimportant questions—Jurisdiction of drainage referee. *Burke* v. *Tilbury North* (1906), 8 O. W. R. 862.

New evidence on appeal.]—Where the order of a Court upon an appeal has not been issued, the appeal is still pending and within the control of the Court, and the Court is at liberty, of its own motion or on application, to recall the opinion which has been pronounced, and, on a proper case, to admit further evidence for the purpose of the appeal, under Con. Rule 498. The rule which governs the admission of new evidence upon appeal is fenced round with strict limitations. There must be no remissness in adducing all possible evidence at the trial; the new evidence must be practically conclusive; merely corroborative evidence, evidence to admit which would be merely setting oath against oath, evidence obtained under suspicious circumstances, or evidence which might merely enable an opponent's witness to be cross-examined more effectively, will not do; as a rule, the evidence must be of some fact or document essential to the case, of the existence or authenticity of which there is no reasonable doubt, or no room for serious dispute. After an order had been pronounced by a Divisional Court reversing the judgment in the plaintiff's favour of an Official Referee in an action to enforce a mechanic's lien, but before the order had issued, the plaintiff applied for leave to adduce fresh evidence to show that, by a mistake of his bookkeeper, certain items in respect of materials furnished had been charged as extras, whereas in fact the materials had been furnished under the contract. The Divisional Court allowed the evidence to be given, and, although it had always been in the possession of the plaintiff, there being no suspicion of bad faith, credited it, recalled the order pronounced, and substituted an order affirming the judgment of the Referee—the evidence being conclusive upon the question involved in the appeal:—*Held*, that the discretion of the Court was properly exercised. Order of a Divisional Court, 14 O. W. R. 389, 19 O. L. R. 428, affirmed. *Rathbone* v. *Michael* (1910), 15 O. W. R. 639, 20 O. L. R. 503.

No special ground for treating case as exceptional — *Ontario Rule 603.*] — Master refused on motion for judgment under above rule to permit an adjournment to cross-examine plaintiff's manager on his affidavit unless defendants filed an affidavit shewing a defence on merits, which they declined to do. Appeals to a Judge in Chambers and a Divisional Court were dismissed. As there were no exceptional circumstances, leave to appeal to Court of Appeal, refused. *Dixon* v. *Hubbard*, 13 O. W. R. 926.

No special reasons.] — Application founded on two affidavits was made on behalf of garnishees to Master to set aside an attaching order. He directed cross-examination of the affiants. From this order garnishees appealed unsuccessfully to a Judge in Chambers, a Divisional Court, and now sought leave from a Judge of Court of Appeal to appeal under s. 76 (g) of Judicature Act. Leave refused. *Bank of Nova Scotia* v. *Booth*, 13 O. W. R. 209.—The Court of Appeal also refused to entertain a motion for same leave on same material, as applicants had exhausted their right by applying to Judge in Chambers. *Ibid.*, 13 O. W. R. 294. See 10 W. L. R. 94, 313.

Order for new trial—*Stay of execution, pending appeal from.*]—Effect on new trial—Motion for removal of stay. *Uylaki* v. *Dawson*, 6 O. W. R. 569, 738, 10 O. L. R. 683.

Order of Divisional Court directing new trial—*Appeal from by defendants.*]—Increase in amount awarded to plaintiffs without cross-appeal—Judgment—Rule 817. *Cavanagh* v. *Glendinning*, 10 O. W. R. 475.

Refusal on terms.]—On motion by defendants for leave to appeal to Court of Appeal, from 13 O. W. R. 1211, which had affirmed, with a variation, judgment at trial, 13 O. W. R. 259, it appeared that before trial defendants had quit business and injunction granted now being abandoned, the motion was refused. *Copeland-Chatterson* v. *Business Systems* (1909), 14 O. W. R. 128.

Right of appeal — *Loan Corporations Act—Intra vires — Penalty—Prohibition — Conviction.*]—Appeal by defendants under s.-s. 4 of s. 117 of Loan Corp. Act, R. S. O. 1897, c. 205, from their conviction by P. M. of Toronto of offence of having, acting as agents for preferred Mercantile Co. of Boston (incorporated), entered into a contract contrary to the provisions of s. 117:—*Held*, confirming the conviction, that there was no right of appeal. *R.* v. *Pierce*, 25 C. L. T. 70, 4 O. W. R. 411, 5 O. W. R. 464, 9 O. L. R. 374.

Right of appeal—*Order of Divisional Court affirming order setting aside third party notice.*]—Judicature Act, s. 76 (1) (f)—Ultimate rights of parties—Future action for indemnity. *Self* v. *Toronto*, 12 O. W. R. 705.

Right of appeal—*Surrogate Court case.*]—Divisional Court—Second appeal. *Haynes* v. *Edmonds*, 1 O. W. R. 340.

Security for costs—*Application to dispense with — Poverty of applicant—O. J. Act, s. 76, Rule 826.*]—Sec. 76 (c) of O. J. Act, as enacted by 4 Edw. VII. c. 11, s. 2 (O.)—Con. Rule 826 being to same effect—provides that, subject to Rules of Court, on

appeal from Divisional Court, ... security, unless otherwise ordered by Court of Appeal, shall be given for costs of appeal. In action for damages under Fatal Injuries Act, the trial Judge, being of opinion that there was no evidence to submit to jury, dismissed action; but directed the jury to assess the damages (which they did at $3,500) in case it should be held on appeal that there was such evidence; and on appeal to Divisional Court trial Judge's finding was affirmed. — An application to a Judge of Court of Appeal, on ground of alleged poverty of appellant, to dispense with or reduce amount of security for costs of appeal to Court of Appeal, was, in the circumstances, refused. *Whiteman* v. *Hamilton Steel & Iron Co.*, 16 O. L. R. 257.

Security on appeal from order for new trial—*Stay of trial—Rule 827—Removal of stay.*]—New trial having been ordered by Divisional Court, plaintiff gave notice of trial, but defendants appealed to Court of Appeal from order directing new trial, and gave security required by Con. Rule 826, which was duly allowed:—*Held*, the order for new trial was a "judgment or order appealed from," within meaning of Con. Rule 827 (1), and, security for appeal having been allowed, the execution thereof, by proceeding on a new trial or otherwise, was stayed pending appeal, by force of that Rule, such judgment or order not being an accepted case mentioned in the Rule. Rule is not confined to judgment or order directing payment of money, but extends generally to all appealable judgments or orders which are to be "executed" by proceedings to be taken thereunder or in consequence thereof.—In a proper case stay may be removed and permission given to proceed to trial notwithstanding appeal; but as general rule such permission ought not to be granted; and in this case refused. *Uylaki* v. *Dawson*, 10 O. L. R. 683, 6 O. W. R. 738.

Stay of execution removed.]—Plaintiff obtained judgment and defendants appealed to Court of Appeal except as to $8,7.58. Stay of execution was removed as to that sum. *Gledhill* v. *Telegram* (1909), 14 O. W. R. 1.

Stay of proceedings—*Security.*]—Trial Judge dismissed action and directed discharge of a registered caution. Plaintiff's appeal to Divisional Court was dismissed, and he gave required security on appeal to Court of Appeal. Stay of proceedings granted pending appeal which to be brought on at next sittings of the Court. *Thompson* v. *Skill*, 12 O. W. R. 1170.

Stay of proceedings—*Terms—Security.*]—Appeal from judgment dismissing action and directing cancellation of registered caution—Prosecution of appeal—Continuance of caution pending appeal. *Thompson* v. *Skill*, 12 O. W. R. 1170.

Terms—On a motion for leave to appeal to Court of Appeal from 14 O. W. R. 226, reversing judgment at trial, 13 O. W. R. 599, special relief from printing appeal case and giving usual security refused. Leave granted on usual terms of giving security and printing. *Cowie* v. *Cowie* (1909), 14 O. W. R. 575.

ii. *From Single Judge.*

Amount involved less than $1,000.]—Matter in controversy in present appeal being less than $1000, no title to real estate or interest therein being in dispute, nor any question of future rights being involved in the decision, the only question being whether plaintiff was entitled to be paid a share of bounty on oil gained by defendants, and this being purely a pecuniary demand depending upon the proper construction of the lease and the Bounty Act—leave to appeal direct to Court of Appeal refused. *Smith* v. *Englefield*, 13 O. W. R. 382.

Bond — *Form—Irregularity.*]—Obligees—Motion to set aside—Costs. *Re Strathy Wire Fence Co.*, 2 O. W. R. 834, 1031, see 3 O. W. R. 889.

Conditional allowance of—*Reduction of damages — Election—Further appeal.*]—After plaintiff's damages had been assessed by jury, trial Judge dismissed action. Plaintiff appealed, and Court of Appeal ordered that, if plaintiff elected to reduce damages assessed by jury, appeal should be allowed with costs, and judgment entered for plaintiff for reduced amount with costs, or otherwise that there should be a new trial:—*Held*, that plaintiff was entitled to have a clause inserted in order of Court protecting plaintiff in event of appeal by defendant to Supreme Court of Can. against her election to reduce damages. *Fahey* v. *Jephcott*, 21 C. L. T. 519, 2 O. L. R. 353.

Consolidation of two appeals—Directions for printing. *Bready* v. *Grand Trunk Rw. Co.*, *Hughes* v. *Grand Trunk Rw. Co.*, 2 O. W. R. 1169.

Delay in setting down—*Extension of time.*]—Waiver of right of appeal—Proceeding in Master's office—Consent. *Boulton* v. *Boulton*, 2 O. W. R. 884, 5 O. W. R. 177.

Dispensing with copies of evidence for use of Judges. *Hamilton* v. *Kramer-Irwin Rock Asphalt & Cement Paving Co.*, 1 O. W. R. 111, 2 O. W. R 25, 3 O. W. R. 343, 347.

Effect of allowing — *Non-appealing party—Costs.*]—Action to restrain township and a contractor from constructing a drain authorized by township by-law. Judgment of H. C. J. granted injunction against and ordered costs to be paid by both defendants, and ordered corporation to indemnify contractor if he paid them. Corporation appealed to Court of Appeal, making contractor a respondent; the latter appeared at the hearing of appeal, but did not himself appeal. Appeal was allowed with costs:—*Held*, that the result of allowing corporation's appeal was that the action should be dismissed as against both defendants, but contractor should have no costs of appeal. *Semble*, that he should have his costs below against plaintiff. *Challoner* v. *Lobo*, 21 C. L. T. 201, 1 O. L. R. 292.

Extension of time for—*Application to opposite solicitor — Unreasonable refusal — Costs.*]—Rules 799 and 801, prescribing time for filing and serving notice of appeal and

serving appeal case, enable appellant, whenever necessary, to obtain further time from Court or a Judge: and that being so, the solicitor requiring further time should, in general, before applying to Court, apply to solicitor for respondent, explaining occasion for it, and latter ought, in every proper case, to grant the request; any other course of conduct only occasions unnecessary and useless costs. And where application for an extension was made to solicitor, and, in opinion of Judge who heard a motion to extend the time, unreasonably refused, an order was made extending time and staying execution, without costs to respondent. *Bodine* v. *Howe*, 21 C. L. T. 154, 1 O. L. R. 208.

Extension of time—*Application to opposite solicitor—Unreasonable terms—Costs.*]—Where respondent's solicitor refused, except upon more stringent terms than the Court would impose, to extend time for delivery by appellant of draft appeal case and reasons of appeal, and appellant, declining to accept terms, moved before a Judge of Court of Appeal and obtained order extending time, costs of motion were made costs to appellant in appeal. *McGuire* v. *Corry*, 21 C. L. T. 333, 1 O. L. R. 590.

Extension of time — Laches—Security. *Brown* v. *McGregor*, 1 O. W. R. 398.

Increased security for costs—Exceptional circumstances. *McLeod* v. *Lawson*, 7 O. W. R. 699.

Leave to appeal—*Amount involved.*]—Reasons for granting leave—Form of order—Recital. *Matheweson* v. *Beatty* (1906), 8 O. W. R. 869.

Leave to appeal—*Case tried with jury.*]—On application under s. 76 (a) of 4 Edw. VII. c. 11 (O.) for leave to appeal to Court of Appeal direct from trial Judge and jury in a case of sufficient importance and difficulty, in addition to amount of judgment ($2,500), to justify an appeal, it was objected that the section did not apply to the case of a trial with a jury, but only to trials by a Judge without a jury:—*Held*, that the plain object of the section was to avoid a double appeal; that it should receive a liberal construction; and that the judgment at or following upon the trial, where the issues of fact are tried by a jury is the "judgment, order, or decision" of the Judge within the meaning of the section; and leave to appeal was granted. *Randall* v. *Ottawa Electric Co.*, 24 C. L. T. 394, 8 O. L. R. 701, 3 O. W. R. 146, 173, 1022, 4 O. W. R. 240, 269, 6 O. W. R. 913.

Leave to appeal—*Court of Appeal.*]—Motion by defendant for leave to appeal direct to Court of Appeal from judgment at trial, passing over Divisional Court. Leave to appeal granted, question involved being a mixed question of law and fact and one in which an appeal to Supreme Court of Canada would lie. *Molsons Bank* v. *Stearns*, 5 O. W. R. 479, 6 O. W. R. 667, 10 O. L. R. 95.

Leave to appeal—*Extension of time.*]—Mistake of solicitor. *Hamilton* v. *Hamilton, Grimsby & Beamsville Ry. Co.* (1906), 8 O. W. R. 669.

Leave to appeal.]—Final judgment — Reference as to damages. *Playfair* v. *Turner*, 7 O. W. R. 744.

Leave to appeal.] — Grounds. *Canada Carriage Co.* v. *Lea*, 5 O. W. R. 86, 6 O. W. R. 633.

Leave to appeal.]—*Ignorance of change in law.*]—Consent—Acquiescence. *Burr* v. *Hamilton*, 4 O. W. R. 280.

Leave to appeal—*Jurisdiction—Amount in controversy—4 Edw. VII. c. 11, s. 76a (O.)*]—At time of commencement of action to declare void two mortgages given to secure the same debt, the amount of the debt exceeded $1,000. Upon application by plaintiff for leave to appeal direct to Court of Appeal from judgment pronounced at trial, it was contended by defendant that pending the litigation moneys had been realized by him which reduced claim below $1,000, but this was disputed by plaintiff:—*Held*, that proper conclusion was that the matter in controversy in appeal exceeded the sum or value of $1,000 exclusive of costs, and therefore there was jurisdiction under 4 Edw. VII. c. 11, s. 76a (O.), to make the order asked for. *Wade* v. *Elliott*, 10 O. W. R. 277, 14 O. L. R. 637.

Leave to appeal—*Order of Judge quashing municipal by-law.*]—Judicature Act, s. 76a—Grounds for granting leave. *Re Sinclair and Owen Sound* (1906), 8 O. W. R. 298.

Leave to appeal—*Order of Judge refusing prohibition.*] — No appeal to Supreme Court of Canada. *Re Saltfleet*, 11 O. W. R. 379.

Leave to appeal — *Order of Judge of High Court on appeal from report.*] — Grounds. *O'Leary* v. *Perkins*, 5 O. W. R. 257.

Leave to appeal—*Winding-up—Contributory.*]—Amount in controversy—Interest—Costs—Merits. *Re Wiarton Beet Sugar Co., Kydd's Case*, 5 O. W. R. 542, 637, 6 O. W. R. 491, 590.

Leave to cross-appeal nunc pro tunc—*Parties—Costs.*]—*McDermott* v. *Hickling*, 23 C. L. T. 40, 1 O. W. R. 19, 768.

Motion to quash appeal of third party against plaintiff—Useless proceeding. *Gaby* v. *Toronto*, 1 O. W. R. 440, 606, 635, 711.

Master's report — *Time.*]—Leave to appeal—Terms—Costs. *Smellie* v. *Watson*, 2 O. W. R. 118, 3 O. W. R. 475.

Notice of appeal—*Extending time.*]—Under present practice relief will be granted against a slip in practice, such as failure to give notice of appeal in time, whenever justice of the case requires it, and no injury to opposite party which cannot be compensated for by costs or otherwise has resulted. In considering what justice requires in such a case, regard is to be had to *bona fides* of applicant; the delay, whether great or trifling, as affecting question of prejudice to opposite party; and, especially where application is made after default, whether

appeal appears to be groundless or frivolous. Where, therefore, a *bona fide* intention to appeal had been made out, points raised were open to argument, and delay was very short, no sittings of Court having been lost, leave to serve notice of appeal was given. *Ross* v. *Robertson*, 24 C. L. T. 216, 7 O. L. R. 464, 3 O. W. R. 158, 513.

Removal of stay of execution in part.]—Con. Rule 827 (2). *Singlehurst* v. *Wills* (1910), 1 O. W. N. 417.

Reversal of judgment on questions of fact. *Lewis* v. *Dempster*, 1 O. W. R. 602.

Right of appeal—*Election case.*]—Dismissal of charges of corrupt practices. *Re Lennox Provincial Election*; *Perry* v. *Carscallen*, 2 O. W. R. 190; *Re South Oxford Provincial Election*, *Patience* v. *Sutherland*, 1 O. W. R. 795, 2 O. W. R. 196, 6 O. L. R. 203.

Right of appeal—*Order directing new trial.*]—Second trial taking place before appeal heard—Abandonment—Quashing. *Webb* v. *Canadian General Electric Co.*, 2 O. W. R. 322, 865, 1113, 3 O. W. R. 853.

Right of appeal—*Order of Judge removing stay of execution — Discretion — Grounds for removal.*]—Appeal lies to Court of Appeal from order of a Judge thereof, in Chambers, under Rule 827, directing the execution of judgment appealed from shall not be stayed pending appeal. Such order is not a purely discretionary one; a proper case must be made out for allowing respondent to enforce what has not yet become a final judgment, the appeal being a step in the cause. A Judge in Chambers having ordered the removal of the stay, his order was reversed by the Court, where appeal appeared to be prosecuted in good faith and on substantial grounds, and effect of an execution would practically be to close up appellant's business. *Centaur Cycle Co.* v. *Hill*, 22 C. L. T. 253, 24 C. L. T. 209, 1 O. W. R. 229, 377, 401, 639, 2 O. W. R. 1025, 3 O. W. R. 255, 354, 4 O. L. R. 92, 493, 7 O. L. R. 411.

Right of appeal—*Third party—Appeal on his own behalf—Third party procedure—Directions.*] — Order under Con. Rule 213 giving third party right to appear at trial of action, even though he be declared bound by judgment, is not equivalent to an order giving him leave to defend.—In action where the third parties had no right to defend, but had obtained leave to appeal in name of defendants, of which they had availed themselves:—*Held*, that an appeal in their own name was not competent. *Gaby* v. *Toronto*, 1 O. W. R. 635, considered and distinguished. *Desoronto Iron Co.* v. *Rathbun Co.* (1906), 11 O. L. R. 433, 7 O. W. R. 162.

Security for costs of appeal—*Joint appeal—Security furnished by one party—Payment into Court—Abandonment—Motion for payment out—Costs—Set-off—Increased security.*]—Two defendants appealed to Court of Appeal from a judgment of High Court; notice of appeal was a joint one; and $200 was paid into Court, as security for the respondents' (plaintiffs') costs of appeal, by one appellant, but in name of both and for joint benefit:—*Held*, that appellant who had paid the money in was not entitled, upon abandoning his appeal, to have the money paid out to him, the other appellant desiring and intending to avail himself of the deposit and to proceed with appeal. First appellant's motion for payment out being dismissed with costs to other appellant, and it appearing that by judgment appealed against the first appellant was entitled to be indemnified by other against all amounts payable by first under the judgment, and to recover from other any amount so paid and his costs of action, &c.:—*Held*, that the costs of motion should be set off against anything first appellant might already have paid, or might ultimately have to pay, under provisions of judgment referred to, as the result of appeal.—*Held*, under circumstances of the case, that appeal would be more expensive than usual, and that the security should be increased to $400, but that, upon the true construction of Rule 830, s.-ss. 1, 4, 8, where security is given by payment into Court, it cannot be increased to more than $400. *Centaur Cycle Co.* v. *Hill*, 22 C. L. T. 253, 24 C. L. T. 209, 1 O. W. R. 229, 377, 401, 639, 2 O. W. R. 1025, 3 O. W. R. 255, 354, 4 O. L. R. 92, 493, 7 O. L. R. 411.

Security on appeal—*Money paid into Court—Payment out after purpose answered—Further appeal.*]—A party who has paid money into Court as security upon his appeal to Court of Appeal is entitled, after his appeal has been allowed with costs, to take the money out, although his opponent is prosecuting a further appeal to Supreme Court of Canada or to Privy Council. An appeal to Court of Appeal is a step in the cause, but a further appeal is not so. *Centaur Cycle Co.* v. *Hill*, 22 C. L. T. 253, 24 C. L. T. 209, 1 O. W. R. 229, 377, 401, 639, 2 O. W. R. 1025, 3 O. W. R. 255, 354, 4 O. L. R. 92, 493, 7 O. L. R. 411.

Settling appeal case—*Evidence on various issues.*]—Construction of contract—Limited appeal. *City of Hamilton* v. *Kramer-Irwin Rock Asphalt, etc., Co.*, 1 O. W. R. 111, 2 O. W. R. 25, 3 O. W. R. 343, 347.

Settlement of book — *Appointment — Onus.*]—Having regard to Rules 798 *et seq.*, relating to appeals to Court of Appeal, the burden of procuring from "Court appealed from, or a Judge thereof" (Rule 798), an appointment to settle appeal case or book, the parties being unable to agree, is upon appellant. Rule 801 (3) enables the respondent to move in the matter, if so disposed; but it is appellant's duty to enter case with registrar and set down appeal for argument; this he cannot regularly do without depositing appeal books (Rule 812); and before they are deposited they must be settled. *Gatman* v. *Michigan Central Rw. Co.*, 21 C. L. T. 334, 1 O. L. R. 636.

Special grounds—*Leave to appeal to Court of Appeal refused.*] — No special grounds shewn for treating this case as exceptional. *McLeod* v. *Can. Nor. Rw. Co.*, 13 O. W. R. 378; See 12 O W. R. 1279, 18 O. L. R. 616, 9 Can. Ry. Cas 39.

Stay of action by statute—*No order made—No final judgment.*]—Leave to appeal from 13 O. W. R. 1148 refused, there being no "final judgment" yet from which an appeal to Supreme Court would lie. *Smith* v. *London* (1909), 14 O. W. R. 148; action stayed by legislative authority (1909), 14 O. W. R. 1248, 1 O. W. N. 280. See *Beardmore* v. *Toronto* (1909), 14 O. W. R. 1262, 1 O. W. N. 278.

Stay of execution—*Removal—Rule 827 (2)—Absence of special circumstances.*] — Motion for order to remove stay of execution under Ont. Rule 827 (2) consequent upon defendant having given security for costs of his appeal to Court of Appeal refused, there being no precedent for such an order. No special circumstances. *Pringle* v. *Hutson*, 13 O. W. R. 617.

Stay of execution of injunction — *Disobedience of injunction — Contempt of Court—Stay upon terms—Con. Rule 827 (1) (d).*]—Rule that a party to an action guilty of contempt can take no step, is subject to several exceptions, and one of these is that the party is entitled to prosecute an appeal from the order or judgment which it is alleged he has been guilty of disobeying.—Upon application by defendants to a Judge of Court of Appeal, under Con. Rule 827 (1) (d), for an order staying execution of injunction awarded by the High Court, pending an appeal from that judgment to Court of Appeal, where it is alleged that defendants are in contempt for disobedience of the judgment, but they have not been so adjudged, the Judge will not determine whether a contempt has been committed.—Where defendants were appealing in good faith, execution of injunction was stayed, upon terms, pending disposition of appeal. *Copeland-Chatterson Co.* v. *Business Systems Ltd.*, 9 O. W. R. 390, 14 O. L. R. 337.

Stay of execution of judgment for partition pending appeal—*Security.*] — Motion to remove stay. *Monro* v. *Toronto Rw. Co.*, 1 O. W. R. 25, 316, 813, 2 O. W. R. 207, 3 O. W. R. 14, 299, 4 O. W. R. 392.

Stay of execution pending appeal.]—Continuance of injunction dissolved by judgment appealed from. *Klees* v. *Dominion Coat and Apron Supply Co.*, 2 O. W. R. 841, 937, 3 O. W. R. 937, 6 O. W. R. 200.

Stay of proceedings — *"Further proceedings"—Motion for injunction—Con. Rule 829.*]—In an action for a declaration that a partnership existed and for dissolution and account, in which judgment was obtained by plaintiff, and in which an appeal to Court of Appeal was pending, the usual security therefor having been given:—*Held*, that an application to a High Court Judge for injunction to restrain defendant from dealing with partnership moneys was "a further proceeding . . . other than the issue of the judgment or order and taxation of costs thereunder," under Con. Rule 829, which a High Court Judge could not entertain. *Embree* v. *McCurdy* (No. 1), 9 O. W. R. 961, 14 O. L. R. 284.

Stay of proceedings—*Removal—Security for costs—Ont. Rules 826, 827.*]—Upon an appeal to Court of Appeal, upon security for costs being allowed, in general the proceedings ought to be stayed; but if it is made to appear in any case that respondent may suffer injustice by his execution being stayed, then the stay may be removed, upon terms which may be just to both parties: Rules 826, 827. Plaintiff recovered a judgment against defendants, a benevolent society incorporated in a foreign country, but having members in Ontario who paid dues and assessments, which were transmitted abroad. Defendants appealed from the judgment to Court of Appeal, and gave security for costs. Upon an application by plaintiff under Rule 827 to remove the stay of proceedings it was admitted by defendants that they had no assets in Ontario, but they said that they were advised that they had good grounds for appeal, and if it should fail, that plaintiff's claim would be paid; and this was not contradicted:—*Held*, that the dues and assessments of members in Ontario, being voluntary payments, could not be reached by a receiver or by attachment; and there was no prejudice or injustice that plaintiff was likely to suffer by the stay, as he already had security for costs, and the delay would be compensated by interest on the judgment, if the appeal should be unsuccessful. *Boyd* v. *Dominion Cold Storage Co.* (1897), 17 P. R. 545, distinguished. *Wintemute* v. *Brotherhood of Railway Trainmen*, 19 P. R. 6.

Suspension of injunction pending appeal.]—*Taylor* v. *Township of Collingwood*, 3 O. W. R. 368, 553, 6 O. W. R. 261.

Time—*Late entry—Refusal of consent—Confirmation — Responsibility for delay — Costs.*]—Defendants on 19th May gave notice of appeal to Court of Appeal from judgment delivered on 22nd April, and gave security on 22nd May. Reasons for appeal were not served till 10th Sept., and reasons against appeal not till 13th Oct. The next sittings of Court of Appeal was set for 10th Nov. The appeal case was not prepared in time to enter case on 6th Nov., and plaintiff's solicitor refused to consent to its being entered on 10th for sittings beginning on that day. The case was entered without consent on 17th Nov., and a motion was made to confirm entry:—*Held*, that plaintiff's solicitor should have consented to proposed entry on 10th Nov., and the subsequent entry should be confirmed; and, as both parties were nearly equally blameable for delay, there should be no costs. *McLaughlin* v. *Mayhew*, 23 C. L. T. 42, 5 O. L. R. 114, 1 O. W. R. 308, 2 O. W. R. 10, 590.

iii. *From Ontario Railway and Municipal Board.*

Amount involved.] — In determining whether an appeal will lie to the Court of Appeal, from the decision of the Ontario Railway and Municipal Board, in respect to appeals *re* assessments, it is the amount of the assessment made by the assessor that must govern, not the amount to which the Board may have reduced the assessment. *Coniagas Mines* v. *Cobalt* (1910), 15 O. W. R. 258.

Leave to appeal from decision of Ontario Railway and Municipal Board—*Questions of fact.*]—Certificate of Board. *Re Niagara Falls and Niagara Falls Suspension Bridge Co.*, 9 O. W. R. 865.

iv. *From County Court.*

Order for set-off of costs—*Finality—Appeal.*]—An order of a County Court Judge to set off defendant's costs incurred in the County Court in excess of such costs as would have been incurred in a Division Court against the costs of plaintiff is in its nature final, and therefore appealable under s. 52 of County Courts Act, R. S. O. c. 55. *Babcock* v. *Standish*, 19 P. R. 195, 20 C. L. T. 329.

Right of appeal—*Practice on appeal—Companies—Ontario Winding-up Act—Final Order.*]—Section 27 of Ont. Joint Stock Cos. Winding-up Act, R. S. O. 1897, c. 222, contains the code of proceedings on appeal from any order or decision of the Court under that Act, no provision being made in Con. Rules or elsewhere. There is no provision that reasons for and against appeal are required, or delivery or settlement of proposed case. The practice when the case has come before a single Judge has been to send up original papers and have appeal heard upon them. *Semble*, that an order of a Co. Ct. Judge rescinding an order previously made by him under s. 41 of above Act for dissolution of a company, is a final order, and therefore appealable. *In re Equitable Savings, Loan and Building Association*, 22 C. L. T. 386, 4 O. L. R. 479, 6 O. L. R. 26, 1 O. W. R. 571, 2 O. W. R. 366.

v. *From Master's Orders.*

Notice of appeal—*Time—Pronouncing or entry of judgment.*] — Judgment in a mechanics' lien action, tried by local Master, was signed 12th March, but dated 24th Feb., being the day on which Master had signed a memorandum of his findings, a copy of which he on same day sent by mail to solicitors for each of the parties. Memorandum contained no reference to costs of action, but they were disposed of by judgment as signed. There was no arrangement between solicitors and Master, that his findings were to be sent by mail:—*Held*, that the month within which notice of intention to appeal from the judgment must, by Rule 799, be given, ran from signing of judgment on 12th March. *Wallace* v. *Bath*, 24 C. L. T. 288, 7 O. L. R. 542, 3 O. W. R. 426.

Security on appeal—*Extension of time for allowance and setting down appeal—Delay—Merits.*]—After judgment was given declaring plaintiff entitled to value of certain bonds, which defendants had failed to deliver over, such value to be determined by a reference to local Master, and after a long interval, without anything having been done under reference, it was transferred to Master in Ordinary, and, after finding of Master, and appeals and cross-appeals therefrom, plaintiff for first time claimed interest on such value from date of breach, and moved to have the judgment amended so as to include such interest. Motion refused, whereupon plaintiff gave notice of appeal to Court of Appeal, but did not furnish necessary security until after time for appealing had elapsed:—*Held*, that, in the circumstances, the time for allowance of security and setting down of appeal should not be extended. *Ray* v. *Port Arthur, Duluth and Western Rw. Co.*, *Ray* v. *Middleton*, 24 C. L. T. 334, 7 O. L. R. 737, 2 O. W. R. 345, 3 O. W. R. 160, 724.

Time — *Cross-appeal—Ont. Rule 769.*]—According to the true meaning of Rule 769, each party is precluded from appealing against the report or certificate of a Master unless he serves his notice of appeal within 14 days mentioned in the Rule; and notice of appeal given in proper time by one party does not prevent the report from becoming absolute as regards another party. *Stewart* v. *Ferguson*, 19 P. R. 21.

vi. *From Drainage Referee.*

Extending time for—*Excuse for delay.*]—Importance of case—Costs—Objectionable affidavit. *Kirby* v. *Township of Pelee*, 7 O. W. R. 864.

Report of Drainage Referee. See *Adelaide & Warwick* v. *Metcalfe*, 20 C. L. T. 63, 27 A. R. 92.

vii. *From Magistrates.*

Constitutional law—*Justice of the peace—Stated case.*]—A case can be stated by a J. P. under R. S. O. c. 91, s. 5, for the opinion of the Court of Appeal, only when the constitutional validity of the statute in question is involved, and not when the decision depends merely upon whether the statute is or is not applicable to defendants:—*Held*, that appeal would not lie from decision of the P. M. of Toronto that the Toronto Rw. Co. were bound by a city by-law passed under authority of Municipal Act, directing them to put vestibules on their cars, the company contending the by-law and Municipal Act did not apply because their line crossed lines of Dominion railways, thus making their undertaking a work for the general advantage of Canada and subject only to Dominion regulations. *R.* v. *Toronto Rw. Co.*, 19 C. L. T. 386, 26 A. R. 491.

Jurisdiction.]—Court of Appeal for Ontario has no jurisdiction to hear an appeal upon a case stated by a magistrate from a summary conviction under Ont. Summary Convictions Act, for an offence against a provincial statute. Under Part XV. of the Criminal Code, a case may be stated for the opinion of "the Court," but in Ontario "the Court" means the High Court of Justice, ss. 2 (35a), 705 (b). *R.* v. *Henry* (1910), 15 O. W. R. 621, 20 O. L. R. 494.

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13. Ontario — Appeal to Divisional Court of High Court.

i. *From Single Judge*, 101.
ii. *From Judge in Chambers*, 102.
iii. *From County Courts*, 103.
iv. *From Division Courts*, 107.
v. *From District Courts*, 109.
vi. *From Surrogate Courts*, 109.
vii. *From Masters' Orders*, 109.
viii. *From Magistrates*, 109.
(*No cases.*)
ix. *From Drainage Referees*, 109.
(*No cases.*)
x. *From Taxing Officers*, 110.

i. *From Single Judge.*

Abandonment — *Reinstatement—Leave to appeal.*] — The defendants, after setting down an appeal for hearing by a Divisional Court, served notice abandoning it, and the case was struck out of the list. They afterwards moved to have it restored to the list. —*Held*, that if the motion could be treated as one for leave to appeal, notwithstanding the lapse of time, it would be incumbent upon the applicants to shew that *prima facie* the judgment below was wrong; and there being no error apparent on the face of the judgment, and no specific error having been pointed out, such an application must be refused.—But, *semble*, the motion could not be so treated.—The judgment below found that the defendants were trespassers and directed a reference as to damages. When the appeal was abandoned the defendants thought the claim of the plaintiffs would be much smaller than it subsequently appeared to be; and on learning the size of the claim, the defendants wished to renew their appeal.—*Held*, no ground for interfering.—The defendants had not made out any case shewing that any injustice was likely to arise if they were not allowed to appeal, or that they were only asking for what was just. *Union Bank* v. *Rideau Lumber Co.*, 20 C. L. T. 96, 19 P. R. 106.

Appeal from order of Judge in Court dismissing appeal from school award—*Right of appeal.*]—Application to extend time for appealing—Refusal on merits—Solicitor's slip. *Re Mersea School Section (No. 3)*, 12 O. W. R. 417.

Conviction—Leave refused to appeal from order refusing to quash conviction of defendant under Liquor License Act, 14 O. W. R. 71. Section 739 of the Code applies to convictions in matters within jurisdiction of Ont. *R.* v. *Reid* (1909), 14 O. W. R. 153.

Dismissal of action — Non-payment of costs at appointed time—Time for payment extended — Jurisdiction of Divisional Court. *Strati* v. *Toronto Construction Co.*, 17 O. W. R. 259, 1 O. W. N. 877, 1000, 2 O. W. N. 172.

Extension of time for—Delay—Merits. *Mitchell* v. *Sylvester*, 6 O. W. R. 615, 883.

From ruling of Master in Ordinary —*Forum.*] — Weekly Court or Divisional Court—Matter of practice. *Munro* v. *Toronto Ry. Co.*, 1 O. W. R. 25, 316, 813, 2 O. W. R. 207, 3 O. W. R. 14, 299, 4 O. W. R. 392.

Leave to appeal—Refusal of leave to proceed in action against company in liquidation. *Re Pakenham Pork Packing Co.*, 6 O. L. R. 582, 2 O. W. R. 951, 983, 4 O. W. R. 22.

Motion to quash appeal—*Acquisition of lands at tax sale—Sale by tender—Resolution of council to accept lower tender—Action by higher tenderer to restrain sale—Insufficient reasons for accepting lower tender.*]—Motion to quash appeal by defendant corporation to Divisional Court from the judgment of Magee, J., upon action to restrain defendants from proceeding with a sale to defendant Caldwell of certain lots acquired by corporation under Assessment Act in satisfaction of arrears of taxes. Action was dismissed by Street, J., and plaintiff appealed to Divisional Court, which held (5 O. W. R. 310), that plaintiff was entitled to succeed, unless defendant corporation could prove at a further trial good reasons which induced them to sell to defendant Caldwell. Defendant corporation elected to have a further trial, and it took place before Magee, J.—*Held*, plaintiff not entitled to have his offer accepted nor to prevent corporation from selling for less than amount of his offer, but he was entitled to an injunction to restrain them from closing the sale to Caldwell on basis only of the action of the special committee or of the council. 6 O. W. R. 1. Motion to quash above appeal, *held*, that the mere payment of money as directed by a judgment is not a bar to an appeal from that judgment by party making such payment. (reference to *Pierce* v. *Palmer*, 12 P. R. 308), and if the existing injunction was removed and appellants were declared to be at liberty to carry out the sale, there was nothing to support the contention that defendant Caldwell could not purchase the lands in question; also that there was nothing to prevent his co-defendants from taking steps by appeal to relieve themselves from an onerous judgment which they allege to have been pronounced in error. *Phillips* v. *Belleville*, 6 O. W. R. 129, 10 O. L. R. 178.

Order of Judge in Court—*Motion to quash by-law.*] — Appeal from decision of Judge in Court refusing to quash a by-law lies either to Divisional Court or Court of Appeal; but appellant must elect his tribunal, and can have only one appeal. *In re Ross & East Nissouri*, 21 C. L. T. 287, 1 O. L. R. 353.

Right of appeal—*Leave.*]—Judgment as to costs. *Russell* v. *Eddy*, 5 O. L. R. 379, 2 O. W. R. 164.

Right of appeal—*Libel—9 Edw. VII., Ont., c. 40, s. 12, s.-s. 4.*]—Where Master in Chambers has jurisdiction to entertain an application for security for costs, 3 Edw. VII., Ont., c. 40, s. 12, s.-s. 4, does not give to either party any greater right of appeal than if application was to a local Judge. *See* S. C. (1909), 14 O. W. R. 617, 698; *Kelly* v. *Ross* (1909), 14 O. W. R. 823, 1 O. W. N. 116.

Setting down — *Christmas vacation — Time of—Rules 790 (1), 352 (e).*]—D. C. *held* that the practice of setting down appeals in Christmas vacation was well settled and not being *res integra* should not be disturbed. *Hislop* v. *Joss* (1902), 1 O. W. R. 9.

ii. *From Judge in Chambers.*

Conflicting decisions — *Reasons to doubt correctness of judgment.*] — Where there are no conflicting decisions in H. C. J. for Ont., and there are no good reasons to doubt the correctness of a judgment, leave to appeal to Divisional Court should not be given. *Robinson* v. *Mills* (1909), 19 O. L. R. 162, 13 O. W. R. 606, 763, 853, and *Re Shafer* (1907), 10 O. W. R. 409, at p. 412, especially referred to. *Ryckman* v. *Randolph* (1909), 14 O. W. R. 1013, 1 O. W. N. 201, 20 O. L. R. 1.

Conflicting decisions — *Rule 1277 — Reasons to doubt correctness of order—Discretion — Discovery — Postponement—Preliminary issue.*] — Leave refused to appeal from 14 O. W. R. 154, where Judge in Chambers affirmed Master in Chambers, 14 O. W. R. 62. *Stow* v. *Currie* (1909), 14 O. W. R. 248.

Matter of practice—*Increasing costs.*]—See *Dodge* v. *Smith*, 21 C. L. T. 162, 1 O. L. R. 46; *Bateman* v. *Mail Printing Co.*, 21 C. L. T. 559, 2 O. L. R. 416.

Order striking out jury notice.] — Motion for leave to appeal from an order striking out the jury notice in an action on a guarantee:—*Held*, that there was no good reason to doubt the correctness of the order as the question was one of equity and should be tried by a Judge without a jury. Leave to appeal refused. *Sovereign Bank* v. *Rance* (1910), 15 O. W. R. 168.

iii. *From County Courts.*

Costs only involved—*Question of principle.*]—See *Grove* v. *Bender*, 20 C. L. T. 95.

Final order — *Capias.*]—An order of a County Court Judge discharging defendant from arrest under a ca. sa. is not in its nature final within meaning of County Courts Act, R. S. O. c. 55, s. 52, and an appeal does not lie therefrom. *Gallagher* v. *Gallagher*, 31 O. R. 172.

Final order.]—Motion by defendant to set aside a judgment for default in County Court action as irregular and void, was dismissed by County Court Judge, who gave the defendant leave, on payment of $5, to move on merits for leave to defend:—*Held*, that this was a final order and that an appeal lay therefrom. *O'Donnell* v. *Guinane*, 28 O. R. 389, distinguished. *Voight Brewery Co.* v. *Orth*, 23 C. L. T. 168, 5 O. L. R. 443, 2 O. W. R. 304.

Final order.]—Dismissal of action for want of prosecution. *Diamond Harrow Co.* v. *Stone*, 7 O. W. R. 685.

Interlocutory order.]—Examination of judgment debtor and transferee. *Re Gault* v. *Carpenter*, 1 O. W. R. 404.

Motion for new trial.]—There is no appeal to a Divisional Court from a judgment of a County Court on a motion for a new trial made to that Court, in an action tried with a jury. *Brown* v. *Carpenter*, 27 O. R. 412, followed. *Irvine* v. *Sparks*, 20 C. L. T. 115, 31 O. R. 603.

New evidence.]—Under Rule 498, High Court may entertain an application, in a proper case, to admit new evidence on a County Court appeal, notwithstanding R. S. O. c. 55, s. 51, s.-s. 3, under which such an application must be made, before County Court, and this although the time for applying for a new trial had expired. *Butler* v. *McMicken*, 21 C. L. T. 71, 32 O. R. 422.

Order dismissing appeal from taxation of costs—*Interlocutory.*]—Order made by Judge in a County Court action dismissing an appeal from a ruling as to scale of costs upon taxation of plaintiff's costs of an action awarded by judgment, is in its nature interlocutory and not final, within the meaning of s. 52 of County Courts Act, R. S. O. 1897, c. 55, and no appeal lies therefrom to Divisional Court. *Blakey* v. *Latham*, 43 Ch. D. 23, followed. *Babcock* v. *Standish*, 19 P. R. 195, distinguished. In *Kruetziger* v. *Brox*, 32 O. R. 418, the question of the right to appeal was not raised or considered. *Leonard* v. *Burrows*, 24 C. L. T. 219, 7 O. L. R. 316, 3 O. W. R. 186.

Order dismissing motion to commit—*Finality.*]—Appeal by plaintiffs from an order of Co. C. Judge dismissing a motion by appellants to commit defendant for refusing to be sworn and examined as a judgment debtor, upon ground that a proper foundation had not been laid for his examination by a return of *nulla bona* to a *fi. fa.*, or an affidavit stating that such would be the return:—*Held*, that no appeal lay, because order appealed against was not in its nature final, but merely interlocutory, within meaning of s. 52 of County Courts Act, R. S. O. c. 55. *New Hamburg Manufacturing Co.* v. *Barden*, 21 C. L. T. 377.

Proceedings not certified.] — *Held*, (Meredith, J., dissenting), that appeal from order in a County Court action was not properly before the Court because proceedings were not certified. *Lucas* v. *Holliday*, 24 C. L. T. 365, 8 O. L. R. 541, 3 O. W. R. 732.

Right of appeal—*Final or interlocutory order—Order striking out part of pleading.*]—Order of Co. C. Judge purporting to be made under Con. Rule 261, striking out part of defence as disclosing no reasonable answer, is in its nature final, and appeal from it will lie under s. 52 of County Courts Act, R. S. O. 1897, c. 55. *Smith* v. *Traders Bank*, 11 O. L. R. 24, 6 O. W. R. 748.

Right of appeal from—*Jury—Order of County Court in term—County Courts Act, s. 51.*]—Under s. 51 of County Courts Act, R. S. O. 1897 c. 55, where there has been a trial by jury for an action in County Court, and motion had been made to County Court in term for a new trial, and dismissed, no appeal lies from the dismissing order to Divisional Court; but, *semble*, where the findings of jury are reversed in term, an appeal lies. *Booth* v. *Can. Pacific Rw. Co.*, 8 O. W. R. 860, 13 O. L. R. 91.

Right of appeal — *Municipal Drainage Act—County Court Judge — Persona designata.*]—Accounts of engineers and surveyors employed by municipalities under Municipal Drainage Act, R. S. O. 1897, c. 226, may be audited by County Court Judge under 3 Edw. VII. c. 22, s. 4, and no appeal will lie to Divisional Court from his certificate, as it is not an affirmative order that can be enforced, there being no direction for payment of what the Judge found to be due the engineer or surveyor by municipality. Clute, J. (dissenting), *held*, that County Court Judge acted as a *persona designata*, from whose decision, as a declaratory judgment, an appeal would lie under s. 2 of said Act, special leave having been given to appeal under s. 4. *Moore* v. *March* (1909),

14 O. W. R. 1066, 1 O. W. N. 38, 206, 20 O. L. R. 67, see 13 O. W. R. 692, 14 O. W. R. 1194.

Right of appeal.]—New trial p[illegible] moved for. *Smith* v. *Bloomfield*, 2 O. W. [illegible] 881.

Right of appeal.] — Nonsuit—Negligence—Evidence for jury—New trial. *Camp* v. *Armstrong Cartage and Warehouse Co.*, 3 O. W. R. 686.

Right of appeal—*Order refusing to vary minutes of judgment—Duty of Judge to certify proceedings—Set-off of costs.*]—Order of Co. C. Judge in action in County Court dismissing an application to vary minutes under Con. Rule 625 (2) is an interlocutory and not a final order; and no appeal lies from it to High Court. *Semble*, per Britton, J., in Chrs., that the fact that there may be no appeal from such an order is no reason why the Judge should not certify papers; question whether or not there is an appeal from such an order is for Court appealed to, and such certificate should as a rule be given upon request; the Judge's duty being ministerial only.—*Semble*, also, that the setting off of costs (which was the matter in question on motion to vary minutes) is no part of what is ordinarily understood as settling minutes of judgment.—A motion for a mandamus to Judge to certify proceedings was dismissed by Britton, J., and the dismissal was affirmed by the Court. *In re Taggert* v. *Bennett*, 23 C. L. T. 224, 6 O. L. R. 74, 2 O. W. R. 184, 419, 513.

Right of appeal—*Summary order for judgment if money not paid into Court—Order "in its nature final"—County Courts Act, s. 52—Valid defences—Unconditional leave to defend.*]—Order made by County Court Judge upon application by plaintiffs for summary judgment under Rule 603, allowing defendants to defend upon condition of their paying money into Court, and directing that, in default of payment into Court, plaintiffs be at liberty to sign final judgment, is "in its nature final and not merely interlocutory," within meaning of s. 52 of County Courts Act; and an appeal therefore lies from such an order to Divisional Court. *Bank of Minnesota* v. *Page* (1887), 14 A. R. 347, followed. *Rural Municipality of Morris* v. *London and Canadian L. and A. Co.* (1891), 19 S. C. R. 434, following English decisions, distinguished. Where valid defences are sworn to by defendants in answer to a motion for summary judgment, unconditional leave to defend should be granted. *Jacobs* v. *Booths Distillery Co.* (1901), 50 W. R. 49, 85 L. T. R. 262, followed. Order of County Court Judge of Carleton reversed. *Castle Co.* v. *Kouri* (1909), 18 O. L. R. 462, 14 O. W. R. 125.

Right of appeal.]—Summary trial of interpleader issue. *Vipond* v. *Griffin*, 2 O. W. R. 532.

Setting down — *Time — Certificate — Jurisdiction.*] — *Held*, that until the Judge of a County Court has certified under his hand to the proper officer of the High Court, as provided by ss. 55 and 56 of R. S. O. c. 55, an appeal cannot be set down for hearing: *McCarron* v. *Metropolitan Life Ins. Co.*, 19 C. L. T. 230; *Gilmor* v. *McPhail*, 16 P. R. 151.—After the time limited by the statute for setting down has expired, there is no jurisdiction to hear the appeal.—If the Judge neglects or refuses to certify under the above-mentioned sections in time to enable the appellant to set down the apeal within the time limited by the statute, his certificate cannot be dispensed with, nor the time enlarged for granting it.—The certificate in time to enable the appeal to be set down under these sections is a condition precedent to the jurisdiction of this Court to hear the appeal, and being such cannot be dispensed with. *Reckie* v. *McNeil*, 20 C L. T. 73, 31 O R. 444.

Setting down — *Time—Copies of pleadings.*]—At the hearing of an appeal from a County Court judgment the plaintiff objected that the original pleadings were not certified by the Judge of the Court below, but only copies of them, and that the appeal was set down for too early a date, it having been set down for a sitting of a Divisional Court which began less than thirty days after the decision complained of: see s. 57 of the County Courts Act, R. S. O. c. 55; Rules 793, 795, and s. 55 of the Act.—*Held*, that it is the Rule, and not the statute, which requires the original pleadings to be certified, and the Court may and does dispense, in a proper case, with the fulfilment of the requirements of the Rules, or permits something to be done *nunc pro tunc*.—*Held*, also, that the provisions of s. 57 and Rule 795, as to setting down, were designed to prevent an appeal being unduly delayed, and are to be read as providing that the setting down is to be for a sittings not later than the first sittings after thirty days from the decision complained of. *Lees* v. *Ottawa and New York R. W. Co.*, 20 C. L. T. 75, 31 O. R. 567.

Setting down—*Time—Judgment—Settlement.*]—The County Courts Act, R. S. O. c. 55, by s. 57, provides that "the appeal shall be set down for argument at the first sittings of a Divisional Court of the High Court of Justice which commences after the expiration of one month from the judgment, order, or decision complained of."—*Held*, that the month begins to run from the date of the judicial opinion or decision, oral or written, pronounced or delivered, and the judgment or order founded upon it must be referred to that date.—If such opinion or decision is not pronounced or delivered in open Court, it cannot be said to be pronounced or delivered until the parties are notified of it.—*Quære*, whether after a judgment has been settled and entered, the Judge has power to resettle it. *Fawkes* v. *Swazie*, 20 C L. T. 8, 31 O. R. 256.

Time—*Judgment—County Courts Act, s. 57.*]—If a judicial opinion or decision, oral or written, is not pronounced or delivered in open Court, it cannot, until the parties are notified of it, be said to be pronounced or delivered within meaning of s. 57 of County Courts Act, R. S. O. 1897 c. 55, requiring appeals from County Court to be set down for first sitting of Divisional Court commencing on or after the expiration of one month from judgment, order, or decision complained of.—Dictum of Armour, C.J., in *Fawkes* v. *Swayzie*, 31 O. W. R. 256, approved. *Allan* v. *Place*, 10 O. W. R. 603, 15 O. L. R. 148.

Time for appealing expired—*Power to extend time for appealing after — Ontario County Courts Act, 10 Edw. VII. c. 30, s. 44* (2).]—Plaintiff moved to have time for appealing from a County Court judgment extended, he having failed to serve notice of appeal and to have the appeal set down in time.—Divisional Court *held*, that they had jurisdiction to grant the order as asked.—*Re Molson, Ward* v. *Stevenson*, 21 O. L. R. 289, 1 O. W. N. 1038, followed:—*Held*, that on the merits a case had been made out for so extending the time. Motion granted on term that appellant should pay the costs of motion to respondent in any event upon final taxation. *Hunter* v. *Patterson* (1910), 16 O. W. R. 993; 2 O. W. N. 61.

Weight of evidence.]—Correcting error. *Jackson* v. *McLaughlin*, 2 O. W. R. 159.

iv. *From Division Courts.*

Certified copy of proceedings—*Filing —Notice of appeal—Time—Extension.*]—An order refusing a new trial of Divisional Court plaint was made on 25th August; the clerk certified a copy of proceedings on 29th August, and it was filed in H. C. J. on 4th September; notice of appeal was not given for October sittings of Divisional Court, but on 12th October appellant obtained order in Division Court extending time for filing the certified copy of proceedings, and on 17th October obtained and filed another copy, and gave notice to opposite party of having done so and of appeal for November sittings:—*Held*, that the order extending time was inoperative because the certified copy had already been filed; and, the delay in giving notice of appeal not having been accounted for, appeal must be quashed. *Heise* v. *Shanks*, 21 C. L. T. 139, 1 O. L. R. 48.

County Court—*Right of appeal from—New trial.*] — Judgment having been pronounced by junior Judge in County Court action a motion by way of appeal from or to set aside such judgment and to enter judgment for defendants, or in alternative for a new trial, was made to senior Judge; and on such appeal the judgment was set aside and judgment entered for defendants dismissing action:—*Held*, that an appeal lay to Divisional Court by unsuccessful party to such appeal; and the fact that a new trial in alternative was asked for was immaterial. The sub-secs. of s. 51 of County Courts Act, R. S. O. 1897 c. 55, applicable, are s.-ss. 1, 2, and 5, and not s.-s. 3. *Leishman* v. *Garland*, 22 C. L. T. 109, 3 O. L. R. 241, 1 O. W. R. 22.

Filing certified copy of proceedings —*Extension of time for.*]—Divisional Court has no power to extend time limited by s. 158 of Division Courts Act for filing certified copy of proceedings in Division Court, and has no power, under s.-s. 2 of s. 158 (as added by 4 Edw. VII. c. 12, s. 2), or otherwise, to extend time for setting down appeal until it is seized of the appeal by filing of certified copy, time for filing which may be extended by the Judge in the Division Court. *Whalen* v. *Wattie*, 16 O. L. R. 249, 11 O. W. R. 917.

Notice of grounds — *Failure to give—Amendment.*]—Where defendants, appealing from judgment of Division Court, procured and filed a certified copy of proceedings within two weeks prescribed by s. 158 of Division Courts Act, and set down appeal to be heard at an unnecessarily early sittings of Divisional Court, but neglected to give plaintiff notice of setting down of appeal and of grounds of it, the Court, upon objection taken by plaintiff when appeal came on for hearing, postponed hearing until next sittings, for which defendants were still in time, in order that they might give a proper notice.—*Semble*, that so soon as certified copy of proceedings is filed, if filed within proper time, and case is set down, if set down within proper time, and for proper Court, the appeal is properly lodged, and other matters are matters done in appellate Court, as to which the Court may have power of amendment or enlargement of time. *Smith* v. *Port Colborne Baptist Church Trustees*, 21 C. L. T. 163, 1 O. L. R. 195.

Notice of setting down.]—Giving of notice of setting down for argument and of the appeal and of grounds thereof, required by s. 158 of Division Courts Act, is a condition precedent to right to appeal to Divisional Court from a Division Court, and where this notice has not been given Divisional Court has no jurisdiction to deal with appeal. *Bradley Co.* v. *Wilson Lumber Co.*, 24 C. L. T. 317, 8 O. L. R. 184, 4 O. W. R. 66.

Notice of setting down.]—Default of appellant—Waiver of cross-appeal. *Waller* v. *Malone*, 3 O. W. R. 774.

Right of appeal—*Amount in dispute.*]—Plaintiff brought action in Division Court for $100.75, amount of promissory note for $64.87 and $35.38 interest, and recovered judgment for $83.90; trial Judge finding against an alleged release set up by defendant, but only allowing $19.13 for interest instead of $35.38 as claimed. A motion for a new trial was refused:—*Held*, that "the sum in dispute upon appeal" under s. 154 of Division Courts Act, R. S. O. 1897 c. 60 was $83.90, and, as it did not exceed $100, a motion to quash appeal to High Court was allowed. *Petrie* v. *Machan*, 28 O. R. 504, distinguished. *Lambert* v. *Clark*, 24 C. L. T. 129, 7 O. L. R. 130, 3 O. W. R. 363.

Right of appeal—*Public Schools Act—Division Courts Act—Motion for new trial—Necessity for.*]—Action to recover a sum in excess of $200 for balance of teacher's salary was brought against public school trustees in Division Court, as permitted by s. 81 (7) of the Public Schools Act, 1 Edw. VII. c. 39 (O.) Action was dismissed, and plaintiff, in appealing to Divisional Court, failed to follow the procedure prescribed by Division Courts Act:—*Held*, that "the ordinary right of appeal," mentioned in s. 98 (2) of Public Schools Act, is right of appeal given by Division Courts Act; and plaintiff, not having moved for a new trial in Division Court, as required by s. 154 of Division Courts Act, R. S. O. 1897, c. 60, could not maintain her appeal.—*Coté* v. *Halliday*, 17 C. L. T. Occ. N. 53, followed. *Norton* v. *Bertie Public School (Section 6) Trustees*, 17 O. L. R. 413, 12 O. W. R. 1249.

Surrogate Court—*Notice of appeal from — Description of Appellate Court.*] — On motion to quash appeal to Divisional Court subsequent to passing 58 V. c. 13, s. 45 (O.), on ground that notice of appeal did not specify the Court to which appeal was taken, and that the bond filed followed the Surrogate form "To Court of Appeal:"—*Held*, that the intention to appeal expressed in notice was sufficient, and that the words "Court of Appeal" in bond might be read as equivalent of "proper appellate tribunal;" motion to quash dismissed. *Taylor* v. *Delaney*, 22 C. L. T. 136, 3 O. L. R. 380, 1 O. W. R. 208, 409.

Time—*Judgment—Division Courts Act, s. 158.*]—By s. 158 of Division Courts Act, R. S. O. 1897 s. 69, appellant upon appeal to Divisional Court from judgment of Division Court, shall, within two weeks after date of decision complained of, file the certified copy of proceedings, etc.:—*Held*, applying and following the dictum of Armour, C.J., in *Fawkes* v. *Swayzie*, 31 O. R. 256, that where the decision is not pronounced in open Court, it is not to be regarded as pronounced or delivered until the parties are notified of it. *Mazon* v. *Irwin*, 10 O. W. R. 537, 15 O. L. R. 81.

v. *From District Courts.*

Extension of time.]—Leave to set down — Terms — Costs — Condition precedent. *Young* v. *McKay*, 3 O. W. R. 447.

Questions of fact.]—*Hand* v. *Sutherland*, 2 O. W. R. 263.

vi. *From Surrogate Courts.*

Affidavit.]—An appeal to a Divisional Court from an order of a Surrogate Court is not duly lodged and will be quashed if security has not been given, and an affidavit of the value of the property affected filed, as required by Rule 57 of the Surrogate Court Rules of 1892, which are made applicable by s. 36 of the Surrogate Courts Act, R. S. O. c. 59, notwithstanding the provisions of Con. Rule 825 that no security for costs shall be required on a motion or appeal to a Divisional Court. *In re Wilson, Trusts Corporation of Ontario* v. *Irvine*, 17 P. R. 407, applied and followed. *In re Nichol*, 21 Occ. N. 184, 1 O. L. R. 213.

Executors and trustees — *Fixing compensation.*]—By virtue of R. S. O. c. 59, s. 36, an appeal lies to Divisional Court from an order of a Surrogate Court Judge allowing compensation to an executor under the Trustee Act, R. S. O. c. 129, s. 43. *Re Alexander* (1900), 31 O. R. 167.

vii. *From Masters' Orders.*

Decision of Local Master upon reference for trial.]—Appeal heard by consent. *Potter* v. *Orillia Export Lumber Co.*, 8 O. W. R. 804.

viii. *From Magistrates.*

(No cases.)

ix. *From Drainage Referees.*

(No cases.

x. *From Taxing Officers.*

Costs — *Taxation — Evidence—Brief of, used by counsel for opposite party.*]—Meredith, C.J., *held* allowance made by taxing officer was correct, appeal dismissed. *Pennington* v. *Housinger* (1902), 1 O. W. R. 507. See 1 O. W. R. 270.

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14. Ontario — Appeal to Judge of High Court.

Costs — *Taxation—Mortgagor and mortgagee—Appeal.*]—No appeal lies from the taxation of a mortgagee's costs of proceedings under the power of sale in a mortgage, had under R. S. O. (1897), c. 121, s. 30. *Re Vanluven & Walker* (1900), 19 P. R. 216.

Judge of High Court—*Right of appeal from order of County Court Judge quashing quo warranto proceedings.*]—See *Rex ex rel. McFarlane* v. *Coulter*, 22 C. L. T. 414, 4 O. L. R. 520, 1 O. W. R. 636.

Master's report—*Extending time for.*]—Special circumstances—Terms. *Randall* v. *Berlin Shirt and Collar Co.*, 5 O. W. R. 256, 646.

Master's report.]—Extension of time—Delay—Explanation — Gounds of appeal. *Campbell* v. *Croil*, 7 O. W. R. 86, 157, 237.

Master's report.]—Questions of fact—Credibility of witnesses—Corroboration. *Tilt* v. *Tilt*, 11 O. W. R. 803.

Order of County Court Judge — *Assignments Act—Jurisdiction—Leave to appeal—Transfer of motion to Judge of Court of Appeal—General words in notice of motion—Costs—Power to award.*]—A Judge of the High Court of Justice has no jurisdiction to entertain an appeal or give leave to appeal from an order of a County Court Judge as to the valuing of securities under s. 20 of the Assignments and Preferences Act, R. S. O. 1897, c. 147; but, under Con. Rule 784, he may refer the motion to a Judge of the Court of Appeal, who, under 63 V. c. 17, s. 14 (O.), has jurisdiction to grant leave to appeal in such a case; and *held*, that to do so was proper in this case, in view of the general words in the notice of motion, "or for such other order as may seem just."—Under Con. Rule 1130 (1) costs may be awarded against a party to any proceeding in the Supreme Court of Judicature for Ontario, even though there be no jurisdiction to entertain the matter. *In re Erb (Aaron) No. 1*, 12 O. W. R. 108, 16 O. L. R. 594.

Report of referee—*Reference of matters in dispute in an action—"In a summary way"—Solicitor's bill.*]—Proceedings in an action upon a solicitor's bill were stayed upon a certain agreement being entered into between the parties, whereby it was provided that evidence as to services rendered and disbursements made was to be given to a certain accountant named, and "in case of dispute as to services rendered or disbursements made, the matters disputed are to be referred in a summary way to F. E. Marcon, deputy clerk at Windsor, under R. S. O. c. 174, for decision."—*Held*, that by

"a summary way," the parties meant that the reference was to be without ceremony or delay, the words "under R. S. O. c. 174" merely introducing the procedure under that Act (the Act respecting solicitors), but not to be construed as providing for an appeal from the report made by the deputy clerk upon such reference. *Sale* v. *Lake Erie & Detroit River Rw. Co.*, 20 C. L. T. 332, 32 O. R. 159.

15—ONTARIO—APPEAL TO SESSIONS.

Dismissal of complaint — *By-law.*]—There is no appeal to the Court of General Sessions of the Peace from an order of dismissal of a complaint made against the defendants for an offence against a city by-law passed under the authority of s. 551 of the Municipal Act, R. S. O. c. 223. *R.* v. *Toronto P. S. Board*, 20 C. L. T. 175, 31 O. R. 457.

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16. ONTARIO MINING COMMISSIONER — APPEAL TO AND FROM.

Against issue of certificate of record —*Extending time—Whether such an appeal lies—Policy of Act.*]—S. on 2nd Sept., 1909, recorded a mining claim staked out by him on 1st Sept. At this time (though the lands were under the provisions of the Act open to staking) an appeal by another licensee against the cancellation of a former claim had not yet been disposed of. After this appeal had been finally dismissed the Recorder on 29th Dec., granted S. a certificate of record. B. subsequently sought to record a new staking and to set aside the certificate of record and have S.'s claim cancelled for lack of discovery and other defects. No fraud or mistake within the meaning of the Act being shown and no evidence of merits or validity of B.'s claim being offered, it was held by the Commissioner that the certificate of record should not be set aside and that extension of time for appealing from the granting of it should be refused, and that the attack upon S.'s claim should be dismissed.—It is not the policy of the Act to encourage attacks upon mining claims after the time allowed for filing disputes against them has elapsed and a certificate of record has been issued.—Query, whether in the absence of fraud or mistake an appeal under the Act will lie against the granting of a certificate of record. *Re Ball and Stewart* (1910), M. C. Cas. 461.

From Commissioner — *Failure to set down and lodge certificate within time.*]—On motion to quash an appeal by R. to the Divisional Court, held by the Divisional Court, quashing the appeal, that as the appeal had not been set down, and a certificate of setting down lodged with the Recorder within the time limited by s. 151 of the Act (1908), it must be deemed conclusively to be abandoned, and there is no power to extend the time beyond the limit prescribed by the Act. *Reekie* v. *McNeil* (1899), 32 O. R. 444, followed. *Re Rogers and McFarland* (1909), 14 O. W. R. 943, M. C. Cas. 407, 19 O. L. R. 622.

From Commissioner—*As to due performance of work.*] — Held, by the Court, quashing the appeal, that the decision of the Commissioner as to the due performance of the work was final and not subject to appeal. *Re Perkins and Dowling* (1909), M. C. Cas. 436, 1 O. W. N. 290.

From Divisional Court — *Leave—New trial.*]—*Held*, per Moss, C.J.O., on an application under s. 152 (Act of 1908), for leave to appeal from an order of the Divisional Court granting a new trial, that as the Court had exercised its discretion in granting the new trial and had determined nothing in respect to the final rights of the parties, that discretion should not be interfered with, though upon the facts it might appear that such an order should not have been made. *Re Smith and Hill* (1909), 14 O. W. R. 881, M. C. Cas. 349, 19 O. L. R. 577, 14 O. W. R. 881.

From Recorder—*Extending time—Serving substitutionally.*]—Where notice of appeal from a Recorder is filed within the time allowed the Commissioner has power, if satisfied that it is a proper case for appeal, and that after reasonable efforts an adverse party could not be served, to extend the time for such service and order that the service may be made substitutionally, and this may be done on an *ex parte* application. *Re Downey & Munro* (1909), M. C. Cas. 173, 14 O. W. R. 523, 19 O. L. R. 249.

From Recorder—*Delay in prosecuting.*]—Proceedings under the Act must be prosecuted promptly, and if an appellant is not present with his evidence at the time appointed for hearing and no explanation is given, the appeal must be dismissed. *Re MacCosham and Vanzant* (1908), M. C. Cas. 277.

From Recorder—*Notice of—Party "adversely interested."*]—In an appeal from cancellation of a mining claim by the Recorder a subsequent applicant for the same property is a party "adversely interested" under s. 75 of The Mines Act, 1906, and if not duly served with notice of the appeal the appeal must be dismissed. *Re Petrakos* (1906), M. C. Cas. 22, 13 O. L. R. 650, 9 O. W. R. 367.

From Recorder—*Party adversely interested.*]—In an appeal from cancellation of a mining claim staked out while a working permit application was pending, the working permit applicant is a party "adversely interested" within the meaning of the Act, and if he is not served with notice of the appeal the appeal must be dismissed. *Re Chartrand and Large* (1908), M. C. Cas. 240.

From Recorder—*Party adversely interested—Extending time for service.*]—The Recorder gave his decision in a dispute between R. and McC. on 17th July; M. later the same day staked out and filed application for a mining claim upon the property in dispute. R. filed a notice of appeal from the Recorder's decision on 18th July, but did not serve either McC. or M.:—*Held*, that McC. and M. were parties "adversely interested," within s. 133 (3) (1908), and that failure to serve them within the time limited by the Act was fatal to the appeal.—Extension of time for service was refused where the appellant failed to shew that it was a proper case for appeal, and

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that after reasonable effort the necessary parties could not be served. *Re Rowlandson* (1908), M. C. Cas. 257.

From Recorder—*Service of notice.*]—A post office certificate of registration of a letter to respondent, assumed to contain notice of an appeal from the Recorder, which the respondent denied he received, is not sufficient to establish service of such notice under s. 75 of the Mines Act, 1906. *Re Woodward and Carleton* (1906), M. C. Cas. 16.

Notifying subsequent stakers of the hearing.] — Where a subsquent claim is staked out and recorded after the Recorder has cancelled a former one the subsequent claimant should be made a party to and notified of the hearing of an appeal from the cancellation. *Re Milne and Gamble* (1910), M. C. Cas. 249, 1 O. W. N. 545.

Recorder acting ex parte—*Decision by Commissioner on merits — Retrial.*] — S. had obtained from M. an agreement or option for purchase of 3 mining claims, and recorded it, and the Recorder noted it on the records of the claims. On failure of S. to pay deposits into the bank as the agreement or option required, M. applied *ex parte* to the Recorder who, on proof of the default, cancelled the noting on the record of the claims. S. appealed to the Commissioner who, pursuant to appointment, after refusing a request on behalf of the appellant for an adjournment for which no cause was shewn, heard evidence, and finding S. had no longer any right under the agreement or option, dismissed the appeal on the merits. On appeal to the Divisional Court a retrial before the Commissioner was granted on condition that the appellant should pay into Court the instalments in default. *Re Smith and Millar*, 458.

Recorder's refusal to record application with dispute — *Procedure.*] — Where a claimant, who has filed an application for a mining claim which the Recorder refused to record by reason of there being a prior application upon the same property, enters a dispute against the prior application and therein claims to be entitled to the property, an appeal against such refusal is not necessary. *Re MacKay and Boyer* (1907), M. C. Cas. 83.

Status of appellant.] — An appeal lies from a decision of the Commissioner dismissing a dispute against a recorded mining claim, notwithstanding that the appellant has no right or interest in the property himself (overruling, upon this point, *Re Cashman and The Cobalt and James Mines, Ltd.*, M. C. Cas. 70, and *Re Munro and Downey*, M. C. Cas. 193); and there appears to be no distinction in this respect between decisions of the Commissioner on appeal from the Recorder and decisions by him in the first instance. *Re Smith and Hill* (1909), M. C. Cas. 349, 19 O. L. R. 577, 14 O. W. R. 881.

Time for—*Findings of fact.*]—M. and L. on 27th Feb., 1907, staked out a mining claim for B. The claim after inspection was cancelled by the Recorder for lack of discovery, entry thereof being made on the record on the evening of 20th August after the office was closed to the public; notice was given next day—the Act requiring it to be given not later than the day after cancellation; appeal to the Commissioner was filed by B. on 5th September, the Act requiring appeal to be taken within 15 days from the record of the decision. The evidence before the Commissioner shewed that M. and L. in staking had used a standing tree cut off as the Act required for their discovery post, it being within 3 feet of a crack or small vein into which they had picked and put some shots on the day of staking, exposing a little iron pyrite; it was claimed that they had also found, and intended the post to apply to, another vein 15 or 20 feet from the post, which was afterwards opened up and found to be more promising. *Held*, by the Commissioner, that the appeal filed on the 16th day after entry of cancellation was too late and must be dismissed upon that ground, but that on the merits it would also have to be dismissed as the crack near the post was out of the question as a discovery, and he was not satisfied on the evidence that M. and L. had discovered the second vein when they staked, and that at all events it was not until sinking had been done that anything valuable was disclosed there, the rich silver discovery of the respondent D., who staked the property on 22nd August, having meanwhile intervened. *Held*, by the Divisional Court that the appeal was not too late and that there was a sufficient discovery and that the appeal should be allowed. Anglin, J., however, holding that the staking was not sufficient and that the appeal should be dismissed upon that ground. *Held*, by the Court of Appeal, that the appeal was too late and that there was no sufficient discovery, also that the burden of proof was on the appellant, and that the findings of the Commissioner who heard the evidence should not be interfered with unless for plain and weighty reasons. *Re Blye and Downey* (1908), M. C. Cas. 120, 11 O. W. R. 323, 12 O. W. R. 986.

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17 PRINCE EDWARD ISLAND— APPEAL TO SUPREME COURT.

Charlottetown City Court.]—No right of appeal from. *Wheatley* v. *Long*, 1 E. L. R. 132.

County Courts—*Construction of County Court Act.*] — Appeal from County Court where judgment under $5. *Held*, (Peters, J.), no jurisdiction. *Meacham* v. *Robertson* (1881), 2 P. E. I. R. 411.

Nature of appeal from conviction for violation of a statute.]—Denial of right of appeal by P. E. Island Prohibition Act—Constitutionality. *McMurrer* v. *Jenkins*, 3 E. L. R. 149.

Notice of appeal.] — On appeal from Commissioners' Court it was *held*, that the notice of appeal was bad, it not being entitled in any Commissioners' Court. *Sanderson* v. *Hayden* (1868), P. E. I. R.

P. E. I. Indigent Debtors Act.]—Order for discharge from custody. *McKinnon* v. *McDougall*, 3 E. L. R. 573.

18. Privy Council—Appeal to.

Amount appealable £500—*No appeal to Privy Council except from highest Court of Appeal in the Province.*]—By the Royal Instructions to the Governor of Prince Edward Island, an appeal is given to the Governor and Council, from the decision of the Supreme Court, in all cases where the amount at issue is of the value of £300, and from the Council of Her Majesty, where the amount at issue is £500. An action having been commenced, and judgment obtained in the Supreme Court, for £135, an application was made for leave to appeal from such judgment to Her Majesty in Council, notwithstanding its being below the appealable amount:—*Held*, by the Judicial Committee, that there being an intermediate Court of Appeal in the Island, no appeal could be received from the Supreme Court; but their Lordships, under the circumstances, advised the allowance of the appeal to the Governor and Council in the Island. *Re Cambridge* (1841), C. R. 1 A. C. 145.

Amount in controversy—*Damages — Original claim—Abandonment of portion.*]—The plaintiff in an action in a Superior Court may at any time abandon a part of his claim, and upon such abandonment the remainder only is deemed to be in controversy. —On the trial of an action in which the damages were laid at $5,000, a nonsuit was entered, but it was agreed that in case the plaintiff should, on appeal, be held entitled to maintain the action, the damages should be fixed at $1,000. On appeal to a Divisional Court, the plaintiff was held so entitled, and a new trial was directed unless the defendants consented to judgment for the $1,000. This the defendants refused to do, and appealed to the Court of Appeal, when the judgment of the Divisional Court was affirmed. An application was then made for leave to appeal to the Privy Council, on the ground that the matter in controversy exceeded $4,000. In answer thereto the plaintiff, by affidavit, stated that he was only claiming $1,000, which he regarded as agreed upon for all purposes, and offered to amend his statement of claim.—*Held*, that the application must be refused, as the damages must be deemed to be limited to the $1,000. *Preston* v. *Toronto Ruc. Co.*, 31 O. L. R. 78, 8 O. W. R. 753.

Application for leave—*Forum.*]— A Judge of the Court of King's Bench in Chambers has no jurisdiction to entertain an application for leave to appeal to the Privy Council from a judgment rendered by the Court. *Pelliser* v. *Consumers Cordage Co.*, 14 Que. K. B. 338.

Application to stay execution—*Judgment of Supreme Court of Canada.*]—Forum —Judgment certified to Court below—High Court—Order staying execution—Leave to appeal. *Thompson* v. *Equity Fire Insurance Co.* (1909), 1 O. W. N. 138. See S. C. in 17 O. L. R. 214, 41 S. C. R. 491.

Canadian Supreme and Exchequer Courts Act, 1875, s. 47—*Colonial Courts of Admiralty Act, 1890, s. 6 —Judgment of Supreme Court exercising admiralty jurisdiction — Special leave to appeal unnecessary.*]—Notwithstanding the provisions of the Canadian Supreme and Exchequer Courts Act, 1875, s. 47, with respect to the finality of the judgments of the Supreme Court, an appeal lies as of right under s. 6 of the Colonial Courts of Admiralty Act, 1890, from a judgment of the Supreme Court of Canada when pronounced in an appeal thereto from a decree of the Colonial Court of Admiralty, constituted in pursuance of and exercising jurisdiction under the said Act. Judgment in "*Cape Breton*" v. *Richelieu & Ont. Nav. Co.*, 36 S. C. R. 564, affirmed. *Richelieu & Ontario Navigation Co.* v. "*Cape Breton*," [1907] A. C. 112.

Consolidation of actions for purposes of appeal—*Motion for—Forum.*]—The Court of Appeal has no jurisdiction to grant a motion for the consolidation of two actions, in view of an appeal to the Judicial Committee of the Privy Council, after it has rendered judgment in the two actions separately; such a demand can only be granted by the Judicial Committee. *Que. Bridge & Rw. Co.* v. *Que. Improv. Co.*, 8 Que. P. R. 135.

Court of Appeal for B. C. has no power to allow an appeal from a judgment of that Court to His Majesty in his Privy Council. *MacKenzie* v. *Chilliwhack* (1910), 14 W. L. R. 621; 15 B. C. R. 256.

Intention to apply for leave—*Stay of judgment appealed from—Supreme Court of Canada.*]—The Superior Court cannot, upon a simple declaration of a party that he intends to apply to the Judicial Committee of the Privy Council for leave to appeal from a final judgment of the Supreme Court of Canada, stay the execution of that judgment.—*McDougall* v. *Montreal Street Rw. Co.*, 24 Que. S. C. 509.

Interference on appeal — *Concurrent findings of fact by Courts below.*]—See *Archambault* v. *Archambault*, [1902] A. C. 575.

Judgment against non-residents — *Time for appealing—Special leave—Not asserted on appeal within 14 days from final decree.*]—Upon a petition stating that a party against whom a decree had been pronounced by the Supreme Court of Newfoundland, was at the time resident in England, and had no representative within the Island, or notice of proceedings against him, the Judicial Committee gave leave to appeal upon terms, notwithstanding that he had not asserted an appeal within fourteen days from the final Decree as required by the Charter of Justice of Newfoundland. *Henderson* v. *Henderson* (1843), C. R. 1 A. C. 198.

Judgment directed a reference—*Referee insisted on proceeding—Stay of proceeding pending appeal granted.*]—In an action for damages, plaintiff was given judgment and a reference to the Official Referee was directed. Defendants appealed to the Privy Council. The Official Referee directed that, notwithstanding the appeal, the reference should be proceeded with. Falconbridge, C.J.K.B., granted an order staying proceedings on the reference, pending the determination of the appeal. Order affirmed by Divisional Court on the ground that the order was within the discretion of the Chief Justice, and the Court could not say that the discretion was wrongly exercised. *Sharpe* v. *White* (1910), 15 O. W. R. 683, 20 O. L. R. 575.

Jurisdiction—*Judgment — Reference to Court for opinion — Leave to appeal.*]—*Held*, following *Union Colliery Co.* v. *Attorney-General for British Columbia*, 27 S. C. R. 637, that the opinion of the Court rendered under R. S. M. c. 28, upon a constitutional question submitted by an order of the Lieutenant-Governor in council, was not a judgment, decree, order, or sentence within the meaning of the Imperial order in council of the 26th November, 1892, relating to appeals from the Court of Queen's Bench for Manitoba, and that such Court has no jurisdiction to grant an application for leave to appeal to his Majesty in Council under that order from such an opinion.—*Held*, also, that, although it was shewn that the enforcement of the Liquor Act would deprive the province of a revenue far exceeding £300 per annum, and would prejudicially affect the very large investments of persons engaged in the liquor traffic, it could not be said that any questions respecting property or civil rights to the value of £300 were involved in the decision sought to be appealed from. *In re The Liquor Act*, 21 C. L. T. 416, 13 Man. L. R. 323.

Leave to appeal — *Amount in controversy.*]—In determining the question of the value of the amount involved, upon which the right to appeal to the Privy Council depends, the Court, on a motion for leave to appeal, will look at the judgment as it affects the parties; and where it appeared from affidavits in support of the motion that the defendants in obeying an injunction would be put to an expense of over £300, they were granted leave to appeal. *Centre Star Mining Co.* v. *Rossland-Kootenay Mining Co.*, 11 B C. R. 509, 1 W. L R. 313, 336.

Leave to appeal—*Application to allow security.*]—Where the sole question in two actions was as to the validity of an order of the railway committee of the Privy Council of Canada requiring the plaintiffs to build a bridge:—*Held*, refusing an application to allow the security upon a proposed appeal to His Majesty in His Privy Council from the decision of the Court of Appeal, that an appeal did not lie as of right under R. S. O. 1897, ch. 48, sec. 1. *Can. Pac. Rw. Co.* v. *Toronto* (1909), 14 O. W. R. 1065, 1 O. W. N. 189, 19 O. L. R. 663.

Leave to appeal—*Forum for application—Security.*]—A petition for leave to appeal to the Privy Council cannot be granted by a Judge in Chambers unless sufficient security is offered at the same time. *Pallister* v. *Consumers' Cordage Co.*, 7 Que. P. R. 299.

Leave to appeal—*Grounds.*]— Petition for special leave to appeal from 35 S. C. R. 133, dismissed where petitioners were appellants to that Court and no important question of law was raised. *Ewing* v. *Dominion Bank*, [1904] A. C. 806.

Leave to appeal—*Mines—Constitutional Question—Cross-appeal without notice—Consolidation—Security—Cost of printing record.*]—The suppliants obtained leave to appeal from the judgment of the Supreme Court of Canada, 23 Occ. N. 34, 32 S. C. R. 586, dismissing three petitions of right, and in part reversing the judgment in 7 Ex. C. R. 414. The Board also granted the Crown leave to cross-appeal, and directed that the Supreme Court record should be accepted; that the three cases should be consolidated; that the security deposit should be £100 in each case; that each side should bear one-half the cost of transcribing and printing the Privy Council record; and that the appeal and cross-appeal should be heard together, upon one printed case lodged on each side. *Chappelle* v. *R.*, *Cormack* v. *R.*, *Tweed* v. *R.*, 23 C. L. T. 163.

Leave to appeal—*Rescission—Petition.*]—See *Ontario Mining Co.* v. *Seybold*, [1903] A. C. 73.

Leave to appeal — *Supreme Court of Canada.*]—Special leave to appeal from 34 S. C. R. 74, was refused, petitioner having elected to appeal to that Court and not to his Majesty direct, and no question of law being raised of sufficient importance to justify a further appeal. *Ex p. Clergue*, [1903] A. C. 521, followed. *Can. Pac. Rw. Co.* v. *Blain*, [1904] A. C. 453.

Leave to appeal—*Terms—Costs.*]—See *Canadian Pacific Rw. Co.* v. *Roy*, [1902] A. C. 220.

Leave to appeal—*When granted.*]—See *In re Tomey Homma*, 21 C. L. T. 424, 8 B. C. R. 76.

Motion to allow security—*Matter in controversy exceeding $4,000—Value.*]—On a motion by the plaintiffs for the allowance of the security on an appeal from the Court of Appeal to the Privy Council, in an action brought by the corporation of a city against two electric light companies, to have it declared that they had forfeited their rights under certain agreements with the city, under which they held their franchises, on the ground that they had amalgamated contrary to the terms of such agreements, which action had been dismissed:—*Held* (Meredith, J.A., dissenting), that the whole matter in controversy at trial (being the destruction, not the acquisition of the defts.' franchise) was whether the co.'s had forfeited their right by an amalgamation, and this clearly did not come within the last branch of s. 1 of R. S. O. 1897, c. 48, and that there was nothing before the Court to shew that such matter was of value to the pltffs. of more than $4,000, or of any sum or value capable of being ascertained or defined. Per Meredith, J.A.—The matter in controversy much exceeded $4,000, and if controverted leave should be given appellants to prove value. *Toronto* v. *Toronto Electric Light Co.*, *Toronto* v. *Incandescent Light Co., of Toronto, & Toronto Electric Light Co.* (1906), 11 O. L. R. 310, 7 O. W. R. 119.

Ontario appeal—*R. S. O. 1897, c. 48, s. 1—Admission of appeal—Order of Court—Appealable case.*]—Under R. S. O. 1897, c. 48, s. 1, it is essential that an appeal to the King in council should be admitted by the Court of Appeal. The Court is bound to exercise its judgment whether any particular case is appealable or not; and where it appears by its order that it has left that question open, the appeal is incompetent. *Gillett & Co.* v. *Lumsden*, [1905] A. C. 601.

Practice—*Stay of execution—Security.*] Where, after judgment on appeal to the Supreme Court of Canada, the losing party proposes to appeal to the Judicial Committee of the Privy Council, the Court will order proceedings on such judgment in the Court of original jurisdiction to be stayed on satisfactory security being given for the debt, interest, and costs. *Union Investment Co.* v. *Wells*, 41 S. C. R. 244.

Right of appeal—*Amount in controversy—Patent of invention.*]—An action for infringement of a patent of invention, wherein the plaintiff claims an injunction and $15,000 damages, which he consents in writing to reduce to $25, in order to escape costs of an *enquête*, is not, whatever may be the value of the patent, a cause in which an appeal lies as of right to the Privy Council. *Came* v. *Consolidated Car Heating Co.*, 4 Que. P. R. 256, 11 Que. K. B. 114.

Right of appeal—*From judgment on petition of right.*]—An appeal lies to the P. C. from a decision of the Court of Queen's Bench for Que. on a petition of right. *R.* v. *Demers*, [1900] A. C. 103. Reversing 7 Que. Q. B. 433.

Right of appeal—*Quo warranto proceeding.*]—An appeal does not lie to the Privy Council from a judgment of the Court of King's Bench reversing a judgment of the Superior Court and refusing a petition for a *quo warranto* against a director of a company to prevent him from acting as president. *Vipond* v. *Robert*, 9 Que. P. R. 273.

Right of appeal to His Majesty in Council.]—An Act of the parliament of Great Britain declared that all laws passed by the legislature of a colony should be valid and binding, within the colony, and directed that the colonial Court of Appeal should be subjected to such appeal as it was previously to the passing of the Act, and also to such further and other provisions as might be made in that behalf by any Act of the colonial legislature:—*Held*, that, an Act having been passed by the colonial legislature, limiting the right of appeal to causes where the sum in dispute was not less than $500 sterling, a petition for leave to appeal, in a cause where the sum was of less amount, could not be received by the King in council, although there was a special saving, in the colonial Act, of the rights and prerogatives of the Crown. V. art. 1178 C. P. C. *Cuvillier* v. *Aylwin* (1832), 1 C. R. A. C. 22, Stuart 527, 2 Knap. 72, 12 Eng. Reprint, 406, 1 R. J. R. Que. 391.

Security — *Con. Rule 831.*] — Consolidated Rule 831 requires a bond for $2,000 as security for the prosecution of an appeal to his Majesty in his Privy Council: Payment into Court of $1,000 does not satisfy the above Rule, having regard to R. S. O. (1897), c. 48, s. 2. *Florence Mining Co.* v. *Cobalt Lake Mining Co.* (1909), 14 O. W. R. 507, 19 O. L. R. 342.

Security—*Delay—Extension of time — Record returned.*]—Where leave to appeal to the Privy Council has been granted by the Court of King's Bench sitting in appeal, from a judgment rendered by the latter tribunal, and a delay having been fixed for putting in security, the delay has expired without security being furnished, and without any application having been made for an extension of the delay before the expiration thereof, and the record has thereupon been transmitted to the Court below, the Court of King's Bench, or a Judge thereof, has ceased to have jurisdiction over the cause, and cannot grant an application, made subsequently, for the extension of the delay for putting in security. *Asbestos and Asbestic Co.* v. *William Sclater Co.*, 21 Occ. N. 251, 3 Que. P. R. 491, 10 Que. Q. B. 61.

Security for appeal.]—The appellant, in pursuance of the Canada Act, 34 Geo. III., c. 2, s. 35, tendered his bond as security for the due prosecution of the appeal. The bond, though without sureties, and binding only on the appellant, was, upon a rule to shew cause, duly allowed. Pending the appeal the appellant died, and the same was duly revived against the executors. Application that the executors should give proper and sufficient security, or the appeal stand dismissed, refused—the Judicial Committee being of opinion that the allowance of the security in the Court below precluded the respondents from objecting now to the form of the bond, and that their appearance to the order of revivor prevented the Court imposing terms on the appellant. *Semble*, the term "proper security," in the Canada Act, 34 Geo. III., c. 2, s. 35, means security with proper sureties, and not merely personal. The Court of Appeals in Upper Canada having refused to order the Court of King's Bench to send up the original papers and documents on the file of the Court, but not part of the Record, their decision was affirmed, the Judicial Committee holding that the Court of Appeals was a Court of Error, and governed by the same rules as prevails in Courts of Error in England. *Powell* v. *Washburn* (1838), C. R. 1 A. C. 127.

Stay of proceedings—*Motion for.*]—A Judge in Chambers of the Supreme Court of Canada will not entertain an application to stay proceedings pending an application for leave to appeal from the judgment of the Court to the Judicial Committee of the Privy Council. *Adams* v. *Bank of Montreal*, 31 S. C. R. 223.

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19. QUEBEC—APPEAL TO COURT OF KING'S BENCH.

Abandonment—*Fresh appeal—Payment of costs.*]—Where, owing to the neglect of the appellant to furnish security within the time fixed, an appeal has been declared to be abandoned, the appellant cannot launch a fresh appeal from the same judgment before paying the costs of the first appeal. *Cain* v. *Bartels*, 10 Que. K. B. 323.

Abandonment — *Notice—Intervention.*] An abandonment of an appeal is only valid when notice thereof has been served upon all the parties to the cause. Where notice has not been served upon all the parties, the appeal is to be regarded as pending, and there is nothing to hinder a person from intervening to protect his right in appeal. *McNally* v. *Prefontaine*, 3 Que. P. R. 401.

Acquiescence in judgment — *Statement shewing share of expenses ordered to be paid.*]—If an opposant has been declared

proprietor of a lot of cattle under seizure, but condemned to pay one-half the costs of the care and keeping of the animals, and there is an application for the taxation of these costs, he acquiesces in the judgment by producing a statement purporting to shew his share in said costs, without any reservation or declaration of intention to appeal. *Beauchamp* v. *Poitras*, 10 Que. P. R. 229.

Arbitration award under the Railway Act of Canada.]—An appeal to the Superior Court, under s. 209 of the Railway Act of Canada (R. S. C., c. 37), from an arbitration award, may be taken by means of an ordinary petition, and without a direct action. *Lamarre* v. *Grand Trunk Rw. Co.* (1910), 16 R. de J. 53.

Disposition of appeal — *Question of fact — Deference paid to finding of trial Judge—Independent estimate of evidence.*]—The rule that Courts of Appeal, in weighing the motives and conclusions upon questions of facts of judgments which come before them for review, should take into consideration the advantage which the Judge of first instance, at the trial, had in seeing and hearing the witnesses, is not an absolute rule, and they may and should, in the case of conflict of testimony, especially where the witnesses appear disinterested, adjudge according to the independent estimate which they form. *Montreal Harbour Commissioners* v. *Montreal Grain Elevating Co.*, 17 Que. Q. B. 385, 4 E. L. R. 78.

Effect of appeal — *Removal of record from Superior Court—Motion to remove exhibits.*]—The filing of the inscription in appeal and the giving of security remove the record from the jurisdiction of the Superior Court; a motion to dismiss some exhibits from the record, which had been filed after the *enquête* and merits of the case, and which had not been referred to in any of the depositions, cannot be then entertained. *Page* v. *Connolly*, 10 Que. P. R. 101.

From conviction—*Provincial offence—Criminal Code.*]—The offence of forcibly and unlawfully passing a turnpike gate without first having paid the legal toll, being an offence under a Provincial law, and concerning a matter under the exclusive authority of the Provincial Legislature, no appeal lies from a conviction by a magistrate to the Court of Queen's Bench, Crown Side, under Art. 879 of the Criminal Code, this article only applying to offences or matters over which the Parliament of Canada has legislative authority (Art. 840, Criminal Code). *Lecoms* v. *Hurtubise*, 8 Que. Q. B. 439.

From conviction—*Recorder's Court.*]—There is no right of appeal to the Court of Queen's Bench, Crown side, from a conviction by the Recorder's Court, Montreal, on a matter which is under the exclusive legislative authority of the Legislature of the Province of Quebec. Section 503 of the Montreal city charter, 62 V. c. 58, does not confer such right of appeal. *Superior* v. *Montreal*, 9 Que. Q. B. 138, 3 Can. Cr. Cas. 379.

From conviction—*Summary trial.*] — There is no right of appeal to the Court of Queen's Bench, Crown side, on the merits of a case, from the decision of a Judge of the Sessions, or of any other magistrate or functionary mentioned in s. 782 (1) (*a*), Criminal Code, when he has acted under the jurisdiction conferred upon him for the summary trial of certain specified indictable offences; but in the case mentioned in the amendment passed in 1895 (58 & 59 V. c. 40) to s. 782 of the Criminal Code, viz., where the defendant is charged with any of the offences mentioned in s.-ss. (*a*) and (*f*) of s. 783, and where the offender is tried by two justices of the peace sitting together, there is an appeal from their conviction. *R.* v. *Racine*, 9 Que. Q. B. 134.

From decision of Court of Revision.]—There is no appeal to the Court of Queen's Bench from a decision of the Court of Revision for the city of Montreal varying a report of the commissioners for the city in an expropriation matter. *Re Montreal & Grand Trunk Rw. Co.*, 3 Que. P. R. 208.

From interlocutory order in municipal election case—*Constitutional law — Provincial statute.*]—There is no appeal to the Court of Queen's Bench from an interlocutory judgment rendered in a contested municipal election case, under the charter of the city of Montreal, 62 V. c. 58 (Q.).—2.—The legislative provision which prohibits such appeal is *intra vires* of a Provincial Legislature. *Clarke* v. *Jacques*, 9 Que. Q. B. 238.

From judgment of Court of Review —*Amount in controversy.*]—There is no appeal to the Court of Queen's Bench from a judgment of the Court of Review reversing that of the Court of first instance, in an action to obtain a release of a judgment for $45.20 with interest and costs, pronounced against the plaintiff in another case, and also to obtain a discharge of the lien resulting from the registration of such judgment. *Fortier* v. *Noel*, 3 Que. P. R. 294.

From Recorder's Court—*9 Edw. VII. c. 72.*]—There is no right of appeal to the King's Bench from a decision of the Recorder's Court of the City of Montreal in the matters enumerated in section 1 of 9 Edw. VII. c. 72. *Montreal Street Rw. Co. and Montreal* (1910), 16 R. de J. 431.

From order in Chambers — *Taxation of costs.*]—No appeal lies from the decision of a Judge in Chambers upon a petition to review the taxation of a bill of costs. *La Valée & Richelieu Rw. Co.* v. *Menard*, 3 Que. P. R. 133.

Inscription—*Incomplete record — Power of Superior Court to set aside.*] — The Superior Court has no jurisdiction to grant a motion to set aside an inscription in appeal, upon the ground that the appellant since the inscription has not taken the necessary proceedings to complete the record and bring it before the Court of Appeal. *Bayard* v. *Royal Electric Co.*, 6 Que. P. R. 348.

Inscription—*Time—Service of notice—Omission of date.*]—The delivery of the inscription of an appeal to the registrar and

the serving of notice thereof on the opposite party on the last day allowed by law, is a valid inscription of an appeal.—The inscription of an appeal may be notified by a bailiff of the Superior Court. The omission of the date of the judgment appealed against in the inscription is not a fatal irregularity, provided that the judgment has been otherwise designated. *McAvoy* v. *Willig*, 14 Que. K. B. 59.

Inscription in appeal—*Motion to dismiss—Service of the inscription before it is filed in the office of the Court—C. C. P. 1213.*]—A copy of the inscription in appeal cannot be served upon the opposite party until the inscription itself has been filed in the office of the Superior Court.—A motion based upon this irregularity will be granted for costs, the appellant having since filed the inscription; all proceedings had before the filing of such inscription are null and of no effect. *Gross* v. *Racicot* (1909), 11 Que. P. R. 124.

Judgment on a writ of prohibition to forbid the Magistrate's Court determining a motion to set aside a resolution of a municipal council touching a license certificate. There is an appeal to the Court of King's Bench from the judgment of the Superior Court acting as a Court of Appeal, on the question of a writ of prohibition, to remove from the Magistrate's Court the cognizance of a motion to set aside a resolution of a municipal council regarding licenses. This judgment is not rendered in a matter concerning municipal corporations and municipal officers, but in a matter where the License Act is to be considered. *Desormeaux* v. *Bainville*, 18 Que. K. B. 407, 10 Que. P. R. 231.

Jurisdiction—*Personal condemnation in an action for damages—Damages suffered in the past and probable in the immediate future.*]—The defendant condemned in a personal action in the Circuit Court to pay a sum of $99 for damages resulting from the damming of a river, has no right of appeal to the Court of King's Bench to have such judgment modified in such a way as to make it applicable to future as well as to present damages. *Lake Megantic Pulp Co.* v. *Beauregard* (1910), 19 Que. K. B. 281.

Leave to appeal—Criminal cause where magistrate refused to state a case. *R.* v. *Hamelin*, 3 E. L. R. 279.

Leave to appeal—*Custody of children.*]—A judgment refusing to the wife the custody of her children pending an action for separation from bed and board, is one from which leave to appeal will be granted, although such an appeal would appear to be unwise. *Lachapelle* v. *Lacroix*, 7 Que. P. R. 307.

Leave to appeal—*Demurrer—Interlocutory judgment—Evidence—Pleading.*]—When an interlocutory judgment, maintaining an inscription in law, has not the effect of excluding evidence upon any matter pertinently pleaded, leave to appeal will not be granted, as this judgment can, in any event, be reviewed by the Superior Court, even before the final judgment in the cause. *Girouard* v. *Girouard*, 8 Que. P. R. 419.

Leave to appeal—*Interlocutory judgment—Husband and wife—Separation—Reconciliation.*]—In an action for separation from bed and board, a judgment declaring that the allegations of reconciliation have been proved, reserving to the parties the right to discuss the consequences of the reconciliation upon the proceeding pending between them, is not an interlocutory judgment from which an appeal can be permitted under art. 46, C. P. *Christin* v. *Lafontaine*, 6 Que. P. R. 297.

Leave to appeal—*Interlocutory judgment — Waiver of appeal — Compliance with order.*]—Even if a judgment granting to a foreign plaintiff an additional delay to file a proper power of attorney comes under any of the conditions stipulated in Art. 46, C. P., leave to appeal shall not be granted when it appears that the plaintiff has complied with part of the order of the Court below, by furnishing security for costs, and has also, one day only after the expiry of the delay, filed a power of attorney, which, however, is insufficient. *Can. Asbestos Co.* v. *Glasgow & Montreal Asbestos Co.*, 5 Que. P. R. 65.

Leave to appeal—*Interlocutory order—Exception to form.*]—When a pleading has been disallowed upon demurrer or exception to the form and there appears to be a reasonable doubt as to the correctness of the judgment, leave to appeal will generally be accorded, almost as a matter of course; but the contrary rule prevails when it is the demurrer or the exception itself which has been disallowed. *Ogilvie* v. *Fraser*, 3 Que. P. R. 546.

Leave to appeal—*Interlocutory order—Security — Time for appealing.*] — Where leave to appeal from an interlocutory order has been once allowed, without specification of the delay within which the security in appeal shall be given, there is no specified delay fixed for the bringing of the appeal other than the delay of 6 months. *Ferrel* v. *Saultry*, 8 Que. P. R. 268.

Leave to appeal—*Interlocutory order—Time—Prosecution of appeal.*] — Obtaining leave to appeal from an interlocutory judgment of the Superior Court does not, by the inception of such appeal, entitle the party obtaining such leave to the 6 months provided by article 1209, 6 P. C., for an appeal to the Court of King's Bench, and if he does not prosecute such appeal within a reasonable time after obtaining such leave, he will lose the right to make it. *Hoffnung* v. *Porter*, 7 L. C. J. 301, followed. *Hasburger* v. *Gutman*, 13 Que. K. B. 360.

Leave to appeal — *Judgment allowing demurrer in part—Leave to both parties to appeal.*]—Where a judgment has sustained in part and dismissed in part a defence in law, and leave to appeal has been granted upon demand of party against whom the defence in law has been partly sustained, leave to appeal will also be granted the party whose defence in law has been partly dismissed. *Cantlie* v. *Cantlie* (1906), 8 Que. P. R. 39.

Leave to appeal—*Judgment of Superior Court dismissing declinatory exception — Jurisdiction.*]—Where in an action to declare

a marriage void, the defendant pleads want of jurisdiction of the Court before which he has been brought, the Court of King's Bench will grant leave to appeal from a judgment dismissing the declinatory exception. *Gober* v. *Agnew*, 8 Que. P. R. 198.

Leave to appeal—*Time — Vacation.*]—The 30 days allowed by article 1211, C. P. C., for moving for leave to appeal from an interlocutory judgment run during the long vacation, and fall under exception 11 of art. 15, C. P. C. *Poirier* v. *Montreal* (1906), 14 Que. K. B. 481.

Motion to dismiss—*Service of the inscription before it is filed in the office of the Court—C. C. P. 1213.*]—An inscription in appeal cannot be served upon the opposite party until it has been filed in the office of the Superior Court; otherwise, the inscription may be rejected upon motion. *Gagnon* v. *Bourgoin* (1909), 11 Que. P. R. 123.

Motion to dismiss appeal—*Forum.*]—A motion to dismiss an appeal on the ground of non-transmission of the record within the time allowed therefor should be made before the Court of King's Bench, the appellate Court, and not before the Superior Court, which is disseised of the cause by the inscription in appeal and the security. *Wright* v. *Phillips*, 4 Que. P. R. 37.

Motion to dismiss appeal — *Jurisdiction—Taxes—Amount—C. P. 43, 44.*]—The Court of Appeal has no jurisdiction to hear a case in which a municipal corporation claims a privilege for taxes due when the amount of such claim is only $80. *Montreal* v. *Mitchell* (1910), 11 Que. P. R. 252.

Municipal matters — *Mandamus—Cancellation of a gift made to a municipality—C. P. 43, 992, 1006.*]—The Court of King's Bench has jurisdiction to hear a case involving an appeal from a judgment which dismissed a writ of mandamus whereby the plaintiff sought to oblige the mayor of a municipality to sign a resolution adopted by the municipal council authorizing the cancellation of a deed of gift in favour of the municipality and the drawing of a deed ceding back the lands given to the plaintiff; the question at issue in the case is not one respecting municipal matters. *The Mun. Homes & Invest. Co.* v. *Legare*, 11 Q. P. R. 226, 16 R. de J. 42.

Power of Court to vary judgment appealed from when affirming it — *Divorce—Custody of children.*]—The Court of King's Bench, sitting in appeal, has the right to and should add to the provisions of a judgment which comes before it in appeal, even when affirming it, whatever terms the circumstances may require. Therefore, where a decree for separation of husband and wife comes before the Court which provides for the custody of one only of several children, the Court may, in an affirming judgment, order what it deems necessary in this respect as to the other children. *Edward* v. *Belleau*, 16 Que. K. B. 341.

Quaere, does an appeal lie to Court of King's Bench from judgment of Superior Court sitting in appeal from an award of arbitration under s. 200 of Dom. Rw. Act? *Que., Montreal & Southern Rw. Co.* v. *Landry*, 19 Que. K. B. 82.

Railway Act — *Arbitrators' award — Second appeal to the Court of King's Bench —Motion to dismiss—C. P. 42; R. S. C. c. 37, s. 209.*]—By virtue of Art. 209 of the Railway Act, one appeal only to the Superior Court is permitted from the arbitrators' award. If an appeal has already been heard by the Superior Court, there can be no appeal from that Court to the Court of King's Bench. *Vallieres* v. *Ont. & Que. Rw. Co.* (1909), 11 Que. P. R. 245; 19 Que. K. B. 521.

Record — *Depositions and documents omitted — Two actions tried together.*] — Where two causes have been joined together for purpose of trial, according to terms of Art. 292, C. P. C., and appeal has been launched from judgment rendered in one of them, and record sent up to appellate Court does not contain all depositions and documents produced in accordance with order for trial of the two actions together, the appeal should not on that account be declared defective, and motion to so decide will be refused, if depositions and documents omitted do not refer to appeal and are without importance in regard to the decision of it. *Bernard* v. *Carbonneau* (1906), Q. R. 15 K. B. 287.

Removal of stay of execution pending appeal—*Grounds for—Security.*]—The provisional execution of a judgment will only be granted when without it there would be irremediable loss, or when an appeal therefrom is launched without probable cause; especially will it be refused when the security in appeal covers all ordinary and future damages. *Carter* v. *Urquhart*, 8 Que. P. R. 210.

Right of appeal—*Bankruptcy and insolvency—Distribution of proceeds of real estate — Appeal by hypothecary creditor — Status — Acquiescence — Security — Insufficiency — Supplementing—Notice of appeal —Parties—Time.*]—A judgment of distribution of the proceeds of the real estate of an insolvent, prepared by the prothonotary in conformity with Art. 879, C. P., as amended by 61 V. c. 47, is, notwithstanding Art. 890, C. P., appealable to the Court of King's Bench.—2. The transferee of an hypothecary creditor whose claim is mentioned in the certificate of hypothecs, has, although such transfer was secured after the sale of the property by the sheriff, a *prima facie* right of appeal from the judgment of distribution. —3. The fact of the appellant having allowed the sheriff to distribute the moneys in his hands does not constitute an acquiescence in the judgment of distribution.—4. If security is given within 5 days from the filing of the inscription in appeal, the appellant may, such security being contested, give additional security to the respondent, and the appeal will not be quashed by reason of the insufficiency of the first security or of the lateness of the second, no objection being made to the sufficiency of the latter.—5. The party who appeals from the judgment of distribution of the proceeds of the real estate of an insolvent must give notice of appeal to all parties collocated, and not only to

the curator, and the Court will, on motion of the latter to quash the appeal, give the appellant delay in which to serve the inscription in appeal upon the other parties to the judgment of distribution, or desist from his appeal as regards the collocations in favour of one or more parties. *Bousquet* v. *Henderson*, 9 Que P. R. 321.

Right of appeal—Conviction for breach of Provincial Sunday Observance Act.]—See *R.* v. *Ouimet*, 14 Can. Crim. Cas. 136.

Right of appeal — *Conviction on summary trial—Recorder's Court.*]—No appeal lies to the Court of King's Bench, Crown side, from a conviction by a Recorder's Court upon a summary trial under s. 783 of the Criminal Code. *R.* v. *Portugais*, 10 Que. K. B. 567.

Right of appeal—*Final or interlocutory judgment—Husband and wife—Separation—Construction of will—Reference.*] — In an action for separation from bed and board, a judgment holding that a provision in the will of the defendant's father, that the movable and immovable properties bequeathed may not in any manner be liable for the support and maintenance of his wife, does not provide for the exclusion of said properties from the community then on the death of the testator existing between the parties, and ordering the report to be referred back to the practitioner appointed by the Court to take an inventory of the property and assets of the community of property existing between the plaintiff and defendant, and ordering the said practitioner to include therein the properties and immovable effects belonging to the said estate, and revenues thereof derived from the movable property from the time of the testator's death to the time of the dissolution of the community of property, is an interlocutory judgment not falling under the condition imposed by par. 2 of Art. 46 C. P., and may be remedied by a final judgment. *Stewart* v. *Cairns*, 5 Que. P. R. 235.

Right of appeal—*Final or interlocutory judgment—Jurisdiction of Circuit Court.*]—Action brought in Circuit Court was removed upon declinatory exception into the Superior Court and dismissed upon merits by latter Court. Upon appeal to Court of Review, that Court declared the action was within the competence of the Circuit Court. In an appeal *de plano* to Court of King's Bench: — *Held*, that the judgment of Court of Review sending record back to Circuit Court was a final judgment, from which an appeal *de plano* would lie. *St. Denis* v. *Benoit* (1906), 7 Que. P. R. 318.

Right of appeal—*From Circuit Court.*]—There is no appeal to the Court of King's Bench from the judgment of the Circuit Court of the *chef-lieu* of a district. *Senécal* v. *Corporation of de-L'Ile Bizard*, 3 Que. P. R. 388.

Right of appeal — *Interlocutory judgment.*]—In matters in which no appeal lies, such as those mentioned in Arts 43 and 1006, C. P., there is no appeal from an interlocutory judgment any more than from a final judgment. *Grier* v. *David*, 4 Que. P. R. 417.

Right of appeal — *Interlocutory judgment—Leave to prove new facts — Discretion.*]—No appeal lies from an interlocutory judgment by which a Judge, in his discretion, permits or refuses to permit a party to prove by way of supplementary defence or reply material facts arising after the contestation. *Dupuis* v. *Dupuis*, 5 Que. P. R. 59.

Right of appeal — *Interlocutory judgment — Refusal of interim injunction — Leave.*]—Judgment which rejects a petition for an interlocutory injunction, demanded before issue of writ of summons, is an interlocutory judgment from which there may be an appeal *de plano* without leave of Judge of Court of King's Bench. *Wampole* v. *Lyons* (1906), 7 Que. P. R. 339.

Right of appeal — *Interlocutory judgment—Removal of cause to another district.*]—An appeal lies from an interlocutory judgment maintaining a declaratory exception and remitting the record to the Court of another district. *Gosselin* v. *Belley*, 4 Que. P. R. 233.

Right of appeal—*Judgment dismissing declinatory exception — Leave to appeal — Time for moving—Computation.*]—A motion for leave to appeal will be granted if it is made on the 31st day after the judgment appealed against, if the 30th day was a Sunday or holiday.—Leave will be given to appeal from a judgment dismissing a declinatory exception, such judgment in part ending the cause and determining a matter which cannot be remedied by the final judgment, viz., the issue and method of trial. *Porter* v. *Can. Rubber Co. of Montreal*, 10 Que. P. R. 197.

Right of appeal—*Judgment in distribution of proceeds of sale by sheriff under warrant of curator—Status of appellant—Assignee of hypothecary creditor—Security in appeal — Supplementary security after expiration of delay—Parties entitled to notice of inscription—Right of curator to move for rejection of appeal for irregularity—Powers of Court.*]—A judgment directing distribution by the prothonotary of the proceeds of a sale of immovable property abandoned for the benefit of creditors, made by the sheriff under a warrant of the curator, is subject to appeal under Art. 830, C. P., and is not a judgment in virtue of Art. 879, nor of any of the articles referred to in Art. 890 of the same Code.—2. A party who appears, by a notarial deed of assignment, to have acquired the rights of a creditor named in the registrar's certificate of hypothecs in the case, may institute such an appeal.—3 An appellant who has given security within five days after filing the inscription to appeal, may supplement it by further security, given after the delay, and both the bonds together, if sufficient, will avail as the security required under Art. 1213, C. P.—4. Notice of an inscription to appeal from a judgment of distribution under Art. 830, C. P., should be served upon all the parties interested in the distribution. When the sum distributed is the proceeds of the sale of abandoned property, the curator of the insolvent debtor has a sufficient interest to move for the rejection of the appeal, on the ground that notice thereof has not been served on all parties entitled to it, and the Court may, in such a case, order the appellant to serve the notice accordingly within a prescribed delay. *Bousquet* v. *Henderson*, 17 Que. K. B. 550.

Right of appeal—*Judgment in review confirming judgment of Superior Court, but reducing amount.*]—If a judgment of the Court of Review merely reduces the amount which a defendant has been condemned to pay by the lower Court, the defendant cannot appeal therefrom to the Court of King's Bench. *Hull Electric Co.* v. *Clément*, 10 Que. P. R. 172.

Right of appeal—*Judgment of Court of Review on concurrent appeal within time limited for appealing—Arts. 1203, 1209, C. P. Q.*]—An appeal from a judgment of the Superior Court, rendered on the trial of a cause, will lie to the Court of King's Bench, appeal side, if taken within the time limited by Art. 1209 of the Code of Civil Procedure of Quebec, notwithstanding that in the meantime, on an appeal by the opposite party, the Court of Review may have rendered a judgment affirming a judgment appealed from. *Chicoutimi Pulp Co.* v *Price*, 27 C. L. T. 656, 39 S. C. R. 81.

Right of appeal—*Judgment of Court of Review sending action back to add parties—Final judgment.*]—A judgment of the Court of Review referring back the record to a Superior Court to allow the plaintiff to bring certain parties before the Court (in this case the heirs in an action for the division of the inheritance) is a final judgment upon which there is an appeal *de plano* to the Court of King's Bench. *Stevens* v. *Coleman*, 8 Que. P. R. 414.

Right of appeal—*Judgment of Superior Court — Municipal matter — Petition — Action—Motion to quash appeal—Costs.*]—No appeal lies to the Court of King's Bench by virtue of the provisions of c. 1 of Title XI., R. S. Q., against a judgment rendered by the Superior Court concerning a municipal matter, although the plaintiff has joined to his petition a writ of summons.—The respondent, not having made his motion to quash the appeal until the hearing on the merits, had no right to his costs of the motion to any greater extent than the costs incurred for printing and filing the additional factums filed at the request of the Court upon such preliminary question. *Mignéron* v. *St. Laurent*, 9 Que. P. R. 43.

Right of appeal—*Judgment on contestation of claim for privilege for municipal tax under $100 on proceeds of inn-keeper's license—C. P. 44, 830, 881 and 890; 8 Edw. VII. c. 74, s. 2.*] — A judgment rendered by the Court of Review, reversing a judgment of the Superior Court, and dismissing a claim of the City of Montreal to be paid by privilege out of the proceeds of sale of an inn-keeper's license, sold by a curator to an estate abandoned in insolvency, a business tax amounting to less than $100, is not susceptible of appeal to the King's Bench, the demand in question not relating to duties or rents or other matters in which the rights in future of the parties may be appealed. *Montreal & Chartrand* (1910), 16 R. de J. 430.

Right of appeal—*Leave — Winding-up Act—Superior Court.*]—An appeal from a decision or order of the Superior Court or of a Judge thereof, in any proceedings under the Winding-up Act of Canada, may only be taken to the Court of King's Bench by leave of a Judge of the Superior Court. *Brayley* v. *Ross*, 9 Que. P. R. 103, 4 E. L. R. 121.

Right of appeal—*Lapse of time—Petition of right—Power of Crown to waive delay.*]—A petition of right was dismissed by the Superior Court, Quebec, on the 3rd June, 1890. The petitioner some time afterwards applied to the Lieutenant-Governor in council for redress for the grievance complained of in the petition of right, whereupon an order in council was passed on the 8th June, 1899, whereby the Crown purported to waive the petitioner's delay in instituting an appeal from the judgment of the Superior Court and to consent to the petitioner's appealing *nunc pro tunc*. On such appeal coming before the Queen's Bench the Crown took no objection to the jurisdiction, but the Court *ex proprio motu*, raised the point that it was not competent to entertain the appeal after the expiration of the delays prescribed by law, and dismissed it for want of jurisdiction.—*Held*, by the Supreme Court of Canada, following *Cimon* v. *The Queen*, 23 S. C. R. 64, that it was competent to the Crown to waive the delay, and the Court of Queen's Bench had jurisdiction. *Lord* v. *R.*, 10 Que. K. B. 97.

Right of appeal — *Mandamus—Municipal councillor — Declarations — Right to seat.*]—No appeal lies to the Court of Queen's Bench from a judgment of the Superior Court in an action of mandamus, under the provisions of c. 40, s. 3, C. C. P., to compel a municipal corporation to recognise the plaintiff as a duly elected and qualified member of their municipal council and to reinstate him in that position, from which they had removed him without lawful cause; and additional conclusions asking for a declaration by the Court of the illegality of the resolution of the council professing to effect the removal, and that the defendant abstain pending the suit from acting under the alleged illegal resolution, do not change the nature of the action or remove it from the conditions and restrictions of c. 40, C. C. P. *Lorimier* v. *Bédard*, 10 K. B. 95.

Right of appeal — *Mandamus — Secretary-treasurer of municipality — Taxes.*]—No appeal lies to the Court of Queen's Bench from the judgment of a Superior Court granting a mandamus to the secretary-treasurer of a municipal corporation commanding him to receive municipal and school taxes at the time of a municipal election over which he is presiding. *In re Mosan & Petitclerc*, 3 Que. P. R. 345.

Right of appeal—*Municipal matters—Interlocutory judgment.*]—Article 1006, C. C. P., which states that no appeal lies to the Court of King's Bench from any final judgment rendered under the provisions of c. 40 in matters relating to municipal corporations and officers, also excludes an appeal from an interlocutory judgment in such matters. *Wright* v. *Tremblay*, 12 K. B. 368.

Right of appeal—*Municipal matters—Superior Court—Final judgment — Exceptions—Circuit Court.*]—There is an appeal from every final judgment of the Superior

Court, even in an action to quash a resolution of a municipal council. The only exceptions are those indicated in art. 1006, C. P. C.; in cases of *certiorari* under art. 1306, C. P. C.; and in cases mentioned in arts. 4178 and 4616, R. S. Q., concerning town corporations. There is no longer an appeal from the Circuit Court of a county town either in municipal matters or others, since the passing of 49 & 50 V. c. 18. *Lachance* v. *Ste Anne de Beaupré*, 10 Que. K. B. 223.

Right of appeal—*Order of Judge—Revision of taxation.*]—No appeal lies to the Court of King's Bench against a decision of a Judge of the Superior Court, in Chambers, reviewing and confirming the taxation by the prothonotary of the costs adjudged in favour of one of the parties. *La Valle and Richelieu Ric. Co.* v. *Menard*, 11 Que. K. B. 1, 3 Que. P. R. 133.

Right of appeal—*Order under Winding-up Act—Appeal without leave of Judge of Court below.*]—The right of appeal from a judgment can be exercised only under the conditions and in the manner provided in the statute which grants the right. Consequently, as the Winding-up Act, R. S. C. 1906, c. 144, s. 101, declares that there shall be an appeal from orders or decisions made under it, with the leave of a Judge of the Court of first instance, an appeal taken without such leave, or even with that of a Judge of the Court of Appeal, is not competent, and will be quashed or dismissed. *Brayley* v. *Ross*, 17 Que. K. B. 152.

Right of appeal — *Prohibition — Refusal.*]—An appeal lies to the Court of King's Bench from a decision refusing to grant a writ of prohibition. *Gaynor & Green* v. *Lafontaine*, 7 Que. P. R. 240.

Right of appeal—*R. S. Q., ss. 4178-4615 — Judgment of Superior or Circuit Court — Costs where appeal dismissed for want of jurisdiction.*]—No appeal lies to the Court of King's Bench from a judgment of the Superior Court rendered under the provisions of c. 1 of Tit. XI., R. S. Q. (ss. 4178 to 4615), "Of Town Corporations." The same rule applies to judgments *in part materia* of the Circuit Court, when that tribunal is substituted for the Superior Court by the special charter of a town, which makes the statutory provisions mentioned applicable to the town.—When an appeal is dismissed for want of jurisdiction, the only costs awarded are those of a motion. *Nichol* v. *Waterloo*, 16 Que. K. B. 509, 8 Que. P. R. 361.

Security—*Time—Extension.*]—After the expiration of the time fixed by law and the order of a Judge for furnishing security on appeal, a motion to extend the time will not be granted. *Larocque* v. *Rosenthal*, 5 Que. P. R. 386.

Status of appellant—*Member of extinct corporation — Curator — Creditors—Divers judgments—Single appeal.*]—The appellant, in his capacity of member of an extinct corporation, duly called on to give his advice, and also as contesting the petition of the respondent, ought to be regarded as a party to the judgments appealed against, and as having an interest in causing them to be reversed.—2. The Judge who has been asked to name a curator to the effects of an extinct corporation can call together the creditors and persons interested without a special prayer to that effect in the petition, seeing that such calling together is a preliminary measure necessary to the nomination of the curator; but proof of the allegations of the petition will be ordered *avant de faire droit* and before naming the curator.—3. Different judgment rendered in a cause, namely, the judgment naming the curator and interlocutory judgments, may be the subject of a single appeal. *Joynt* v. *Mulcair*, 9 Que. Q. B. 23.

See *Macdonald* v. *Thibaudeau*, 8 Que. Q. B. 449.

Stay of proceedings.]—Seeing the production of the draft letters and affidavit in support of petition—not contradicted by affidavit of adverse party—that proceedings in appeal would be suspended and the record ordered to be re-transmitted to Superior Court, to the end that proof could be there made upon the matters alleged in the petition. *B.——ex-qual* v. *R.——*, 16 R. de J. 42.

Time for appealing — *Expiration of—Waiver—Petition of right.*]—The provisions of arts. 1020 and 1209, C.C., limiting the time for inscription and prosecuting of appeals to the Court of Queen's Bench, are not conditions precedent to the jurisdiction of the Court to hear the appeal, and they may therefore be waived by the respondent. *Cimon* v. *The Queen*, 23 S. C. R. 62 referred to. Art. 1220, C. C., applies in proceedings by petition of right. *Lord* v. *R.* (1901), 21 C. L. T. 253, 31 S. C. R. 165.

Time for appealing — *Interlocutory judgment—Sale of immovables by sheriff.*]—The time for appealing from an interlocutory judgment begins to run from the day of the pronouncing of the judgment, and not from its transmission to the prothonotary. 2. A judgment ordering a sheriff to sell en bloc immovables seized in a final judgment, from which an appeal lies *de plano*. *Connolly* v. *Stanbridge*, 4 Que. P. R. 186.

Transmission of record — *Motion — Forum.*]—A motion to have a record transmitted to the Court of Appeal must be made to the Superior Court, not to the Court of Appeal. *Wilson* v. *Carpentier*, 8 Que. P. R. 157.

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20. QUEBEC—APPEAL TO SUPERIOR COURT IN REVIEW.

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

rent between them, is a sufficient compliance with the law. *Michaud* v. *Michaud*, 34 Que. S. C. 88.

Certificate of filing petition for review—*Leave to serve—Faulty certificate — Powers of amendment.*] — A party who omits to serve, with his petition for review of a judgment, the certificate of filing by the prothonotary, may obtain leave to serve and file such certificate. 2. If the certificate of filing by the prothonotary does not indicate the date on which the petition has been deposited, such certificate will be sufficient if the record shews the date and if no prejudice results to the opposite party, the Judge having, by virtue of the provisions of the new Code of Procedure, very large powers of allowing amendments in matters of procedure. *Breton* v. *Chabot*, 18 Que. S. C. 154.

Declaring rule nisi absolute — *Its nature—Right of appeal therefrom—C. C. P. 52, 83, 503.*]—A judgment which declares a rule *nisi* to be absolute is a final judgment. Such judgment can be taken to the Court of Review or to the Court of Appeal. A witness threatened with a *rule nisi* may contest it through counsel, without being obliged to first appear in person. *Semble*, a witness may simply appeal from a judgment which has declared a *rule nisi* to be absolute, without also being obliged to appeal from the judgment which ordered the rule to issue and the delay to go to appeal only commences from the date of the last judgment. *Collins* v *Can. North. Que. Rw. Co. & Richardson*, 11 Que. P. R. 133.

Deposit—*Amount—Opposition to seizure —Amount involved in action.*]—The amount of the deposit necessary upon an appeal to the Superior Court in Review taken by an opposant who claims certain chattels seized under execution, and whose opposition has been dismissed, is fixed by the amount claimed in the action. *Cf. Boulet* v. *St. John*, 8 Que. P. R. 139. *Gibson* v. *Wright*, 8 Que. P. R. 311.

Deposit—*Defendant sued in double capacity — Inscription in review by plaintiff — Single deposit.*]—Although a defendant has been sued by the same action in his quality of testamentary executor of the estates of two consorts, common as to property, which community is still in an undivided state, and has filed separate pleas, a single deposit in review by the plaintiff is sufficient, even if the defendant has filed two separate appearances in review. *McJarvey* v. *McNally*, 9 Que. P. R. 156.

Deposit — *Time — Non-juridical day — —Right of appeal—Third party brought in en garantie — Tutor — Family council — Authorization.*] — When the last of the 8 days within which the deposit for the purpose of review of a judgment must be made, is a non-juridical day, and the next day is a Saturday, the deposit must be made on the first juridical day following.—In a real action in which the defendant has brought in his grantor *en garantie*, and the latter has taken *fait et cause* and contested the demand, but the principal defendant has not been dismissed from the action, a judgment which maintains the action may be inscribed in review by the third party alone.—An inscription in review by a party acting in the capacity of tutor, which is ratified by the order of the Court upon the advice of a family council, is valid, just as if it had been made with preliminary authorization. *Brown* v. *McIntosh*, 31 Que. S. C. 465.

Discontinuance of appeal—*Demand of certificate — Appearance — Waiver.*] — A motion on behalf of the respondent demanding a certificate of a discontinuance filed by the appellant of his inscription for review, where the appearance of the respondent is filed after such discontinuance, will be dismissed with costs. *Latouche* v. *Philips Manufacturing Co.*, 9 Que. P. R. 21.

Entry—*Notice—Time.*]—It is not necessary to serve the notice of entering a case for review within the time allowed for the entry; it is sufficient to serve it within a reasonable time after the entry. *Carter* v. *Reilly*, 17 Que. S. C. 129.

Entry—*Time—Certificate of prothonotary —Final judgment.*]—The entry of an appeal from the certificate of the prothonotary, under Art. 223, C. P., stating that an intervening party has not filed his intervention, with a certificate shewing its service, within three days from its reception, ought to be made, notified and filed within eight days from the date of the certificate, which is equivalent to a final judgment upon the intervention. *Hillock* v. *Croizard*, 3 Que. P. R. 261.

From Circuit Court—*Future rights— Municipal corporations.*]—There is no appeal from the decision of the Circuit Court upon a petition, under Art. 100 of the Municipal Code, to quash a simple resolution which declares a road and bridge formerly local to be a county road and bridge, when it does not appear that the future rights of the petitioner are affected by it. *Guertin* v. *County of Laprairie*, 16 Que. S. C. 531.

From Circuit Court — *Mortgage — Builder's privilege—Vendor and purchaser.*] —A judgment of the Circuit Court in an action in recognition of a hypothec is appealable to the Court of Review.—2 The registration of a builder's privilege, for work done at the request of a person owning an immovable subject to a resolutory condition entailing the vendor to demand the dissolution of the sale by reason of failure to pay the price, ceases to have any effect after the vendor has taken back the property under the condition. *Latour* v. *L'Heureux*, 16 Que. S. C. 485.

From interlocutory judgment—*Dilatory exception — Municipal corporations.*]— A judgment dismissing an exception to the jurisdiction is interlocutory.—There is no appeal to the Court of Review from an interlocutory judgment, even in matters concerning municipal corporations and municipal offices. *Bédard* v. *Village of Delorimier*, 17 Que. S. C. 141.

From order of Judge — *Taxation of costs.*]—There is no appeal from the order of a Judge of the Superior Court taxing and ascertaining the costs of an arbitration

by virtue of par. 20 of Art. 5164, R. S. Q. *Richelieu East Valley Rw. Co.* v. *Jetté*, 17 Que. S. C. 493; 3 Que. P. R. 133.

Incomplete record.]—When a case is inscribed in review, and the record from the Court below is found to be incomplete, the Court of Review, on motion, will order the same to be sent back and completed before hearing argument. *Whiting* v. *Menier*, 16 Que. S. C. 448.

Inscription — *Deposit — Consolidated contestations — One judgment.*]—When the parties have agreed to the joining and consolidation of two contestations of declarations of garnishees for the purpose of trial, that is to say, the final examination and hearing upon the merits, and only a single judgment is pronounced upon such contestations, an appeal from such judgment to the Superior Court in review may be made upon a single inscription, accompanied by a single deposit. *Bastein* v. *Richardson*, 9 Que. P. R. 19.

Inscription—*Deposit—Two actions tried together.*]—Where two actions between the same parties have been tried together and disposed of by a single judgment, a single inscription in review and a single deposit are sufficient. *Levinson* v. *Axelrad*, 8 Que. P. R. 242.

Inscription — *Time — Saturday.*] — When the time for the filing of an inscription in review expires on a Saturday, such inscription may be validly filed and notice thereof served on the Monday following. *Asselin* v. *Frechette*, 8 Que. P. R. 134.

Inscription by one party—*Increasing amount recovered against party inscribing—No cross-appeal.*]—Upon an inscription for review by one of the parties, the Court sitting in review cannot increase the amount recovered against that party, unless the other party has also inscribed for review. *Curé et Marguilliers de St. Charles de Lachenaie* v. *Archambault*, 9 Que. P. R. 369.

Inscription by plaintiff in review—*Several defendants—Single deposit—Identity of defences—Single hearing—Consolidation of appeals.*]—An inscription in review accompanied by a single deposit, made by the plaintiff in an action brought against several defendants in respect of a judgment recovered against only one of them, and dismissing the action as to the others, is valid and regular when these defendants have appeared separately by the same attorney, and have filed separate but identical pleas, when there has been by their consent only one trial and hearing on the merits.—2. When there are several inscriptions for review of the same judgment, one by the plaintiff and the others by different defendants, the Court may order that they shall be joined in order that there may be a single hearing and a disposition by a single judgment. *Hétu* v. *Humphrey*, 32 Que. S. C. 169.

Inscription for review—*Notice — Service—Filing—Time.*]—The fact that notice of inscription in review was served on the opposite party within the eight days allowed for making the deposit, but not returned into Court within such delay, is not a ground for rejecting the inscription, and a motion to reject such inscription will be dismissed, where it is shewn that the notice, after service has been filed on the nearest following juridical day after the expiration of the eight days. *McDonald* v. *Vineberg*, 3 Que. P. R. 548.

Inscription for review — *Signature—Solicitor.*]—An inscription of a case for review, in order to be valid, must be signed by the solicitor for the appellant, and not in his name by another whom he has authorized. *Drouin* v. *Rosenstein*, 3 Que. P. R. 563.

Inscription in review.]—According to the provisions of 8 Edw. VII. (Que.), c. 74, ss. 1, 2, 3, an appeal lies to the Court of Review from a final judgment of the Superior Court and of the Circuit Court which is susceptible of appeal to the Court of King's Bench, and an appeal lies to the Court of King's Bench from a final judgment of the Superior Court in all cases in which the sum demanded or the value of the object claimed is $500 or more. Consequently, in the present case, an appeal lies to the Court of Review since the sum demanded is more than $500, and this although the defendants, appellants, were only condemned to pay $294.98. *Marazza* v. *O'Brien*, 16 R. de J. 1.

Inscription in review—*Motion to dismiss—Action for rent under $100—Intervention—C. P. 52.*]—No appeal lies to the Court of Review from a judgment of the Circuit Court which has dismissed an intervention which prayed that certain effects be released from seizure, when the rent claimed, for the present and for the future, does not amount to the sum of $100. *Sabbah* v. *Kimel & Singer Sewing Machine Co.* 11 Que. P. R. 153.

Inscription in review—*Time—Delay in post office—Practice.*]—An inscription (accompanied by a cheque for the deposit) in revision of a judgment given in the district of Ottawa, filed three days after the expiration of the delay prescribed by Art. 1196, C. P., is valid, if it appears that it was deposited in the post office at Montreal, within five days from the pronouncing of the judgment, that is to say, in such time that, in the ordinary course, it should have reached the office of the Court in due time, and that the delay is owing to the postal service. *Fournier* v. *Providence Fire Assce. Co.*, 35 Que. S. C. 310.

Inscription in review—*Winding-up Act —Authorization by the Court to appeal — C. P. 52; R. S. C. c. 144, ss. 101, 102.*]—An appeal lies to the Court of Review from a judgment of the Superior Court in a case to which an insurance company which is being wound up, is a party. (Cf. *Montreal Coal & Towing Co.* v. *Standard Life Ins. Co.*, 6 Q. P. R. 243.)—No authorization from the Court is necessary for such appeal. *Standard Mutual Fire Ins. Co.* v. *Dom. Mutual Fire Ins. Co.* (1910), 11 Que. P. R. 386.

Interlocutory judgment—*Exception to form.*]—An appeal to the Court of Review from an interlocutory judgment ordering defendant to plead to the merits notwith-

standing that he has filed an exception to the form on the ground that he is a minor, will be refused. C. P. 167, 529. *Serling* v. *Levine*, 16 R. L. n. s. 1.

Judge in Chambers—*His jurisdiction—Motion to set aside a judgment, C. P. 70.*—A Judge sitting in Chambers has not the power to grant a petition asking for the setting aside of a judgment of the Court which has refused the appeal, because the appellant failed to file his statement within the time allowed. *Ouimet* v. *Fleur* (1909), 10 Que. P. R. 325.

Judgments appealable — *Judgment refusing leave to appeal.*]—Judgment refusing leave to appeal does not fall under any of the headings of Art. 52 C. P. and is not appealable. *Pagé* v. *Génois* (1909), 36 Que. S. C. 207.

Jurisdiction—*Superior Court sitting in review—Judgment of the Circuit Court dismissing a petition to set aside a valuation roll.*]—No appeal lies to the Court of Review from a judgment of the Circuit Court dismissing a petition to set aside a valuation roll. *Martel* v. *South Marston*, 37 S. C. Que., p. 289.

Jurisdiction to hear appeal—*Security—Dispensing with.*]—The deposit required for the purposes of review is not necessary to give jurisdiction to the Court, and the solicitors for the respondent may, by their consent, relieve the appellant from making it. *Jutras* v. *St. Francois*, 19 Que. S. C. 206.

Leave to appeal—*Final or interlocutory order—Precaution.*]—When there is serious question whether a judgment is final or interlocutory, an application asking that leave be granted to appeal to the Court of Review will be allowed, because said application is a fair measure of precaution. *Teolo* v. *Cordasco*, 9 Que. P. R. 416.

Leave to appeal—*Motion for—Time—Vacation.*]—The time allowed for making an application for leave to appeal from an interlocutory judgment runs during the long vacation. *Poirier* v. *Montreal*, 7 Que. P. R. 278.

Parties to appeal—*Defendant en garantie.*]—The cause was set down for review by the plaintiff. The defendant moved to set aside the setting down and to remit the cause to the district of Arthabasca, on account of the default of the plaintiff to make the defendant *en garantie* a party to the appeal, she having appeared and pleaded to the principal demand, which was the subject of the appeal; the principal defendant having also pleaded thereto:—*Held*, that the defendant *en garantie* was not a necessary party. *Gastonguay* v. *Savoy*, 3 Que. P. R. 398.

Review by plaintiff of judgment dismissing action—*Third party intervening—Notice to—Deposit.*]—A plaintiff whose personal action, in which the defendant, while contesting it, has brought in a warrantor who has intervened and also contested the plaintiff's claim, has been dismissed, may properly inscribe in review of the judgment without giving notice to the warrantor, and is not obliged to make more than one deposit. *Bray* v. *Montreal & Gascon*, 32 Que. S. C. 115.

Right of appeal—*Acting on judgment—Reservation.*]—A plaintiff who has obtained a judgment in his favour for part of his claim, and who has appealed as to the part of his claim in which he has failed, does not lose the right to his appeal by acting upon and executing the part of the judgment which is in his favour, especially when he does so with an express reservation of his appeal. *Brook* v. *Wolff*, 31 Que. S. C. 63, 8 Que. P. R. 186.

Right of appeal—*Action raising constitutional question — Dismissal for want of notice to Attorney-General—Notice in view of appeal.*]—A plaintiff unsuccessful by the judgment of first instance upon a demand founded upon the unconstitutionality of a statute, because he has not given to the Attorney-General the notice required by Art. 114, C. P., cannot appeal from that judgment upon giving the notice aforesaid. *Dallaire* v. *Déry*, 31 Que. S. C. 385.

Right of appeal—*Circuit Court—Appeal—Amount involved.*]—There is no appeal from the Circuit Court of the chief place in a district, even if, in an action between landlord and tenant, it has decreed the cancellation of a lease for more than $100. *Palliser* v. *Consumers' Cordage Co.*, 7 Que. P. R. 280.

Right of appeal—*Death of defendant—Inscription in name of—Nullity—Motion to amend.*]—This cause was taken *en délibéré sur le mérite* on the 10th June, 1899, and final judgment was rendered on the 27th November, 1899. During the *délibéré* the defendant died, and after the judgment his solicitors, in ignorance of his death, inscribed the case for review in the name of the deceased. The plaintiffs' solicitors made a motion to set aside the inscription, upon the ground that only the legal representatives of the defendant could make it. The solicitors for the defendant made a cross-motion to substitute in the inscription the names of the executors of the defendant's will:—*Held*, reversing the decision of the Court of Review, that the inscription was void, and the motion to amend it could not be granted. *Fraser* v. *Price*, 10 Que. K. B. 511.

Right of appeal — *Dismissal of petition for homologation of report—Expropriation—Municipal corporation.*] — No appeal lies from a decision of Judge of Superior Court rejecting petition of the city of Montreal for homologation of a report of expropriation commissioners, under s. 439 of 62 Vict. c. 58, and, as a consequence, an inscription for review of such a decision will be rejected on motion. *Montreal* v. *Donovan* (1906), 27 Que. S. C. 259.

Right of appeal—*Existence of appeal to King's Bench.*]—The Superior Court sitting in review is not competent to review a judgment against which there is no appeal to the Court of King's Bench. *St. Paul* v. *Latour*, 34 Que. S. C. 125.

Right of appeal—*Final judgment—Dismissal of intervention.*]—A judgment of the Superior Court which dismisses an intervention is a final judgment from which an appeal lies to the Court of Review. The word "final" in Art. 52, C. P., borrowed from the English language, and evidently *mal-a-propos*, corresponds to the word "*définitif*" applied, in French civil procedure, to appeals from judgments. *Renaud* v. *Pilon*, 4 Que. P. R. 65.

Right of appeal—*Final judgment—Injunction.*]—A judgment dissolving an injunction issued in an action to set aside a resolution of a municipal council is not a final judgment within the meaning of clause 1 of Art. 52, C. P. C., and not being one of the judgments referred to in clauses 2, 3 and 4, is not subject to review by the Court. *Perreault* v. *Lévis*, 30 Que. S. C. 123.

Right of appeal—*Interim injunction—Order continuing—Final judgment.*] — No appeal lies to the Superior Court in review from a judgment maintaining an interim injunction, especially if such judgment has not the character of a definite final judgment. *Ricard* v. *Grand Mere Electric Co.*, 9 Que. P. R. 10.

Right of appeal—*From Circuit Court—Judgment quashing resolution of municipal council.*]—A judgment of the Circuit Court, sitting at Montreal, quashing, under Art. 100, C. M., a resolution of a municipal council which declared the seat of a councillor to be vacant, cannot be reviewed before three Judges of the Superior Court. *Clermont* v. *St. Martin*, 18 Que. S. C. 220.

Right of appeal—*Future rights—Municipal by-law — Telephone company.*] — A judgment of the Circuit Court condemned the defendants to pay a penalty of $25 for failure to paint their poles erected within the limits of the municipality plaintiff, as provided by a by-law ordering telephone and other poles to be painted and to be kept painted thereafter:—*Held*, that the demand (which was for $50) did not relate to a matter "in which the rights in future of the parties may be affected," within the meaning of Art. 44, clause 3, of the Code of Procedure, and therefore no appeal lay in such case to the Court of King's Bench sitting in appeal from a judgment of the Circuit Court; and consequently such judgment was not susceptible of revision by the Court of Review. (Art. 52, C. C. P.) *Coaticook* v. *People's Telephone Co.* (1901), 21 C. L. T. 351, 19 Que. S. C. 535.

Right of appeal—*Habeas corpus.*]—No appeal lies to the Court of Review in matters of habeas corpus *ad subjiciendum*. *Lorenz* v. *Lorenz*, 7 Que. P. R. 149.

Right of appeal—*Interlocutory order—Amount in controversy — Statutes.*]—There is no appeal to the Superior Court in Review from an interlocutory order in a cause in which the amount claimed is not more than $500, as inscription for review can be made only in the cases enumerated in clause 1 of Art. 44, and clauses 2 and 3 of Art. 52*a* of the Code of Civil Procedure, as amended by the Quebec statute, 8 Edw. VII. c. 74. *Can. Rubber Co.* v. *Porter*, 10 Que. P. R. 184.

Right of appeal — *Interlocutory judgment—Dismissal of exception—Objection to appeal—Costs.*]—A judgment dismissing an exception to the form is only an interlocutory judgment, and is not appealable to the Superior Court in Review. 2. If the respondent in review has not complained by motion that the judgment is only interlocutory, but has raised this point only in his *factum* and his argument, the inscription in review will be set aside with costs only of a motion to set aside. *Migneron* v. *Yon*, 4 Que. P. R. 179.

Right of appeal—*Inscription for review—Tutor—Judgment.*]—Art. 306, C. C., which forbids a tutor to appeal from a judgment without having been authorized to do so by a Judge, upon the advice of a family council, does not apply to an inscription for review, which is only for a re-hearing before the same Court presided over by three Judges. *Beaumont* v. *Lamonde*, 5 Que. P. R. 113.

Right of appeal—*Judgment of Circuit Court—Petition to quash assessment roll.*] —An appeal will not lie to three Judges of the Superior Court from a judgment rendered by the Circuit Court at the chief town of a district, upon a petition to quash an assessment roll. *Noyes* v. *Cowansville*, 8 Que. P. R 426.

Right of appeal—*Judgment of Recorder's Court—Amount—Taxes.*] — An appeal lies to the Superior Court sitting in review from a final judgment of a Recorder's Court for an amount exceeding $500, in an action for municipal or school taxes. *Montreal* v. *Meldola de Sola*, 32 Que. S. C. 257.

Right of appeal—*Municipal by-law.*]—There is no appeal to the Superior Court in review from a judgment of a Judge of that Court granting a petition for the confirmation of a municipal by-law. *St. Paul* v. *Latour*, 9 Que. P. R. 262.

Right of appeal — *Order striking out plea—Stated case.*]—There is no appeal to the Court of Review from a judgment striking out one of two pleas filed by the defendant on a conjoint statement of the case under Art. 512, C. P. *Grenier* v. *Connolly*, 7 Que. P. R. 212.

Security—*Consent to irregular deposit—Validity of inscription—Solicitor's authority to consent.*]—In the case of an inscription for review, if the attorneys of the respondent consent to the deposit required by Art. 1196, C. P., remaining in the hands of the attorney for the appellant, the Court of Review will not, *ex mero motu*, declare the inscription irregular and void, especially if the Court is of opinion that the judgment of first instance should be affirmed on the merits. *Semble*, that in a case where the Court of Review was disposed to reverse the judgment below, it would order that proof should be given of the authority of the attorney to consent on behalf of his client. *Jutras* v. *St. Francois*, 3 Que. P. R. 530.

Security—*Deposit—Amount of—Amount in controversy.*]—An inscription for review in an action to set aside a lease containing a contract for sale, when the value of the immovable in question is more than $400, must be accompanied by a deposit of $75, and the Court will order the party who inscribes to supplement his deposit of $50. *Marsolais* v. *Grenier*, 4 Que. P. R. 392.

Security for costs—*Amount of.*]—Although an action may appear to be in the nature of a possessory action, if the amount claimed is less than $400 it belongs to the second class of the tariff, and a deposit of $50 made with an inscription in review is sufficient. *Morin* v. *Gagné*, 7 Que. P. R. 82.

Security for costs—*Amount of—Petition of creditor.*]—A petition of a creditor of an insolvent to be put in possession of effects belonging to the petitioner which are in the hands of the curator, falls under the head of actions of the second class; and an inscription for review must be accompanied by a deposit of $75. *Brothers* v. *Desmarteau*, 6 Que. P. R. 484.

Security for costs—*Amount of—Several respondents.*]—Where there are several defendants who have appeared and pleaded separately in the Court of first instance, the plaintiff who has failed must with his inscription for review make as many deposits as there are defendants. *Acer* v. *Percy*, 24 Que. S. C. 232.

Security for costs—*Amount of—Several respondents.*]—Where several defendants have appeared and pleaded separately, a plaintiff, whose action has been dismissed and who is appealing, must make as many deposits upon appeal as there are distinct defences. *Acer* v. *Percy*, Q. R. 24 S. C. 232, followed. *Germano* v. *Mussen*, 6 Que. P. R. 249.

Security for costs—*Deposits—Amount involved.*]—The amount in litigation spoken of in art. 1196, C. P., must exceed the amount due under the judgment for principal, and does not include the amount of costs. 2. In the case of an appeal by the defendants to the Court of Review from a judgment for less than $400 in an action brought for a sum greater than $400, the amount in litigation is less than $400, and the deposit necessary is $50. *Saunders* v. *United Factories*, 6 Que. P. R. 34.

Security for costs—*Deposit — Title to land—Amount involved.*]—The plaintiff sued to obtain a good title to a property which he alleged that he had bought from the defendant at the price of $150 and improvements, which he alleged were worth $350.—*Held*, that he must, under art. 1106, C. P., make a deposit of $75 to obtain a review of the judgment dismissing his demand. *David* v. *Chenever*, 6 Que. P. R. 24.

Several defendants—*Separate defences—Inscription for review and deposit—Consolidation of contestations.*]—Where several defendants, sued jointly, file, by the same attorney, each one a separate plea, but absolutely identical, after having demanded particulars by one motion made on behalf of all, one inscription for review and one deposit are sufficient.—In such a case the different contestations may be joined in one. *Hétu* v. *Humphrey*, 8 Que. P. R. 337.

Status of appellant—*Provisional guardian—Leave.*]—A provisional guardian has no right to appeal from a judgment dismissing a petition by him, without obtaining the leave of the Court or Judge; and the entry of the appeal without leave will be struck out with costs, on motion. *Doucker* v. *Lynn*, 3 Que. P. R. 260.

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21. QUEBEC — APPEAL TO SUPERIOR COURT (SINGLE JUDGE).

Order in Chambers—*Guardian.*]— An appeal does not lie to the Superior Court (single Judge sitting at Montreal) from an order of a Judge at Chambers appointing a guardian and a person to watch the conduct of the guardian. *Bousquet* v. *Dauphinais*, 2 Que. P. R. 366.

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22. QUEBEC—APPEAL TO CIRCUIT COURT.

Judgment of Board of Delegates — *Choice of forum for appeal—Time for appeal.*]—Where an appeal from a judgment of a board of delegates of two counties may be taken either in a district like that of Montreal, in which every juridical day is a term day, or in another district like that of Iberville, in which the terms are fixed by proclamation of the Crown, during certain months of the year, the appellant is absolutely free to take his appeal in either of such two districts. 2. It is the situation of the municipalities in different districts which fixes the jurisdiction of the Circuit Court of one or other of such districts. 3. The time for lodging an appeal under Art. 1070, C. M., is always only a modality of the procedure followed as to time in the district in which the appellant is taking his appeal. 4. To decide the contrary would be to deprive the appellant of his choice between the jurisdiction of the Circuit Court of the district of Montreal and of that of the district of Iberville. *Arbec* v. *Lussier*, 20 Que. S. C. 543.

Leave to appeal—*Affidavit not required—M. C. 646, 1061, 1071.*]—It is not necessary to support with an affidavit a petition for leave to appeal to the Circuit Court, under the provisions of Art. 1061, M. C., from the resolutions adopted by a municipal council, according to Art. 746, M. C., for the purpose of inscribing upon the valuation roll the names of certain persons mentioned in the resolutions. *Hebert* v. *St. Michel* (1910), 16 R. de J. 523.

Municipal corporations — *Board of delegates—Service of writ—Costs.*]—An appeal lies to the Circuit Court, under Art. 1062, M. C., from any decision of a board of delegates, at the instance of any party aggrieved thereby, although the right of a petition, under Art. 100, M. C., is only granted to a municipal elector.—2. The respective county corporations are sufficiently served with the writ of appeal by a service of the copy of the writ upon the secretary

of the board of delegates.—3. The county corporations are liable for the costs of an appeal from a decision of their board of delegates acting on its own motion. *Megantic* v. *Compton*, 16 Que. S. C. 281.

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23. SASKATCHEWAN—APPEAL TO SUPREME COURT.

Committal for contempt of Court—*Disobedience of injunction.*]—Leave to appeal from 12 W. L. R. 310 granted on terms. There is no deliberate defying the order of the Court. This is not an appeal in a criminal cause or matter. *Moose Mountain Lumber and Hardware Co.* v. *Paradis*, 12 W. L. R. 424.

Right of appeal to Court en banc from order of Judge—*Interlocutory order—Leave—Rule 501.*] — Defendant, having given notice of an appeal from the judgment pronounced upon the trial of this action, made default in filing the appeal books within the time limited. An application was, therefore, made to a Judge for an order extending the time for filing the appeal books, which was refused. From this order the defendant appealed. On the appeal it was objected that the appeal did not lie, the order appealed from being an interlocutory order, from which no appeal lay without leave, which had not been obtained. The action involved an interest in real estate:—*Held*, that the fact that an interest in real estate was involved in the action did not give a right of appeal from an order in such action without leave, unless such title or interest was in question in the order appealed from. 2. That the order in question, while it might, in effect, finally dispose of the action as far as the defendants were concerned, was not thereby a final order, but was interlocutory, a final order being one made in an application which, if decided in favour of either party, finally disposes of the action, while this application, if the appellants had succeeded, would have allowed them to proceed with the action. *Newkirk* v. *Stees* (1910), 14 W. L. R. 707, 3 Sask. L. R. 208.

Stay of execution pending appeal — *Retention in Court of money paid in—Special circumstances — Insolvency of respondents.*]—The Court will stay execution pending an appeal, or retain in Court moneys paid in which represent the subject-matter of the action, if it is established or seems probable that the party realising or receiving the money would be unable to pay it back should he fail in the appeal. *Huggard* v. *Ont. & Saskatchewan Land Cor.*, 7 W. L. R. 489, 1 Sask. L. R. 52.

Stay of proceedings pending appeal —*Grounds for—Sufficiency of—Dismissal of previous application — Res judicata.*] — Judgment having been given for the plaintiff, the defendant appealed to the Court *en banc*, and applied for a stay of execution pending the appeal. The application was dismissed, the material being held insufficient. The application was renewed on affidavits by the barrister engaged as counsel for the defendant, setting out the judgment, the appeal, payment into Court of the amount of the judgment, and, in a general way, that he believed injustice would be done if a stay were not ordered, and an affidavit by an agent that he was informed by the defendant's counsel that the defendant, if the plaintiff realised the judgment, would, in the event of the appeal being successful, have difficulty in recovering the money.—*Held*, that, in order to obtain a stay of proceedings pending appeal, special grounds must be shewn, and no such grounds were shewn by the material filed.—2. That the defendant having previously applied for a stay and failed, the matter was now *res judicata*. *Covert* v. *Janzen*, 1 Sask. L. R. 424, 9 W. L. R. 133.

Surrogate Courts Act, 1907, sec. 36 —*Forum.*] — Appellants, being dissatisfied with an order of the Surrogate Judge, gave notice of appeal therefrom "to a Judge of the Supreme Court of Saskatchewan," and of intention "to move to the presiding Judge in Chambers on." This notice was given on the last day for appealing. On the hearing of appeal it was objected that the appeal was not taken to the proper tribunal, under the Surrogate Courts Act, and on this objection being made an application was made to amend the notice:—*Held*, that the appeal given by the Surrogate Courts Act is to a Judge of the Supreme Court sitting in Court, and as rules have been promulgated fixing the sittings of Court for each judicial district, the appeal is to a Judge sitting in Court at such appointed times, and as the notice here evidently contemplated the Judge in Chambers as the tribunal to which the appeal was to be taken, it was irregular, and no action could be taken upon it. 2. That inasmuch as the time for appeal had expired and the right of appeal was gone, no amendment could be made in the notice of appeal. 3. That in any event the subject matter in question did not exceed $200, and there was therefore no right of appeal in any case. *Re Independent Order of Foresters* (1910), 13 W. L. R. 409, 3 Sask. L. R. 13.

Warrant of prosecution — *Abandonment—Motion to dismiss—Practice—Notice of appeal.*]—Plaintiffs having given notice of appeal to the Court *en banc*, neglected to perfect the appeal within the time limited, and the defendant moved to dismiss. It was objected on the authority of *Griffin* v. *Allen*, 11 Ch. D. 913, that no costs of the motion should be allowed, as no demand had been made for costs of the appeal:—*Held*, that *Griffin* v. *Allen*, *supra*, did not lay down the established practice in these matters, but merely indicated the course the Court would pursue in such cases, and no such practice having been established in this Court, the application should be allowed with costs, but the rule in *Griffin* v. *Allen* was a very proper one, and in the future the Court would not, in the absence of good cause, allow costs of an application to dismiss for want of prosecution of an appeal, unless the applicant has made a previous demand for costs of the appeal, which has not been complied with. *Wessel* v. *Tudge*, 11 W. L. R. 309, 2 Sask. L. R. 231.

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24. SUPREME COURT OF CANADA—APPEAL TO.

Acquiescence—*Estoppel — Appeal for costs—Quashing.*]—The defendants severally

contested a demand for judicial abandonment, on the ground that they were not partners. The judgments appealed from declared them to be partners. They then abandoned their property under reserve of exception taken to the judgments and of their recourse by appeal to the Supreme Court of Canada, and declared that the abandonment was consented to under these reserves and in order to avoid a *capias*, penalties, trouble, and costs. After a curator had been appointed, and while the estate was being realised and distributed, they commenced proceedings for appeals to the Supreme Court of Canada. On motions to quash the appeals.—*Held*, Sedgewick, J., *dubitante*, that the abandonment made was an *acquiescement* and voluntary execution of the judgments in question, and estopped the defendants from further appeal, except on the question of costs. Upon that question the Court had jurisdiction to entertain an appeal, but uniformly declined to do so. In such cases the proper practice is to move to quash the appeal. *Schlomann* v. *Doucker* (1900), 20 C. L. T. 271, 30 S. C. R. 323.

Acquiescence—*Exception — Motion to vary minutes—Costs.*]—Where a respondent, on an appeal to the Court below, has failed to set up the exception resulting from acquiescing in the trial judgment, as provided by art. 1220 of the Code of Civil Procedure, he cannot, afterwards, take advantage of the same objection by motion to quash a further appeal to the Supreme Court of Canada An application to vary the minutes of judgment, in respect of matters which had not been mentioned at the hearing of the appeal, was granted but without costs. *Chambly Manufacturing Co.* v. *Willett* (1904), 24 C. L. T. 204, 34 S. C. R. 502.

Allowance of.]—Application of money paid into Court on appeal to Court of Appeal—Contract—Construction — Conditions —Certificate of engineer—Repairs to pavements of streets — Municipal corporations. *Hamilton* v. *Kraemer-Irwin Rock Asphalt & Cement Paving Co.*, 1 O. W. R. 111, 2 O. W. R. 25, 3 O. W. R. 343, 347.

Allowance of—*Forum—Judge of Court of first instance.*]—When judgment is rendered by the Court of Review affirming a judgment of the Superior Court, sitting in a rural district, the party who wishes to appeal to the Supreme Court of Canada, and furnish security for costs, must apply for leave to do so to the Judge of the district where the action was brought. *Daigle* v. *Quebec Southern Rw. Co.*, 6 Que. P. R. 403.

Allowance of.]—Læave to appeal—Necessity for—No application for. *Bisnaw* v. *Shields*, 3 O. W. R. 309.

Allowance of—*Motion to extend time—Jurisdiction of single Judge of Court appealed from.*]—A Judge of the Court of Appeal has no jurisdiction to extend the time for the allowance of the security proposed to be given upon an appeal intended to be brought from the judgment of that Court to the Supreme Court of Canada in a case where no such appeal can be brought without leave; although it be impossible to move for such leave owing to the fact that neither Court sits in vacation. But the power of the full Court of Appeal or of the Supreme Court to grant leave or to allow the appeal under the provisions of 60 V. c. 24 (O.), does not depend upon a single Judge making such an order. *Tabb* v. *Grand Trunk Rw. Co.* (1904), 24 C. L. T. 335, 8 O. L. R. 281, 514, 4 O. W. R. 116, 135.

Amendment of petition—*Discretion—Supreme Court Act, s. 63.*]—See *Hill* v. *Hill* (1904), 24 C. L. T. 73, 34 S. C. R. 13.

Amount in dispute.]—An action was brought by the lessee of lands, the rental of which was $250 per annum, to have the lease cancelled as being simulated:—*Held*, that no amount of $2,000 or upwards was in dispute, and the appeal not relating to any title to land or tenements or annual rents within the meaning of s. 29 (*b*) of R. S. C. c. 135, the Supreme Court had no jurisdiction to hear it. *Frechette* v. *Simoneau*, (1910), 20 C. L. T. 433.

Amount in dispute—*Assessment—Title to land.*]—In proceedings by the city of Montreal to collect the amount assessed on the defendants' land, an opposition to the seizure, alleging that the claim was prescribed, was maintained, and the city sought to appeal to the Supreme Court.—*Held*, that there was nothing in controversy between the parties but the amount assessed on the defendants' land, and that being less than $2,000, the Court had no jurisdiction to entertain the appeal. *Montreal* v. *Land & Loan Co.* (1904), 24 C. L. T. 79, 34 S. C. R. 270.

Amount in dispute—*Future rights.*]—In an action for *séparation de corps*, the decree granted separation and ordered the husband to pay $1,500 per year alimony. It was paid for some years, and the husband having died his widow brought suit to enforce payment from his universal legatees. The Court of King's Bench having reversed the judgment of the Superior Court in her favour, she sought to appeal to the Supreme Court of Canada.—*Held*, that, as she was only entitled to one year's alimony when the suit commenced, the appeal would not lie, notwithstanding the fact that if she had succeeded in the King's Bench she could have executed the judgment for more than $3,000. The amount demanded establishes the right to appeal, and if that is less than $2,000 the appeal will not lie, though more than $2,000 may be recovered.—*Held*, also, that future rights were not bound by the judgment appealed from by reason of its effect on her right to further payment of the alimentary allowance. *Winteler* v. *Davidson* (1904), 24 C. L. T. 79, 34 S. C. R. 274.

Amount in dispute.]—In an action by the lessee of lands leased for 4 years and 9 months at a rental of $250 per annum, to have the lease cancelled as being simulated: —*Held*, that no amount of $2,000 or upwards was in dispute, and that, as the appeal did not relate to any title to land or tenements nor to annual rents within s. 29 (*b*) of R. S. C. c. 135, it could not be entertained by

the Supreme Court of Canada. *Frechette* v. *Simmoneau* (1910), 20 C. L. T. 433, 31 S. C. R. 12.

Amount in dispute——*Life pension.*]—Action for $62.50, the first monthly instalment of a life pension, at the rate of $750 per annum claimed by the plaintiff, for a declaration that he was entitled to such annual pension from the defendants, payable by equal monthly instalments of $62.50 each, during the remainder of his life, and for judgment for such payments during his life. It was shewn that the costs of an annuity equal to the pension claimed would be over $7,000.—*Held*, following *Rodier* v. *Lapierre*, 21 S. C. R. 69, *Macdonald* v. *Galivan*, 28 S. C. R. 258, *La Banque du Peuple* v. *Trottier*, *ib.* 422, *O'Dell* v. *Gregory*, 24 S. C. R. 661, and *Talbot* v. *Guilmartin*, 30 S. C. R. 482, that the only amount in controversy was that of the first monthly instalment, and that the Supreme Court of Canada had no jurisdiction to hear an appeal. *Lapointe* v. *Montreal Police Benevolent and Pension Society*, 35 S. C. R. 5.

Amount in dispute—*Pleas*—*Incidental issues.*]—Issues raised merely by pleas cannot have the effect of increasing the amount in controversy so as to give the Supreme Court of Canada jurisdiction to hear an appeal; Girouard, J., dub. *Standard Life Assurance Co.* v. *Trudeau* (1900), 20 C. L. T. 223, 30 S. C. R. 308.

Amount in dispute — —*Reddition de compte*—*Contestation.*]—An action *en reddition de compte* concluded with a demand for $1,000. The defendant filed an account for over $8,000, and by his pleas claimed a small balance was due him. The plaintiff replied by contesting several items of the account filed, and, abandoning his former conclusions, claimed whatever should be found due him on the contestation. He recovered $2,200 in the Superior Court, which the Court of Queen's Bench affirmed. On appeal to the Supreme Court of Canada.—Held, that more than $2,000 was in controversy, and the appeal would lie. Motion for approval of security granted with costs. *Bell* v. *Vipond* (1901), 21 C. L. T. 328, 31 S. C. R. 175.

Amount in dispute——*Retrazit.*]—The judgment appealed from condemned the defendants to pay $775.40, the balance remaining after deducting $1,524.60 realised on a sale of property made by consent *pendente lite*. The amount demanded was $2,300.20, so that the plaintiffs' full fact was in fact sustained.—*Held*, that, as the amount recovered was different from that demanded, and the amount of the original demand exceeded $2,000, the Supreme Court of Canada had jurisdiction to entertain an appeal. *Joyce* v. *Hart*, 1 S. C. R. 321, *Levi* v. *Reed*, 6 S. C. R. 482, and *Laberge* v. *Equitable Life Assurance Society*, 24 S. C. R. 59, followed. *Cowan* v. *Evans*, 22 S. C. R. 328, *Mitchell* v. *Trenholme*, *ib.* 331, *Lachance* v. *Société de Prêt et des Placements*, 26 S. C. R. 200, and *Beauchemin* v. *Armstrong*, 34 S. C. R. 285, distinguished. *Dufresne* v. *Fee*, 35 S. C. R. 8.

Amount in dispute—*Statutes*—*Repugnancy.*]—Paragraph (*f*) of s. 1 of 60 V. c. 34 (D.), which provides that, where an appeal from the Court of Appeal for Ontario depends on the amount in dispute, such amount shall be understood to be that demanded, and not that recovered, if they are different, has no operation, being repugnant to (c), which requires the matter in controversy on the appeal to exceed $1,000 to give jurisdiction. Where two clauses of the same statute, coming into force at the same time, are repugnant, the clause placed last in point of arrangement cannot be held to supersede the other as expressing the latest mind of Parliament. *Hunter* v. *Ottawa* (1900), 20 C. L. T. 431; S. C., *sub nom. Ottawa* v. *Hunter*, 31 S. C. R. 7.

Amount in dispute——*Title to land*—*Future rights* — *Extending time.*]—L. had given a mortgage to the Standard Loan and Savings Co. as security for a loan, and had received a certain number of the company's shares. All the business of that company was afterwards assigned to the defendants, and L. paid the latter the amount borrowed, with interest, and $460.80 in addition, and asked to have the mortgage discharged. The company refused, asserting that L., as a shareholder in the Standard Co., was liable for its debts, and demanded $79.20 therefor by way of counterclaim. An action by L. for a declaration that the mortgage was paid and for repayment of the $460.80 was dismissed (3 O. L. R. 191, 22 Occ. N. 60), but on appeal the Court of Appeal ordered judgment to be entered for L. for $47.04 (5 O. L. R. 471, 23 Occ. N. 165, 2 O. W. R. 370). The defendants appealed to the Supreme Court.—*Held*, that the appeal would not lie; that no title to lands or any interest therein was in question; that no future rights were involved within the meaning of s. 1 (d) of 69 & 61 V. c. 34; and that all that was in dispute was a sum of money less than $1,000, and therefore not sufficient to give jurisdiction to the Court.—*Held*, also, that the time for bringing the appeal cannot be extended after the expiration of 60 days from the pronouncing or entry of the judgment appealed from. *Lee* v. *Can. Mutual Loan & Invest. Co.*, 24 C. L. T. 47; *S. C., sub. nom. Can. Mutual Loan & Investment Co.* v. *Lee*, 34 S. C. R. 224.

Amount in dispute — *Waiver*—*Consent.*]—The case on appeal to the Supreme Court of Canada cannot be filed unless security for the costs of the appeal is furnished as required by s. 46 of the Act. The giving of such security cannot be waived by the respondent nor can the amount fixed by the Act be reduced by his consent. *Holstein* v. *Cockburn*, 35 S. C. R. 187.

Amount in dispute.] — Where the Court of King's Bench affirmed the judgment of the Superior Court dismissing the action, but varied it by ordering the defendant to pay a portion of the costs.— *Held*, that, though $2,117 was demanded by the action, the defendant had no appeal to the Supreme Court of Canada, as the amount of the costs which he was ordered to pay was less than $2,000. *Allan* v. *Pratt*, 15 App. Cas. 780, and *Monette* v. *Lefebvre*, 16 S. C. R. 387, followed. *Beauchemin* v. *Armstrong*, (1904), 24 C. L. T. 111, 34 S. C. R. 285.

Appeal bond — *Judgment reversed by King's Bench, but restored by Supreme Court.*]—C. P. 1214.—*Held*, the security in appeal is not discharged until the matter becomes finally settled by the Court of last resort. *Lowrey* v. *Routh*, M. L. R. 3 Q. B. 364, followed. *Bruneau* v. *Genereux* (1910), 11 Que. P. R. 277.

Appeal per saltum—*Extension of time—Jurisdiction of Judge of Court below.*]—A Judge of the Court appealed from has no jurisdiction to extend the time for appealing *per saltum* to the Supreme Court of Canada. After the expiration of 60 days from the signing, entry, or pronouncing of judgment, leave to appeal *per saltum* to the Supreme Court of Canada cannot be granted. *Barrett* v. *Le Syndicat Lyonnais du Klondyke*, 33 S. C. R. 667.

Appeal per saltum—*Jurisdiction.*] — Leave to appeal *per saltum* refused where appellant had been too late to appeal to a Divisional Court for Ontario, and leave for an extension of time had been refused, and where he had no right to appeal to the Court of Appeal for Ontario. *Ottawa Electric Co.* v. *Brennan* (1901), 31 S. C. R. 311, followed. *Armour* v. *Onondaga* (1907), 42 S. C. R. 218. See 14 O. L. R. 606, 9 O. W. R. 833.

Appeal per saltum—*New grounds.*]—Per Taschereau, C.J.—Where leave to appeal per saltum has been granted on the ground that the Court of last resort in the province has already decided the question in issue, the appellant should not be allowed to advance new grounds to support his appeal. *Miller* v. *Robertson* (1904), 24 C. L. T. 205, 35 S. C. R. 80.

Application for leave pending.—Delay in hearing owing to vacation—Application to Judge of Court of Appeal to stay issue of certificate of judgment, refused.—Remedy by application to High Court. *Tinsley* v. *Toronto Ry. Co.*, 12 O. W. R. 511.

Approval of security on appeal — *Right of appeal—Title to land—Motion to Supreme Court for leave to appeal.*]—Proposed appeal from 13 O. W. R. 301. There having been no decision in a case like the present whether title to land is brought into question, security allowed *quantum valeat*, with suggestion that leave to appeal on confirmation of security be had from Supreme Court. *Can. Pac.* v. *Brown*, 13 O. W. R. 679.

Binding decision on former appeal —*Supreme Court of Nova Scotia—Quashing appeal—Judgment—Estoppel — Mandamus.*] —See *Drysdale* v. *Dominion Coal Co.* (1904), 24 C. L. T. 166, 34 S. C. R. 328.

Bond—*Form of.*]— In addition to the defects to which attention was drawn in *Jamieson* v. *London and Canadian L. and A. Co.*, 18 P. R. 413, and *Young* v. *Tucker*, *ib.*, 449, the form of bond given in Cassels' Practice, 2nd ed., p. 220, is also defective in not setting forth to whom the penalty is payable, and also in not stating that the bond is signed and sealed by the obligors. *Liscomb Falls Co.* v. *Bishop* (1904), 24 C. L. T. 186.

Bond—*Insufficiency—Time for filing new bond—Extension—Judge of Court below.*]—If a security bond given to guarantee the costs of an appeal to the Supreme Court of Canada is found insufficient by the registrar of that Court, and a delay is granted by him to furnish another bond, a Judge of the Court of King's Bench can enlarge the delays for perfecting the appeal. *Armstrong* v. *Beauchemin*, 6 Que. P. R. 128.

Bond — *Surety — Wife.*] — One of the sureties of the plaintiff's bond filed as security for the costs of an appeal to the Supreme Court of Canada was the wife of the plaintiff.—*Held*, that the bond was insufficient on that account, but that the time should be extended to enable the plaintiff to file another bond. *Messenger* v. *Bridgetown* (1900), 20 C. L. T. 409.

British Columbia—*New trial.*]— An action and counterclaim in the Supreme Court of British Columbia. Judgment was given for the plaintiff upon his claim (which was not in dispute), and the counterclaim was dismissed. The counterclaim was for damages for breach of contract to deliver 37 cars of hay, and the trial Judge held that the letter of acceptance of the plaintiff's offer to sell was conditional, and the parties were never *ad idem*. On appeal to the full Court this judgment was reversed, and a new trial of the counterclaim ordered. The case was tried anew before a Judge with a jury, and a verdict for the defendants (plaintiffs by counterclaim) was given. The plaintiff moved for leave to appeal *per saltum* to the Supreme Court of Canada.—*Held*, that, even if the full Court had, by its judgment directing the new trial, determined the question as to the existence of an enforceable contract, the plaintiff might still succeed before the full Court, and so it was not a case for granting leave to appeal *per saltum*. *Oppenheimer* v. *Brackman & Ker Milling Co.* (1901), 21 C. L. T. 275.

Concurrent findings of fact.] — The Supreme Court of Canada will not interfere with concurrent finding on questions purely of fact unless satisfied that the conclusions appealed from are clearly wrong. *Weller* v. *McDonald-McMillan Co.* (1910), 43 S. C. R. 85.

Consolidating two appeals in one.]—Under s. 73 of the Supreme Court Act and Rules 8 and 14 of the Supreme Court, 1907, an order may be made consolidating two appeals to the Supreme Court of Canada from the judgment of the Court of Appeal for Manitoba, upon separate appeals to the Court of Appeal from orders of a single Judge made in the same case, and giving the plaintiff leave to print one appeal case for the Supreme Court and directing that the judgment of the Court of Appeal upon both such appeals should be taken as one judgment on one appeal for the purpose of the appeal to the Supreme Court. *Emperor of Russia* v. *Proskouriakoff*, 18 Man. L. R. 143, 9 W. L. R. 207. See 10 W. L. R. 1, 42 S. C. R. 226.

Constitutional question — *Abandonment.*]—Where a motion to quash an appeal has been refused, on the ground that

a decision upon a constitutional question is involved, the subsequent abandonment of that question cannot affect the jurisdiction of the Supreme Court of Canada to entertain the appeal. *Pharmaceutical Association of Quebec* v. *Lévernois* (1901), 21 C. L. T. 8, 31 S. C. R. 43.

County Court case—*Removal into High Court—Leave to appeal.*]—An action was begun in a County Court to recover damages for injury to land by water from drains. After issue joined the cause was removed into the High Court, a question as to the jurisdiction of the County Court having been raised. All subsequent proceedings were carried on in the High Court, and at the trial a reference was ordered to the Drainage Referee, who held that the plaintiffs had no cause of action. The Court of Appeal reversed this holding, and gave judgment for the plaintiffs: 26 A. R. 162, 19 Occ. N. 133.—*Held*, that the action was not originally brought in a Superior Court, as required by R. S. C. c. 135, ss. 24 (a) and 28, and there was no jurisdiction to hear the appeal; and it was therefore quashed.—Leave to appeal cannot be granted under 60 & 61 V. c. 34, s. 1 (e), in a case not appealable under R. S. C. c. 135.—Decision of Osler, J.A., allowing the appeal to the Supreme Court, 18 P. R. 449, 19 C. L. T. 213, overruled. *Young* v. *Tucker* (1900), 20 C. L. T. 29, 30 S. C. R. 185.

Delays occasioned by the Court — *Jurisdiction—Controversy involved—Title to land.*]—An action *au petitoire* was brought by the corporation of the city of Hull against the respondents claiming certain real property which the government of Quebec had sold and granted to the city corporation for the sum of $1,000. The attorney-general for Quebec was permitted to intervene and take up the *fait et cause* of the plaintiffs, without being formally summoned in warranty. The judgment appealed from was pronounced on the 25th September, 1903. Notices of appeal on behalf of both the plaintiff and the intervenant were given on the 3rd November, and notices that securities would be put in on the 10th November, 1903, on which latter date the parties were heard on the applications for leave to appeal and for approval of securities before Wurtele, J., who reserved his decision until one day after the expiration of the sixty days immediately following the date of the judgment appealed from, and on the 25th November, 1903, granted leave for the appeals and approved the securities filed.—*Held*, that the plaintiffs could not be prejudiced by the delay of the Judge, in deciding upon the application, until after the expiration of the sixty days allowed for bringing the appeals, and, following *Couture* v. *Bouchard*, 21 S. C. R. 281, that the judgment approving of the securities and granting leave for the appeals must be treated as if it had been rendered within the time limited for appealing when the applications were made and taken *en délibéré*.—*Held*, also, that, as the controversy between the parties related to a title to real estate, both appeals would lie to the Supreme Court of Canada notwithstanding the fact that the liability of the intervenant might be merely for the reimbursement of a sum less than $2,000. *Atty.-Gen. for Que.* v. *Scott* (1904), 24 C. L. T. 110, 34 S. C. R. 282.

Discretion—*Amendment — Formal judgment.*]—The Supreme Court should not interfere with the exercise of discretion by a provincial Court in refusing to amend its formal judgment. Such amendment is not necessary in a mining case, where the mining regulations operate to give the judgment the same effect as it would have if amended. *Creese* v. *Fleischman* (1900), 24 C. L. T. 51, 34 S. C. R. 279.

Disposition of appeal.] — Concurrent findings of Courts below—Validity of will—Refusal to interfere—See *Laramée* v. *Ferron*, 41 S. C. R. 391.

Disposition of appeal—*Finding of jury—Questions of fact — Duty of appellate Court.*]—Where the question was one of fact, upon which there was conflicting evidence, and the jury, on evidence properly submitted to them, accepted the evidence on one side and rejected that adduced upon the other, the Supreme Court refused to disturb their findings. *Windsor Hotel Co.* v. *Odell*, 27 C. L. T. 782, 39 S. C. R. 336.

Disposition of appeal.] — Reversal of judgment of Court below — Effect of contract—Restoration of finding of trial Judge.—See *Hayes* v. *Day*, 41 S. C. R. 134.

Disputed question of law.] — In an award made under 54 & 55 V., c. 6, s. 6 (D.), 54 V., c. 2, s. 6 (O.), and 54 V., c. 4, s. 6 (Q.), there can be no appeal to the Supreme Court of Canada, unless the arbitrators in making the award set forth therein a statement that in rendering the award they have proceeded on their view of a disputed question of law. *Province of Ontario* v. *Province of Quebec and Dominion of Canada—In re Common School Fund and Lands*, 30 S. C. R. 306.

Extension of time for appealing.]—Delay in settling judgment of Court of Appeal—Security on appeal—Bond—Supreme Court Act, s. 76 (*d*). *Lamont* v. *Wenger*, 12 O. W. R. 880.

Extension of time for appealing.]—Special circumstances. *Thompson* v. *Equity Fire Ins. Co.*, *Thompson* v. *Standard Mutual Fire Ins. Co.*, 12 O. W. R. 881.

Extension of time for giving notice of appeal.]—Intention to appeal—Special circumstances—Merits. *London & Western Trusts Co.* v. *Lake Erie & Detroit River Rw. Co.* (1906), 8 O. W. R. 31.

Extension of time for giving security.]—Special circumstances. *Hudson's Bay Co.* v. *Kenora, Keewatin Power Co.* v. *Kenora*, 11 O. W. R. 1092.

Factum — *Irrelevant comments.*]—Comments in the appellants' factum relating to a judgment of the Wreck Commissioner's Court, which did not form any part of the record, were ordered to be struck out, with costs to the respondents. "*Cape Breton*" v. *Richelieu & Ont. Nav. Co.*, 36 S. C. R. 564.

Final judgment—*Plea of prescription—Costs.*]—A judgment affirming the dismissal of a plea of prescription, when other pleas remain on the record, is not a final judg-

ment from which an appeal lies to the Supreme Court of Canada.—An objection to the jurisdiction of the Court should be taken at the earliest moment. If left until the case comes on for hearing and the appeal is quashed, the respondent may be allowed costs of a motion only.—*Hamel* v. *Hamel*, 26 S. C. R. 17, approved and followed. *Griffith* v. *Harwood* (1900), 20 C. L. T. 270, 30 S. C. R. 315. (See also S. C., 2 Que. P. R. 505.)

Final judgment—*Ruling on evidence—Proceedings in equity.*]—Where a referee, on a reference under the Vendor and Purchaser Act to settle the title under a written agreement for a lease, rules that evidence might be given to shew what covenants the lease should contain, an appeal does not lie to the Supreme Court of Canada from a judgment affirming such ruling, it not being a final judgment, and the case not coming within the provisions of s. 24 (*e*) of the Supreme and Exchequer Courts Act, relating to proceedings in equity.—Gwynne, J., dissenting. *In re City of Toronto & Can. Pac. Rw. Co.* (1900), 20 C. L. T. 269, 30 S. C. R. 337.

From Divorce Court of N.B.]—Settling case—Superior Court. *Currey* v. *Currey*, 8 E. L. R. 487.

From Supreme Court of N.B.]—Extending time — Refusal — Special circumstances—Practice. *Harris* v. *Sumner*, 8 E. L. R. 347.

Future rights—*Nullité de procès-verbal—Reservation of recourse.*]—An action *en nullité de procès-verbal* does not bring future rights in question in such a way as to allow an appeal to the Supreme Court of Canada. Questions of procedure should, except in special and extraordinary cases, be left to the Provincial Court. If a judgment dismisses an action *en nullité de procès-verbal* for default of the plaintiff to prosecute it, but reserves the plaintiff's recourse, the prescription enacted by Art. 705, C.M., cannot be set up in answer to a subsequent action. *Nicolet* v. *Tousignant*, 3 Que. P. R. 257.

Grounds of appeal — *New grounds—Collision between ships—Nautical assessors.*]—See "*Tordenskjold*" v. "*Euphemia*," 41 S. C. R. 154, 6 E. L. R. 90; "*Nanna*" v. "*Mystic*," 41 S. C. R. 168, 6 E. L. R. 303.

Interference—*Question of procedure.*]—See *McFarren* v. *Montreal Park and Island Rw. Co.* (1900), 20 C. L. T. 323, 373, 30 S. C. R. 410.

Interference in matter of procedure.]—See *Gibson* v. *Nelson*, 35 S. C. R. 181.

Interlocutory judgment — *Quebec.*]—The Court of King's Bench, or a Judge thereof, has no jurisdiction to grant leave to appeal to the Supreme Court of Canada from a judgment of the Court of King's Bench, confirming an interlocutory judgment of the Superior Court. *Desaulniers* v. *Payette*, 12 Que. K. B. 182.

Judgment of Divisional Court.]—*Held*, per Strong, C.J., and Gwynne, J., that under s. 26, s.-s. 3, of the Supreme and Exchequer Courts Act, leave to appeal direct from a judgment of a Divisional Court of the High Court of Justice for Ontario may be granted in cases where there is no right to appeal to the Court of Appeal.—Girouard, J., without expressing any opinion, concurred in dismissing an appeal from an order in Chambers granting leave to appeal. Taschereau and Sedgwick, JJ., contra. *Farquharson* v. *Imperial Oil Co.* (1899), 19 C. L. T. 125, 372, 30 S. C. R. 188.

Jurisdiction—*Amount in controversy—Addition of interest to amount of verdict—Stay of execution.*]—*Toronto Rw. Co.* v. *Milligan*, 42 S. C. R. 238.

Jurisdiction—*Doubt as to—Practice.*]—Where the jurisdiction of the Supreme Court of Canada to entertain an appeal was in doubt, but it was considered that the appeal should be dismissed on the merits, the Court heard and decided the appeal accordingly.—Cf. *Bain* v. *Anderson*, 28 S. C. R. 481. *Can. Pac. Rw. Co.* v. *R.*, 38 S. C. R. 137.

Jurisdiction.]—In the Province of Quebec the privilege of floating timber down watercourses, in common with others, is not a predial servitude nor does it confer an exclusive right of property in respect of which a possessory action would lie, and, in a case where the only controversy relates to exercise of such a privilege, the Supreme Court of Canada has no jurisdiction to entertain an appeal. *Price Bros.* v. *Tanguay* (1900), 42 S. C. R. 133.

Jurisdiction—*Matter in controversy — Instalment of municipal tax.*]—In an action instituted in the province of Quebec to recover the sum of $1,133.53, claimed as an instalment of an amount exceeding $2,000 imposed on the defendant's lands for special taxes, the Supreme Court of Canada has no jurisdiction to entertain an appeal although the judgment complained of may be conclusive in regard to further claims arising under the same by-law which would exceed the amount mentioned in the statute limiting the jurisdiction of the Court: *Dominion Salvage and Wrecking Co.* v. *Brown*, 20 S. C. R. 203, followed. *Gutremont* v. *Joyce* (1910), 30 C. L. T. 1039.

Jurisdiction.]—On application for cancellation of a liquor license issued under the Alberta Liquor License Act, a Judge of the Alberta Supreme Court in Chambers granted an originating summons ordering all parties concerned to attend before him in Chambers, and after hearing the parties who appeared in answer to the summons, refused the application. The Full Court reversed this order and cancelled the license. On appeal by the licensee to Supreme Court of Canada:—*Held*, that the case came within *Can. Pac. Rw. Co.* v. *Little Seminary* (16 S. C. R. 606), consequently the Supreme Court of Canada had no jurisdiction to entertain the appeal. *St. Hilaire* v. *Lambert*, 42 S. C. R. 264.

Jurisdiction.]—No appeal will lie to the Supreme Court of Canada from an order of committal against a judgment debtor, under Manitoba King's Bench Rule 755, for contempt in refusing to make satisfactory an-

swers on examination for discovery. *Bateman* v. *Svenson* (1909), 42 S. C. R. 146, affirming 18 Man. L. R. 493, 10 W. L. R. 361.

Leave to appeal—*Appeal per saltum—Winding-up Act — Defective proceedings.*]—Leave to appeal per saltum, under s. 26 of the Supreme Court Act, cannot be granted in a case under the Dominion Winding-up Act. An application under s. 76 of that Act, for leave to appeal from a judgment of the Supreme Court of New Brunswick, was refused where the Judge had made no formal order on the petition for a winding-up order, and the proceedings before the full Court were in the nature of a reference rather than of an appeal from his decision. *In re Cushing Sulphite Fibre Co.* (1905), 25 C. L. T. 136, 36 S. C. R. 494.

Leave to appeal—*Criminal case.*]—The Act of the Dominion Parliament respecting appeals from the Court of Appeal for Ontario to the Supreme Court, 60 & 61 V. c. 34, applies only to civil cases. Criminal appeals are still regulated by the provisions of the Criminal Code. Motion by the prisoner for leave to appeal from the judgment of the Court of Appeal (1902), 4 O. L. R. 223, 22 C. L. T. 225, refused. *R.* v. *Rice* (1902), 22 C. L. T. 355, 32 S. C. R. 480, 1 O. W. R. 394.

Leave—*Family council—Will—Legacy — Interim enjoyment—Seduction.*] — Although a guardian cannot, under Art. 306, C. C., appeal from a judgment until he has been authorised by the Judge or the prothonotary upon the advice of the family council, nevertheless, when the guardian has had his appeal ratified by the family council after it has been brought, the Court will permit him to produce the authorisation, but he will have to pay the costs of his petition to be allowed to do so. *Clement* v. *Francis*, 6 L. N. 325, and *Laforce* v. *Town of Sorel*, M. L. R. 6 Q. B. 109, followed. *Greenwood* v. *Dent*, 9 Que. Q. B. 11.

Leave to appeal *from judgment of Court of Appeal—Doubt as to jurisdiction without leave—Order ex cautela—Remedy under Rule 1 of Supreme Court.*]—Application to Court of Appeal for special leave to appeal to Supreme Court of Canada from judgment 12 O. W. R. 481, refused. The case was on the Supreme Court list for hearing when this application was made *ex cautela*. Application should have been made under above Rule 1. *Lamont* v. *Wenger*, 13 O. W. R. 1084.

Leave to appeal—*Jurisdiction of Court of Appeal—Supreme Court Act, ss. 48 (e), 69, 71—Extension of time for appealing—Appeal quashed in Supreme Court — Argument on merits.*]—The Court of Appeal has jurisdiction, under s. 48 (e) of the Supreme Court Act, R. S. C. 1906 c. 139, to grant special leave to appeal from a judgment of the Court of Appeal to the Supreme Court of Canada, and at the same time, under s. 71, to extend the time for appealing, even after the sixty days allowed by s. 69 have expired.—The Court (Meredith, J.A., dissenting), refused leave to appeal from the judgment in 16 O. L. R. 386, 11 O. W. R. 748, after the time for appealing had long expired, notwithstanding that an appeal to the Supreme Court of Canada, launched without leave, had been argued in that Court upon the merits before being quashed for want of jurisdiction. *Irving* v. *Grimsby Park Co.*, 18 O. L. R. 114, 13 O. W. R. 516.

Supreme Court Act—Duty or fee—Interest in land—Future rights.]—Under a by-law of the defendants, an incorporated company, every person desiring to enter the park was required to pay a fee for admission. An action was brought for a declaration as to the right of the company to exact payment of such fee from the lessee of land in the park: —*Held*, that the matter did not relate to the taking of a "customary or other duty or fee" nor to "a like demand of a general or public nature affecting future rights" under s. 48 (*d*) of the Supreme Court Act, nor was "the title to real estate or some interest therein" in question under clause (*a*). There was, therefore, no appeal to the Supreme Court of Canada from the judgment of the Court of Appeal in such action. *Grimsby Park Co.* v. *Irving*, 41 S. C. R. 35.

Leave to appeal—*Jurisdiction of Court of Appeal—Supreme Court Act, ss. 48 (e), 69, 71—Extension of time for appealing—Amount involved — Special circumstances—Difference of opinion in Court of Appeal.*]—The Court of Appeal has jurisdiction, under s. 48 (e) of the Supreme Court Act, R. S. C. 1906 c. 139, to grant special leave to appeal from a judgment of the Court of Appeal to the Supreme Court of Canada, and at the same time, under s. 71, to extend the time for appealing even after the sixty days allowed by s. 69 have expired.—The Court (Meredith, J.A., dissenting), refused leave to appeal from the judgment in 17 O. L. R. 530, deeming that there were no special circumstances which would take this case out of the general rule that litigation involving no more than the sum of $1,000 should cease with the rendering of judgment by the Court of Appeal.—The mere fact of a difference of opinion among the members of the Court is not, in itself, a sufficient reason for treating a case as exceptional. *Milligan* v. *Toronto Rw. Co.*, 18 O. L. R. 109, 13 O. W. R. 513. See 42 S. C R. 238.

Leave to appeal.]—*McLaughlin* v. *Lake Erie and Detroit River Rw. Co.*, 1 O. W. R. 266, 428.

Leave to appeal—*Matters not of public importance.*]—A member of an Order held a benefit certificate entitling him, if he reached the age of seventy years or became entirely disabled, to receive a sum of money based on the membership of the Order. On reaching the age stated, he demanded the amount, and, on the Order refusing to pay, brought an action therefor, the defence to which was, that he had stated his age incorrectly in his application for membership, and violated certain conditions, which, however, the Court held were not set out nor referred to in the certificate. A judgment for the plaintiff at the trial was affirmed by the Court of Appeal, and, the amount recovered being under $1,000, the defendants moved the Supreme Court for special leave to appeal under 60 & 61 V. c. 34, s. 1 (e):—*Held*, that the questions involved not being of public importance, and the judgment of the Court of Appeal (2 O. L. R. 79, 21 Occ. N. 372) appearing to be well founded, the leave would not be granted.

Fisher v. *Fisher*, 28 S. C. R. 494, followed. *Hargrove* v. *Royal Templars of Temperance* (1902) 22 C. L. T. 1, 31 S. C. R. 385. (See, also, *S. C.* (1901), 2 O. L. R. 126, 21 C. L. T. 432.

Leave to appeal—*Special grounds—Dissenting judgments.*]—Leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal, 13 O. L. R. 569, 8 O. W. R. 517, was refused, the majority of the Court holding that it was not necessary to consider, upon an application for leave, the question whether an appeal would lie without leave, and being of opinion that no special reasons were shewn for granting leave, the circumstance that out of the nine Judges of the Provincial Courts who heard the case two dissented from the opinion of the majority, not being a special ground.—Meredith, J.A., dissenting, was of opinion that an appeal lay without leave, and therefore the Court of Appeal had no jurisdiction to entertain the application for leave; but that, if there were jurisdiction, the leave should be granted. *Lovell* v. *Lovell*, 9 O. W. R. 227, 13 O. L. R. 587.

Leave to appeal—*Special leave—Railway Act, 1903—Order of Board of Railway Commissioners — Jurisdiction.*]—Where the Judge entertained doubt as to the jurisdiction of the Board of Railway Commissioners for Canada to make the order complained of, and the questions raised were of public importance, special leave for an appeal was granted, on terms, under the provisions of s. 44 (3) of the Railway Act, 1903. *Montreal St. Rw. Co.* v. *Montreal Terminal Rw. Co.*, 35 S. C. R. 478.

Leave to appeal—*Special leave—60 & 61 V. c. 34, s. 1 (D.)*]—Special leave to appeal from a judgment of the Court of Appeal for Ontario (60 & 61 V. c. 34, s. 1 (D.)) may be granted in cases involving matters of public interest, important questions of law, construction of Imperial or Dominion Statutes, a conflict between Dominion and provincial authority, or questions of law applicable to the whole Dominion.—Even if a case is of great public interest and raises important questions of law, leave will not be granted if the judgment complained of is plainly right. *Lake Erie & Detroit River Rw. Co.* v. *Marsh* (1904), 35 S. C. R. 197, 24 C. L. T. 363.

Leave to appeal.]—Time expired—Application to Judge in Chambers — Subsequent application to Court — Election of forum—Appeal — Discretion. *Hamilton* v. *Mutual Reserve Life Ins. Co.*, 2 O. W. R. 155, 806, 3 O. W. R. 851, 4 O. W. R. 299, 416, 5 O. W. R. 162.

Leave to appeal — *Time expired — Special circumstances.*] — The appellants allowed the delay of 60 days, from date of judgment rendered by the Court of King's Bench, to elapse without applying for leave to appeal to the Supreme Court. Subsequently, they obtained leave to appeal to the Privy Council. They now moved for leave to appeal to the Supreme Court, and offered to desist from its appeal to the Privy Council if the present motion was granted:—*Held*, that the "special circumstances" referred to in s. 42 of the Supreme and Exchequer Courts Act, are circumstances which would make it unreasonable to impute the failure to act within the prescribed time to the negligence of the party seeking the appeal, e.g., illness, absence, ignorance of the rendering of the judgment, inability owing to poverty to find sureties within the prescribed delay, but not circumstances which did not prevent the application from being made within the proper delay. *Montreal* v. *Montreal St. Rw. Co.*, 11 Que. K. B. 325.

Limitation of time—*Railway Commissioners—Question of jurisdiction—Leave of Judge—Powers of board—Completed railway—Order to provide station—R. S. (1906) c. 37, ss. 26, 151, 158-9, 166-7 and 258.*]—Except in the case mentioned in Rule 59 there is no limitation of the time within which a Judge of the Supreme Court may grant leave to appeal under sec. 56 (2) of the Railway Act on a question of the jurisdiction of the Board of Railway Commissioners. The Board of Railway Commissioners has power to order a railway company whose line is completed and in operation to provide a new station at any place where it is required to afford proper accommodation for the traffic on the road. *Grand Trunk Rw. Co.* v. *Department of Agriculture* (1910), 30 C. L. T. 336, 42 S. C. R. 557, 10 Can. Ry. Cas. 84.

Matter in controversy—*Assessment of damages — Costs.*] — Leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal in *Lashley* v. *Goold Bicycle Co.*, 23 Occ. N. 304, 6 O. L. R. 319, reversing the judgment of Ferguson, J., 22 Occ. N. 372, 4 O. L. R. 350, was sought by the defendants, on the ground of hardship, the judgment being for $1,000 only, exclusive of the costs, which had accumulated until they exceeded $2,000, and also on the ground that the damages had been assessed by mere guess, and were not justified by any reasonable calculation warranted by the circumstances of the case. Leave was refused. *Goold Bicycle Co.* v. *Laishley*, 35 S. C. R. 184.

Matter in controversy—*Séparation de corps—Money demand.*]—In an action by a wife for *séparation de corps* for ill-treatment, the declaration prayed that the husband be condemned to deliver up to the wife her property, valued at $18,000. The judgment in the action decreed separation and ordered an account as to the property:—*Held*, that no appeal would lie to the Supreme Court from the decree for separation. *O'Dell* v. *Gregory*, 24 S. C. R. 661, followed. And the money demand in the declaration, being only incidental to the main cause of action, could not give the Court jurisdiction to entertain the appeal. *Talbot* v. *Guilmartin* (1900), 20 C. L. T. 322, 30 S. C. R. 482.

Matter in controversy—*Tutorship.*]—The Supreme Court of Canada has no jurisdiction to entertain an appeal from a judgment pronounced in a controversy in respect to the cancellation of the appointment of a tutrix to minor children. *Noel* v. *Chevrefils* (1900), 20 C. L. T. 272, 30 S. C. R. 327.

New questions raised on appeal—*Jurisdiction of Court below.*]—Questions of law appearing upon the record, but not raised

in the Court below, may be relied upon for the first time on an appeal to the Supreme Court of Canada, where no evidence in rebuttal could have been brought to affect them had they been taken at the trial. *Gray* v. *Richardson*, 2 S. C. R. 431, and *Scott* v. *Phœnix Assurance Co.*, Stu. K. B. 354, followed. An objection that a Judge of the Court below had no jurisdiction to render a judgment from which an appeal is asserted, is not proper ground on which to question the jurisdiction of the appellate Court to entertain the appeal. *McKelvey* v. *Le Roi Mining Co.* (1903), 23 C. L. T. 61, 32 S. C. R. 664.

New trial — *Alternative relief — Final judgment.*]—In an action on a policy of insurance on the life of the plaintiff's husband, the defence being misrepresentation and concealment of material facts, the plaintiff obtained a verdict, though the defendants' counsel contended that there was no case to go to the jury. On appeal to the Court of Appeal the defendants claimed judgment for them or in the alternative a new trial, and a new trial was granted (6 O. L. R. 434, 23 Occ. N. 86, 2 O. W. R. 78, 4 O. W. R. 351). The defendants then appealed to the Supreme Court of Canada to obtain the larger relief:—*Held*, that the appeal did not lie; that it was not an appeal from the order for a new trial; and that the judgment refusing to dismiss the action was not final. *Dillon* v. *Mutual Reserve Fund Life Association* (1904), 24 C. L. T. 47; *Mutual Reserve Fund Life Assn.* v. *Dillon*, 34 S. C. R. 141.

Notice of appeal and security in appeal.]—Extension of time for giving—Excuse for delay — Discretion — Appeal from order of Judge in Chambers to Court of Appeal. *Brenner* v. *Toronto Rw. Co.*, 11 O. W. R. 55, 441.

Objection first taken on appeal.]—See *Regina* v. *Poirier* (1899), 19 C. L. T. 378, 30 S. C. R. 36. Digested under LANDLORD AND TENANT.

Ontario — *Divisional Court — Constitutional question.*]—Under s. 26, s.-s. 3, of the Supreme and Exchequer Courts Act, leave to appeal direct from the "final judgment" of a Divisional Court of the High Court of Justice for Ontario may be granted in cases where there is a right of appeal to the Court of Appeal for Ontario; and the fact that an important question of constitutional law is involved, and that neither party would be satisfied with the judgment of the Court of Appeal, is sufficient ground for granting such leave. *Ontario Mining Co.* v. *Seybold*, 31 S. C. R. 125.

Ontario—*Single Judge of High Court.*]—On appeal by B. and others, whose lands were expropriated by the company, to the High Court from the award of arbitrators appointed to determine the value of their lands, the amount of the award was increased: 21 Occ. N. 208. The company, having no right of appeal to the Court of Appeal, according to a late decision of that Court, *In re Birely and Toronto, Hamilton and Buffalo Rw. Co.*, 25 A. R. 88, 18 Occ. N. 128, applied to a Judge of the Supreme Court of Canada, in Chambers, for leave to appeal direct from the decision of the High Court, under s. 26, s.-s. 3, of the Supreme and Exchequer Courts Act. The application was referred by the Judge to the full Court:—*Held*, that, to give jurisdiction to a Judge to grant leave to appeal *per saltum* under s. 26, s.-s. 3, of the Act, it is essential that there should be a right of appeal to the Court of Appeal, and it not being shewn that there was such a right in this case, the motion should be refused. *In re Brennan & Ottawa Electric Rw. Co.* (1901), 21 C. L. T. 309, 31 S. C. R. 311.

Order dismissing opposition — *Previous non-appealable order for security — Res judicata — Review.*] — An order requiring *opposants à fin de charge* to furnish security that lands seized, if sold in execution subject to the charge, should realize sufficient to satisfy the claim of the execution creditor, was held to be interlocutory and non-appealable, 33 S. C. R. 340. Upon default of such security, the opposition was dismissed in the Court below:—*Held*, on appeal, that the order was the only one which could properly have been made, and that the merits of the former order could not be reviewed. *Desaulniers* v. *Payette*, 35 S. C. R. 1.

Order for new trial — *Weight of evidence—Discretion—New grounds of appeal.*] —The Court below ordered a new trial upon the ground that the verdict was against the weight of evidence:—*Held*, that this was not an exercise of discretion with which the Supreme Court of Canada would refuse to interfere; and the verdict of the trial was restored. The argument of an appeal to the Supreme Court of Canada must be based on the facts and confined to the grounds relied on in the Court below. Judgment in 35 N. S. Reps. 94, *sub nom. Confederation Life Assn.* v. *Brown*, reversed. *Confederation Life Assn.* v. *Borden*, 34 S. C. R. 338.

Order on petition for leave to intervene.]—There is no appeal to the Supreme Court of Canada from an order on a petition for leave to intervene in a cause, the proceeding being merely interlocutory in its nature. *Hamel* v. *Hamel*, 26 S. C. R. 17, followed. *Connolly* v. *Armstrong*, 35 S. C. R. 12.

Petitory action—*Order defining boundary line.*]—Where, in an action *au petitoire* and *en bornage*, the question as to title has been finally settled, a subsequent order defining the manner in which the boundary line between the respective properties shall be established is not appealable to the Supreme Court of Canada. *Cully* v. *Ferdais*, 30 S. C. R. 330, followed. *Hull* v. *Scott*, 34 S. C. R. 617.

Practice.]—Security for costs — Appealable amount—Interest and costs—Jurisdiction —"Matter in dispute." *Labrosse* v. *Langlois*, 6 E. L. R. 111.

Practice on appeal—*Cross-appeal—Parties.*]—The action was against two defendants jointly, and the plaintiff obtained a verdict at the trial against both. The Court of Appeal confirmed the verdict as to McN., and dismissed the action as to the other defendants. McN. appealed to the Supreme Court of Canada, making the other defendants respondents on his appeal: — *Held*, that the plaintiff, respondent, was entitled to cross-appeal against the respondent defendants, to

have the verdict against them at the trial restored. *McNichol* v. *Malcolm* (1907), 27 C. L. T. 664, 39 S. C. R. 265.

Printed case—*Expense of—Parties.*]—*Held*, that in determining the amount to be paid by the party seeking to use for purposes of an appeal to the Supreme Court the appeal books printed by the opposite party, the fact that the party to pay has paid for the copies of the stenographer's notes used in the Divisional Court is not to be considered. If there were no printed books, he would have to print for the Supreme Court, and in paying for the books already printed he is only paying a different person. The question is how much he should pay in order to get the thirty copies he needs for the Supreme Court. No general scale can be formulated. The thirty books do not represent the whole value of the printer's charge. The books retained by the party printing, or of which he has got the benefit, as well as the bulk of the book and the number actually printed, etc., have to be taken into consideration. The sum of $95 fixed as approximately representing the proportion settled in previous cases. *Teetzel* v. *Dominion Construction Co.*, 18 P. R. 16, followed. *Trusts and Guarantee Co.* v. *Hart*, (1901), 21 C. L. T. 494.

Prohibition — *Quebec case — R. S. C. (1906), c. 129, ss. 39 and 46.*]—No appeal lies to Supreme Court of Can. from judgment of Court of Quebec in any case of proceedings for or upon a writ of prohibition, unless the matter in controversy falls within some of the classes of cases provided for by s. 46 of the Supreme Court Act, R. S. C. (1906), c. 139. *Shannon* v. *Montreal Park & Island Ry. Co.*, 28 S. C. R. 374, overruled. *Desormeaux* v. *Ste. Therese* (1910), 30 C. L. T. 527, 43 S. C. R. 82.

Proposed appeal—*Failure to give security—Payment out of money in Court representing subject matter of action.*]—Pending an action a sum of money was paid into Court by the defendants, which money represented land, the subject matter of the action. The defendants, having been successful on the trial and on appeal, applied for payment out of the money. The plaintiff had given notice of an appeal to the Supreme Court of Canada, but had not furnished security as required within the time limited. An application for payment out before the time for giving security had expired had previously been refused on account of the appeal. On a renewed application for payment out:—*Held*, that an appeal to the Supreme Court of Canada cannot be considered as brought or entered until security has been furnished, and, as no security had been given, the defendants were entitled to an order for payment out. *Huggard* v. *Ontario and Saskatchewan Land Corporation*, 1 Sask. L. R. 495, 9 W. L. R. 432.

Quantum of damages—Interference by Court below — Restoration of verdict.—See *Coghlin* v. *La Fonderie de Joliette*, 24 Occ. N. 110, 34 S. C. R. 153.

Questions of fact.]—Upon issues raised as to matters of fact, the Supreme Court of Canada declined to disturb the concurrent findings of the Courts below, while on a question of law reversing the judgment in Q. R. 11 K. B. 19, and restoring that in Q. R. 21 S. C. 241. *Citizens' Light and Power Co.* v. *St. Louis*, 34 S. C. R. 495.

Questions of fact.]—There is no rule of law or of procedure which prevents the Supreme Court or an intermediate Court of appeal from reversing the decision at the trial on the facts. In an action for the price of a tombstone, the defence was that it was not of the design ordered. The trial Judge dismissed the action, but his judgment was reversed by the Court of Appeal (1 O. W. R. 602); and the Supreme Court of Canada affirmed the reversal. *Lewis* v. *Dempster* (1903), 23 C. L. T. 179, 33 S. C. R. 292.

Questions of fact—*Concurrent findings of Courts below.*]—A judgment based on concurrent findings of fact in the Courts below ought not to be disturbed on appeal to the Supreme Court of Canada if the evidence be contradictory. *D'Avignon* v. *Jones*, 32 S. C. R. 650.

Questions of fact — *Final judgment — Right of appeal—Leave to appeal to Privy Council—Costs.*]—In an action by executors against the appellant to recover certain sums of money due to their estate, the Judge of the Territorial Court, at the request of the plaintiffs, selected one of the items, and adjudicated on the evidence taken that the action in respect thereof be dismissed:—*Held*, that this was, within the meaning of the Yukon Territorial Act, 1899, s. 8, a final judgment in respect thereof, notwithstanding that the remaining items in suit were referred, and the costs were reserved. No appeal therefrom to the British Columbia Court lay after the expiration of 20 days. Special leave having been granted to appeal from a decree of the Supreme Court of Canada on a petition stating that the construction of the said statute was a matter of general public importance, without stating that it had been repealed:—*Held*, that, as the omission was immaterial and *bona fide*, the appellant should not be deprived of his costs. Judgment in *Belcher* v. *McDonald*, 33 S. C. R. 321, reversed. *McDonald* v. *Belcher*, [1904] A. C. 429.

Questions of fact—*Trial by Judge without jury—Findings of fact—Evidence—Reversal by Appellate Court.*]—In an action for damages for personal injuries, the trial Judge, who heard the case without a jury, and before whom the witnesses were heard, held that the expert evidence of the witnesses for the defence were entitled to credit, and dismissed the action. The judgment was reversed in the Court of Review, and the reversal upheld by the Court of Queen's Bench, upon a different appreciation of the weight of evidence by the Judges in these Courts. On appeal to the Supreme Court of Canada:—*Held*, that, as the judgment at the trial was supported by evidence, it should not have been so reversed. Judgment appealed from reversed and judgment of trial Judge restored. *Granby* v. *Menard* (1901), 21 C. L. T. 7, 31 S. C. R. 14.

Questions of fact.]—Where there does not appear to have been manifest error in the findings of the Courts below, they will not be disturbed on appeal. Judgment of the Court of Queen's Bench for Lower Canada (Q. R. 9 Q. B. 18), reversing the judgment of the Court of Review and restoring that of the Superior Court, affirmed. *Paradis* v. *Limoilu*, 30 S. C. R. 105.

See also *Quebec Fire Ins. Co.* v. *Bank of Toronto* (1900), 20 Occ. N. 222.

Questions of fact—*Concurrent findings of two Courts below.*]—See *Voilleux* v. *Ordway*, *Price* v. *Ordway*, 24 Occ. N. 109, 34 S. C. R. 145.

Refusal to interfere—*Matters of procedure.*]—The Court, following its usual practice, refused, on an appeal, to interfere with the action of the Courts below in matters of mere procedure, where no injustice appeared to have been suffered in consequence, although there might be irregularities in the issues as joined which brought before the trial Court a *demande* almost different from the matter actually in controversy. *Finnie* v. *Montreal* (1902), 22 C. L. T. 356, 32 S. C. R. 335.

Refusal to interfere—*Matters of procedure — Partnership—Account.*] — The judgment appealed from held that in an action *pro socio*, it was sufficient for the plaintiff in his statement of claim to allege facts that would justify an inquiry into all the affairs of the partnership and the liquidation of the same, without producing full and regular accounts of the partnership affairs:—*Held*, that the appeal involved merely a question of procedure in a matter where the appellant had suffered no wrong, and, therefore, that the appeal should be dismissed. *Higgins* v. *Stephens* (1902), 22 C. L. T. 195, 32 S. C. R. 132.

Refusal to interfere—*Matters of procedure—Verdict—Weight of evidence.*] — The Court refused to interfere with a decision of the Court of Appeal for Ontario in a matter of procedure, viz., whether a verdict of a jury was a general or special verdict. The Court also refused to disturb the verdict on the ground that it was against the weight of evidence, after it had been affirmed by two tribunals below. *Balfour* v. *Toronto Rw. Co.* (1902), 1 O. W. R. 671, 22 C. L. T. 221, 32 S. C. R. 239.

Right of appeal—*Actio pauliana—Controversy involved — Title to land.*]—In the province of Quebec, the *actio pauliana*, though brought to set aside a contract for sale of an immovable, is a personal action and does not relate to a title to lands so as to give a right of appeal to the Supreme Court of Canada. *Lamothe* v. *Davelny*, 41 S. C. R. 80, 6 E. L. R. 153.

Right of appeal—*Action for declaration and injunction—60 & 61 V. c. 34, s. 1 (d).*]—The Act 60 & 61 V. c. 34, s. 1 (d), relating to appeals from the Court of Appeal for Ontario, does not authorize an appeal in an action for a declaration that a municipal by-law is illegal and for an injunction to restrain its enforcement.—A by-law providing for a special water rate for certain industries does not bring in question the taking of an annual or other rent, custom or other duty or fee, under clause (d).—Appeal from judgment of Court of Appeal in *Hamilton Distillery Co.* v. *Hamilton, Hamilton Brewing Assoc.* v. *Hamilton*, 12 O. L. R. 75, quashed. *Hamilton* v. *Hamilton Distillery Co., Hamilton* v. *Hamilton Brewing Assoc.* (1907), 27 C. L. T. 153, 38 S. C. R. 239.

Right of appeal — *Amount in controversy.*]—The Supreme Court of Canada has no jurisdiction to entertain an appeal in a suit to annul a *procès-verbal* establishing a public highway, notwithstanding that the effect of the *procès-verbal* in question might be to involve an expenditure of over $2,000 for which the appellants' lands would be liable for assessment by the municipal corporation. *Dubois* v. *Village of Ste. Rose*, 21 S. C. R. 65; *City of Sherbrooke* v. *McManamy*, 18 S. C. R. 594; *County of Verchères* v. *Village of Varennes*, 19 S. C. R. 365, and *Bell Telephone Co.* v. *City of Quebec*, 20 S. C. R. 230, followed. *Webster* v. *City of Sherbrooke*, 24 S. C. R. 52, 268, and *McKay* v. *Township of Hinchinbrooke*, *ib.* 55, referred to. *Reburn* v. *Parish of Ste. Anne*, 15 S. C. R. 92, overruled. *Toussignant* v. *Nicolet* (1902), 22 C. L. T. 355, 32 S. C. R. 353.

Right of appeal — *Amount in controversy—Claim and counterclaim — Leave to appeal.*]—The plaintiffs claimed $1,500 damages for delay in delivery of iron. The defendants, besides denying the charge of non-delivery in due time, counterclaimed for $1,223 demurrage. At the trial judgment was given for the plaintiffs for $1,000, and the counterclaim was dismissed. Upon appeal to the Court of Appeal the judgment was varied by limiting the damages to the fall in the price of iron during a considerably shorter time than that fixed in the Court below, the amount to be ascertained on a reference. Upon a motion by the defendants to allow a bond given by them as security upon an appeal by them to the Supreme Court of Canada, the plaintiffs' counsel stated that the plaintiffs' claim on the reference would be less than $1,000, and contended that no appeal lay:—*Held*, however, that, as the plaintiff claimed $1,500, and was not limited by the judgment of the Court of Appeal to any particular sum, the matter in controversy on the appeal exceeded the sum of $1,000, so that the appeal lay:—*Held*, also, that upon the counterclaim the sum of $1,223 was involved, and that an appeal lay in respect thereof. The Court of Appeal declined to grant, *ex cautela*, leave to appeal to the Supreme Court, the case not being one in which leave, if it were necessary, ought to be granted. *Frankel* v. *Grand Trunk Rw. Co.*, 22 C. L. T. 229, 3 O. L. R. 703, 1 O. W. R. 254, 339, 396.

Right of appeal — *Amount in controversy—Contrainte par corps — Insolvent.*]—On a contestation of a statement of an insolvent trader by a creditor claiming a sum exceeding $2,000, the order appealed from condemned the appellant under art. 888, C. P. Q., to three months' imprisonment for secretion of a portion of his insolvent estate, to the value of at least $6,000:—*Held*, that there was no pecuniary amount in controversy, and there could be no appeal to the Supreme Court of Canada. *Clement* v. *Banque Nationale*, 33 S. C. R. 343.

Right of appeal — *Amount in controversy — Conditional renunciation.*]—Where a conditional renunciation reducing the amount of the claim to a sum less than $2,000 has not been accepted by the defendant, the amount in controversy remains the same as it was upon the original *demande*, and, if such *demande* exceeds the amount limited by s. 29 of the Supreme Court Act, an appeal will lie. *Montreal Water & Power Co.* v. *Davie*, 25 C. L. T. 5, 35 S. C. R. 255.

Right of appeal — *Amount in controversy—Creditor's action—Transfer of cheque —Preference.*]—R., on behalf of himself and all other creditors of McG., brought an action for a declaration that the transfer of a cheque for $1,025 by McG. to S. was preferential and void, and to recover the proceeds of the cheque for distribution among the creditors. The judgment of the High Court, *Robinson* v. *McGillivray*, 12 O. L. R. 91, 7 O. W. R. 438, affirmed by the Court of Appeal, 13 O. L. R. 232, 8 O. W. R. 602, dismissed the action:—*Held*, that the only matter in controversy was the property in the sum represented by the cheque, and such sum being more than $1,000, an appeal would lie. *Robinson, Little & Co.* v. *Scott & Son*, 27 C. L. T. 313, 38 S. C. R. 490.

Right of appeal — *Amount in controversy—Interest before action.*]—A judgment for $1,000 damages, with interest from a date before action brought, is appealable under 60 & 61 V. c. 34, s. 1 (c). *McNevin* v. *Canadian Railway Accident Ins. Co.*, 22 C. L. T. 223, 32 S. C. R. 194.

Right of appeal — *Amount in controversy—Interest—Costs—Collateral matter.*]—An action having been brought against the maker and indorser of a promissory note for $2,000, the makers sued the indorser in warranty, alleging that no consideration was given for the note, and asking that the indorser guarantee them against any judgment obtained in the main action. They also asked that an agreement under which the makers were to become liable for $3,000 be declared null. The two actions were tried together, and judgment given for the plaintiff in the action on the note, while the action in warranty was dismissed. On appeal from the latter judgment:—*Held*, that the amount in dispute was $2,000, the value of the note sued on; that the costs of the action in warranty could not be added, and without them the sum of £500 was not in controversy, even if interest and costs in the main action were added; the appeal, therefore, did not lie.—*Held*, also, that the agreement which the plaintiffs in warranty sought to avoid was only a collateral matter to the issues raised on the appeal, and could not be considered in determining the amount in dispute.—Interest after the commencement of the action, unless specially claimed as damages, cannot be added to the amount claimed in the declaration in determining the amount in controversy for the purpose of giving jurisdiction upon an appeal to the Supreme Court of Canada. *Labrosse* v. *Langlois*, 41 S. C. R. 43, 6 E. L. R. 111.

Right of appeal — *Amount in controversy—Reference to assess damages—Final judgment.*]—In 1905 L. and others purchased from W. his creameries on the faith of a statement purporting to be made up from the books and shewing an output for the years 1904-5 equal to or greater than that of 1903. Having discovered that this statement was untrue, they brought an action for rescission of the contract to purchase and damages for the loss in operating during 1906. The judgment at the trial dismissing the action was affirmed by a Divisional Court. The Court of Appeal, *Lamont* v. *Wenger*, 12 O. W. R. 481, 511, reversed the latter judgment, held that rescission could not be ordered, but the only remedy was damages, and ordered a reference to assess the amount. On appeal to the Supreme Court of Canada:—*Held*, Girouard, J., dissenting, that, as it could not be ascertained from the record what the amount in controversy on the appeal was, or whether or not it was within the appealable limit, the appeal did not lie.—*Held, per* Idington, J., that the judgment appealed against was not a final judgment.—*Per* Girouard, J., dissenting.—It is established by the evidence at the trial, published on the record, and admitted by the respective counsel for the parties, that the amount in dispute exceeds $1,000. The Court, therefore, has jurisdiction to hear the appeal. *Wenger* v. *Lamont*, 41 S. C. R. 603.

Right of appeal — *Amount in controversy—Retrait—R. S. C. 1906, c. 139, s. 46 (c).*]—In an action for damages for the death of the plaintiff's husband by the negligence of the defendants, as alleged, she laid the damages at $10,000, but before the trial filed a retrait reducing her claim to $1,999. At the trial the damages were assessed at $1,333, and judgment for that amount was ordered by the trial Judge to be entered. This was affirmed by the Court of King's Bench, and the defendants appealed to the Supreme Court of Canada: — *Held*, that under the limitation provided by R. S. C. 1906 c. 139, s. 46 (c), the appeal did not lie. *Montreal Park & Island Rw. Co.* v. *Labrosse*, 40 S. C. R. 96, 5 E. L. R. 101.

Right of appeal — *Amount in controversy—Verdict of $1,000—Addition of interest —Supreme Court Act, s. 48.*] — Where the amount of a judgment to be appealed from was $1,000, and $43.05 interest had accrued on such judgment.—*Held*, that the matter in controversy exceeded the sum or value of $1,000, exclusive of costs, within the meaning of s. 48 of the Supreme Court Act, R. S. C. 1906 c. 139, allowing an appeal to the Supreme Court of Canada. *Milligan* v. *Toronto Rw. Co.*, 17 O. L. R. 370, 12 O. W. R. 1103.

(Afterwards, the Supreme Court of Canada quashed the appeal, on the ground that there was no right of appeal without leave, thus overruling the above decision).

Right of appeal—*Annulment of procès-verbal—Servitude.*]—In a proceeding to set aside resolutions by a municipal corporation giving effect to a *procès-verbal*, the Court followed *Toussignant* v. *County of Nicolet*, 32 S. C. R. 353, and quashed the appeal with costs. Art. 560, C. C., referred to. *Leroux* v. *Ste. Justine de Newton*, 37 S. C. R. 321.

Right of appeal — *Appellant granted alternative relief of new trial on motion to Court below.*]—Where the party failing at the trial moves the Court of last resort for the province for judgment, or, in the alternative, for a new trial, he cannot appeal to the Supreme Court of Canada, from a judgment granting the latter relief. *Mutual Reserve Insurance Co.* v. *Dillon*, 34 S. C. R. 141, followed. *Ainslie Mining & Rw. Co.* v. *McDougall*, 40 S. C. R. 270, 5 E. L. R. 344.

Right of appeal—Case not originating in a Superior Court—Final judgment—Objection to jurisdiction in factum — Court's duty to consider objection although not pressed—Motion to quash—Costs. *Blain* v. *Jamieson*, 6 E. L. R. 71.

Right of appeal—*Controverted election —Judgment dismissing petition — Want of prosecution.*]—There is no right of appeal to the Supreme Court of Canada from a judgment dismissing a petition against the return of a member of the House of Commons for want of prosecution within six months prescribed by R. S. C. c. 9, s. 32, the Controverted Elections Act. *In re Richelieu Dominion Election, Vanasse* v. *Bruneau*, 22 C. L. T. 193, 32 S. C. R. 118.

Right of appeal—*Controverted election —Petition—Lost record—Substituted copy—Judgment on preliminary objections—Discretion of Court below — Jurisdiction.*] — The record in the case of a controverted election was produced in the Supreme Court of Canada on an appeal against the judgment on preliminary objections, and, in re-transmission to the Court below, the record was lost. Under the procedure in similar cases in the province where the petition was pending, a record was reconstructed in substitution for the lost record, and, upon verification as to its correctness, the Court below ordered the substituted record to be filed. Thereupon, the respondent in the Court below raised preliminary objections, traversing the correctness of a clause in the substituted petition, which was dismissed by the judgment appealed from:—*Held*, that, as the judgment appealed from was not one upon a question raised by preliminary objections, nor a judgment upon the merits at the trial, the Supreme Court of Canada had no jurisdiction to entertain the appeal, nor to review the discretion of the Court below in ordering the substituted record to be filed. *In re Two Mountains Dominion Election, Ethier* v. *Legault*, 22 C. L. T. 192, 32 S. C. R. 55.

Right of appeal—*Controverted election petition — Order fixing time for trial.*]—No appeal lies to the Supreme Court of Canada from an order of the Judges assigned to try an election petition fixing the date for such trial. *Re Halifax Dominion Election, Roche* v. *Hetherington, Carney* v. *Hetherington*, 39 S. C. R. 401.

Right of appeal — *Constitutional question—No money value involved.*]—A case in which no money value is in controversy, but in which a judicial declaration is prayed for that under the B. N. A. Act the Dominion government has no power to appoint a commissioner for extradition, is one in which an appeal will lie from a judgment of the Court of King's Bench to the Supreme Court of Canada.—Such a judgment is not a judgment in a criminal matter governed by art. 750 of the Criminal Code, but is rendered by the Court in exercise of its civil jurisdiction. *Gaynor* v. *Lafontaine* (1906), Q. R. 14 K. B. 335.

Right of appeal—*Declinatory exception —Interlocutory judgment — Review of judgment on exception—Practice.*] — The action was dismissed in the Superior Court upon declinatory exception. The Court of King's Bench reversed this decision, and remitted the cause for trial on the merits. On motion to quash a further appeal to the Supreme Court of Canada:—*Held*, that the motion should be granted, on the ground that the objection to the jurisdiction of the Superior Court might be raised on a subsequent appeal from a judgment on the merits.—*Per* Girouard, J.:—The judgment of the Court of King's Bench was not a final judgment, and consequently no appeal could lie to the Supreme Court of Canada. *Wilson* v. *Shawinigan Carbide Co.*, 26 C. L. T. 526, 37 S. C. R. 535.

Right of appeal — *Demurrer — Final judgment — Jurisdiction.*]—The declaration, in an action by a municipality claiming forfeiture of a franchise for non-fulfilment of the obligations imposed in respect thereof, alleged in five counts as many different grounds for such forfeiture. The defendant demurred generally to the declaration and specifically to each count. The demurrer was sustained as to three counts and dismissed as to the other two. On appeal from the decision of the registrar refusing an order to affirm the jurisdiction of the Supreme Court to entertain an appeal from the judgment maintaining the demurrer:—*Held*, that each count contained a distinct ground on which forfeiture could be granted, and a judgment depriving the municipality of its right to rely on any such ground was a final judgment in respect thereof which could be appealed to the Supreme Court of Canada. *City of St. Jean* v. *Molleur*, 40 S. C. R. 139, 5 E. L. R. 57.

Right of appeal—Doubt—Allowance of appeal. *Hamilton* v. *Hamilton Street Rw. Co.*, 4 O. W. R. 47, 207, 311, 411, 5 O. W. R. 151, 6 O. W. R. 206, 375.

Right of appeal — *Extradition—Prohibition—Statute — Public policy — Criminal proceedings.*]—A motion for a writ of prohibition to restrain an extradition commissioner from investigating a charge of a criminal nature, upon which an application for extradition has been made, is a proceeding arising out of a criminal charge within the meaning of s. 24 (g) of the Supreme Court Act, as amended by 54 & 55 V. c. 25, s. 2, and in such a case no appeal lies to the Supreme Court of Canada. *In re Wendhall*, 20 Q. B. D. 832, and *Hunt* v. *United States*, 166 U. S. 424, referred to. Appeal quashed with costs. *In re Gaynor and Greene*, 25 C. L. T. 116; *Gaynor and Greene* v. *United States of America*, 36 S. C. R. 247.

Right of appeal—*Final judgment.*]—In 1903 the United Lumber Co. executed a contract for sale to D. of all their lumber lands and interests therein, the price to be payable in three instalments at fixed dates. By a contemporaneous agreement the company undertook to get out logs for D., who was to

make advances for the purpose. The agreement for sale was carried out and two instalments of the purchase money paid. At the time these contracts were executed the Union Bank had advanced money to the company, and shortly afterwards the contract for sale was assigned to the bank as security for such and for future advances. The company having assigned in insolvency, the bank brought an action against D. for the last instalment of the purchase money, to which he pleaded that he had paid in advance to the company and the bank more than the sum claimed. The trial Judge held that the bank had no notice of the second agreement under which D. claimed to have advanced the money, and gave judgment for the bank with a reference to ascertain the amount due. The full Court set aside this judgment and ordered a reference to ascertain the amount due the bank and, if anything was found to be due, to ascertain the amount due to D. from the company. The bank sought to appeal from the latter decision:—*Held*, that the judgment of the full Court was not a final judgment from which an appeal would lie under the Supreme Court Act to the Supreme Court of Canada. *Union Bank of Halifax* v. *Dickie*, 41 S. C. R. 13.

Right of appeal — *Final judgment.*]—The trial of an action to adverse an application for a certificate of improvements for a mineral claim was begun, but before the plaintiff closed his case, an adjournment was granted to permit him to put in proof of the measurement shewing the extent of the encroachment of one mineral claim on the other. During the course of the trial it appeared that the map or plan filed by the plaintiff under s. 37 of the Mineral Act of British Columbia, was not made as a result of a survey, but from measurements taken by the plaintiff's brother. The defendants then urged a dismissal of the action, contending that the map or plan was of no effect, but the trial Judge ordered it to be filed as part of the evidence, and declined to deal with its effect as that state of the action. The defendants appealed from the trial Judge's refusal to dismiss the action, to the full bench of the Supreme Court of British Columbia, and there contended that the action should have been dismissed, and that a postponement should not have been granted, because the plaintiff had not filed with the Mining Recorder a map made as a result of a survey. With this view the majority of the Court agreed, and directed a judgment to be entered dismissing the action and allowing the appeal. From this judgment the plaintiff appealed to the Supreme Court of Canada:—*Held*, that under the interpretation of the words "final judgment" in the Supreme and Exchequer Courts Act, s. 24, the judgment appealed from dismissing the action was a final judgment. *Paulson* v. *Beaman*, 22 C. L. T. 425.

Right of appeal — *Final judgment — Time—Exchequer Court Act, R. S. C. 1906 c. 140, s. 82—Exchequer Court Rules.*]—Notwithstanding that no appeal has been taken from the report of a referee within the 14 days mentioned in ss. 19 and 20 of the General Rules and Orders of the Exchequer Court of Canada (12th December, 1899), an appeal will lie to the Supreme Court of Canada from an order of the Judge confirming the report, as required by the said sections, within the 30 days limited by s. 82 of the Exchequer Court Act, R. S. C. 1906, c. 140. *North Eastern Banking Co.* v. *Royal Trust Co., In re Atlantic and Lake Superior Rw. Co.*, 41 S. C. R. 1.

Right of appeal—*Future rights—Tollbridge—Exclusive limits — Infringement of privilege.*] — The plaintiff's action was for $1,000 damages for infringement of his tollbridge privileges, in virtue of 58 Geo. III. c. 20 (L.C.), by the construction of another bridge within the reserved limit, and for the demolition of the bridge, etc. The judgment appealed from dismissed the action. On a motion to quash the appeal:—*Held*, that the matter in controversy affected future rights, and, consequently, an appeal would lie to the Supreme Court of Canada. *Galarneau* v. *Guilbault*, 16 S. C. R. 579, and *Chamberland* v. *Fortier*, 23 S. C. R. 37, followed. Motion refused with costs. *Rouleau* v. *Pouliot*, 25 C. L. T. 97, 36 S. C. R. 26.

Right of appeal—*Interest of appellant —Parties — Sale of substituted lands — Res inter alios acta—Res judicata.*]—Where a person who might have an eventual interest in substituted lands had not been called to the family council nor made a party in the Superior Court to proceedings for authority to sell the lands, the order authorizing the sale was held to be *res inter alios acta*, and not to prejudice his rights, and therefore he could not maintain an appeal therefrom. *Prevost* v. *Prevost*, 25 C. L. T. 2, 35 S. C. R. 193.

Right of appeal—*Intervention—Amount in controversy—Judicial proceeding.*]—In an action in the province of Quebec to recover $804.45, a writ of attachment before judgment issued at the same time as the writ of summons, and goods in possession of the defendant, of the value of $4,000, were provisionally attached. The respondent company subsequently intervened in the action, claiming the goods thus attached. The judgment maintained the plaintiff's action, quashed the attachment, maintained the intervention, and declared that the company were owners of the goods. On motion to quash an appeal by the plaintiff:—*Held*, Girouard, J., dissenting, that the intervention was a "judicial proceeding" within the meaning of s. 29 of the Supreme and Exchequer Courts Act, and that the right of appealing to the Supreme Court of Canada was determined by the matter in controversy upon the intervention.—*Walcott* v. *Robinson*, 11 L. C. Jur. 303; *Miller* v. *Déchêne*, 8 Q. L. R. 18; *Turcotte* v. *Dansereau*, 26 S. C. R. 578, and *King* v. *Dupuis*, 28 S. C. R. 388, followed.—*Atlantic and North-West Rw. Co.* v. *Turcotte*, Q. R. 2 Q. B. 305; *Allan* v. *Pratt*, 13 App. Cas. 780, and *Kinghorn* v. *Larue*, 22 S. C. R. 347, distinguished. *Coté* v. *James Richardson Co.*, 27 C. L. T. 155, 38 S. C. R. 41.

Right of appeal.]—Judgment of Supreme Court of Nova Scotia varying judgment of trial Judge as to scope of reference—Not a final judgment—Appeal quashed. *Union Bank* v. *Dickie*, 6 E. L. R. 88.

Right of appeal—*Judgment of Court of King's Bench, Quebec—Court of Review—Reduction of damages—Confirmation of Superior Court judgment—R. S. C. 1906 c. 139,*

s. 40.]—There can be no appeal to the Supreme Court of Canada from a judgment of the Court of King's Bench, appeal side, quashing an appeal from the Superior Court, sitting in review, for want of jurisdiction. *City of Ste Cunégonde* v. *Gougeon*, 25 S. C. R. 78, followed. Idington, J., dissented.—In an action for damages, where the plaintiff obtains a verdict at the trial, and the Court of Review reduces the amount awarded thereon, the judgment of the Superior Court is confirmed, and, therefore, no appeal lies to the Court of King's Bench, but there might be an appeal from the judgment of the Court of Review to the Supreme Court of Canada. *Simpson* v. *Palliser*, 29 S. C. R. 6, distinguished. Idington, J., dissented. *Hull Electric Co.* v. *Clement*, 41 S. C. R. 419, 6 E. L. R. 431.

Right of appeal—*Judgment of Superior Court in Review, Quebec—Appeal to Privy Council—Appealable amount—Amendment of statute—Application—Notice of appeal—New trial.*]—An appeal lies to the Supreme Court of Canada from a judgment of the Court of Review which is not appealable to the Court of King's Bench, but is susceptible of appeal to His Majesty in Council.—By 8 Edw. VII. c. 75 (Q.), the amount required to permit of an appeal to His Majesty in Council was fixed at $5,000 instead of £500 as theretofore:—*Held*, that this Act did not govern a case in which the judgment of the Court of Review was pronounced before it came into force.—By s. 70 of the Supreme Court Act notice must be given of an appeal from the judgment, *inter alia*, "upon a motion for a new trial:"—*Held*, that such provision applies only when the motion is made for a new trial and nothing else, and notice is not necessary where the proposed appeal is from the judgment on a motion for judgment *non obstante*, or, in the alternative, for a new trial. *Sedgwick* v. *Montreal Light Heat and Power Co.*, 41 S. C. R. 639.

Right of appeal—*Judgment of Superior Court in Review, Quebec—Collection of municipal taxes—Action in Recorder's Court—Montreal city charter, 62 V. c. 58 (Q.)—Special tribunal—Court of last resort—Supreme Court Act, R. S. C. 1906 c. 139, s. 41.*]—Under the provisions of the Montreal city charter, 62 V. c. 58, s. 484 (Q.), an action was brought by the city corporation in the Recorder's Court to recover taxes on an assessment of the company's property in the city. Judgment was recovered for $39,691.80, and an appeal to the Superior Court, sitting in review, under the provisions of the Quebec statute 57 V. c. 49, as amended by 2 Edw. VII. c. 42, was dismissed. On an application by the company to affirm the jurisdiction of the Supreme Court of Canada to hear an appeal from the judgment of the Court of Review:—*Held*, that the Superior Court, when exercising its special appellate jurisdiction in reviewing this case, was not a Court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, within the meaning of s. 41 of the Supreme Court Act, R. S. C. 1906 c. 139, and, consequently, there could be no jurisdiction to entertain the appeal. *Montreal Street Ry. Co.* v. *Montreal*, 41 S. C. R. 427.

Right of appeal — *Jurisdiction of Supreme Court of Nova Scotia—Stated case—Provincial legislation—Assessment.*]—An Ontario company resisted the imposition of a license fee for "doing business in the city of Halifax," and a case was stated and submitted to the Supreme Court of Nova Scotia for an opinion as to such liability. On appeal from the decision of that Court to the Supreme Court of Canada, counsel for the corporation of the city of Halifax contended that the proceedings were really an appeal against an assessment under the city charter, that no appeal lay therefrom to the Supreme Court of the province, and, therefore, and because the proceedings did not originate in a Superior Court, the appeal to the Supreme Court of Canada did not lie:—*Held, per* Fitzpatrick, C.J.C., and Duff, J., that, as the appeal was from the final judgment of the Court of last resort in the province, this Court had jurisdiction under the provisions of the Supreme Court Act, and it could not be taken away by provincial legislation.—*Per* Davies, J.:—Provincial legislation cannot impair the jurisdiction conferred upon this Court by the Supreme Court Act. In this case the Supreme Court of Nova Scotia had jurisdiction under Order xxxiii., Rule 1, of the Judicature Act.—*Per* Idington, J.:—If the case was stated under the Judicature Act Rules, the appeal would lie, but not if it was a submission under the charter for a reference to a Judge at request of a ratepayer. *Halifax* v. *McLaughlin Carriage Co.*, 27 C. L. T. 659, 39 S. C. R. 174.

Right of appeal—*Leave—Order postponing hearing of demurrer—Infringement—Exchequer Court.*]—Unless an order upon a demurrer be a decision upon the issues raised therein, leave to appeal to the Supreme Court of Canada cannot be granted under the provisions of ss. 51 and 52 of the Exchequer Court Act, as amended by 2 Edw. VII. c. 8. *Toronto Type Foundry Co.* v. *Mergenthaler Linotype Co.*, 36 S. C. R. 593.

Right of appeal — *Leave—Winding-up Act—Amount in controversy.*]—In proceedings under the Winding-up Act, an appeal lies to the Supreme Court of Canada only when the amount involved exceeds $2,000:—*Held*, that an order for the winding-up of a company does not involve any amount, and no appeal lies from the judgment of a provincial court refusing to set it aside, and leave to appeal cannot be granted. Appeal quashed without costs. *Cushing Sulphite Fibre Co.* v. *Cushing*, 26 C. L. T. 455, 37 S. C. R. 427.

Right of appeal — *Leave—Winding-up Act — Final judgment — Amount in controversy.*]—By s. 76 of the Winding-up Act, an appeal can be taken to the Supreme Court of Canada by leave of a Judge of that Court, if the amount involved is $2,000 or over. On application for leave to appeal from a judgment of the Supreme Court of New Brunswick setting aside an order of a Judge in the winding-up proceedings, which postponed a sale of lands of the insolvent company in a suit in equity for foreclosure of a mortgage, and directed the sale to proceed:—*Held*, that s. 76 of the Winding-up Act must be taken in connection with s. 28 of the Supreme Court Act, and by the latter an appeal can be taken only from a final judgment; and that the

judgment in this case was not final; and leave to appeal could not be granted:—*Held*, also, that no pecuniary amount was involved in the proposed appeal, and leave should be refused on that ground also. Motion refused with costs. *In re Cushing Sulphite Fibre Co.*, 26 C. L. T. 190, 37 S. C. R. 173.

Right of appeal—*Manitoba Mechanics' Lien Act, s. 36.*]—See *Day* v. *Crown Grain Co. and Cleveland*, 27 C. L. T. 664, 39 S. C. R. 258, C. R. [1908] A. C. 150.

Right of appeal—*Matter in controversy—Future rights—Hypothec for rent charges.*]—In an action for the price of real estate sold with warranty, a plea alleging troubles and fear of eviction under a prior hypothec to secure rent charges on the land, does not raise questions affecting the title nor involving future rights so far as to give the Supreme Court of Canada jurisdiction to entertain an appeal. *Bank of Commerce* v. *Le Cure et les Marguilliers de la Nativité*, 12 S. C. R. 25; *Wineberg* v. *Hampson*, 19 S. C. R. 369; *Jermyn* v. *Tew*, 28 S. C. R. 497; *Waters* v. *Manigault*, 30 S. C. R. 304; *Frechette* v. *Simoneau*, 31 S. C. R. 13; *Toussignant* v. *County of Nicolet*, 32 S. C. R. 353, and *Canadian Mutual Loan and Investment Co.* v. *Lee*, 34 S. C. R. 224, followed. *L'Association Pharmaceutique de Quebec* v. *Livernois*, 30 S. C. R. 400, distinguished. *Carrier* v. *Sirois*, 25 C. L. T. 121, 36 S. C. R. 221.

Right of appeal—*Matter in controversy—Removal of executors — Acquiescence in judgment.*]—The Supreme Court of Canada has no jurisdiction to entertain an appeal in a case where the matter in controversy has become an issue relating merely to the removal of executors, though by the action, an account for over $2,000 had been demanded and refused by the judgment at the trial, against which the plaintiff had not appealed. *Noel* v. *Chevrefils*, 30 S. C. R. 327, followed. *Laberge* v. *Equitable Life Assurance Society of the United States*, 24 S. C. R. 59, distinguished. *Donohue* v. *Donohue*, 23 C. L. T. 147, 33 S. C. R. 134.

Right of appeal—*Matter originating in Superior Court — Confirmation of tax sale transfer.*] — The confirmation of a tax sale transfer by a Judge of the Supreme Court of the North-West Territories, under s. 97 of the Land Titles Act, 1894, is a matter or proceeding originating in a Court of superior jurisdiction, and an appeal will lie to the Supreme Court of Canada from a final judgment of the full Court affirming the same; Sedgewick and Killam, JJ., contra. *City of Halifax* v. *Reeves*, 23 S. C. R. 340, followed. *North British Canadian Investment Co.* v. *Trustees of St. John School District No. 61, N. W. T.*, 35 S. C. R. 461.

Right of appeal—*Matter in controversy—Tierce opposition.*]—A creditor of an insolvent with a claim for $600 filed a *tierce opposition* to vacate a judgment declaring the respondent to be the owner of the business of a restaurant and the liquor license accessory thereto, alleged to be worth over $5,000. The opposition was dismissed on the ground that, in the circumstances of the case, the company had no *locus standi* to contest the judgment. On motion to quash an appeal to the Supreme Court of Canada:—*Held*, that, as there was no pecuniary amount in controversy, an appeal would not lie. *Coté* v. *James Richardson Co.*, 38 S. C. R. 41, distinguished. *Canadian Breweries Co.* v. *Garicpy*, 38 S. C. R. 236.

Right of appeal—*New trial—Discretion—Ontario appeals—60 & 61 V. c. 34.*]—*Held, per* Fitzpatrick, C. J., and Duff, J., that s. 27 of R. S. C. c. 135 prohibits an appeal from a judgment granting, in the exercise of judicial discretion, a new trial in the action.—*Per* Davies, J.:—Under the rule in *Town of Aurora* v. *Village of Markham*, 32 S. C. R. 457, 22 Occ. N. 354, no appeal lies from a judgment of the Court of Appeal for Ontario on motion for a new trial, unless it comes within the cases mentioned in 60 & 61 V. c. 34, or special leave to appeal has been obtained. *Per* Curiam:—Appeal from judgment of the Court of Appeal, 11 O. L. R. 171, 6 O. W. R. 633, quashed. *Canada Carriage Co.* v. *Lea*, 26 C. L. T. 847, 37 S. C. R. 672.

Right of appeal—*Order for security—Final judgment.*] — A judgment granting a motion ordering an *opposant à fin de charge* to give security that the real estate advertised for sale will be sold for a sufficient price to enable the hypothecary creditors to be paid in full, is an interlocutory judgment, and a Judge of the Court of King's Bench cannot grant leave to appeal therefrom to the Supreme Court of Canada. *Desaulniers* v. *Payette*, 5 Que. P. R. 364.

Right of appeal—*Order for security—Final judgement.*]—An order requiring *opposants à fin de charge* to furnish security that lands seized in execution, if sold by the sheriff subject to the charge claimed, should realize sufficient to satisfy the claim of the execution creditor, is not a final judgment, and no appeal lies from it to the Supreme Court of Canada. *Desaulniers* v. *Payette*, 33 S. C. R. 340.

Right of appeal—*Order on motion for new trial—Court below equally divided.*]—An appeal lies to the Supreme Court of Canada from an order of the Supreme Court of New Brunswick refusing, by reason of an equal division, to set aside a verdict and order a new trial. In this case a rule was obtained calling on the plaintiffs to shew cause why the verdict should not be set aside and a new trial had, and the formal order was that "the Court having taken time to consider, and being equally divided, the said rule drops, and the verdict entered for the plaintiffs on the trial stands." A motion to quash an appeal from this order was refused. *Bustin* v. *Thorne & Co.*, 37 S. C. R. 532.

Right of appeal—*Order quashing by-law—Appeal de plano—Leave to appeal.*]—Appeals to the Supreme Court from the judgments of the Court of Appeal for Ontario are exclusively governed by the provisions of 60 & 61 V. c. 34, and no appeal lies as of right unless given by that Act. Therefore, there is no appeal *de plano* from an order quashing a by-law, though an appeal is given in such case by the Supreme and Exchequer Courts Act. The Supreme Court will not entertain an application for special leave to appeal under the above Act after a similar application has been made to the Court of Appeal, and leave has been refused. Application for leave

to appeal from the decision in 3 O. L. R. 600, 22 Occ. N. 205, refused. *In re Markham & Aurora*, 1 O. W. R. 289, 22 C. L. T. 354, 32 S. C. R. 457.

Right of appeal—*Possessory action.*]—Petitory actions always involve title to lands, in a secondary manner, and consequently are appealable to the Supreme Court of Canada. *Pinsonneault* v. *Hebert*, 13 S. C. R. 450; *Gauthier* v. *Masson*, 27 S. C. R. 575; *Commune de Berthier* v. *Denis*, 27 S. C. R. 147; *Riou* v. *Riou*, 28 S. C. R. 52; *Couture* v. *Couture*, 34 S. C. R. 716, referred to. *Cully* v. *Ferdais*, 30 S. C. R. 322; *Emerald Phosphate Co.* v. *Anglo-Continental Guano Works*, 21 S. C. R. 424, and *Davis* v. *Roy*, 33 S. C. R. 345, distinguished. *Delisle* v. *Arcand*, 25 C. L. T. 95, 36 S. C. R. 23.

Right of appeal — *Possessory action—Landlord and tenant—Rent.*]—In a possessory action, with conclusions for $200 damages, the defendant admitted the plaintiff's title and claimed the right of occupying the premises as her tenant. The judgment appealed from affirmed a judgment dismissing the possessory conclusions and adjudging $200 for rent:—*Held*, that the defendant had no right of appeal to the Supreme Court of Canada. *Davis* v. *Roy*, 33 S. C. R. 345.

Right of appeal—*Railway Act—Expropriation — Appeal from award — Choice of forum.*]—By s. 168 of 3 Edw. VII. c. 58, amending the Railway Act, 1903 (s. 209 of the present Act), if an award by arbitrators on expropriation of land by a railway company exceeds $600, any dissatisfied party may appeal therefrom to a Superior Court, which in Ontario means the High Court or the Court of Appeal (Interpretation Act, R. S. C. 1906 c. 1, s. 34, s.-s. 26):—*Held*, that, if an appeal from an award is taken to the High Court, there can be no further appeal to the Supreme Court of Canada, which cannot even given special leave.—Appeal from the decision of Meredith, C.J., in *Re Armstrong and James Bay Rw. Co.*, 12 O. L. R. 137, 7 O. W. R. 713, quashed. *James Bay Rw. Co.* v. *Armstrong*, 27 C. L. T. 313, 38 S. C. R. 511.

Right of appeal—*Recusation of arbitrator.*]—No appeal lies to the Supreme Court of Canada from a judgment of the Court of Queen's Bench, confirming a judgment of the Superior Court, which dismissed a recusation of an arbitrator appointed in an expropriation by a railway company. *Vallée Est du Richelieu R. W. Co.* v. *Menard*, 5 Q. P. R. 179.

Right of appeal—*Special leave—Judge in Chambers—Appeal to full Court.*]—No appeal lies to the Supreme Court of Canada from an order of a Judge of that Court in Chambers granting or refusing leave to appeal from a decision of the Board of Railway Commissioners under s. 44 (3) of the Railway Act, 1903. *Williams* v. *Grand Trunk Rw. Co.*, 25 C. L. T. 113, 36 S. C. R. 321.

Right of appeal — *Stated case—Final judgment — Origin in Superior Court—Supreme Court Act, ss. 36, 37.*]—An information was laid before the police magistrate for the city of St. John, N.B., charging the license commissioners with a violation of the Liquor License Act by the issue of more licenses in Prince ward than the Act authorized. The informant and the commissioners agreed to a special case being stated for the opinion of the Supreme Court of New Brunswick on the construction of the Act, and that Court, after hearing counsel for both parties, ordered that "the board of license commissioners for the city of St. John be and they are hereby advised that the said board of license commissioners can issue eleven tavern licenses for Prince ward in the said city of St. John and no more (38 N. B. R. 508). On appeal by the commissioners to the Supreme Court of Canada.—*Held*, that the proceedings did not originate in a superior Court, and were not within the exceptions mentioned in s. 37 of the Supreme Court Act; that they were *extra cursum curiæ*; and that the order of the Court below was not a final judgment within the meaning of s. 36; the appeal, therefore, did not lie and should be quashed. *Blaine* v. *Jamieson*, 41 S. C. R. 25, 6 E. L. R. 71.

Right of appeal—*Successions—Security by beneficiary — Future rights — Interlocutory order.*]—Application for approval of security on appeal to the Supreme Court of Canada from an order directing that a beneficiary should furnish the security required by article 663 of the Civil Code of Lower Canada, was refused, on the ground that it was interlocutory, and could not affect the rights of the parties interested. *Kirkpatrick* v. *Birks*, 37 S. C. R. 512.

Right to appeal.]—The Supreme Court of Canada has invariably refused to interfere with questions involving the consideration of questions of practice and procedure. See *Williams* v. *Leonard* (1896), 26 S. C. R. 406; *Green* v. *George* (1907), 42 S. C. R. 219, and *Emperor of Russia* v. *Proskouriakoff* (1908), 42 S. C. R. 226. See 9 W. L. R. 207.

Right to appeal.]—Where the record did not shew that the sum or value demanded by the action was of the amount limited by the Supreme Court Act in respect to appeals from the Province of Quebec, nor that any title to lands or future rights were affected, an appeal will not lie to the Supreme Court of Canada. *Verrett* v. *Aqueduc de la Jeune-Lorette* (1909), 42 S. C. R. 156.

Right of appeal — *Yukon Territorial Court — Decisions of Gold Commissioner — Finality of judgment — Mining lands.*]—The Supreme Court of Canada has jurisdiction to hear appeals from the judgments of the Territorial Court of the Yukon Territory, sitting as the Court of appeal constituted by the Ordinance of the Governor in Council, in respect to the hearing and decision of disputes affecting mineral lands in the Yukon Territory. The Governor in Council has no jurisdiction to take away the right of appeal to the Supreme Court of Canada provided by 62 & 63 V. c. 11 (D.) *Hartley* v. *Matson*, 23 C. L. T. 39, 32 S. C. R. 575.

Security — *Delay in approval—Jurisdiction—Extension of time—Stay of execution.*]—Application for approval of the security on an appeal to the Supreme Court of Canada was made within the time limited by the statute, but the hearing of the application

was not completed until afterwards, and the Judge made an order, after the expiration of 60 days from the rendering of the judgment appealed from, approving of the security offered by the appellants:—*Held*, Idington, J., dissenting, that although the record did not shew that the Judge had expressly made an order to that effect, he impliedly extended the time by accepting the security offered, and that this was a sufficient compliance with the statute.—An objection that the security approved was not such as contemplated by ss. 75 and 76 of the Supreme Court Act (the amount thereof being insufficient for a stay of execution), was not entertained, for the reason that the amount in controversy was sufficient to bring the case within the competence of the Court, and it was immaterial whether or not execution could be stayed. *Attorney-General for Quebec* v. *Scott*, 34 S. C. R. 282, and *Halifax Election Cases*, 37 S. C. R. 601, referred to. *Great Northern R. W. Co. of Canada* v. *Furness, Withy & Co.*, 40 S. C. R. 455, 5 E. L. R. 309.

Security—Stay of proceedings on judgment appealed from—Judgment for costs—Immediate payment—Undertaking of solicitor. *Eggleston* v. *Canadian Pacific Rw. Co.*, *Duggan* v. *Canadian Pacific Rw. Co.* (N.W.T.), 1 W. L. R. 356, 570, 576.

Several appellants.]—The respondents (defendants in the Superior Court) filed separate appearances in appeal, but, by mutual arrangement between them and the appellants, one factum only was filed by the latter, and one judgment rendered (dismissing the appeal). Upon the application for leave to appeal to the Supreme Court, the respondents urged that they were entitled to separate security for costs, from each of the four appellants, that is to say, four bonds of $500 each:—*Held*, that the appeal to the Supreme Court should be allowed upon security being furnished as for a single appeal, viz., to the extent of $500. *Archer & Severn*, 12 P. R. 472, followed. *Bonsack Machine Co.* v. *Falk*, 9 Que. Q. B. 355.

Special leave—*Error in judgment—Concurrent jurisdiction—Mandamus—Malicious prosecution.*]—Special leave to appeal from a judgment of the Court of Appeal for Ontario, under s. 1 (e) of 60 & 61 V. c. 34, will not be granted on the ground merely that there is error in such judgment. Such leave will not be granted when it is certain that a similar application to the Court of Appeal would be refused. The Ontario Courts have held that a person acquitted on a criminal charge can only obtain a copy of the record on the fiat of the Attorney-General. S. having been refused such fiat, applied for a writ of mandamus, which a Divisional Court granted (21 Occ. N. 432, 2 O. L. R. 315), and its judgment was affirmed by the Court of Appeal (22 Occ. N. 360, 4 O. L. R. 394):—*Held*, that the mandamus having been granted, the public interest did not require special leave to be given for an appeal from the judgment of the Court of Appeal, though it might have had the writ been refused. The question raised by the proposed appeal is, if not one of practice, a question of the control of provincial Courts over their own records and officers, with which the Supreme Court should not interfere. *Attorney-General* v. *Scully*, 23 C. L. T. 60, 33 S. C. R. 16.

Special leave—*Forum.*]—A Judge of the Supreme Court of British Columbia may grant special leave for an appeal to the Supreme Court of Canada although he did not sit as a member constituting the full Court which rendered the judgment appealed from. *Oppenheimer* v. *Brakman & Ker Milling Co.*, 32 S. C. R. 699.

Special leave — *Public interest — Important questions of law—Exemption from taxation—School rates — R. S. (1906), c. 139, s. 48.*]—By a municipal by-law an industrial company was given exemption from taxation for a term of years. P., a ratepayer of the municipality, applied for a writ of mandamus to compel the council to assess the company for school rates which, he claimed, were not included in the exemption. The decision to grant the writ was affirmed by the Court of Appeal (20 O. L. R. 246). On motion for special leave to appeal from the latter judgment:—*Held*, that the case was not one of public interest and did not raise important questions of law. It did not, therefore, fall within the principles laid down in *Lake Erie & Detroit River Railway Co.* v. *Marsh* (35 S. C. R. 197), for granting such leave. Motion refused with costs. *Whyte Packing Co.* v. *Pringle* (1910), 30 C. L. T. 338, 42 S. C. R. 691.

Stay of execution pending appeal—Money paid in by defendants to represent subject matter of action — Plaintiff unsuccessful at trial and before Court *en banc*—Application by defendants for payment out—*Bona fide* appeal by plaintiff to Supreme Court of Canada—Retention of money in Court pending appeal. *Huggard* v. *Ontario & Saskatchewan Land Corporation*, 9 W. L. R. 38.

Stay of execution pending application for leave to appeal—Grounds for stay—Absence of special circumstances. *Tinsley* v. *Toronto Rw. Co.*, 12 O. W. R. 581.

Stay of proceedings—*Judgment—Certificate.*]—After decision of Court of Appeal has been certified by registrar, the case is no longer pending in Court of Appeal, and, by Rule 818, the subsequent proceedings are to be taken as if the decision had been given in the Court below. A Judge of Court of Appeal has, therefore, no power, under Judicature Act, R. S. O. 1897, c. 51, s. 54, or 60 & 61 V. c. 34, s. 1 (D.), or otherwise, after certificate, to make an order staying proceedings upon the judgment of Court of Appeal pending an application for leave to appeal therefrom to Supreme Court of Can. *Hargrove* v. *Royal Templars of Temperance*, 21 C. L. T. 432, 2 O. L. R. 126.

See also S. C., 22 C. L. T. 1, 31 S. C. R. 385.

Stay of proceedings — *Payment of money out of Court.*]—At the trial the plaintiffs recovered judgment in the High Court against the defendants for damages and costs. The defendants appealed to the Court of Appeal, paying $200 into Court as security to the plaintiffs for the costs of such appeal. The appeal was dismissed with costs. The defendants launched a fur-

ther appeal to the Supreme Court of Canada, and gave the security required by s. 46 of the Supreme and Exchequer Courts Act, but no other security.—*Held*, that proceedings to enforce the plaintiffs' judgment in the High Court were not stayed, either by force of s. 48 or otherwise.—But the Court was not bound to pay out immediately to the plaintiffs the sum of $200 paid in by the defendants, the judgment of the Court of Appeal being stayed pending the appeal to the Supreme Court, which might determine that the plaintiffs were not entitled to the costs of the Court of Appeal.—And in this case the money ought not to be paid to the plaintiffs, from whom it could never be recovered, and whose solicitors declined to take it upon the usual undertaking, but should remain in Court during the pending appeal. *Rombough* v. *Balch*, 20 C. L. T. 106, 19 P. R. 123.

Stay of proceedings — *Order granting new trial.*]—The defendant appealed to the Supreme Court of Canada from a judgment of the Supreme Court of Nova Scotia, sitting *en banc*, granting a new trial. Security on the appeal having been given and allowed, an application was made by the defendant to stay execution and all other proceedings. No opposition was made to the stay of execution, but the plaintiffs objected to a stay of the trial and of all other proceedings.—*Held*, that the trial and all other proceedings should be stayed pending the appeal, and a Judge of the Court appealed from had jurisdiction to impose such a stay. *Bartlett* v. *Nova Scotia Steel Co.*, 22 C. L. T. 261.

Stay of proceedings pending appeal —*Money in Court—Application for payment out—Jurisdiction of Judge to refuse pending appeal.*]—In an action respecting a large amount of land, the defendants obtained the dissolution of an injunction on payment into Court of $35,000, the value of the land. The cause having been tried and judgment given for the defendants, which was affirmed on appeal, the defendants applied for payment out of the money paid in. The plaintiffs opposed the application, on the ground that they had taken an appeal to the Supreme Court of Canada.—*Held*, that the money in Court represented the land in question in the action, and that the Court had, therefore, jurisdiction to preserve the property which was the subject matter of the action pending the ultimate decision as to the parties entitled to it. *Huggard* v. *Ontario & Saskatchewan Land Corporation (No. 2)*, 1 Sask. L. R. 421, 9 W. L. R. 38.

Supplementary evidence — *Objections not taken at trial — Amendment of pleadings.*]—On the hearing of the appeal, objection was taken for the first time to the sufficiency of the plaintiff's title, whereupon he tendered a supplementary deed to him of the lands in question:—*Held*, following *Exchange Bank of Canada* v. *Gilman*, 17 S. C. R. 108, that the Court could not allow the production of the document, as fresh evidence could not be admitted upon appeal:—*Held*, also, that the defendant could not raise the question as to the sufficiency of the plaintiff's title for the first time on appeal. It appeared that the allegations and conclusions of the plaintiff's declaration were deficient, and the Court under s. 63 of the Supreme and Exchequer Courts Act, ordered all necessary amendment to be made thereto for the purpose of determining the real controversy between the parties as disclosed by the pleadings and evidence. Judgment in 8 Que. Q. B. 534 varied. *Montreal* v. *Hogan*, 21 C. L. T. 6, 31 S. C. R. 1.

Time—Extension—Grounds of proposed appeal—Alteration in position of parties — Transfer of subject matter. *Ross Brothers* v. *Pearson* (N. W. T.), 1 W. L. R. 338, 575, 2 W. L. R. 259.

Time—*Extension—Intention to appeal—Suspension of proceedings—Merits.*]—Upon an application to extend the time for appealing from the Court of Appeal to the Supreme Court, the applicant must shew a *bona fide* intention to appeal held while the right to appeal existed, and a suspension of further proceedings by reason of some special circumstances in consequence of which they were held in abeyance. No such case having been made out, and the Court not being impressed with the merits of the defence, leave to extend the time was refused to two defendants. *In re Manchester Economic Building Society*, 24 Ch. D. 488, followed. *Smith* v. *Hunt*, 23 C. L. T. 42, 5 O. L. R. 97, 1 O. W. R. 598, 798.

Time for appealing extended.]—Time for appealing to the Supreme Court of Canada from 14 O. W. R. 25, 19 O. L. R. 188, extended. *Goodison* v. *McNab* (1909), 15 O. W. R. 138.

Leave to appeal to Supreme Court of Canada, refused, on ground that after the expiration of sixty days from the signing or entry or pronouncing of a judgment of the Court of Appeal for Ontario, the Supreme Court of Canada is without jurisdiction to grant special leave to appeal therefrom, and an order of the Court of Appeal extending the sixty days will not enable it to do so. *Goodison Thresher Co.* v. *McNab* (1910), 30 C. L. T. 338, 42 S. C. R. 694.

Time—*Limit—Pronouncing or entry of judgment.*]—In determining whether the 60 days within which an appeal to the Supreme Court must be taken, run from the pronouncing or entry of the judgment appealed against, no distinction should be made between common law and equity cases. The time runs from the pronouncing of judgment in all cases, except those in which there is an appeal from the Registrar's settlement of the minutes, or such settlement is delayed because a substantial question affecting the rights of the parties has not been clearly disposed of by such judgment. Motion for leave to appeal *per saltum* refused with costs. *Robert* v. *Elgin*, 25 C. L. T. 93, *Elgin* v. *Robert*, 36 S. C. R. 27.

Time expired—Special circumstances—Refusal by Judge — Appeal to full Court. *Hamilton* v. *Mutual Reserve Life Ins. Co.*, 2 O. W. R. 155, 806, 3 O. W. R. 851, 4 O. W. R. 299, 416, 5 O. W. R. 162.

Time for appeal — *Extension — Grounds.*] — Where special grounds were shewn, the defendants were allowed an appeal to the Supreme Court of Canada, although the 60 days had expired, and no

notice of appeal had been given.—Grounds which are considered insufficient to grant an application to extend the time for appealing. *Taylor* v. *Cummings*, 40 N. S. R. 151.

Time for appeal — *Extension — Grounds.*]—An application to extend the time for appealing from the judgment of the Supreme Court of Nova Scotia, in favour of the plaintiff, to the Supreme Court of Canada. Judgment had been delivered on the 28th March, 1888, and the 60 days expired on the 28th May. The application for extension was made two months after the time for appealing had expired. The extension was asked for on the ground that the parties interested consisted of a number of attaching creditors, living in different parts of the Dominion, and that, owing to this fact, an agreement could not, at an earlier date, be arrived at by all interested:—*Held*, that the grounds set forth were not sufficient to justify granting such an extension. The time which had elapsed since the judgment was four months, in which the plaintiff had been allowed to enjoy his judgment unchallenged, for the giving notice of appeal should not be considered. *In re Mar* v. *Chester Economic Building Society*, 24 Ch. D. 488, and *Collins* v. *Vestry of Paddington*, 5 Q. B. D. 368, referred to. *Nelson* v. *Archibald*, 40 N. S. R. 152*n*.

Time for appeal — *Extension — Jurisdiction, — R. S. C. c. 135, s. 42 — Practice.*]— The Court refused to entertain a motion to quash the appeal on the ground that it had not been taken within the 60 days limited by the statute, and that an order by a Judge of the Court appealed from, after the expiration of that time, was *ultra vires*, and could not be permitted under s. 42 of the Supreme and Exchequer Courts Act, R. S. C. c. 135. *Temiscouata Ry. Co.* v. *Clair*, 38 S. C. R. 230.

Time for appeal — *Extension — Leave to appeal—Necessity for—Powers of Court of Appeal.*]—Time for allowing appeal extended, and the security approved of and allowed, under s. 71 of the Supreme Court Act, R. S. C. 1906, c. 139, although this might have been done by a single Judge of this Court, since the failure to apply within the proper time, under s. 69, arose from the impression that leave to appeal was necessary, and no Court was sitting during that time to which the application for leave could have been made. Also leave to appeal granted, if necessary, *valeat quantum*, under s. 48 (*e*) of the Supreme Court Act. *Hamilton Steamboat Co.* v. *Mackay*, 10 O. W. R. 510, 15 O. L. R. 184.

Time for appeal—Extension—Notice of appeal. *McLean* v. *Campbell*, 2 E. L. R. 316.

Title to land—*Duty—Future rights.*]—Proceedings to restrain the owner of land from constructing a ditch thereon under the Ditches and Watercourses Act to prevent injury to adjoining property, do not involve any question of title to land or any interest therein, within the meaning of 60 & 61 V., c. 34, s. 1 (*a*), relating to appeals to the Supreme Court of Canada in Ontario cases. The fact that the adjoining land was to be taxed for benefit by construction of the ditch would not authorise an appeal under s.-s. (*d*), as relating to the taking of a duty or fee, nor as affecting future rights. *Waters* v. *Manigault*, 20 C. L. T. 222, 30 S. C. R. 304.

Title to land — *Future rights—Quashing.*]—An opposition to a writ of possession issued in execution of a judgment allowing a right of way over the opposant's land does not raise a question of title to land nor bind future rights, and in such a case the Supreme Court of Canada has no jurisdiction to entertain an appeal. If the jurisdiction of the court is doubtful, the appeal must be quashed. — *Langevin* v. *Les Commissaires d'Ecole de St. Marc*, 18 S. C. R. 599; *O'Dell* v. *Gregory*, 24 S. C. R. 661; *Riou* v. *Riou*, 28 S. C. R. 53; *Chamberland* v. *Fortier* 23 S. C. R. 371; *La Commune de Berthier* v. *Denis*, 27 S. C. R. 147; and *McGoey* v. *Leamy*, 27 S. C. R. 193, 545, discussed. *Cully* v. *Ferdais*, 20 C. L. T. 273, 30 S. C. R. 330.

Two appeals in same action — Consolidation—Judgment of Court of Appeal — Practice—Powers of Judge of Court of Appeal. *Emperor of Russia* v. *Proskouriakoff*, 9 W. L. R. 207, 42 S. C. R. 226.

Ultra vires—*Action for penalties—Plea.*]—The Association Pharmaceutique sued L. for $325, penalties for selling drugs without license. L. pleaded a general denial and that the Pharmacy Act was *ultra vires*. The action was dismissed below for want of proof of the illegal selling alleged.—*Held*, Strong, C.J., and Gwynne, J., dissenting, that if the Court should find error in the judgment appealed from, the question of *ultra vires* pleaded by L. would have to be dealt with, and the case was therefore appealable under s. 29 (*a*) of the Supreme Court Act, though no appeal would lie if this plea were not on the record. *Association Pharmaceutique* v. *Livernois*, 20 C. L. T. 322, 30 S. C. R. 400.

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25. YUKON TERRITORY — APPEAL TO TERRITORIAL COURT.

Court en Banc—Extension of time for —Mistake of solicitor—Long delay—Special circumstances. *Munroe* v. *Morrison* (Y.T.), 2 W. L. R. 132, 367.

Decision of Gold Commissioner—Deposit of appeal books—Extension of time for —Forum—Jurisdiction. *Grant and Strong* v. *Treadgold* (Y.T.), 2 W. L. R. 484.

Extension of time for—Explanation of delay — Special circumstances. *Moore* v. *Shackleford* (Y.T.), 8 W. L. R. 1.

Extension of time—*Rules of Court—Special circumstances—Absence of solicitor for appellant—Member of parliament — No sittings of Court last.*]—Motion by plaintiff to extend time for filing appeal book. Shortly after the plaintiff's solicitor had given notice of appeal he left for Ottawa to attend his parliamentary duties, leaving instructions for preparation of appeal book, which in-

structions were neglected. As no sittings of the Court were lost appeal book directed to be deposited within 24 hours and indulgence granted on other terms. *Stone* v. *Goldstein*, 11 W. L. R. 386, 539.

Notice of appeal—Extending time—Discretion—Solicitor's slip — Terms—Costs—Security. *Alaska Mercantile Co.* v. *Ballantine* (Y.T.), 1 W. L. R. 504, 2 W. L. R. 115.

Security for costs of—Time for applying for—Application after expiry of time—General rule giving power to enlarge time. *Gold Run Klondike Mining Co.* v. *Charbonneau* (Y.T.), 1 W. L. R. 264.

Stay of execution pending appeal—*Terms — Special circumstances — Return of moneys paid out of Court pursuant to judgment—Practice.*] — See 12 W. L. R. 455. Plaintiff signed judgment and received gold dust out of Court and distributed same. Then defendant served notice of appeal. Application for return of value of gold dust refused. Proceedings on execution stayed under special circumstances. *Olsen* v. *Desjarlais*, 12 W. L. R. 467.

Time for appealing—Notice of appeal—Vacation—Appeal late—Objection—Notice—Extension of time—Discovery of fresh evidence. *Thompson* v. *Sparling* (Y.T.), 6 W. L. R. 143.

To Court en banc, Yukon—Extension of time for—Mistake of solicitor—Long delay—Special circumstances—Forum for hearing application—"Ct. or Judge" — "Ct. en banc." *Munroe* v. *Morrison* (Y.T.), (1906), 4 W. L. R. 31.

To Court en banc, Yukon—Notice — Time—Order refusing to set aside default judgment except on terms—Interlocutory or final order. *Langevin* v. *Hebert* (Y.T.), (1906), 4 W. L. R. 367.

Yukon Territory Act—*Constitution of Territorial Court for Hearing Appeals.*] — *Quære*, whether, under the provisions of s. 6 of the Yukon Territory Act, 62 & 63 V. c. 11, and of the North-West Territories Act, R. S. C. c. 50, s. 42, thereby made applicable to the Territorial Court of the Yukon Territory, three Judges of that Court are necessary to constitute a quorum for the hearing of appeals from judgments upon the trial of actions therein? *Barrett* v. *Le Syndicat Lyonnais du Klondyke*, 35 S. C. R. 667.

APPEARANCE.

Leave to enter after judgment.] — Judgment had been entered in default of appearance, and before the return of a summons for an order for the examination of the defendant as a judgment debtor, the defendant entered an appearance by a solicitor, who took out a summons for a stay of proceedings, on the ground that the parties had settled the action:—*Held*, that the summons must be discharged on the ground that leave to enter an appearance should have been obtained. *Chong Man Chock* v. *Kai Fung*, 21 C. L. T. 320, 8 B. C. R. 67.

Limitation of—*Submission to judgment—Irregularity.*]— The indorsement on the writ of summons was for a declaration that certain lands (described), being the lands intended to be devised to the plaintiff by the will of J. P., but erroneously described therein, were freed and discharged from the conditions and obligations to which they were subjected by the will in favour of the defendant, and from all bequests, legacies, and other payments charged therefrom by the will in favour of the defendant, and for damages against the defendant for wrongful refusal to execute a quit-claim deed of the lands when tendered to him for execution. The appearance entered by the defendant was limited to that part of the plaintiff's claim which asked for damages against the defendant and for costs. The appearance also stated as follows: "Without admitting that the plaintiff is entitled to the declarations asked for in the writ of summons herein, the defendant will make no objection to the making of the declarations asked for, and the defendant is also willing to execute a quit-claim deed in favour of the plaintiff of the lands devised to the plaintiff by the last will . . . "—*Held*, that there was no authority in the Rules or in the practice for an appearance limited as was this one, in an action of the character disclosed in the indorsement of the writ of summons. The appearance was set aside and judgment entered for the plaintiff (except as to the claim for damages) with costs. *Padget* v. *Padget*, 22 C. L. T. 137, 1 O. W. R. 160.

Notice.]—It is not necessary to serve a notice of appearance upon the opposite party. *Morin* v. *Jetté*, 5 Que. P. R. 69.

Notice.]—It is not necessary to serve upon the plaintiff notice of an appearance by the defendant. *Meigs* v. *Missisquoi*, 6 Que. P. R. 118.

Notice.]—An appearance must be served on the opposite party in the Superior Court. *Yanowsky* v. *Great Northern Rw. Co.*, 6 Que. P. R. 440.

Notice—*Practice.*] — A defendant is not obliged to serve upon the plaintiff's attorney a duplicate or certified copy of his appearance: it is sufficient if he delivers it to the registrar within the time prescribed by law. *Cardinal* v. *Picher*, 26 Que. S. C. 523, 7 Que. P. R. 19.

Partnership — Individuals — Form — Amendment. *Oshawa Canning Co.* v. *Dominion Syndicate*, 2 O. W. R. 221, 315.

See Absconding Debtor — Husband and Wife—Judgment — Parties — Process—Writ of Summons.

APPOINTMENT.

See Trusts and Trustees.

APPORTIONMENT.

See Costs — Damages — Landlord and Tenant.

APPRAISEMENT.

See INSURANCE—LANDLORD AND TENANT.

APPRENTICE.

See MASTER AND SERVANT.

APPROPRIATION OF PAYMENTS.

See PAYMENT—PRINCIPAL AND SURETY.

APPURTENANCES.

See TITLE TO LAND—WAY—WILL.

AQUEDUCT.

See CONTRACT—EASEMENT — MUNICIPAL CORPORATIONS—MORTGAGE—WATER AND WATERCOURSES.

ARBITRATION AND AWARD.

Accord and satisfaction.]—This was an action to recover the amount of an award. When the defendants first heard that they had been directed to pay $881.53 under the award, they wrote to the plaintiff's solicitor that a shortage amounting to $281.53 had not been taken into account by the arbitrators, and offered to pay $600, which the plaintiff's solicitor accepted. The defendants still neglected to pay same, and plaintiff now sued for full amount of award.—*Held*, there was an accord and satisfaction for $281.53 and judgment was given plaintiff for $600. *Warrell* v. *Nipissing*, 12 O. W. R. 933.

Accounts of Province of Canada — *Common school fund and lands—Jurisdiction of arbitrators — Deed of submission—Construction.*]—By agreement of submission dated the 10th April, 1893, the provinces of Ontario and Quebec referred to a statutory tribunal the "ascertainment and determination of the amount of the principal of the common school fund and the method of computing" interest thereon, and of the amount for which Ontario was liable. The fund was established by 12 V. c. 200 (C.), and consisted (*inter alia*) of the proceeds of public lands received by Ontario and paid to the Dominion:—*Held*, that a claim by Quebec that Ontario should be debited with uncollected prices of land sold by it, being a claim for wilful neglect and default and in the nature of damages, not suggested in but heterogeneous to the matters actually specified in the submission, was not, on its true construction, included therein. Judgment in 31 S. C. R. 516, *sub nom. Province of Quebec* v. *Province of Ontario and Dominion of Canada, In re Common School Fund and Lands*, reversed and award of arbitrators restored. *Attorney-General for Ontario* v. *Attorney-General for Quebec*, [1903] A. C. 39.

Action for money demand—Defence of payment of amount ascertained by award —Amendment of statement of claim—Allegation of invalidity of award—Demurrer—Procedure in attacking award—Interpretation of Rules of Ct.—Joinder of claim to set aside award with original demand—Equitable jurisdiction—Effect of Judicature Act —Time for attacking award—9 & 10 Wm. III. c. 15—Prayer for general relief. *Johannesson* v. *Galbraith* (Man.), (1905), 1 W. L. R. 445, (1906), 3 W. L. R. 275.

Action to enforce award — Uncertainty. *Messenger* v. *Hicks* (1906), 2 E. L. R. 76.

Action to recover amount fixed by award—Conduct of parties — Correspondence—Accord and satisfaction as to part of sum awarded—Costs. *Warrell* v. *Nipissing Trading & Transportation Co.*, 12 O. W. R. 933.

Admission of irrelevant evidence by the arbitrators, if not shewn to have affected amount of award, is no ground of appeal therefrom. *Que., Montreal & Southern Ry. Co.* v. *Landry*, 19 Que. K. B. 82.

Agreement to refer—Stay of action—Inconsistent provisions of agreement—Parties not *ad idem*. *Kerr* v. *Brown* (N.W.T.), 1 W. L. R. 379.

Appeal — *Estoppel.*] — A party who appeals from an award is estopped from attacking it, on the ground that it was not served. *Que., Montreal & Southern Ry. Co.* v. *Landry*, 19 Que. K. B. 82.

Appeal from award — Municipal Act, s. 464—Leave to adduce further evidence. *Re Fitzpatrick & New Liskeard*, 11 O. W. R. 483.

Appointment of sole arbitrator — *Submission—Arbitration Act—Appeal — Order of Judge in Chambers.*]—A submission contained in a policy of insurance provided "that, if any difference shall arise in the adjustment of a loss, the amount to be paid . . . shall be ascertained by the arbitration of two disinterested persons, one to be chosen by each party, and, if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be sufficient."—*Held*, reversing the decision of a Divisional Court, 1 O. W. R. 87, 192, 3 O. L. R. 93, 22 C. L. T. 94, and of Street, J., 2 O. L. R. 301, 21 C. L. T. 532, that the submission was not one providing for a reference "to two arbitrators, one to be appointed by each party," within the meaning of the Arbitration Act, R. S. O. 1897, c. 62, s. 8; and, therefore, one party having failed, after notice from the other, to appoint an arbitrator, the other could not appoint a sole arbitrator. *Re Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls*, 2 O. L. R. 585, 21 C. L. T. 595, approved.—*Held*, also, that the order of Street, J., dismissing an application to set aside the appointment of a sole arbitrator, was not made by him as *persona designata*, but was a judicial order from which an appeal lay. *Excelsior Life Ins. Co.* v. *Employers' Lia-*

bility Assce. Cor., In re Faulkner, 23 C. L. T. 215, 5 O. L. R. 609, 2 O. W. R. 348, 3 O. W. R. 391.

Appointment of sole arbitrator — *Cheese and Butter Companies Act—Rules.*] —By reason of s. 16, R. S. O. 1897, c. 201, there is no jurisdiction to appoint an arbitrator to decide a dispute between a cheese and butter manufacturing association and one of the members, with reference to the withdrawal of a member, unless and until the association makes rules in accordance with s. 6 of that Act in reference to the expulsion of members. *In re Camden Cheese & Butter Mfg. Co. & Hart*, 24 C. L. T. 291, 3 O. W. R. 837.

Appointment of third arbitrator — *Parol appointment—Agreement—Re ation —Injunction.*] — Certain rights and easements of the plaintiffs were expropriated by a gas company under an Act enabling the company to make such expropriation and providing for the determination, by arbitration, of the amount of remuneration to be paid. The plaintiffs appointed C. to be one of the arbitrators, and the company appointed B. The plaintiffs claimed a declaration that D., who was alleged to have been agreed upon by C. and B. as the third arbitrator, was not duly appointed, and an injunction to prevent him from acting, (1) because the appointment of D. was not agreed to by C., (2) because the appointment was not made in writing, and (3) because the appointment, if agreed to by C. in the first instance, was revoked by C. withdrawing his consent thereto before action brought.—*Held*, that the onus of establishing the grounds relied upon was upon plaintiffs. The question as to whether C. did or did not assent to the appointment of D. was one of fact, and, the finding of the trial Judge on the point being adverse to the plaintiffs, and the weight of evidence being in favour of the finding, there was no reason for setting it aside. In the absence of anything to require the appointment of the third arbitrator to be made in writing the same law would govern as in the appointment of an umpire under a submission, which may be made by parol if no particular mode of appointment be prescribed. D. having been appointed, and having consented to act, his appointment could not be revoked by subsequent dissent of the parties. *Kedy* v. *Davison*, 34 N. S. Reps. 233.

Arbitrator — *Disqualification.*] — An alderman of the city of St. John is disqualified to act on behalf of the city as one of a board of arbitrators to determine the value of land expropriated by the city under 61 V. c. 52. *In re Abell*, 21 C. L. T. 511, 2 N. B. Eq. Reps. 271.

Arbitrator — *Fees — Advocate.*] — An advocate who accepts the functions of an arbitrator in regard to the expropriation of land is an arbitrator, and not an advocate; his services therefore should be remunerated in the same way as those of any other arbitrator in a similar matter. *Provincial Light, Heat and Power Co.* v. *Valois*, 10 Que. P. R. 43.

Arbitrators functi officio, after award made—*Making two awards.*]—Not all present when award was made. *Kelly* v. *MacDonald* (1877), 2 P. E. I. R. 173.

Arbitrator basing award solely upon inspection of premises — Understanding between parties — Acquiescence—Motion to set aside award—Notice of motion—Amendment—Arbitrator awarding on matters not included in submission—Deduction in amount of award. *Re Flatt and Northern Engineering and Supply Co.*, 12 O. W. R. 834.

Arbitrator's fees—*Recovery of—Promise — Consideration.*]—Where there is evidence of an express promise, founded on good consideration, to pay an arbitrator for his services, it is misdirection to withdraw the same from the jury. *Pinder* v. *Cronkhite*, 34 N. B. Reps. 498.

Award is validly made by arbitrators at a meeting of which the arbitrator, named by the expropriating party, has had due notice, and it need not be served upon such party. *Que., Montreal & Southern Rw. Co.* v. *Landry*, 19 Que. K. B. 82.

Building contract—*Completion of work —"All matters in dispute"—Arbitrators—Delegation of duty.*]—The action was to recover a balance on a building contract, alleging completion. The defendant denied completion, and counterclaimed against the plaintiff on several grounds. After the record had been entered for trial the parties entered into an agreement to refer to two named arbitrators and a third one to be appointed by the latter "all matters whatsoever in dispute" between them. The arbitrators thus appointed having made their award in the plaintiff's favour, he moved, under Rules 754-764 of the King's Bench Act, to have the award made a judgment of the Court.—*Held*, dismissing the motion with costs, that the award was bad on the following grounds:—1. It shewed on its face that the work under the plaintiff's contract had not been completed, so that the plaintiff was not entitled to recover anything at all in this action. 2. From evidence taken on the hearing of the motion it was clear that the arbitrators had not taken into consideration "all matters whatsoever in dispute," but had failed to deal with a number of such matters which had been brought to their attention. *Bowes* v. *Fernie*, 4 My. & Cr. 150, *Wilkinson* v. *Page*, 1 Hare 276, and Russell on Arbitration, 8th ed., p. 172, followed. 3. The arbitrators had attempted to delegate to another person (unascertained) their authority to decide whether the sum of $110, part of the amount awarded, should or should not be paid: see *Tandy* v. *Tandy*, 9 Dowl. 1044. *Blakeston* v. *Wilson*, 23 C. L. T. 27, 14 Man. L. R. 271.

British Columbia Arbitration Act — *Setting aside award—Misconduct of arbitrator—Partiality—Evidence — Jurisdiction of majority—Decision in absence of third arbitrator — Judicial discretion.*]—A reference under the British Columbia Arbitration Act authorised two out of three arbitrators to make the award. After notice of the final meeting, the third arbitrator failed to attend on account of personal inconvenience and

private affairs, but both parties appeared at the time appointed and no objections were raised on account of the absence of the third arbitrator. The award was then made by the other two arbitrators present.—*Held*, reversing the judgment in 10 B. C. R. 48, 23 C. L. T. 272, that, under the circumstances, there was cast upon the two arbitrators present the jurisdiction to decide whether or not, in the exercise of judicial discretion, the proceedings should be further delayed or the award made by them alone in the absence of the third arbitrator, and it was not inconsistent with natural justice that they should decide upon making the award without reference to the absent arbitrator.—*Held*, further, that, although the third arbitrator had previously suggested some further audit of certain accounts that had already been examined by the arbitrators, there was nothing in this circumstance to impugn the good faith of the other two arbitrators in deciding that further delay was unnecessary. Where it does not appear that an arbitrator is in such a position with regard to the parties or the matter in dispute as might cast suspicion upon his honour and impartiality, there must be proof of actual impartiality or unfairness in order to justify the setting aside of the award. *In re Doherer and Megaw's Arbitration*, 24 C. L. T. N. 113, 34 S. C. R. 125.

Clerical error in award — *Motion to refer back—Railway Act of Canada.*]—Motion for an order referring back to the arbitrators, to enable them to correct a clerical error, an award made under the Dominion Railway Act.—*Held*, that if the Provincial legislation (R. S. O. 1897, c. 62) applied, the motion was needless, the arbitrators having power (s. 9 (c)) to correct the mistake. If that legislation were not applicable, there was no power to remit the award, nor to correct the error upon this motion. Except under power conferred by statute, or by the parties, the Courts would not correct errors in awards, either directly or through the arbitrators; and the Railway Act of Canada does not authorise the reopening of a reference. *In re McAlpine and Lake Erie and Detroit River Rw. Co.*, 22 C. L. T. 98, 3 O. L. R. 230, 1 O. W. R. 100, 484.

Compensation for closing up streets —Municipal corporations—Railway—Laying tracks on highway. *Re Medler & Toronto*, 1 O. W. R. 545, 3 O. W. R. 534.

Costs—*Disposition of — Submission — Powers conferred by—Invalid award.*]—An action for trespass to land was brought by M. against H., and an action of ejectment by T. M. H. against M., both actions resulting from a disputed boundary between the lands of the respective parties. By agreement the question of the boundary was referred to arbitration, "including the disposition of costs in the said actions." The arbitrators totalled the costs in the two actions and in their award directed them to be paid in certain proportions.—*Held*, per Graham, E.J., Longley, J., concurring, Russell, J., dissenting, that the words of the submission in reference to costs meant clearly "party and party costs," and that the arbitrators having undertaken to deal with the costs and expenses of both sides in the two actions, including costs between solicitor and client, exceeded their powers, and the award was invalid and must be set aside. *Messenger* v. *Hicks*, 42 N. S. R. 13, 3 E. L. R. 230.

Defective award.] — Motion to enlarge time. *Smith* v. *Zwicker* (1906), 1 E. L. R. 70.

Disqualification of arbitrator — *Interest as ratepayer—Certiorari.*]— By the Nova Scotia Acts of 1902, c. 80, the corporation of the town of Glace Bay were empowered, for the purpose of obtaining a water supply, to enter upon any lands in the county of Cape Breton, and it was provided that the damages, if any, payable to the owner of such land, should be determined by arbitration. Objection was taken to the award of damages, on the ground that C. F., one of the arbitrators appointed under the Act, was not a disinterested party, he having been assessed as a ratepayer in the town.— *Held*, that if the arbitrators were acting in a judicial capacity, c. 39, R. S., applied, and the fact of one of the arbitrators being a ratepayer afforded no valid objection to the award made by him; that, if the arbitrators were not acting in a judicial capacity, a writ of certiorari would not lie to remove into the Supreme Court any award made by them. *R.* v. *Glace Bay*, 24 C. L. T. 140, 36 N. S. Reps. 456.

Expropriation — *Compensation.*] — Benefit derivable from expropriation that can be set off against damage caused by expropriation, must be such as is "beyond the increased value, common to all lands in the locality"; if the property be a mill-site, with a water power available, it cannot be urged that its only value is given it by the railway, inasmuch as the owner of a rival mill-site in the locality, not touched by the railway, would presumably derive same benefit from it. *Que., Montreal & Southern Rw. Co.* v. *Landry*, 19 Que. K. B. 82.

Expropriation—*Fixing the indemnity—Appeal from the decision of the arbitrators —Municipal assessment—C. P. 392, C. M. 716.*]—As a general rule, an appeal from an award of arbitrators will be refused, when that appeal depends upon the insufficiency or the excess of the indemnity. Nevertheless an appeal will be permitted when the proof beyond all doubt is in favour of the party who is appealing, or when facts are established demonstrating the partiality, corruption or prevarication of experts. *Can. Nor. Que. Rw. Co.* v. *Frenette* (1909), 10 Q. P. R. 318.

Expropriation] — Of land by railway. *See Quebec & Richmond Rw. Co.* v. *Quinn* (1858), C. R. 2. A. C. 431. Digested under RAILWAY.

Fees of arbitrators—*Workmen's Compensation Act.*]—Schedule to Arbitration Act does not apply to arbitrations under Workmen's Compensation Act, and arbitrator's fees must be dealt with according to a practice analogous to that prevailing prior to Arbitration Act on reference directed by Ct. *Chisholm* v. *Centre Star Mining Co.* (1906), 12 B. C. R. 16, 3 W. L. R. 156.

Fixing compensation.]—Regard should be had to the prospective capabilities of the property, arising from its character and situation, when fixing compensation. *Que., Montreal & Southern Rw. Co.* v. *Landry*, 19 Que. K. B. 82.

Injunction—*Jurisdiction.*]— Injunction will not be granted to restrain a party from proceeding with an arbitration, where the result of arbitration will be merely futile and of no injury to party seeking injunction.—An arbitration to determine value of land of plaintiff taken by defendants will not be restrained because a condition precedent to taking of the land may not have been complied with. *Duncan* v. *Campbellton* (1906), 26 C. L. T. 466, 3 N. B. Eq. 224.

Inspection by arbitrators.]—When the evidence is deficient on an element of damage (v. g. the severance of the property into two blocks by the railway), which the arbitrators were enabled to appreciate by inspection, their finding in that regard will not be disturbed in appeal. *Que., Montreal & Southern Rw. Co.* v. *Landry*, 19 Que. K. B. 82.

Land Purchase Act, 1875—*Award — Finality — Uncertainty — Legal tender — Powers of Provincial Legislature under B. N. A. Act—Ultra vires.*]—The Commissioners' Court, organized under "The Land Purchase Act, 1875," made an award as follows:—"The sum awarded under sec. 26 of the said Act by us, two of the commissioners appointed under the provisions of the said Act, is eighty-one thousand five hundred dollars ($81,500)."—The proprietors moved to set the award aside on the grounds (1) that the award is not final; (2) that it is uncertain; (3) because a delegated authority must be exercised under it to ascertain metes and bounds of land to be conveyed by the Public Trustee to the Commissioner of Public Lands; (4) because the money awarded has not been paid into the treasury of the province (it) had been paid in Dominion notes, which were not legal tender); (5) because it does not appear that the award was made under the terms of "The Land Purchase Act, 1875." It was also contended that the Act was *ultra vires* of the Provincial Legislature:—*Held*, (Palmer, C.J., Peters & Hensley, JJ.), that the award was void and must be set aside; (2) that the Act was not *ultra vires*. *Kelly* v. *Sullivan* (1875), 2 P. E. I. R. 34.

Land Purchase Act, 1875 — *Setting aside award—Award made outside of jurisdiction—Commissioners making two awards—Arbitrators functi officio after making an award — All arbitrators not present when award made.*] — In October, 1876, this case was heard in Charlottetown before W., J. and H., Commissioners appointed under the P. E. Island Compulsory "Land Purchase Act, 1875." In November the Commissioners went to Nova Scotia, where an award was, on 29th November, made and signed by all three. On 1st December H. wished to have his name struck off, as he had made a mistake in signing it, and W., the chairman, in the absence of J., allowed it to be done, and the award signed by all three was then destroyed. In March, 1877, W. and J. signed a second award in New Brunswick without again consulting H., and it was not signed in his presence. The defendant McD., applied to have this award set aside on the grounds, among others, (1) that the award having been made outside the province was a nullity; (2) that on executing the first award the Commissioners became *functi officio*, and any subsequent award made by them was void; (3) that this award was made without consulting H.; (4) that it was not signed in the presence of all the Commissioners:—*Held*, (Palmer, C.J., Peters & Hensley, JJ.), that on the foregoing grounds the award was void and must be set aside. *Kelly* v. *MacDonald* (1877), 2 P. E. I. R. 173.

Lands taken or injuriously affected—*Inclusion of other matters in submission—Appeal — Municipal Act.*]—Persons, having appointed arbitrators under Municipal Act in respect to lands taken by municipality in connection with their waterworks system, afterwards entered into an agreement under seal defining the scope of arbitration and included a claim for damages for breach of contract and others matters not within Municipal Act. They did not provide in the agreement for an appeal under s. 14 of the Arbitration Act, R. S. O. 1897, c. 62. The arbitrators in their award awarded one sum both for the claim "under the Acts and in respect of matters referred to in said submission."—*Held*, affirming order of Teetzel, J., that, as the matters not under the Municipal Act could not be distinguished in amount awarded from the questions referred under the Act, the award being one and indivisible, and as the agreement come to by the parties defining the scope of the arbitration did not provide for an appeal under Arbitration Act, no appeal on merits lay, or was possible. *In re Field-Marshall & Beamsville* (1906), 11 O. L. R. 472, 7 O. W. R. 276, 545.

Leave to enforce award—*Time—Motion to set aside.*]—An application under s. 13 of the Arbitration Act, R. S. O. 1897, c. 62, for an order giving leave to enforce an award, need not be made within six weeks after the publication of the award. Section 45 of the Act does not apply to such an application, but only to applications to set aside awards. An order under s. 13 is necessary, when the reference has been made out of Court. Objections properly the subject of a motion to set aside the award were not considered upon appeal from an order under s. 13. *In re Lloyd & Pegg*, 23 C. L. T. 171, 5 O. L. R. 389, 2 O. W. R. 103.

Motion to enforce award — *Leave to issue execution—Discretion of Court to refuse—R. S. O. 1897, c. 62, s. 13—Jurisdiction of local Judge.*]—Upon an application made under R. S. O. 1897, c. 62, s. 13, to the Court for leave to issue execution to enforce an award, the Court has discretion, upon affidavits produced, to say that, in face of facts disclosed, execution should not issue for the present, as was done in this case; and proceedings were stayed for 30 days to enable the objecting party to apply to extend the time for moving against the award. —A local Judge has jurisdiction to make an order for leave to issue execution to enforce an award. *In re Baker & Kelly*, 9 O. W. R. 136, 14 O. L. R. 623.

Motion to enforce award—*Submission—Matters in difference not all disposed of—Affirmative proof—Delay in making award—Waiver—Estoppel.*]—*Held*, that, in order to impeach an award of arbitrators which determines certain specific matters, on the ground that it does not dispose of all the questions to be disposed of under a general submission of matters in dispute, it must be shewn affirmatively that there were matters in dispute other than those disposed of.—(2) That, after one of the parties has accepted the award, he is estopped from objecting that it was not made within the time limited by the submission. *Morrow* v. *Lindsay*, 6 W. L. R. 386, 7 W. L. R. 48, 1 Sask. L. R. 5.

Motion to set aside award.]—Misconduct of arbitrators—Gross undervaluation of mining claim in question—Interested motives alleged against arbitrators—Evidence—Disproof of charges—Railway Act—Appeal from order refusing to set aside award. *Morley* v. *Klondike Mines Ry. Co.* (Y.T.), 5 W. L. R. 109, 6 W. L. R. 414; *Harrigan* v. *Klondike Mines Ry. Co.* (Y.T.), 5 W. L. R. 137, 6 W. L. R. 417.

Motion to set aside award.]—Mistake of arbitrators — Refusal to hear evidence—Agreement of parties. *Re O'Brien and Trick*, 7 O. W. R. 317.

Motion to set aside award—*Notice of motion—Irregularity—Waiver — Submission to arbitration—Appointment of umpire—Interference—Misconduct of arbitrators—Refusal to hear evidence—Hearing evidence in absence of one party.*]—A motion to set aside an award should be made by summons in Chambers, and not by notice of motion; but where the respondent appears and does not object, he must be taken to waive irregularity.—2. The fact that the umpire was appointed before and sat with the arbitrators during the hearing is not a ground for setting aside an award; but *quære*, whether it might not be a valid objection if the umpire had interfered during the hearing so as to prevent a final agreement.—3. An award will be set aside if the arbitrators refuse to receive evidence properly offered and relevant to the issue.—4. An award will be set aside if the arbitrators, when the hearing is practically over, hear further evidence in the absence of one of the parties without notice to him. *Annable* v. *Annable*, 8 W. L. R. 132, 1 Sask. L. R. 222.

Motion to set aside award.]—Evidence—Findings—Agreement not to appeal. *Re Adams & Bridley, Levy & Weston Machinery Co.*, 3 O. W. R. 445.

Motion to set aside award.]—*Re Rae & Oakley*, 6 O. W. R. 716.

Municipal corporation — *Purchase of electric light plant — Appointment of sole arbitrator — Notice — Arbitration Act—Municipal Act.*]—By an agreement between the town corporation and the assignor of the company for the establishment and operation for ten years of an electric light plant in the town, it was provided that the town might at any time during the ten years purchase the plant at a valuation fixed by three arbitrators, appointed by each party choosing an arbitrator and they two a third in case of dispute, or by a majority of them. Where a submission provides that the reference shall be to two arbitrators, the Act R. S. O. 1897, c. 62, s. 8 (b), gives power to the party who has appointed an arbitrator, (if the other makes default as specified) to appoint that arbitrator as sole arbitrator; and it is provided that the Court or Judge may set aside any such appointment. —*Held*, that notice of the appointment of the sole arbitrator should be given to the party in default, who, if not notified, is not called upon to move against the appointment.—*Held*, also, that the agreement was not to be read as suspending the choice of a third arbitrator till there should be a dispute, but it imported that the three arbitrators should act from the outset; and therefore s. 8 (b) did not apply. *Excelsior Life Ins. Co.* v. *Employers' Liability Assurance Corporation*, 2 O. L. R. 301, and *Gumm* v. *Hallett*, L. R. 14 Eq. 555, considered. *Semble*, that the arbitration was under the Municipal Act, and s. 8 of the Arbitration Act was not applicable: R. S. O. 1897, c. 223, s. 467. *In re Sturgeon Falls Electric Light & Power Co. & Sturgeon Falls*, 21 C. L. T. 595, 2 O. L. R. 585.

Municipal corporation.] — Agreement with electric light company — Erection of poles and wires in streets—Use by another company — Authorisation — Resolution of council—By-law — Compensation — Action —Reference—Motion to set aside award — Misconduct of arbitrators—Champerty—Decision on questions of law. *Ottawa* v. *Ottawa Electric Co.*, 3 O. W. R. 65, 588, 796, 4 O. W. R. 370.

Municipal corporation.] — Purchase of property—Voluntary submission—Construction of agreement—"Works and property"—"Franchises and goodwill"—Statutes — *Ejusdem generis* rule. *Re Kingston & Kingston Light, Heat and Power Co.*, 1 O. W. R. 194, 2 O. W. R. 55, 3 O W. R. 769, 3 O. L. R. 637.

Non-compliance with previous order —*Misconduct of arbitrator—Refusal to state case—Proceeding to execute award notwithstanding motion for special case—Remitting award back.*]—Motion by company to set aside an award made under agreement of reference containing the following clause:—"And it is further agreed that if motion is made to set aside or otherwise respecting the award, the Court may, whether the award be insufficient in law or not, remit the award from time to time to the reconsideration and redetermination of the arbitrator."—*Held*, on the authority of *Re Palmer and Hoskin*, the award should be remitted to the arbitrator for reconsideration under s. 11 of R. S. O. 1897, c. 62, he having failed to comply with the terms of a previous order of 22nd June, 1904, which required him to find and award as to the ownership of the property included in an instrument dated 5th January, 1901, and he had not complied with that order by vesting the property in the Lake Superior Power Co, as the owner thereof. *Re Powell & Lake Superior Power Co.*, 5 O. W. R. 49, 9 O. L. R. 236.

Option of one of two alternatives — *Failure to declare option — Mise en demeure.*]—The party to whom an award gives an option to do one of two things, cannot be presumed to have declared for either alternative by mere lapse of time, and, if he fails to declare his option, he must be put in default, before the other party can seek to enforce the award. Hence, when the option consists in either taking over hardwood logs sunk in a pond, as being of a stated quantity, for a lump sum, or, as soon as the ice is gone from the pond, of fishing them up jointly with the other party, to be sawed, and the output to be divided between them in certain proportions, the standing-by, after the ice is gone, by the party having the option, or his doing nothing during the summer, does not give the other the right to sue for the lump sum, on the assumption that he has implicitly elected the first alternative. A putting in default, *mise en demeure*, is at least required, before an action will lie. *Ross* v. *Fletcher*, 35 Que. S. C. 113.

Oral submission and award — *Validity—Irregularity—Absence of prejudice — Undertaking to pay damages—Consideration —Effect of award — Conversion of damages into debt—Small debt procedure — District Court.*]—The plaintiff sued in the District Court for $12, the amount of an award, the action being brought under the small debt procedure. The plaintiff found cattle upon his land, doing damage, and impounded them. The cattle in fact belonged to the defendant's mother, but it was not shewn that the defendant had not some interest in them; and he, in order to have them released from the pound, signed a written undertaking to pay for the damage done by the cattle on the plaintiff's land. He also agreed orally to an arbitration, and the damages were assessed, by an award (not in writing) of 3 men, at $12. The defendant was not present when the 3 men inspected the land, and made their award, nor was he notified: — *Held*, that the undertaking was signed by the defendant for good consideration; and he was personally responsible to the plaintiff for unascertained damages; that there was an oral submission to arbitration; that the procedure under it by the plaintiff and the arbitrators was irregular, but the defendant was not prejudiced by it, the award being a fair one; that the submission, not being in writing, was not governed by the Arbitration Ordinance; that the oral submission was valid, and so was the award; that the award made the damages a debt, and so within the small debt procedure; and the plaintiff was entitled to judgment. *Erbach* v. *Bender* (1910), 14 W. L. R. 720.

Order for enforcement of award — *Appeal from—Objections to award—Misconduct of arbitrators—Uncertainty.*] — Upon appeal from an order granting one of the parties to an arbitration leave to enforce an award:—*Held*, that the Court could not entertain objections to the award based upon alleged misconduct of the arbitrators; the appellant's course in regard to such objections was to move to set aside the award:—*Held*, however, that the award was uncertain and indefinite in its terms and incapable of enforcement by the Court; and upon this ground the appeal should be allowed and the order for enforcement set aside. *Re Mitchell & Mitchell* (1910), 14 W. L. R. 701.

Power of Court to extend time *for making award after expiry of time fixed by submission.*]—Fixing rent upon renewal of lease—Motion to Court—Costs. *Re Russell & Baldwin*, 12 O. W. R. 408.

Price to be paid by landowner *for right of access to highway.*]—The price to be paid for the right of ingress and egress to and from property is what a reasonable seller would accept from a reasonable buyer for the right acquired. The price is to be ascertained when the right is acquired. The arbitrator in fixing the price rightly considered other means of access which could have been obtained had this not been obtained. *Re Toronto Conservatory & Governors of University* (1909), 14 O. W. R. 408.

Reference in pending action.]—Ordering payment of solicitor and client costs. *Messenger* v. *Hicks*, 3 E. L. R. 230.

Reference to three arbitrators—*Different awards made on different dates—Validity of award—Arbitration Act—Interpretation Act.*]—In an agreement between the parties, provision was made for the submission of any dispute to three persons as arbitrators, the arbitration to be in accordance with and subject to the provisions of the Arbitration Act. On a reference, following a dispute, under the agreement, the arbitrators, being unable to agree, drew up and rendered three separate awards. Two of the arbitrators agreed in their findings. Morrison, J., came to the conclusion that the agreement of a majority constituted an award, pursuant to s. 10, s.-s. 36 of the Interpretation Act.—*Held*, on appeal, per Irving and Clement, JJ., that s.-s. 36 does not apply to the construction of a document *inter partes*, as here, but to something done pursuant to statute.—Per Hunter, C.J.:—The arbitrators having acted *separatim* in making their award, an objection to a finding so made is fatal. *McLeod* v. *Hope & Farmer*, 14 B. C. R. 56, 9 W. L. R. 315.

Remitting to arbitrators—*Incompetency of arbitrator—Appointing new arbitrator.*]—Section 11 of the Arbitration Ordinance provides that "in all cases of reference to arbitration the Court or a Judge may, from time to time, remit the matters referred or any of them to the reconsideration of the arbitrators or umpire." Remission was refused because after the submission was entered into one of the arbitrators commenced an action against the party who had nominated him to recover an amount agreed to be paid for procuring settlement of the matters in dispute.—Where the instrument of submission names the arbitrators, the Court or Judge has no power to appoint a new arbitrator in lieu of one who has become incompetent. *Re Crawford & Allen*, 5 Terr. L. R. 398.

Scope of reference.] — Construction of award—Misconduct of arbitrator — Permitting award to be drawn by solicitor for contestants—Costs—Motion to set aside award. *Re Armstrong and Moyes*, 6 O. W. R. 104.

Setting aside award—*Action—Pleading—Prayer for general relief—King's Bench Act, Rules 773-775—9 & 10 Wm. III. c. 15—Jurisdiction.*]—When the plaintiff, in answer to the defence of an award covering the amount of his claim, amends his statement of claim by setting up facts which, if true, would entitle him to ask specifically to have the award set aside, the statement of claim is good on demurrer, if it contains a prayer for general relief, although it does not ask for that specific relief. Dictum of Killam, J., in *Rogers* v. *Commercial Union Assurance Co.*, 10 Man. L. R. at pp. 675, 676, and notes at p. 625 of *Bullen & Leake*, 5th ed., followed.—2. The Court has jurisdiction over awards, whether or not they are awards to which the provisions of 9 & 10 Wm. III. c. 15, apply. *Smith* v. *Whitmore*, 2 De G. J. & S. 297, followed.—3. Per Mathers, J.—Rule 773 of the King's Bench Act provides a code of procedure only for the enforcement of awards, and Rule 774, which reads, "The former practice with respect to awards shall not be abolished, but the same shall only be followed by special leave of the Court or Judge," should be interpreted as if it read, "The former practice relating to the enforcement of awards," etc. *Johannesson* v. *Galbraith*, 3 W. L. R. 275, 16 Man. L. R. 138.

Setting aside award — *Misconduct of arbitrator—Waiver.*]—A party to an arbitration does not waive his right to object to an award on the ground of misconduct on the part of an arbitrator by failing to object as soon as he becomes suspicious and before the award is made; he is entitled to wait until he gets such evidence as will justify him in impeaching the award. Where two out of three arbitrators go on and hold a meeting, and make an award at a time when the third arbitrator cannot attend, it amounts to an exclusion of the third arbitrator, and the award is invalid. A party by attending at such a meeting and not objecting (although he knew of the third arbitrator's inability to attend) does not waive his right to object afterwards. Per Hunter, C.J. — It is not necessary that there should be absolute proof of misconduct before an award will be set aside on that ground; it is enough if there is a reasonable doubt raised in the judicial mind that all was not fair in the conduct of one or more of the arbitrators. *In re Doherer and Megaw's Arbitration*, 23 C. L. T. 272, 10 B. C. R. 48.

Stated case. — *Matter "arising in the course of the reference" — Construction of contract—Revoking submission—Discretion—Special qualifications of arbitrators—Questions of law.*] — Arbitrators were appointed under the arbitration clause in an agreement between two companies, whereby *inter alia*, one agreed to provide the other daily with a certain quantity of cordwood, which the latter agreed to carbonize into charcoal and to deliver to the former to the maximum quantity of 85,000 bushels per month. The arbitration clause provided that in case of any dispute in regard to the meaning or construction of the agreement or of the mutual obligations of the parties or of any other act, matter, or thing relating to or concerning the carrying out of the true spirit, intention, or meaning of the agreement, the same should be determined by arbitration. One of the claims referred to the arbitrators was for damages for short delivery of charcoal, a shortage being claimed whatever the proper construction of the agreement in that regard. On an application by one of the parties, under s. 41 of the Arbitration Act, R. S. O. 1897 c. 62, for a direction to the arbitrators to state a special case upon which the Court should determine the true construction of the contract as to the amount of charcoal called for per month under it — a matter upon which they had reached and announced a conclusion:—*Held*, that, the claim referred to leaving the proper construction of the agreement open, this was a question of law "arising in the course of the reference," within the meaning of s. 41, and a special case might properly be directed as to it. 2. That a special case having been directed as to the principal question, it might properly be made to include two other questions in dispute, though, had they been the only questions which the applicants desired to have stated, it would not have been proper to direct a case as to them. 3. A party to a reference is not entitled *ex debito justitiæ* to have a special case directed whenever a question of law arises in the course of a reference; it is a matter in the discretion of the Court. 4. There is no general rule that when the arbitrators are specially qualified to decide a question of law, this direction should not be given, at all events where the arbitrators have ruled upon the question. *Semble*, that different considerations apply to the exercise of the discretion to give leave to revoke a submission (s. 3 of the same Act)—a discretion which is to be exercised only under exceptional circumstances. *In re Rathbun Co. and Standard Chemical Co.*, 23 C. L. T. 66, 5 O. L. R. 286, 2 O. W. R. 36, 385, 3 O. W. R. 698, 724, 6 O. W. R. 660.

Statement of case by arbitrators—*Time—Remitting back award.*] — After an award is made it is too late to make an application for an order under s. 1 of the Arbitration Act, R. S. O. 1897 c. 62, directing the arbitrators to state a case for the opinion of the Court as to the admissibility and relevancy of evidence, or for the arbitrators to state a case for the opinion of the Court. The only case in which the Court will remit matters referred to an arbitrator for reconsideration under s. 11 are: (1) where the award is bad on the face of it; (2) where there has been misconduct on the part of the arbitrators; (3) where there has been an admitted mistake, and the arbitrator himself asks that the matter may be remitted; and (4) where additional evidence has been discovered after the making of the award. Where arbitrators received and gave effect in their award to certain evidence, and after the making of the award gave a certificate to that effect, and that they were in doubt as to whether they should have received the evidence:—*Held*, that the case did not come within any of the above four cases, and that an order to remit the matter back to the arbitrators should be refused. *In re Grand Trunk Ry. Co. and Petrie*, 21 C. L. T. 529, 2 O. L. R. 284.

Statutory arbitrators.]—The provinces of Ontario and Quebec submitted to arbitrators for determination the amount of principal of the Common School Fund to ascertain which they should consider not only the sum

held by the Gov. of Canada but also "the amount for which Ontario is liable." In 1896 by award No. 2, the arbitrators determined that moneys remitted to purchasers of school lands unless made in fair and prudent administration, and uncollected purchase money of patented lands, unless good cause were shewn for non-collection, should be deemed moneys received by Ont., and in 1899 the amount of liability under these heads was fixed by award No. 4. In 1902 Privy Council held that the arbitrators had no jurisdiction to entertain a claim by Que. to have Ont. declared liable for purchase money of school lands yet unpatented allowed to remain uncollected for many years. In making their final award in 1907, the arbitrators refused an application by Que. for inclusion therein of amounts found due from Ont. for remissions and non-collections and held that they had exceeded their jurisdiction in determining such liability. On appeal from this determination embodied in the final award.—*Held*, Fitzpatrick, C.J., and Duff, J., expressing no opinion, that the arbitrators had no jurisdiction to determine the liability of Ont. for moneys remitted or not collected. *Atty-Gen. for Ont.* v. *Atty.-Gen. for Que.* [1903] A. C. 39, followed. *Held*, also, Fitzpatrick, C.J., and Duff, J., dissenting, that awards Nos. 2 and 4 so far as they determined this liability were absolutely null, and, therefore, not binding on Ont. *Quebec* v. *Ontario* (1909), 42 S. C. R. 161.

Stay of action—*Partnership—Agreement to refer—Enforcement.*]—Application by defendants to stay proceedings in an action by the personal representatives of a deceased partner to have the survivors account. Under partnership articles a sole arbitrator was appointed in case one of the partners should die before the expiration of the partnership term:—*Held*, granting the order to stay proceedings, subject to plaintiffs being permitted at any time upon such material as they deem sufficient, to apply for appointment of a receiver or for an injunction. The right not limited to an application after award was made, reserving, however, a general liberty to apply at any time for the protection of the partnership property and to prevent the improper use or disposition of it pending the settlement of the matters in question. See *Compagnie de Senegal* v. *Woods*, 53 L. J. N. S. c. 168. *Royal Trust Co.* v. *Milligan*, 6 O. W. R. 476, 10 O. L. R. 456.

Submission — *Scope — Award exceeding authority—Void in part—Setting aside in entirety.*]—Arbitrators, even when they are constituted *amiables compositeurs*, can only adjudicate upon matters which are left to them in the submission, and according to the manner which is there provided. Therefore, when they are appointed to fix the compensation to be paid for the expropriation for three lots of land, an award by which they fix it for two lots, and order that the owner retain the third upon condition of maintaining thereon a road in perpetuity for the use of the authority expropriating, is void.—Such an award is indivisible, and cannot be confirmed by one party and annulled by another; it can only be maintained or annulled in its entirety. Judgment in Q. R. 29 S. C. 328 reversed. *Quebec Bridge and Rw. Co.* v. *Quebec Improvement Co.*, 16 Que. K. B. 107.

Submission—*Scope — Award exceeding authority—Void in part—Setting aside in entirety—Mediators—Expropriation.*]—When arbitrators were appointed under deeds of submission to value three expropriated lots of ground and fix the indemnity for damages, it being declared that they should act as mediators (*amiables compositeurs*), but should be bound to conform to the provisions of s. 161 of the Railway Act, 1903, and the award, in lieu of valuing the third lot, ordered that the expropriators should return it in part and construct a road on their own adjoining land, to be maintained by them in perpetuity, for the benefit of the parties expropriated:—*Held*, that arbitrators who are also appointed mediators cannot disregard their instructions, and that the error vitiated the whole award. *Quebec Bridge and Rw. Co.* v. *Quebec Improvement Co.*, 16 Que. K. B. 107, affirmed. *Quebec Improvement Co.* v. *Quebec Bridge and Rw. Co.*, C. R. [1908] A. C. 212; 1908 A. C. 217; 16 Que. K. B. 353.

Submission — *Time for award—Failure of arbitrators to extend—Action — Defence of arbitration pending—Stay of proceedings.*]—A submission to arbitration, dated the 4th October, 1904, was under seal, and bound the parties to abide by the award so as it was made on or before the 30th October, 1904, or any subsequent day to which the arbitrators should by writing extend the time. There was no covenant not to take other proceedings. The arbitrators proceeded to consider the matters referred to them and continued the arbitration, with the assent of the parties, for nearly two years, but did not by writing extend the time for the award. The plaintiff brought this action for an account in respect of the matters referred, the arbitration being still uncompleted, and the defendant pleaded the submission and proceedings of the arbitrators as an answer to the action:—*Held*, that the assent of the parties to the arbitration being proceeded with after the time had expired was equivalent to a parol submission only; s. 3 of the Arbitration Act, which makes submissions of the same effect as an order of the Court, and irrevocable without leave of the Court, applies, by virtue of s. 2, to submissions in writing only; the same is the case with s. 6, which allows an application to stay proceedings; no order extending the time had been made under s. 10; and therefore the arbitration proceedings afforded no answer. *Ryan* v. *Patriarche*, 8 O. W. R. 811, 13 O. L. R. 94.

Submission by consent of parties — *Award by two arbitrators — Irregularity — Notice to third arbitrator of meeting—Insufficiency—Setting aside award.*] — Award set aside, one of the arbitrators not having been notified of the meeting when award determined on. *In re Lesser and Cohen*, 7 E. L. R. 523.

Submission of suit to arbitration at instance of parties under rule of Court. *Dea* v. *Winter* (1817), Wakeham's Nfld. Ca. 28.

Submission to arbitration.]—Time for making award—Power of arbitrators to extend—Failure to exercise—Action for account—Defence of arbitration pending—No answer to action. *Ryan* v. *Patriarche*, 8 O. W. R. 811.

Taking down evidence — Objection — Findings of arbitrators — Errors — Setting aside award—Costs—Uncertainty as to. *Re Grimshaw & Grimshaw*, 1 O. W. R. 744.

Time for commencement of running of interest on amount awarded—Publication — Confirmation — Judgment. *Re Fielding & Gravenhurst*, 2 O. W. R. 836.

Time for making award—*Expiry—Arbitrator functus officio—Appointment of new arbitrator — Municipal corporation—Prohibition.*]—An arbitrator is *functus officio* as soon as he has made an award or as soon as the time fixed, whether by consent or otherwise, within which he shall make his award has expired.—*Ruthven* v. *Ruthven*, 8 U. C. R. 12, followed.—A previous arbitration to settle the same matter having failed by reason of no award having been made, B. took proceedings under the Winnipeg charter for a fresh arbitration, and applied to have an arbitrator appointed by the County Court Judge to act on behalf of the city, as the city council had failed to make a fresh appointment, relying on the former appointment, which had not been cancelled.—*Held*, that a new appointment was necessary, and the city corporation were not entitled to an order prohibiting the County Court Judge from proceeding to make it. *Bennetto* v. *Winnipeg*, 7 W. L. R. 561, 18 Man. L. R. 100.

Time for making award.]—Last day *after lapse.*]—Arbitrators, *amiables compositeurs*, and experts, become *functi officio* by the lapse of the delay fixed for the performance of their duties. If the period fixed has expired without any report having been made, the submission becomes inoperative, and the Court cannot thereafter grant an extension of the delay. *Beaudoin* v. *Dubrule*, 20 Que. S. C. 575.

Time for making award — Last day falling on Sunday—Judicature Act—Partition—Rights of co-parcener—Statute of Limitations—Adverse possession. *Re Mullin & Mullin*, 2 O. W. R. 874.

Time for making award—*Power to extend—Umpire.*]—By the terms of an agreement for submission to arbitration the matters in difference between parties were referred to the award, etc., of M. and B., and in case they disagreed, or failed to make their award before the 1st August then next, then to the award, etc., of such umpire as said arbitrators should nominate and appoint, "so as the said arbitrators or umpire do make and publish his and their award ready to be delivered on or before the 10th day of August next, or on or before any other day to which said arbitrators or umpire shall, by writing indorsed on these presents, enlarge the time for making such award or umpirage:"—*Held*, per Ritchie, J., and Graham, E.J., that under the terms of the agreement, the power of the arbitrators to consider and deal with the questions submitted absolutely terminated on the 1st August, after which date the umpire was the only person who had authority to make an award:—*Held*, also, that the arbitrators had no authority to extend the time within which the umpire could make his award, and that, as such time, if not legally extended, expired on the 10th August, and the umpire did not attempt to extend it until the 20th September, the award made by him was irregular and void, and the plaintiff could not recover:—*Held*, also, that the provisions of the Arbitration Act, Acts of 1895 c. 7, s. 2 (e), were not applicable, a contrary intention being expressed in the submission which fixed the date before which the arbitrator was to make his award or extend the time:—*Held*, also, that the section, if applicable, would not assist the plaintiff, as the umpire did not begin to extend the time until the 20th September, and the authority of the arbitrators had terminated more than a month previously. McDonald, C.J., and Meagher, J., contra. *Holmes* v. *Taylor*, 33 N. S. R. 415.

Uncertainty of award—*Demurrer.*] — Plaintiff's declaration set out an award alone, and to this defendant objected on the ground of its uncertainty, as it directed an annuity to be paid plaintiff out of her claims on the property, without shewing what those claims were or on what property they attached:—*Held*, (Peters, J.)—That the award was certain.—That an objection to an award on demurrer must appear on its face, or by facts stated in the plea. *McIntyre* v. *McIntyre* (1870), 1 P. E. L. R. 307.

Validity of award.]—Reference to three arbitrators—Separate awards—Agreement of two—Arbitration Act—Interpretation Act, s. 10 (36). *Re McLeod & Hope*, 9 W. L. R. 315.

Value of lands expropriated — *Arbitrators exceeded terms of submission—Award set aside.*]—The Quebec Improvement Co. were owners of three lots near the city of Quebec. The Que. Bridge and Rw. Co. required these lots for their purposes. The companies being unable to agree as to the price of the lots, the matter was referred to arbitration, it being declared that the arbitrators should act as mediators (*amiable compositeurs*), but should be bound to conform to the provisions of Art. 161 of the Railway Act, 1903. The arbitrators in lieu of valuing one of the lots in money ordered that part of the lot should be returned and that the Que. Bridge and Rw. Co., should construct a road on their adjoining land and maintain the same in perpetuity for the benefit of the Que. Improvement Co.—*Held*, that the arbitrators were not bound to adhere strictly to legal formalities and mere irregularities would be excused, but as the arbitrators had exceeded the terms of submission, an error in that respect would vitiate their whole award. Judgment of the Court of King's Bench for Québec, affirmed, judgment of the Superior Court of Quebec, Langelier, J., at trial, discharged. *Que. Imp. Co.* v. *Que. Bridge & Rw. Co.*, C. R., [1908] A. C. 212.

Valuation of shares in a company.]—On January 31st, 1906, four persons, then composing the firm of John Macdonald & Co., on forming a joint stock company, executed an agreement, providing *inter alia* that if any of the parties wished to sell his stock he was to give notice in writing to the other shareholders, who should have the right for 30 days to purchase same, and if not purchased by a shareholder within 30 days, and remaining unsold for 60 days, the same was to be taken

over by remaining shareholders at a valuation, to be determined by arbitration in usual way. In arriving at the value the arbitrators were not to go behind the entries in the company's books, but might take other matters into consideration, etc. The plaintiff desiring to sell his stock in the company, took necessary steps under the agreement to arbitrate. The arbitration was had, and the arbitrators awarded the plaintiff $88,400 for his stock, free and clear of every encumbrance thereon.—Sutherland, J. (15 O. W. R. 432, 1 O. W. N. 505), dismissed plaintiff's appeal from above award, with costs.—Divisional Court allowed an appeal therefrom and remitted the award back to the arbitrators with costs here and below. Meredith, C.J.C.P., dissenting. *Macdonald* v. *Macdonald* (1910), 17 O. W. R. 351; 2 O. W. N. 207.

Voluntary submission to arbitration.]—Subsequent agreement varying submission—New submission—Arbitration Act—Award made after time expired—Failure of arbitrators to extend—Invalidity of award—All matters referred not passed upon by arbitrators—Construction of submission—Valuation of arbitration. *Garside* v. *Webb*, 10 O. W. R. 235, 11 O. W. R. 43.

Workmen's Compensation Act—*Case stated by arbitrator — Reference back — Further case—Jurisdiction of single Judge to refer again to arbitrator.*]—On a case stated in an arbitration under the Workmen's Compensation Act, 1902, the Full Court referred the question back to the arbitrator to make definite findings of fact and have the questions of law clearly formulated. Upon the reference back, the case was re-stated to a single Judge, and the Judge to whom the questions were submitted found that they were questions of fact, and referred the matter back to the arbitrator to "proceed with the arbitration:" —*Held*, on appeal, that there was jurisdiction for such an order; that the arbitrator had not finished his work; and that he would not be *functus officio* until the award should be made. *Armstrong* v. *St. Eugene Mining Co.*, 7 W. L. R. 374, 13 B. C. R. 385.

ARBITRATOR.

See ARBITRATION AND AWARD — NOTICE OF ACTION.

ARCHITECT.

Building house — *Interference with lights — Liability — Servitude — Disposal of property by owner.*]—The architect employed by a land owner to design and superintend the construction of a house, on a vacant site not subdivided into building lots for sale, incurs no liability from the fact that an oblique view is given through a window, in the house designed by him, upon a part of the land sold by the owner to a third party, after the inception of the building. In this case, the proximate cause of the servitude is to be found, not in the plan devised by the architect, but in the disposal made by the owner of his property, in a manner to make one portion of it bear the relation of a servient tenement, to that on which the house is built. *Saint-Jean* v. *Strubbe*, 27 Que. S. C. 266.

Contract to prepare plans—*Work not proceeded with — Commission on estimated cost.*]—The plaintiff was engaged by the defendants to prepare plans and specifications for an hotel building to cost not more than $4,000 or $5,000, for which he was to receive a commission of two per cent. on the cost, with one per cent. additional for superintendence. Instructions as to size, number of rooms, &c., were given by the defendants. Before the plans were completed changes were made, by additions to the original plan, involving an additional expenditure of $1,500. The plans were approved of by the defendants, when completed, and tenders called for, and the work partly proceeded with. It was then found by the defendants that, owing to an advance in the price of materials, the building would cost much more than they had expected, and the work was stopped:—*Held*, that the plaintiff was entitled to recover from defendants the stipulated commission of two per cent. on the estimated cost of the building with the additions agreed upon. *Hutchinson* v. *Conway*, 34 N. S. R. 554.

Fees.]—Action for—Counterclaim for negligence—Questions of fact—Appeal. *Russell* v. *McKerchar* (Man.), 1 W. L. R. 138.

Fees—*Preparation of plans — Contract—Liability—Joint enterprise.*]—In an action by architects to recover from a land-owner fees for preparing plans and specifications for the erection of an apartment house upon the defendant's land:—*Held*, upon conflicting evidence, that the plans and specifications were prepared by the plaintiffs, at their own risk, as sharers with the defendant and others, in a contemplated enterprise, and that the defendant was not liable to the plaintiffs. *Melville* v. *Stirrett* (1910), 14 W. L. R. 557.

Fees—*Preparing plans—Value of services —Evidence.*]—In an action by architects for fees for preparing plans for a building which was never erected, and the plaintiffs were *held*, upon the evidence, entitled to recover the amount which they claimed, there being no evidence as to the value of their services, of any weight as opposed to the testimony of the plaintiffs themselves. *Smith* v. *Crump* (No. 2), (1910), 14 W. L. R. 207.

Fees—*Tariff—Association of architects—Registration.*]—An architect, in order to avail himself of the tariff of the Province of Quebec Association of Architects, in support of a claim for services as architect, must establish that he is registered as a member of the association under the Act, 61 V. c. 33 (Q.) *Beaulieu* v. *Lapierre*, 26 Que. S. C. 1.

Fees for professional services.]—Drawing plans—Supervision of buildings—Other services—Evidence—Costs. *Schwab* v. *Shragge* (Man.), 3 W. L. R. 463.

Fees for professional services.]—Preparation of plans and specifications—Contract—Limited price—Evidence. *Smith* v. *Czerwinski* (Man.), 4 W. L. R. 563.

Instructions to prepare plans—*Limitation as to cost of building — Extraneous conditions—Municipal by-law — Compliance with—Contract—Remuneration for services.*]—Where an architect is instructed to prepare plans for a building to cost not more than a certain sum, but which building must also comply with other conditions as to accommodation under a municipal by-law, then, although, in order to comply with such other conditions, the tenders sent in are in excess of the sum mentioned, the architect cannot recover for his services. *Wilson* v. *Ward*, 14 B. C. R. 131, 9 W. L. R. 481.

Mistake in estimates—*Liability.*]—Decision of Irving, J., 8 B. C. R. 7, holding the defendant, an architect, not liable for loss caused by error in estimates, affirmed by the full Court. *Grant* v. *Dupont*, 8 B. C. R. 223.

Plans—*Payment for—Contract—Commission.*]—The defendant requested the plaintiff, who was an architect, to prepare plans for a building to cost from $1,500 to $1,800. After inspecting the plans, the defendant objected that the building shewn would not give him sufficient room, and suggested changes, which he was told would increase the cost; he assented, and the plans as finally prepared were for a building which would cost $25,000; the building was never in fact erected:—*Held*, that the plaintiff was entitled to be paid a percentage on the latter amount, and that, in the absence of evidence to fix the value independent of the special contract proved by the plaintiff, the sum of $750 (3 per cent. on $25,000) allowed by the trial Judge should not be reduced. *Chappell* v. *Nolan*, 38 N. S. R. 74.

Preliminary plans and drawings.]—Remuneration for—Agreement — Quantum meruit—Evidence. *Bond & Smith* v. *Colonial Investment & Loan Co.*, 11 O. W. R. 617.

Preparations of plans and estimates.]—Remuneration for—Liability of defendant—Contract—Evidence—Conduct of parties—Useless work—Costs. *Lachance* v. *Wilson*, 7 W. L. R. 646.

Work and material ordered for building.]—Absence of authority from owners or contractors—Warranty of authority—Personal liability—Principal and agent. *Horwood* v. *Maclaren*, 8 O. W. R. 857.

ARREARAGES.

See INTEREST.

ARREST.

Absconding debtor.]—Material to support application—Form of affidavit. *Bent* v. *Morine*, 2 E. L. R. 107.

Affidavit.]—The affidavit upon which a *capias* is founded must indicate the place where the debt was contracted, and in the absence of such indication the *capias* will be quashed on petition. *Sheridan* v. *Pingree*, 17 Que. S. C. 310.

Affidavit—*Information—Source.*]—A *capias* issued upon the affidavit of the plaintiff alleging the approaching departure of the defendant and the sale of his effects, based upon information given to him, the plaintiff, by a person worthy of credit, will be quashed on petition, if the plaintiff does not indicate the name of the person who has given him such information. *Lemieux* v. *Bussière*, 3 Que. P. R. 318.

Affidavit to hold to bail—*Residence of parties.*]—In an action for false imprisonment of the plaintiff it appeared that he was arrested upon a *capias* issued by a justice of the peace:—*Held*, that the affidavit upon which the *capias* was granted was sufficient although it did not state the places of residence of the parties so as to shew jurisdiction. *Temperance & General Life Assce. Co. of North America* v. *Ingraham*, 35 N. B. R. 510.

Application for discharge—*Onus—Intent to defraud — Former absconding.*]—Upon an application by the defendant for his discharge from arrest under a *ca. re.*, he did not dispute the existence of the debt, nor that he was about to leave the country without paying or providing for it, but contended that he was not about to quit the province with intent to defraud.—The debt sued for was contracted in 1893, and arose out of a scheme, in which the plaintiff was induced by the defendant to purchase an interest. It was alleged, but disputed, that this was a fraudulent scheme. It was also alleged and denied that the defendant in 1893 absconded from this province to the United States of America. The defendant was a citizen of the United States, and was in Ontario in 1893, and again in 1900, when arrested, for temporary business purposes. It was not shewn that he ever had any property in this province, nor that he took any away with him in 1893, nor that at the time of his arrest he had any in his hands or under his control. The evidence did not shew that he was at the time of the arrest about to leave the province hurriedly, but that he intended to stay till he had finished the business which brought him to the province, and then return to his own country as of course. —Divisional Court *held* (20 C. L. T. 305, 19 P. R. 207), Ferguson, J., dissenting, that the Court could not, upon this application, try the question whether the defendant did or did not abscond in 1893; that the onus was upon the plaintiff to make out the fraudulent intent in the departure now proposed, by more than mere suspicion; and that, upon all the facts and merits disclosed, the arrest could not be maintained. *Kersterman* v. *McLellan*, 10 P. R. 122, distinguished.—Court of Appeal *held*, the expected departure from Ontario with intent to defraud is an essential ingredient of the case to be made out by the applicant for an order of arrest, but it is a question of fact, and the Judge may infer from the facts and circumstances shewn by the affidavits. The decision of the Judge who grants such an order is subject to review, but the onus of shewing that he was wrong rests upon the party who complains of it. Under the circumstances of this case the order was rightly made. The former conduct of the defendant in respect to

the same debt was a fact or circumstance to be taken into consideration on the question of intent. The impecunious or insolvent condition of the defendant does not, of itself, minimise or rebut the fraudulent intent.—Above judgment of Divisional Court reversed.—*Held*, also, that the order of the Court below directing that the bond given by the defendant should be delivered up and the surety therein released, was erroneous; the bond ought to have remained upon the files of the Court, being a record thereof; and the order ought only to have directed that an exoneretur be entered thereon; therefore the bond should be restored. *Beam* v. *Beatty* (1901), 21 C. L. T. 518, 2 O. L. R. 362.

Assaulting police officer — *Arrest of suspect—Resisting—Warrant.*] — Where the defendant, arrested by a provincial constable, who believed that a robbery had been committed, and that the defendant was one of the persons who committed it, and who, being asked to shew his authority, produced and read a warrant against F. E. and others, for breaking and entering a shop and stealing a quantity of goods therefrom, seeing that his name was not mentioned in the warrant, resisted arrest, and in so doing assaulted a constable, and was tried and convicted for assaulting a police officer in the discharge of his duty, with intent to resist lawful arrest, it was held that the arrest could be justified under the statute, notwithstanding the insufficiency of the warrant. *Rex* v. *Sabeans*, 37 N. S. Reps. 223.

Assignment for creditors — *Discharge —Schedule — Contestation — Time.*] — A debtor imprisoned under civil process who makes an assignment of his property, is not prevented from demanding his discharge, for default of contestation of his schedule within four months after its filing, by the fact that the plaintiff who has caused the imprisonment, having been named provisional guardian in respect of the assignment, has neglected to give notice of his appointment and to procure the nomination of a curator, and that in spite of the fact that the time for contestation of the schedule begins to run regularly only after notice of the appointment of the curator. However, in this case, the Court granted to the plaintiff a delay of eight days to contest the schedule, ordering the discharge of the debtor if the contestation were not filed within that time. *Bury* v. *Lynch*, 17 Que. S. C. 166, 2 Que. P. R. 419.

Attachment—*Affidavit—Cause of action —Subsequent attaching creditor—Motion to set aside prior attachment — Status.*] — An application by a subsequent attaching creditor to set aside a previous attachment under the Absent or Absconding Debtors Act, on the ground that the affidavit upon which the previous attachment was made did not disclose a cause of action, and was not made by the plaintiff or his agent. The affidavit was made by the first attaching creditor's solicitor, and set forth that the defendant was indebted for "money lent, for goods sold and delivered, and for board and lodging," stating the amount due under each head:—*Held*, that the affidavit on which the first attachment issued was not made by the plaintiff or his agent, as required by the statute, and the affidavit did not shew any cause of action against the defendant and that the notice of application to set aside the attachment might be amended by adding these grounds of motion; and the application was granted. *Carr* v. *Carr*, 21 C. L. T. 312.

Attachment — *Affidavit — Conclusions of law—Claim for damages.*] — Conclusions of law should not be stated in an affidavit. The statement ought to be in such form as to enable perjury to be assigned. An order for arrest may be granted notwithstanding that the claim is for damages. *Gladwin* v. *Guilford*, 40 N. S. R. 480.

Attachment—*Costs—County Court appeal.*] — The Supreme Court will not, as a general rule, grant an attachment to enforce the payment of the costs of an appeal from the judgment of a County Court. The costs should be certified and application made to the Court below. *MacPherson* v. *Samet*, 34 N. B. R. 559.

Attachment—*Disobedience of order for payment of trust fund into Court—Forum —Judge at Chambers—Collection Act—Time for payment—Proof of non-payment.*]—The defendant was ordered by rule of Court to pay into Court the amount of trust funds admitted by him to be in his hands. The defendant disobeyed the order, and an application was made at Chambers under O. 40, R. 4, and O. 42, R. 2, for an order that a writ of attachment be issued against him. The defendant appeared and objected to the granting of the order for the attachment on the following grounds: (1) that a Judge at Chambers has no authority to grant an order for attachment in such a case; (2) that, in view of s. 1 of the Collection Act, a writ of attachment could not issue for the payment of money; (3) that a time must be limited in the order for the payment, and that it was not sufficient to require it to be paid "forthwith;" (4) that it was not sufficiently proved that the money had not been paid in, a certificate of the prothonotary being necessary, as under the English practice:—*Held*, that there was jurisdiction in Chambers to grant the order in question; that the provision in the Collection Act was not applicable to a case of this kind; that the expression "forthwith" was sufficient; and that the fact that the defendant appeared and did not dispute the non-payment, disposed of the fourth objection. A writ of attachment was granted accordingly. *Gilbert* v. *Endean*, 9 Ch. D. 259, distinguished. *Loasby* v. *Egan*, 40 N. S. R. 74.

Attachment.] — Disobedience to judgment—Service of judgment—Copy—Non-production of original—Status of plaintiffs as applicants for attachment — Parting with interest in part if subject matter of action—Judgment attacked by subsequent action. *McLeod* v. *Lawson*, 10 O. W. R. 1093.

Attachment — *Practice — Rule 704 — Notice—Material on application — Former equity practice.*]—In applying for a writ of attachment against the person for contempt of Court, it is not necessary to shew that the equity practice prior to the coming into force of the Queen's Bench Act, 1895, requiring that the copy of the order served

should be indorsed with the memorandum prescribed by former Equity Rule 290 and Schedule N., has been followed, as the words "circumstance" and "manner," used in Rule 704 of the King's Bench Act, which is the Rule prescribing the present practice, do not extend to the material to be used on applying for such writ of attachment. The Court drew a distinction between the procedure for obtaining the old *ex parte* writ of attachment and the present practice, under which notice is always necessary before the writ can be obtained. *Cotter* v. *Osborne*, 6 W. L. R. 690, 17 Man. L. R. 164.

Attachment — *Rule nisi — Argument on motion—Absence of witness — Proof—Affidavit.*]—A party has the right when a motion is made to obtain an order of attachment against him, to oppose this motion by every means that he could oppose to the enforcement of the order itself. The failure of a witness to appear ought to be set forth in the brief. A motion for a rule *nisi* against a witness who has thus failed to appear ought to be supported by an affidavit. *Beaucage* v. *Arpin* (1909), 10 Que. P. R. 421.

Bail—*Renewal—Default — Re-arrest.*] — Default by a defendant arrested upon *capias* to renew the bail (a bondsman having died), as directed by the order of the Court, is a good ground for ordering him into the custody of the sheriff. *Beliveau* v. *Boschen*, 4 Que. P. R. 62.

Bail bond—*Discharge—Exoneretur.*] — Application for an order to deliver up the bond, given on the defendant's arrest, to be cancelled, the action having been dismissed: —*Held*, that the order should be for the entry of an exoneretur on the bond, not for the delivery up of the bond, following the old practice (*Allison* v. *Desbrisay*, Cochrane 19), there being no specific Rule in the Nova Scotia Judicature Act on the subject. *Watson* v. *Leukton*, 23 C. L. T. 336.

Both parties abroad—*Attachment will lie against defendant temporarily within jurisdiction, but concealing himself.*]—Both plaintiffs and defendants were residents of Nova Scotia, where also the debt was contracted. Defendant came to P. E. I. temporarily, and while here plaintiffs caused a bailable writ to issue against him, but he concealed himself to evade arrest, and it was returned *non est inventus*. Plaintiffs then issued an absent debtor attachment, and summoned Yates as garnishee, he having property of defendant's in his possession. A motion was now made by defendant to quash this attachment, on the ground that both parties being non-residents, and the debt contracted abroad, they did not come within the provisions of the Act. Two questions were raised: (1) whether a non-resident could proceed by attachment for a debt not contracted here; (2) whether a non-resident defendant, here for a temporary purpose, was under the circumstances liable to be proceeded against: — *Held*, Peters, J., that the non-resident plaintiff could proceed, and that the non-resident defendant was liable. *McKean & Sutherland* v. *McKenzie* (1862), 1 P. E. I. R. 203.

Capias.]—Application for discharge under Nova Scotia Indigent Debtors Act—Malicious tort. *Goscombe* v. *Laird*, 3 E. L. R. 499.

Capias—*Affidavit—Amendment—Time and place of debt.*]—The affidavit required for the issuing of the writ of *capias* is not a proceeding susceptible of being amended. 2. Such affidavit must mention the time and place where the indebtedness occurred, within the limits of the provinces of Quebec and Ontario. *Julien* v. *Chuna*, 5 Que. P. R. 413.

Capias—*Affidavit—Debt.*]—A *capias* will be quashed upon petition if the affidavit does not shew that the debt for which it was sued out is a personal debt, or if it does not indicate the place at which the debt was created or became exigible. *European Importing Co.* v. *Mallekson*, 6 Que. P. R. 255.

Capias—*Affidavit—Debt, place of—Judgment.*]—It is essential to state in the affidavit for a *capias* that the debt was contracted or is payable in the provinces of Quebec and Ontario; the mention in the affidavit of the judgment obtained against the defendant will not suffice. *Lavoie* v. *Lévesque*, 8 Que. P. R. 275.

Capias—*Affidavit — Debt—Place of payment.*]—The affidavit for *capias* must shew that the debt for which the suit is brought was created or is made payable within the limits of the provinces of Quebec or Ontario. *D'Amico* v. *Galardo*, 28 Que. S. C. 399, 7 Que. P. R. 234.

Capias — *Affidavit — Fraud — Concealment—Sufficiency of allegations.*]—An affidavit for a *capias* containing an allegation that without the benefit of the writ the plaintiff will be deprived of his remedy against the defendant, and in which the concealment imputed to the defendant is that by virtue of a contract with the plaintiff for the making of joists, and when the defendant was insolvent, in obtaining an advance of $1,000 to pay the wages of his workmen, he had hidden and withdrawn that sum with the intention of defrauding the plaintiff, so that the latter was not able to procure delivery to him of the finished product, the workmen refusing to allow it to be taken away, is sufficient to meet the requirements of art. 895, C. P. C. *King Brothers Limited* v. *Blais*, 14 Que. K. B. 501.

Capias — *Affidavit — "Immediately."*]— An affidavit for *capias* must set forth that the defendant is "*immediately*" about to leave the provinces of Quebec and Ontario, and a *capias* issued upon an affidavit merely, stating that the defendant is about to leave the said provinces, will be quashed on petition to that effect. *Kidd* v. *MacKinnon*, 5 Que. P. R. 177, 20 Que. S. C. 300.

Capias — *Affidavit — Information.*] — Where, in an affidavit made to obtain a writ of *ca. re.*, the plaintiff swears that he is informed of the facts upon which he relies to secure the issue of the writ, he must give the name of the person who has furnished him the information, and if he fails to give it the writ of *capias* will be quashed upon the petition of the defendant. *Lemieux* v. *Bussière*, 18 Que. S. C. 499.

Capias — *Affidavit — Insufficiency — Quashing writ.*]—The insufficiency of the allegations in an affidavit for the issue of a *capias* is irremediable, because there is no way of amending the affidavit, and the issue of the writ cannot be retroactively validated; therefore, the omission to indicate in the affidavit the place where the debt was contracted is fatal and is ground for quashing the writ. *Keruzee* v. *Keruzee* (1906), 8 Que. P. R. 36.

Capias — *Affidavit — Insufficient allegations—Absconding — Grounds of belief.*]—The allegation in an affidavit for *capias* that *it is probable* the defendant is immediately to leave the province of Quebec, is uncertain and insufficient. 2. The affidavit must not only allege the belief of the plaintiff that the defendant is about to leave the province, but also the grounds of his belief. *Shuman* v. *Goodman*, 10 Que. P. R. 256.

Capias—*Affidavit—Residence of parties—Place where debt contracted.*]—When it appears by the affidavit for *capias* that the plaintiff as well as the defendant resides in the province of Quebec, it is not necessary to allege specially that the debt was contracted within the province. *Beauchemin* v. *St. Pierre*, 5 Que. P. R. 484.

Capias—*Affidavit—Sufficiency — Intent—Irregularity—Waiver—Bail.*] — Statements in affidavit as to debt and intention to leave considered. A defendant arrested under a writ of *ca. re.* admits by implication his intention to leave the province by denying his intention to leave it permanently. By the giving of bail, a defendant so arrested waives his right to object to irregularities in the writ. *Robertson* v. *Beers*, 7 B. C. R. 76.

Capias—*Affidavit of debt—Place of payment.*]—An affidavit for a *capias* is insufficient if it does not allege that the debt has been created or is payable within the limits of the provinces of Quebec and Ontario. *Foisy* v. *Levesque*, 9 Que. P. R. 130.

Capias—*Affidavit to hold to bail—Falsity of allegations in—Answer setting up new facts — Inscription in law.*] — A special answer setting up new facts will not be permitted on an application to set aside a writ of *capias* based on the irregularity of the affidavit and the falsity of the allegations contained in it; such an answer will be struck out on an inscription in law. *Demers* v. *Girard*, 7 Que. P. R. 134.

Capias—*Affidavit to hold to bail—Insufficiency of.*]—A *capias* issued upon an affidavit which does not state that owing to the secretion charged, the plaintiff will be deprived of his recourse against the defendant, is illegal, and will be quashed on petition. *Hochar* v. *Drimer*, 7 Que. P. R. 156.

Capias—*Affidavit to hold to bail — Particulars of damages.*]—An affidavit for the issue of a *capias* in an action for damages should state the time and place where the acts which caused the damage were committed. *Gourra* v. *Gourra*, 7 Que. P. R. 157.

Capias—*Assignment by debtor—Previous fraudulent acts.*]—A debtor who has made an assignment for benefit of creditors cannot be arrested on a *capias* for fraudulent acts committed before his assignment. *Demers* v. *Meunier*, 7 Que. P. R. 274.

Capias—*Bail—Amount—Several sureties.*]—In a case of *capias* where the claim is for moneys had and received, the Court is without power to arbitrarily fix for bail an amount other than that claimed in the action, but may order that bail to that amount be given by several sureties, each to the extent of an aliquot part of said sum. *Sicotte* v. *Boschen*, 9 Que. P. R. 390.

Capias — *Bail—Money deposit—Order to accept bail—Return of deposit.*]—The defendant was arrested on a *capias*, and the amount indorsed for bail and $40 for costs were deposited with the sheriff by a friend, out of her own money, the sheriff giving a receipt as follows: "Received from Ida Isaacson $540 in lieu of bail in the case of *Macaulay Bros. & Co.* v. *Hyman Jacobson*:"—*Held*, that an application for an order that the sheriff accept bail, or in lieu thereof, that the defendant be committed to gaol, and that the deposit be returned, should be refused. *Macaulay* v. *Jacobson, Ex p. Isaacson*, 2 E. L. R. 15, 37 N. B. R. 537.

Capias—*Bail—Relief under Rule 1047—Waiver—Discharge of bail.*]—Defendant was arrested under order in nature of a *ca. re.*, and was released from custody upon giving bail by deposit of a sum of money with sheriff.—*Held*, that he had not thereby waived his right to be relieved under Con. Rule 1047; and, it appearing, upon material filed upon motion under that Rule, that the order for arrest should not have been made, an order was made for return to him of sum deposited. *Adams* v. *Sutherland*. *Josh* v. *Sutherland* (1906), 10 O. L. R. 645, 6 O. W. R. 434.

Capias—*Claim for liquidated damages—Order of Judge—Security—Affidavit — Sufficiency — Filing of documents — Petition to quash writ.*]—Where in a *capias* the claim of the plaintiff is for liquidated damages, it is not necessary to obtain an order of a Judge for the issue of the writ, nor for the fixing of the security; and the want of such orders cannot be set up as a ground for quashing the writ.—2. The failure to file with the affidavit the cheques and notes upon which the action is based cannot be the subject of a contestation as to the sufficiency of the affidavit. *Sapery* v. *Serling*, 10 Que. P. R. 52.

Capias — *Claim in action — Affidavit—Omissions.*] — Plaintiff may bring suit for amount for which a *capias* has issued, and at same time claim damages, inasmuch as the two demands are not incompatible nor contradictory.—Omission of domicil of deponent and absence of date when and place where the affidavit was made, are fatal to the *capias*. *Burns* v. *Lee* (1906), 8 Que. P. R. 27.

Capias—*Co. Ct.—Irregularity—Summons to set aside—Title of King—Jurisdiction.*]—It is not necessary that a summons to set aside a writ in a Co. Ct. for irregularity should state the irregularity, nor is it necessary that grounds should be served with summons.—A writ of *capias* in a Co. Ct. will not be set aside because the words "and of the British dominions beyond the seas" are omitted from the title of the King.—A Co. Ct.

capias will not be set aside because it does not aver in statement of cause of action that it arose within the jurisdiction of the Court. *Rogers* v. *Dunbar* (1906), 37 N. B. R. 33.

Capias — *Debt — Partnership — Plaintiff claiming fixed sum — Defendant leaving province.*] — In an action accompanied by *capias ad respondendum*, the plaintiff made affidavit, and also alleged in his declaration that the defendant was personally indebted to him in the sum of $100, the plaintiff being entitled to one-fifth of the profits of a partnership, of which he and the defendant were members, which partnership had realized $500 profits, and that the defendant was about to leave the provinces of Quebec and Ontario with the entire sum. On inscription in law: —*Held*, that by the alleged illegal appropriation of the entire profits and the intended departure therewith, the defendant's possession of the sum of $500 had changed its nature, and that, without the previous institution of an action *pro socio* a personal indebtedness existed on the part of the defendant to a copartner entitled to a share of the sum illegally appropriated, which was sufficient to justify the issue of a *capias* under art. 895 C. C. P. *Ferries* v. *Vathakos*, 25 Que. S. C. 530, 6 Que. P. R. 388.

Capias — *Demand of abandonment — Retired trader—Refusal to assign.*]—It is not necessary that a person be actually engaged in trade when a demand of abandonment is made upon him. Even where he has ceased for several years to carry on trade, he is nevertheless subject to a demand of abandonment based on a commercial debt contracted by himself or his firm while he was engaged in trade; and consequently, in such case, under art. 895, C. C. P., he is liable to arrest under *capias* for refusal to make an abandonment. *Carter* v. *McCarthy*, 6 Que. Q. B. 499, followed, and *Roy* v. *Ellis*, 7 Que. Q. B. 222, distinguished. *Perkins* v. *Perkins*, 22 Que. S. C. 72.

Capias — *Demurrer—Exception.*]—A demurrer to a *capias* will not be struck out on exception to the form, the defendant being at liberty to demur instead of proceeding by petition to quash. *Todd* v. *Murray*, 3 Que. P. R. 521.

Capias.] — Deposit of costs—Application for repayment. *MacAulay* v. *Jacobson* (1906), 2 E. L. R. 15.

Capias — *Description of defendant — Change of residence—Stamps.*]—In a writ of *capias* after judgment, it is sufficient to give the same description of the defendant as that contained in the original writ of summons, although the defendant may have meanwhile changed his place of residence; and such a writ is sufficiently stamped, if it bears the stamps required on an alias writ. *Edgerton* v. *Lapierre*, 27 Que. S. C. 20, 6 Que. P. R. 434.

Capias—*Exception to the form—Claim for salary and commission—Liquidated debt —C. P. 174, 899.*]—When a *capias* is issued for a claim for salary based upon a written contract and for a fixed commission agreed to by the parties, the claim is one for liquidated damages.—An exception to the form alleging that the *capias* could only issue upon the order of a Judge will not be entertained. *Day* v. *Paillard* (1910), 11 Que. P. R. 295.

Capias—*Execution in another province.*] —When the Superior Court has jurisdiction with respect to the subject matter of the principal action, it can issue a writ of *capias* for execution in the province of Ontario, because the code of procedure has only re-enacted the provisions of the laws of the old province of Canada, of which Ontario formed part. *Gravel* v. *Lizotte*, 7 Que. P. R. 201.

Capias—*Execution out of prov.*]—*Capias* issued by Superior Ct. of Que. cannot be executed in Ont., and will be annulled on exception to form. *Gravel* v. *Lizotte* (1906), 7 Que. P. R. 354, 28 Que. S. C. 338.

Capias.]—Fraud upon creditors—Affidavit of debt—Secretion of property—Failure to prove attempt to secrete—Motion to quash *capias*—Costs. *Eliasoph* v. *David* (Que.), 6 E. L. R. 252.

Capias — *Gaol — Mileage.*]—A sheriff is required to safely keep a person arrested on a *capias*, and, as there is no common gaol in Vancouver, the sheriff of Vancouver is entitled to lodge a person arrested in his bailiwick in New Westminster gaol and charge mileage therefor. *Carson* v. *Carson*, 10 B. C. R. 83.

Capias.]—Intent to quit Ont.—Intent to defraud creditors—Evidence—Discharge from custody—*Fleming* v. *McCutcheon* (1906), 8 O. W. R. 368.

Capias.]—Intent to quit Territory—Intent to defraud creditors—Discharge — Bail—Deposit of money—Bond—Practice. *Grant* v. *Rimer* (Y.T.) (1906), 3 W. L. R. 506.

Capias — *Judgment debtor — Arrest —Disclosure — Order for discharge.*] — The order provided for by 60 V. c. 28, s. 15, is a substitute for the remedy by writ of mandamus, and it will therefore be granted only in cases where mandamus will lie. In discharging or refusing to discharge a debtor who has made a disclosure under 59 V. c. 28, c. 7, the Judge or other officer is acting judicially and not ministerially; therefore the Court refused to make an order under s. 15 commanding the Judge of a County Court to discharge a debtor who has made a disclosure before him. *Ex p. Keerson*, 35 N. B. Reps. 233.

Capias — *Motion for discharge—Time— Art. 922 C. P.*]—There is no limitation as to the time within which a defendant may apply to be discharged from an arrest on *capias;* the provisions of Art. 922, C. P., as to the application of the Rules governing summary matters, only refers to delays for joining issue on and the trial of a petition. *Bellingham* v. *Kampf*, 9 Que. P. R. 338.

Capias — *Order sustaining — Failure to serve copy — Habeas corpus—Discharge.*]— One who is imprisoned by virtue of an order of a Judge following upon a *capias* sustained, may obtain his release by a writ of *habeas corpus* if no copy of the order is served upon him, according to law. *Barthos* v. *Vallée*, 10 Que. P. R. 296.

Capias—*Petition to quash—Deposit—Incidental capias — Declaration — Time.*] — A petition to quash a *capias*, based not upon the grounds mentioned in Art. 919 C. P., but upon formal grounds, is subject to the deposit required with preliminary exceptions. 2. The declaration of an incidental *capias* must be deposited at the office of the Court within three days after service of the writ. *Radford* v. *Hickey*, 5 Que. P. R. 311.

Capias—*Satisfaction of debt and costs—Plaintiff proceeding after — Exception to the form.*]—When a person arrested on a *capias* delivers a certain sum in money and goods to the bailiff in satisfaction of the debt and costs, the plaintiff's proceeding on his writ of *capias* without returning to the defendant the goods delivered to the bailiff, unlawful though it be, is not such an irregularity as can be taken advantage of by an exception to the form. *Wilkins* v. *Marchildon*, 7 Que. P. R. 31.

Capias — *Security—Legal security in the matter of a capias—Security provided for in Art. 910 C. P.—Recourse against the security—Condition precedent to a sentence maintaining the capias.*]—The provisional security provided for in Art. 910 C. P. does give the plaintiff recourse to the security only after a sentence of the Court maintaining the *capias*, even though the writ has been issued in a cause after judgment obtained, and to procure the recovery of the debt. *Campeau* v. *Brown* (1909), 36 Que. S. C. 284.

Capias—*Security money—Payment over—Motion.*]—A plaintiff, who has succeeded upon a *capias*, cannot demand by motion that the deposit made with the sheriff by way of security shall be paid over to him. *Rosenberg* v. *Belankowe*, 5 Que. P. R. 378.

Capias — *Setting aside—Irregularity—Action for malicious prosecution.*]—Action for malicious prosecution. The plaintiff was arrested at Yarmouth under a *capias* issued under the provisions of the Towns Incorporation Act. The *capias* was set aside by a stipendiary magistrate, and the plaintiff discharged, because the amount of his travelling fees was not indorsed on the writ, as is required when the person summoned or arrested lives out of the county. The plaintiff then brought this action. The plaintiff urged (1) nullity of the *capias;* (2) that the affidavit was not made *bona fide* and that it was false in two particulars, viz., because no debt was due, and because there was no ground for the affidavit, the ordinary method of procedure, by summons, being all that was requisite:—*Held*, that the *capias* was not void, and that the affidavit was made *bona fide*. *Irwin* v. *Lawson*, 21 C. L. T. 354.

Capias — *Simple arrest — Contestation—Trial—Procedure—Merits.*]—Where in an action writs of *capias* and simple arrest have been issued after return of original process, and defendant contests action upon merits, and at same time contests writs of arrest, plaintiff must proceed first to trial upon merits, and, after judgment in his favour, set the case down for hearing upon the contestations of *capias* and arrest. *Cazal* v. *Matha* (1906), 28 Que. S. C. 131.

Capias — *Surety — Action against surety while capias still pending—C. P. 910, 913.*] —If, in a *capias*, the surety binds and obliges himself to pay "*le montant du jugment a intervenir jusqu'a concurrence de $50, les interets et les frais,*" he cannot be sued while the *capias* is still pending, notwithstanding the fact that the plaintiff has already a judgment for the amount for which the *capias* issued. *Guay* v. *Samson* (1910), 11 Que. P. R. 246.

Capias — *Validity — Motion after payment.*]—A defendant who, being arrested under a writ of *capias*, pays the debt and costs in full to avoid detention, cannot, by motion, demand the return of the writ and proceedings thereon, to discuss the validity of the *capias* or of the plaintiff's claim; his only recourse is by action to recover back the money paid or in damages. *Leduc* v. *Martel*, 2 Que. P. R. 556.

Capias—*Writ of summons — Failure to serve — Expiry—Nullity—Waiver—Costs.*] —A writ of *capias* is essentially a writ of summons as well as one authorizing an arrest, and the articles governing the writ of summons, save any special exception made by law, apply to it. Where a writ issued after judgment has not been served within six months after its issue and no Judge's order extending its life has been made within the six months, the writ becomes non-existent. The absolute nullity of the writ is not a mere irregularity which, under Art. 176, C. P., would be waived by failure to invoke it within the delays prescribed for filing preliminary exceptions, but where such nullity is not so invoked, costs will not be granted. *Demers* v. *Girard*, 7 Que. P. R. 214.

Capias ad satisfaciendum.] — Custody of bail—Discharge—Disclosure of judgment debtor's affairs on examination—Payments to preferred creditors—Indigent debtor. *McDougall* v. *McKinnon*, 9 O. W. R. 689.

Capias after judgment—*Delay in execution.*]—A writ of *capias* after judgment is a mode of executing a judgment, and is not affected by Art. 120 C. C. P., but remains valid beyond the delay of 6 months therein mentioned, until executed.—(2) Even if it be a writ of summons, the peremption in the above article is not absolute, and is waived by failure of the defendant to plead it in the manner and within the delay prescribed in the case of irregularities in such writs. *Demers* v. *Girard*, 28 Que. S. C. 542, 7 Que. P. R. 347.

Ca. re. — *Affidavit — Debt — Identity of plaintiff.*]—The affidavits leading to an order for *ca re.* must shew that there is a debt due from the defendant to the plaintiff. It is not sufficient to shew that there is a debt due from the defendant to one who bears the same name as the plaintiff. A statement in an affidavit that deponent has caused a writ of summons to be issued against defendant, without stating in what action the writ was issued, is not sufficient to shew that plaintiff and deponent are one and the same person. *Wehrfritz* v. *Russell* (No. 2), 9 B. C. R. 79.

Ca. re.—*Costs—Set-off—Stay of execution.*] — Motion to set aside an order for arrest, it being shewn that the defendant did

not intend to leave the province. The Judge directed that the order for arrest be set aside with costs. The plaintiff asked that the costs be set off against the judgment which the plaintiff expected to recover against the defendant. Order for costs to the defendant, but execution therefor stayed for 30 days. *Resnick* v. *Petits*, 24 C. L. T. 238.

Ca. re.—*Execution in another province.*] —A debtor about to leave the province of Ontario may be arrested there upon a *capias*, by a bailiff of one of the Courts of the province of Quebec. *Schmidt* v. *Carbonneau*, 6 Que. P. R. 211.

Ca. re.—*Form of writ—Summons to set aside—Appearance—Costs—Terms.*] — *Held*, on a summons to set aside a writ of *ca. re.*, that it was bad because it did not state the nature of the cause of action. 2. It is not necessary for a person arrested under a writ of *ca. re.*, to enter an appearance before applying for his discharge. 3. The defendant having asked for costs, the order for his discharge should provide that no action be brought against the plaintiff or the sheriff by reason of the *capias* or the arrest. *Wehrfritz* v. *Russell*, 22 C. L. T. 217, 9 B. C. R. 50.

Ca. re.—*Irregularity or nullity—Waiver by giving bail.*]—After the issue of the writ in an action, a summons was issued intituled "in the matter of an intended action:"—*Held*, that it was wrongly intituled. A Judge has power to direct a summons to be issued and made returnable in a registry other than that where the writ was issued. By the giving of special bail, a defendant arrested on a *capias* waives his right to object to the writ. *Tanaka* v. *Russell*, 22 C. L. T. 128, 9 B. C. R. 24.

Ca. re.—*Partnership action.*] — There is no ground for the issue of a *capias* in a partnership action in which a fixed sum is claimed from the defendant, being the plaintiff's share in the profits of the partnership, the whole of which the defendant has appropriated. *Ferries* v. *Vathakos*, 6 Que. P. R. 388, 25 Que. S. C. 530.

Ca. re. — *Service out of province — Validity.*] — The service, in the province of Ontario, of a *capias* issued in the province of Quebec, according to the permission of a deputy prothonotary, allowing the service to be made in Ontario on any day and at any hour, is valid. *Bernard* v. *Carbonneau*, 6 Que. P. R. 194.

Ca. sa. — *Concurrent writ — Expiry of original—Invalid arrest — Application for new writ—Concealment of material facts.*]—A concurrent writ of *ca. sa.* should not be issued after the original writ with which it is concurrent has expired by lapse of time under Con. Rule 874, and a concurrent writ so issued will be set aside as having been improperly issued. The right to make a motion to be discharged from custody upon the merits and upon the ground of concealment by the plaintiff of material facts upon the application founded upon Con. Rule 1047, is confined to the case of an order for arrest made before judgment, and does not extend to a *ca. sa.* The defendant had been arrested under an invalid concurrent writ of *ca. sa.*, and was in the custody of a sheriff, to the knowledge of the plaintiff's solicitor, who prepared an affidavit entirely suppressing the fact of the arrest, upon which he obtained an order for and issued a new writ of *ca. sa.* Upon an appeal to a Divisional Court from an order of a Judge in Chambers refusing to set aside the latter order and writ, and a motion to be discharged:—*Held*, that the application should not be treated as an appeal upon new material from the discretion of the Judge who made the order, as such an application, having for its object the setting aside of the order and writ, must upon the authorities have failed: *Damer* v. *Busby*, 5 P. R. at p. 389. It was really an application to the undoubted jurisdiction of the Court to set aside, in its discretion, orders which had been made by the wilful concealment or perversion of material facts; and a clear case had been made out and the order and writ should be set aside and the prisoner discharged from custody. *Merchants Bank* v. *Sussex* (1902), 22 C. L. T. 387, 4 O. L. R. 524, 1 O. W. R. 572, 584.

Cause of action—*Damages for personal injuries.*]—The words "personal injuries" in Art. 833 (4), C. P., have the same meaning as "personal wrongs" in s. 15 of 12 V. c. 42 (C.), and in R. S. L. C. 1861, c. 87, s. 24. Anything done in violation of the rights of any one in respect of his person is a personal wrong. So, there is ground for arresting for debt the person who causes a bicycle accident for the damages which he has been adjudged to pay to the person injured. *Chouinard* v. *Raymond*, 3 Que. P. R. 184, 18 Que. S. C. 319.

Cause of action — *Promissory note — Judgment — Belief — Concealment.*]—The plaintiff who alleges, in an affidavit for a *capias*, that the defendant is personally indebted to him in a sum greater than $50, for the amount of a promissory note, of which he gives the date and the place of making, and of a judgment rendered upon such note requiring the defendant to pay him the amount of it, is not obliged to say where the judgment was rendered, the note being the cause of action. 2. The deponent is not obliged to state where the defendant has hidden and withdrawn his effects, if he alleges that the concealment and withdrawal were made with the intention of defrauding him. 3. Nor to give his reasons for swearing that the defendant has withdrawn and hidden his effects, if he swears positively that the concealment and withdrawal have taken place. 4. Nor to state in what manner the withdrawal and concealment have taken place. *Lussier* v. *Vincent*, 3 Que. P. R. 98.

Coercive imprisonment — *Judicial surety — Age privilege — Personal notice — Property—Time—Appeal.*] — A person who becomes security for costs on an appeal bond is a judicial surety and consequently has no age privilege exempting him from coercive imprisonment: Art. 833, C. C. P. 2. The appearance of the surety, to oppose the issue of a rule *nisi* for coercive imprisonment, is equivalent to "personal notice" under Art. 837, C. C. P. 3. Discussion of the personal and immovable property of the surety, who has made default to pay his bond, is not necessary before the institution of proceed-

ings against him for coercive imprisonment. 4. The creditor is not obliged to wait during the six months allowed for an appeal from a judgment against the surety, before taking proceedings against him for coercive imprisonment. *Burland* v. *Lamoureux*, 25 Que. S. C. 98, 6 Que. P. R. 106.

Coercive imprisonment—*Jurisdiction—Amount of judgment — Adding costs to.*]—The costs cannot be added to the damages adjudged to make the amount up to $50 in order to justify an application for arrest in an action for personal wrongs. *Campbell* v. *Jaslow*, 7 Que. P. R. 78.

Coercive imprisonment — *Order for—Notice of proceeding on — Petition to set aside order.*]—A petition against a judgment will not be entertained, where it is alleged that such judgment was not in fact rendered, if the petitioner has not inscribed *en faux* against such judgment. 2. No notice to the party is required before putting into execution an order for coercive imprisonment upon a writ or order of the Court in terms of Art. 838, C. P. *Clément* v. *Bilodeau*, 6 Que. P. R. 60.

Coercive imprisonment — *Pleading — Conclusion of declaration.*]—If a plaintiff's claim in its nature is such that it may afford ground for coercive imprisonment in execution of the judgment, conclusions to that effect may be made in the declaration, provided the judgment sought is for a sufficient amount. *Meloche* v. *Lalonde*, 6 Que. P. R. 268.

Coercive imprisonment—*Proceedings—Irregularity.*] — Proceedings leading to coercive imprisonment ought to be marked with certainty and full regularity and no rule will be maintained if the proceedings are irregular. *Mutual Life Assurance Co. of Canada* v. *Lionais*, 6 Que. P. R. 359.

Coercive imprisonment — *When writ may issue.*]—A writ of *contrainte par corps* can only be enforced according to law (Ordinance 1667, Title 34, Art. 11) fifteen days after "signification" of the judgment which orders it; and, at all events, fifteen days after the date of the judgment. *Demers* v. *Payette*, 26 Que. S. C. 534.

Committal order—*Conditional—Service—Arrest—Terms of discharge—County Court practice—Registrar's minute.*]—An order to commit a judgment debtor under s. 193 of the County Courts Act must be absolute, not conditional. Where an order to commit a party is made in his absence, he must be served with a copy of the order before arrest. Orders to commit should be drawn up and should contain the terms on which discharge out of custody may be obtained, as required by Order XIX., r. 13. Where a registrar is present and takes a minute of an order, the minute so taken is conclusive, even though the Judge's recollection of the order is different. *Wallace* v. *Ward*, 9 B. C. R. 450.

Commitment in civil matter—*Habeas corpus — Jurisdiction — Irregularities — Valuation of goods—Bailiff—Contrainte par corps—Costs.*]—A person who is restrained of his liberty under a warrant of commitment granted in a civil matter by a Court or Judge having jurisdiction, is not entitled to liberation under a writ of *habeas corpus* (Art. 1114, C. C. P.), and more particularly where no excess of jurisdiction is shewn. 2. Even if it were assumed that, notwithstanding the terms of Art. 1114, the Court has power to inquire into the regularity of the proceedings, the absence in the rule and commitment of a valuation of the goods, upon payment of which the guardian in default to produce goods would be entitled to be released, cannot be invoked by him as a ground for asking his liberation,—such valuation, under Art. 658, C. C. P., being a right to be exercised by the guardian in default, and not a duty imposed upon the seizing creditor. 3. A bailiff of the Superior Court has concurrent jurisdiction with the sheriff, for the execution of a writ for coercive imprisonment. 4. The fact that the writ of *contrainte par corps*, under which the petitioner for *habeas corpus* is detained, calls on him to pay, in addition to the debt and taxed costs, the costs of the writ of *contrainte* and of the arrest and commitment of the petitioner, is not an irregularity. *Ex p. Kenotasse*, 13 Que. K. B. 185, 6 Que. P. R. 89.

Contrainte par corps — *Assignment for benefit of creditors—Security to avoid imprisonment — Contestation of schedule—Costs.*]—A party against whom a rule *nisi* has been declared absolute, and who has made an abandonment of his property, is entitled to give security to avoid imprisonment until the contestation which may be made of his *bilan* has been determined, or, if a contestation is not filed, until the delays for such contestation have expired.—2. The costs of the motion for leave to give security shall be paid by the applicant. *Rennie* v. *Mace*, 9 Que. P. R. 165.

Contrainte par corps—*Costs—Service of bill.*] — Coercive imprisonment for the amount of a taxed bill of costs will not be ordered, if such bill has not been served upon the party three months at least before the motion for imprisonment is made. *Cordasco* v. *Vendetti*, 33 Que. S. C. 500.

Contrainte par corps — *Damages for personal injuries — Service of judgment — Practice.*]—The service upon the defendant of a copy of a judgment ordering him to pay damages for personal injuries is not sufficient to obtain against him *contrainte par corps*; on default of payment the formalities imposed by Art. 837, C. P., must, besides, be followed. *Gregoire* v. *Migneau*, 8 Que. P. R. 395.

Contrainte par corps—*Executor—Account.*]—Civil imprisonment of a testamentary executor will not be ordered in an action in contestation of his account and to recover the alleged share of the plaintiff in the *reliquat* of such account. *Morris* v. *Meehan*, 6 Que. P. R. 43.

Contrainte par corps—*Issue of committal — Time — Service of judgment.*] — The order of committal necessary for the execution of a judgment making absolute a rule *nisi* based upon Art. 833, clause 3, C. P., cannot issue before the expiration of 15 days from the service upon the debtor of

the judgment. 2. The order of committal cannot issue before the judgment has been served on the debtor and the return of service filed in the office of the Court. *Shawl v. Emond*, 10 Que. P. R. 129.

Contrainte par corps — *Judgment — Action for slander.*]—The fact that a defendant, ordered to pay damages for slander, alleges that he is poor and old, and that the Court ought to suspend the judgment, does not suffice to hinder the obtaining of a rule *nisi* for his imprisonment for default of payment. *Bussière v. Cadotte*, 8 Que. P. R. 369.

Contrainte par corps — *Judgment — Moneys collected — Judicial authority.*]—To be subject to arrest by virtue of Art. 833, C. P., a person must have had the care of moneys or other effects by virtue of judicial authority, and not otherwise. 2. A secretary-treasurer engaged by the syndics of a parish to raise the amount of a note for the construction of a church is not subject to arrest upon a judgment condemning him to restore moneys received by him in such capacity. *Syndics of the Parish of St. Antoine de Longueuil v. Gingras*, 3 Que. P. R. 557.

Contrainte par corps — *Judgment debtor — Concealment of property.*]—*Held*, affirming the judgment in 16 Que. S. C. 393, that in the law of the province of Quebec, even since the new Code of Procedure, the *capias ad respondendum* still exists, and may be issued not only before but after judgment, as a means by which a creditor may arrest his debtor who, in order to defraud and cause the creditor to lose his remedy, conceals and abstracts his (the debtor's) property. 2. Article 897, C. P. C., does not contradict Art. 832. The latter only applies to *contrainte par corps*, while the former refers to a *capias*, two absolutely different things. *Elliott v. Quebec Bank*, 9 Que. K. B. 532.

Contrainte par corps — *Judgment for debt and costs — Application by judgment creditor—Costs due to solicitors—Application by solicitors—Consent—Art. 555, C. P.*]—A demand for *contrainte par corps* in execution of a judgment for debt and costs, the latter being by distraction due to the judgment creditor's attorneys, may be made in the name of the judgment creditor, where he is represented by the same attorneys. The part taken by the latter in the proceedings is equivalent to the consent required by Art. 555, C. P. *Rennie v. Mace*, 33 Que. S. C. 136, 9 Que. P. R. 169.

Contrainte par corps — *Motion for— Contestation.*]—A motion for *contrainte par corps* must be contested *au fonds*, and not by way of motion. *Cordasco v. Venditti*, 9 Que. P. R. 38.

Contrainte par corps — *Release—Assignment of property—Security—Time.*]—A debtor in respect of damages adjudged against him for slander, and upon the point of being imprisoned under a writ of *contrainte par corps*, may obtain a stay of the writ if he makes an assignment of his property, provided that he furnishes security to place himself in the custody of the sheriff whenever he shall be required to do so. But the transfer of the property effected by the *contrainte par corps* does not permit of his being released before the expiration of the time allowed to creditors to contest it. *Fréchette v. Prevost*, 4 Que. P. R. 404.

Contrainte par corps—*Right to—Personal injuries—Accident.*] — Injuries caused by a simple accident resulting from the negligence of a person, without any intention on his part to injure, are not personal injuries on account of which coercive imprisonment can be ordered against such person. *Chartrand v. Smart*, 23 Que. S. C. 304, 5 Que. P. R. 173.

Contrainte par corps—*Rule nisi—Particulars.*]—A defendant against whom a rule for *contrainte par corps* is asked has a right to particulars of the sum total claimed by the rule *nisi*. *Barbeau v. Thibault*, 9 Que. P. R. 329.

Contrainte par corps—*Seizure of goods —Guardian.*] — A rule for *contrainte par corps* cannot be granted against a defendant when effects seized have been taken out of his charge and custody and given over to a guardian for due care and production. *Boissonault v. Bouchard*, 8 Que. P. R. 247.

Contrainte par corps—*Service on defendant's attorney.*]—After judgment against the defendant in an action for libel, the plaintiff made a motion for a rule *nisi* for *contrainte par corps*:—*Held*, that service of notice of such motion upon the defendant's attorney *ad litem*, authorized by an order of the Court, was legal and valid. *Lumb v. Kellan*, 4 Que. P. R. 42.

Contrainte par corps—*When claimable —Action for damages—Malice.*]—An action for damages against a person who has out of malice closed a tap used for the purpose of supplying his co-tenant with water, is not an action in which the plaintiff can claim *contrainte par corps* in default of payment of the damages awarded; and a claim for that relief will be struck out upon demurrer. *Phaneuf v. Knight*, 5 Que. P. R. 70.

Contrainte par corps—*Writ—Exhaustion—Deputy-prothonotary.*]—A writ or order of the Court or Judge for coercive imprisonment is exhausted by the imprisonment of the debtor, followed by his liberation, and no new arrest or imprisonment can thereafter be executed in virtue of the said writ. 2. A writ or order for coercive imprisonment cannot be issued by a deputy-prothonotary of the Court, and an imprisonment effected in virtue thereof is illegal. *Gaudet v. Archambault*, 6 Que. P. R. 27.

Costs—*Fraudulent scheme.*]—The fact of claiming the costs due to the attorney does not render a *capias* void if the demand includes, besides, a personal debt of more than $50 due to the plaintiff. 2. The attempt of the defendant to conceal his earnings from his creditors by having his partner as a permanent creditor, is not a ground for a *capias*. *Le Comptoir d'Escompte v. Decelles*,, 3 Que. P. R. 130.

Debtor in close custody—*Allowance to —Judgment for—Necessity for service.*]—It is not necessary to serve a judgment (under Art. 843, C. P.) requiring the plaintiff to

pay an allowance for maintenance to the defendant whom he detains in gaol, by virtue of a *capias*; and, if the plaintiff does not pay such allowance in the time fixed by the judgment which he says he does not know of, the defendant will be discharged upon petition, under Art. 846. Parties are considered to be present in Court when judgment is rendered upon a demand, however served, and they are held, as a general rule, to have knowledge of it without service. *Tessier* v. *Tessier*, 3 Que. P. R. 93.

Discharge — *Assignment — Time—Contestation of schedule — Assets — Tavern license.*]—A debtor arrested on *capias* cannot be released, upon making an assignment of his effects, until after the expiration of the four months allowed for contesting his schedule. 2. In this case the period of four months began to run on the day on which notice of the assignment was given to the creditors of the insolvent. 3. A tavern license is part of the assets of the debtor, who should assign it as well as other goods. *Pagnuelo* v. *Bastien*, 2 Que. P. R. 455.

Discharge — *Terms — Action—Costs—Discretion.*]—Where an order to arrest is made upon materials which justify it, although the defendant may be discharged from custody under it upon fresh affidavits, the Judge may, in his discretion, impose terms of bringing no action, and may withhold costs. *Sullivan* v. *Allen* (1901), 21 C. L. T. 161, 1 O. L. R. 53.

Disclosure—*Breach of promise of marriage—Unliquidated damages — Debt—Assignment—Security—Defendant out on bail —59 V. c. 28 (N.B.)*]—Provisions of 59 V. c. 28, s. 7 (N.B.), allowing a debtor to make disclosure of his affairs and authorizing his discharge under certain circumstances, are applicable in case of defendant held to bail by Judge's order in action of breach of promise of marriage.—If disclosure reveals a debt due the person making same, a demand for assignment thereof must be made, and an opportunity afforded the applicant for discharge to shew why the same should not be assigned or the nature of the security to be given to him by plaintiff for his protection in event of a failure to recover.—*Quære*, whether provisions of s. 28 of the Act relating to assignment of debts due defendant as a condition of his discharge have any application in cases where defendant is not in actual custody. *R.* v. *Carleton, Ex p. Akerley, In re Akerley* v. *Gaines* (1906), 37 N. B. R. 13.

Disclosure—*Discharge — Transfer with intention to defraud—Question for officer taking examination — Discretion.*]—In disclosure proceedings the question whether the debtor has transferred any property intending to defraud the plaintiff, or since his arrest given any preference to any other creditor, are for the officer taking the examination, and the Court will not interfere with his discretion merely because the circumstances of the transfer are suspicious. *Rex* v. *Ebbett, Ex p. Smith*, 38 N. B. R. 559, 5 E. L. R. 337.

Disobedience of decree for payment of money.]—Where the defendant made default in paying to the plaintiff, under the decree of the Court, a sum of money received by the defendant as a *donatio mortis causa* in favour of the plaintiff, an order was granted for an execution against his body. An order for an execution against the body of a party in default under a decree for payment of money will not be granted where the Court is satisfied that the party in default has no means, and has not made a fraudulent disposition of his property, and his arrest is sought for a vindictive purpose, or to bring pressure to bear upon his friends to come to his assistance. *Thorne* v. *Perry*, 21 C. L. T. 542, 2 N. B. Eq. Reps. 276.

False arrest—English and French jurisprudence compared. *Hetu* v. *Dixville Butter, etc., Assn.*, 3 E. L. R. 120.

Illegal arrest—*Action for—Warrant—Payment under constraint.*]—A warrant for taxes alleged to be due to the defendants was issued by the town treasurer and placed in the hands of a constable for collection. The constable went to the plaintiff's place of business to collect the amount, but, it being Saturday night, an arrangement was made between the constable and plaintiff that the latter would go up on Monday morning and see about the taxes. The plaintiff went to the treasurer's office and contended that the amount claimed in the warrant had been paid, but, as the treasurer insisted that the amount had not been paid, the plaintiff handed him the amount claimed. It appeared that the amount in dispute was due in respect of a property which the plaintiff sold to Y., who agreed to pay the taxes upon it, and paid the same to the treasurer, intimating that it was paid on account of the plaintiff's property, but that the treasurer appropriated the amount in payment of a like amount due by Y., personally. The plaintiff brought an action for illegal arrest, and claimed as special damage, "amount wrongfully extorted from the plaintiff, as set forth in paragraph 4 of the pleading, $8.25." Paragraph 4, referred to, detailed the issue of the warrant "whereby the plaintiff was unlawfully compelled to pay an illegal demand of the defendants, to wit, the sum of $8.25:"—*Held*, that, even on the plaintiff's own evidence, the action must fail. *Walker* v. *Town of Sydney*, 36 N. S. R. 48.

Imprisonment for debt.] — Order of commissioner—Irregularity — Power of Judge in Chambers to set aside. *Spidle* v. *Spidle*, 40 N. S. R. 632.

Imprisonment for fraud—*Insolvent—Right of support in prison.*]—A person imprisoned by virtue of Arts. 833 and 834 C. P., has a right to maintenance and support during his imprisonment; an insolvent (in this case) imprisoned for fraud has no such right; in his case the imprisonment is a penalty, not a means of execution. *Desbiens* v. *Desmarteau*, 8 Que. P. R. 114.

Indeterminate imprisonment — *Provincial statute—Intra vires — Execution — Fixed period—Interest of debtor.*]—The provision contained in Art. 925, C. P. C., which permits the Court to condemn a debtor who has been released on bail, to an indeterminate imprisonment is conditional. The imprisonment mentioned in Art. 925, C. P. C.,

is neither a penalty nor a punishment, but simply a means of execution to force the debtor to give up property which he is detaining to the prejudice of his creditors.—The condemnation of the debtor to an imprisonment limited to eight months is not what the law seems to contemplate, but the debtor cannot complain of it, as it is in his case. *Quebec Bank* v. *Tozer*, 17 Que. S. C. 303.

Intent to quit Ontario—Alimony—Desertion of wife—Return to Ontario—Fraudulent intent—Discharge — Terms—Restraint on disposition of property. *Southorn* v. *Southorn*, 2 O. W. R. 1189, 3 O. W. R. 51.

Intent to quit Ontario—*Creditors.*]—It is not sufficient for a creditor applying for an order for arrest under R. S. O. c. 80, s. 1, to shew the existence of a debt and that the debtor is about to quit Ontario; he must shew some other fact or circumstance which, coupled with those facts, points to an intent to defraud.—*Shaw* v. *McKenzie*, 6 S. C. R. 181, *Toothe* v. *Frederick*, 14 P. R. 287, and the opinions of Burton and Maclennan, JJ.A., in *Coffey* v. *Scane*, 22 A. R. 269, followed.—The opinions of Hagarty, C.J.O., and Osler, J.A., in *Coffey* v. *Scane* and the case, of *Robertson* v. *Coulton*, 9 P. R. 16, dissented from.—*McVeain* v. *Ridler*, 17 P. R. 353, discussed.—Whether or not there is good and probable cause for believing that the intent to defraud exists, is a question of fact.—And where the defendant believed that his wife had no claim against him for alimony:—*Held*, that he could not be intending to defraud her by leaving Ontario. *Phair* v. *Phair*, 20 C. L. T. 34, 19 P. R. 67.

Intent to quit Ontario—Discharge—Disposition of property. *Thompson* v. *Greene*, 3 O. W. R. 310.

Intent to quit Ontario—Intent to defraud—Foreigner. *Henry* v. *Ward*, 1 O. W. R. 222, 655, 2 O. W. R. 422.

Intent to quit province—*Negativing—Order set aside — Appeal — Inference — Effete order—Costs.*]—The defendant was arrested under an order for arrest granted on the affidavit of the plaintiffs' solicitor that he had probable cause for believing, and did believe, that the defendant, unless he was arrested, was about to leave the province. The order for arrest was set aside, and the bond directed to be delivered up to be cancelled by order of a Judge, who was satisfied, on reading the affidavits produced before him, that the defendant, at the time of his arrest, was not about to leave the province:—*Held*, that the order was one that the Court on appeal would not interfere with. 2. Following *Hunt* v. *Harlow*, 1 Old. 709, that a statement of belief that the defendant is about to leave the province being all that is required under the practice to procure an order for arrest, the defendant is entitled to be discharged if he negatives that intention, unless the plaintiff can state facts from which it can be clearly inferred that it was the intention of the defendant to leave. 3. That such an inference was not to be drawn from affidavits merely tending to shew that defendant was keeping out of the way to avoid service of an order for his examination under the Collections Act. 4. That it would be futile to allow the plaintiffs' appeal, as, at the time the order for the defendant's examination under the Collections Act was served, the order for arrest was *effete*, and the bond cancelled, and no stay of proceedings had been obtained, and the liability of the sureties could not be restored. 5. That while the defendant was entitled to have the plaintiffs' appeal dismissed with costs, the costs must be set off against the plaintiffs' judgment in the action. *McLaughlin Carriage Co.* v. *Fader*, 34 N. S. Reps. 534.

Judgment—Execution—Defective process—Discharge of debtor out of custody—Action of escape against sheriff—Damages. *Smiley* v. *Currie*, 5 E. L. R. 536.

Judgment against married woman—Proprietary liability—Form of order—Intent to quit Ontario. *Doull* v. *Doelle*, 4 O. W. R. 525, 5 O. W. R. 238, 253, 413, 6 O. W. R. 39.

Judgment debtor—*Application for discharge—Interest in real estate — Growing crops—Tenancy by the curtesy.*]—A judgment debtor, having made application to be discharged from custody under an execution issued out of a justice's Court, in the course of his examination disclosed that he and his wife resided upon land of which his wife had the fee, and that there were growing crops upon it created by his labour:—*Held*, that, as this disclosed an interest in real property that could not be taken under an execution issued out of a justice's Court, the debtor could not be discharged. The husband's estate of curtesy exists during the lifetime of the wife. *Ex p. Geldert—In re Geldert* v. *Hoar*, 34 N. B. Reps. 612.

Judgment debtor—Unauthorized release not a satisfaction of the judgment. *Conrad* v. *Simpson*, 3 E. L. R. 115.

Judgment debtor—*Order for committal—Appeal from—Questions of fact—Affidavit—Oral evidence.*]—The Court will not set aside an order committing a judgment debtor to prison on the ground of his having made a fraudulent disposition of his property whereby the judgment creditor is materially prejudiced in obtaining satisfaction of his judgment, unless it appears that the Judge making the order has taken some manifestly mistaken view of the law or the facts. As such Judge has had the opportunity of hearing the witnesses give their testimony *viva voce*, and of observing their demeanour, his decision on questions of fact must be taken to have the same weight as the verdict of a jury. On an application for a rule *nisi* to rescind a Judge's order imprisoning a judgment debtor, the applicant cannot shew by affidavit what took place before the Judge to whom the application was made; the stenographer's return of the evidence must be produced. *Ex p. Despres, In re O'Leary* v. *Despres*, 36 N. B. Reps. 13.

Liability for arrest—*Warrant of mayor—Execution by special constables.*]—The execution of a warrant of arrest, signed by the mayor of a municipality, and intrusted to

special constables of the municipality, does not make the municipal corporation responsible for the consequences of the arrest; the constables in making the arrest acting only in the execution of the functions for which they are employed. *Milton* v. *Municipality of Coté St. Paul*, Q. R. 24 S. C. 541.

Malicious arrest—*Municipal officers.*]—An action for damages for unlawfully entering a man's house and maliciously arresting him, brought against a municipality and its constables, must be preceded by notice of action to the latter. *Milton* v. *Municipality of Coté St. Paul*, 6 Q. P. R. 407.

Non-payment of costs—*Disclosure — Notice—Signature—Intituling — Service — Debtor's equitable interest in personal property—Order for discharge.*]—A person in custody under a writ of attachment issued out of the Supreme Court for contempt in not obeying an order to pay costs, is entitled to relief under c. 130 of C. S. N. B. 1903, respecting arrest, imprisonment, and examination of debtors.—A notice of disclosure purporting to be signed by the applicant is sufficient without proof of the signature.—An order for discharge will not be quashed on the ground that the notice of the application to disclose was not intituled in the cause, or that the proceedings and order were intituled in the wrong cause, if it sufficiently appear in the body of the notice, proceedings, and order, in what proceeding the application and order were made.—Service of the notice of disclosure on the wife at the husband's place of abode, he then being within the province, is good, and no order perfecting the service is required.—The officer taking the examination has authority to order an equitable interest in personal property to be held for the benefit of the creditor, and the disclosure of such an interest is no bar to a discharge.—If a debtor makes such a disclosure of his affairs as fulfils the requirements of the Act, a creditor who allows the proceedings to go by default can not object that the disclosure was not a full one. *Rex* v. *Straton, Ex p. Patterson*, 37 N. B. R. 376; *Larsen* v. *Patterson*, 1 E. L. R. 376.

Not executing deed as ordered by the Court—*Defendants evading tender of deed — Deed ordered to be deposited with their attorney for execution.*]—Defendants evaded service of an order of the Court for the execution of a deed, and also evaded tender of the deed therein mentioned, and the Court ordered the deed to be deposited with their attorney for execution. They did not execute it, and a rule *nisi* for an attachment was granted:—*Held*, that the rule must be made absolute, but that no attachment issue for 32 days and then only against such defendants as should not, by that time, have executed the deed. *Sullivan* v. *Carr & Ramsays* (1864), 1 P. E. I. R. 242.

Of ship. See ADMIRALTY.

Order for — Defendant in custody on criminal charge—Motion to set aside order —Forum. *Greer* v. *Powell*, 2 O. W. R. 94.

Order for—Intent to quit Ontario—Motion for discharge—Bail—Rule 1047. *Adams* v. *Sutherland, Josh* v. *Sutherland*, 6 O. W. R. 434, 10 O. L. R. 645.

Order for discharge — *Jurisdiction — Facts appearing in order—Disclosure—Certiorari.*]—An order of discharge made by a clerk of the peace under 59 V. c. 28, s. 32 (N.B.), which states that the party discharged had been in custody in the county of Victoria by virtue of an order of render made by the police magistrate of the district of Andover and Perth Civil Court; that due notice of disclosure had been given; and that the hearing took place at the time and place mentioned in the notice; and is signed by the clerk of the peace for the county of Victoria, is a sufficient statement on the face of the order of the territorial jurisdiction of the officer making the same, and will not be quashed on *certiorari*. If there is evidence from which the officer making the order for discharge might be satisfied that a full disclosure had been made, the Court will not set aside the order, even though not satisfied that the disclosure is a full one, or of the *bona fides* of it. *R.* v. *Straton, Ex p. Porter*, 36 N. B. R. 388.

Order for imprisonment of debtor—*Right of appeal—Certiorari — Debtor divesting himself of property—Payment of another debt—Statement of grounds for order—Evidence given in former proceeding.*]—The fact that, by 61 V. c. 28, s. 8 (N.B.), amending 59 V. c. 28, an appeal to the Supreme Court is given from an order of imprisonment under ss. 46, 48, 49, 51, and 53 of the latter Act, does not deprive a party affected by such order of his right to a *certiorari*, and the Court will grant the writ, if, in their opinion and discretion, the circumstances warrant it. An order for imprisonment made by a County Court Judge on the ground that the debtor, since being arrested and held to bail, has divested himself of the means of paying the debt for which he is sued, is bad if it does not shew on its face the grounds upon which it was issued; the mere payment of a *bona fide* debt, after he is sued, is not such a divesting of property as will render the debtor liable to imprisonment under the Act; and an order based upon the evidence given in a former proceeding against the debtor, and not re-proved upon the hearing of the application for the order in question, is bad. *R.* v. *Forbes, Ex. p. Dean*, 36 N. B. R. 580.

Order for — *Notice to defendant.*]—Under Art. 837, C. P. C., an arrest cannot be allowed except upon a special order granted by the Court after notice personally served on the party liable to arrest. *Ridgeway* v. *Duckworth*, 18 Que. S. C. 126.

Order of Court of equity—*Decree for payment of costs—Satisfaction — Execution —County Court Judge — Jurisdiction—Discharge.*]—An arrest under an execution issued under an order of the Equity Court against the body for enforcement of its decree directing payment of taxed costs on dismissing the plaintiffs' bill, operates as a satisfaction, and an execution issued against the goods of the plaintiffs for the same demand will be set aside: per Hannington, Landry, Barker and McLeod, JJ.; Tuck, C.J., dissenting, and Gregory, J., taking no part.—A County Court Judge has no jurisdiction under the Act respecting Arrest, Imprisonment, and Examination of Debtors, C. S. N. B.

1903 c. 130, to discharge persons in custody under such executions. *Petropolous* v. *Williams Co.*, 3 E. L. R. 370, 38 N. B. R. 146.

Personal injuries—*Judgment—Damages—Res judicata—Assignment for creditors.*]—The law understands by injury what is said, written, done, or omitted with the design of offending some one in his honour, and by the word personal it includes trespass even without the design of dishonouring. 2. Arrest cannot be ordered for damages caused to some one in his property only. 3. A judgment awarding damages to a person as well for rehabilitation of the molestation to which the defendant has exposed him, as for compensation for the loss of time and disbursements which he had incurred, without making a distinction between these two heads of damages, attributes no part of the sum awarded to personal injuries; and if it did so, it would not afford the answer of *res judicata* to an application for the arrest of the defendant for non-payment of the sum fixed by such judgment. 4. A debtor who makes an abandonment of his assets, regular and not contested, is exempt from arrest for a cause arising before the filing of the schedule. *Bédard* v. *Grosboillot*, 3 Que. P. R. 372, 18 Que. S. C. 363.

Petition to quash capias.]—The following allegation in plaintiff's affidavit for a writ of *capias*, based on the ground that defendant is about to leave the country: "I have been so informed by the United States immigration office, where the defendant went to obtain information, before leaving for the United States, the evening of his departure," is too indefinite and cannot justify the issue of a writ of *capias*. *Lazanis* v. *Maronis*, 11 Que. P. R. 23.

Police officer—*False arrest.*]—A police officer, sued for false arrest, is entitled to the notice of action prescribed by Art. 88, C. P., where he made the arrest under instructions. *Lefebvre* v. *Village of Verdun*, 6 Que. P. R. 437.

Prisoner in foreign country without warrant—Detention and return to Ontario to answer charge of theft—Habeas corpus—Custody under oral remands—Justice of the peace—Jurisdiction — Police magistrate. *R.* v. *Walton*, 6 O. W. R. 905, 11 O. L. R. 94.

Privilege — *Witness — Order for committal — Habeas corpus — Order under Collection Act — Excessive fees — Remedy.*] — The applicant was arrested at the city of Halifax, at which place he resided, by the sheriff of the county of Halifax, under an order for his arrest, on the 11th February, 1904, while he was going to his place of business and returning to his home, about three-quarters of an hour after he had left the police court at Halifax, where he had attended to prosecute and give evidence as a necessary and material witness for the Crown in a prosecution instituted by himself the previous day for an aggravated assault committed on him on the 6th February, 1904. On a motion to discharge the prisoner from custody, the sheriff to an order in the nature of a *habeas corpus*, under R. S. N. S. c. 181, "Of securing the Liberty of the Subject," returned the above order for arrest as the cause of the prisoner's detention:—*Held*, dismissing the application, that, in all the circumstances, and as the Judge's order was of a punitive and quasi-criminal character, the prisoner as a witness was not privileged from arrest under it. 2. That the order was one that could not be impeached under *habeas corpus* proceedings. 3. That in view of s. 37 of the Collection Act, which makes the judgment of the Judge upon the appeal under the Act final, the prisoner's remedy, if any, was either to tender the amount properly due or to sue for the penalty for taking excessive fees provided by s. 2 of R. S. N. S. c. 185, but that in any event, under s. 40 of the Collection Act, even if the present application lay, as the evidence taken upon the examination shewed that there was ground for making this order, the application should be refused. *In re Brine*, 24 C. L. T. 145.

Privilege—*Execution—Inferior Court — Action on limit bond—Assignment by sheriff on same day—Holiday—Sitting of Court.*]—The arrest of a person, having privilege by reason of his being an officer of a Superior Court, under an execution issuing out of the City Court of S., is not void, nor does such privilege afford any defence to an action on a limit bond entered into by such officer in order to obtain his discharge. If two things are done upon the same day, it will be assumed that that which ought to have been first done was so done; therefore in an action upon a limit bond by the assignee of the sheriff, it was held in the absence of proof to the contrary that, though the assignment and the writ commencing the action were dated upon the same day, the bond was assigned before the writ was issued. The assignment by the sheriff being a mere formality, only going to shew that the assignee was satisfied with the security, the date thereof was immaterial. Where a Court was by statute bound to sit on a certain day in each week unless Christmas Day, New Year's Day, or any other legal holiday, should fall upon such day:—*Held*, that a day proclaimed by the Governor-General and the Lieutenant-Governor as a holiday for a general public thanksgiving was a legal holiday within the meaning of the Act, and that the Court was not bound to sit upon such a day. *Dibblee* v. *Fry*, 35 N. B. R. 382.

Re-arrest of defendant still in jail on a previous capias.]—Service of a writ of *capias* and re-arrest of defendant made while defendant is in jail on a previous *capias* by same plaintiff, which previous *capias* had been quashed on irregularities, are null and void and will be rejected on exception to the form. *Lazanis* v. *Maronis*, 11 Que. P. R. 29.

Restoration of goods to accused — *Not connected with offence charged.*] — Weatherbe, J., ordered certain articles, taken possession of by the police, to be restored to the accused, who was committed for trial, as they were not connected with the offence charged and were not needed for the purpose of evidence. *Ex p. MacMichael* (1904), 7 Can. Cr. Cas. 549.

Search—*Reasonable and probable cause—Post office—Decoy letter.*]—Appellant, a letter carrier employed by post office department at Montreal, was intrusted with delivery of two decoy letters, for purpose of testing his honesty. Each letter contained a small sum

of money. One of them bore a non-existent address, the other a real address. The latter was delivered, but the former, under the rules of the department, should have been entered in the book kept at the post office for that purpose, and the letter should have been returned by the carrier to post office. There being no entry of this letter in the post office book, after the usual time for making such entry had elapsed, appellant was detained and searched by respondent, a detective, acting under instructions of post office department. The letter not being found on appellant, he was released. On the following day the letter was returned to post office.—*Held* (affirming the judgment in 20 Que. S. C. 549, with a modification of the *considerants*) that appellant having violated the rules of post office department, by failing to enter the letter bearing a non-existent address in the book provided for that purpose, there was reasonable and probable cause for detaining and searching him, and that his action for damages against respondent, in absence of evidence that respondent had made an improper and illegal use of his authority in the manner in which he effected such detention and search, and subsequent release, could not be maintained. 2. A letter is a post letter although directed to a fictitious or non-existent address. *Mayer* v. *Vaughan*, 11 Que. K. B. 340; 5 Can. Cr. Cas. 392.

Simple arrest—*Motion to quash writ—Impeaching debt.*]—By the new code of procedure, on a petition to quash a simple writ of arrest, the existence of the debt may be impeached; one of the essential allegations of the affidavit made on obtaining the writ being the existence of a debt. *Quebec Bank* v. *Halle*, 13 Que. K. B. 44.

Second arrest on same warrant.]—The prisoner, who had been arrested under a warrant to serve a sentence of imprisonment for an offence against the Canada Temperance Act, was, upon his own request, suffered to go at large for a time by the officer who had the execution of the warrant. Shortly afterwards he was again arrested upon the same warrant and conveyed to the county gaol to serve his term of imprisonment. Upon an application for an order in the nature of a *habeas corpus*:—*Held*, by the full Court, that the second arrest upon the same warrant was legal, and that the order should be refused. *Ex p. Doherty*, 35 N. B. Reps. 43. [But see a subsequent decision in the same case, 20 Occ. N. 20.]

Suing by next friend—*Side bar—Attachment.*]—Plaintiff had been represented in this action by next friend and the action had been dismissed. A side bar had been taken out for payment of costs, which were duly taxed, but next friend refused to pay same. Order absolute for attachment issued against next friend. *McGaw* v. *Fish*, 6 E. L. R. 373, 39 N. B. R. 1.

Summary conviction — *Information—Suspicion.*]—A magistrate has no jurisdiction to issue a warrant on an information under the Dom. Summary Convictions Act without examining upon oath the complainant or his witnesses as to the facts upon which the information is based. *Ex p. Boyce*, 24 N. B. R. 347, and *R.* v. *Mills*, *Ex p. Coffon*, 37 N. B. R. 122, followed. *R.* v. *Carleton*, *Ex p. Gundy*, 37 N. B. R. 389; *R.* v. *Lizotte*, 1 E. L. R. 355.

Under warrant of commitment—*Escape—Right to re-arrest under same warrant.*]—The prisoner had been arrested at Amherst by one of the police of that town, under a warrant. After his arrest he escaped, and left the town for some weeks. When he returned he was re-arrested under the same warrant:—*Held*, that, at the most, the escape in this case was negligence on the part of the officer, and that he did not contemplate a voluntary abandonment of his prisoner, but negligently trusted to the latter's promise to surrender himself under the warrant; therefore, he might be re-arrested. *R.* v. *O'Hearon*, 21 C. L. T. 355, 5 Can. Cr. Cas. 531.

Warrant of arrest — *Grounds—Issue without inquiry — Liability.*]—A justice of the peace who issues a warrant of arrest without inquiring into the grounds which the complainant has for suspecting the accused, is responsible to the latter when the complaint is not justified by any serious, reasonable, or plausible ground. *Murfina* v. *Sauvé*, 19 Que. S. C. 51.

ARREST OF JUDGMENT.

See JUDGMENT.

ARSON.

See CRIMINAL LAW.

ARTICLED CLERK.

See SOLICITOR.

ASSAULT.

Action for — *Bar—Conviction.*]—A defendant charged with having committed an assault with intent to do bodily harm, on being asked by the justice whether he would be tried before him summarily or by a jury, elected to be so tried by him, and pleaded guilty. This was objected to by the prosecutor, when the justice stated that he would first ascertain the extent of the assault. After hearing the evidence he adjudicated upon the case and drew up a conviction imposing on the defendant a fine and costs, which the latter paid:—*Held*, that the justice was acting under the special statutory authority for the trial of indictable offences conferred by ss. 783 (c) and 786, under which the defendant is not relieved from civil proceedings for the same assault. *Clarke* v. *Rutherford*, 2 O. L. R. 206.

Action for — *Justification—Trespass—Ouster — Damages.*]—A plaintiff, who knew the rules of an industrial establishment in which persons from outside were not allowed to speak or communicate with the employees, without special permission, cannot recover

from the defendant, manager of such establishment, damages for assault and battery, where the manager ordered him to leave the premises, and, upon his refusal to do so, used ordinary force to eject him: and even if the plaintiff should shew that he was seriously injured by such assault, the action will still be dismissed if it is established that in the course of the resistance and altercation the plaintiff assailed the defendant. *McKittrick* v. *Sangster*, 3 Que. P. R. 449.

Action for—*Particulars.*]—The plaintiff sued for damages for an assault and battery on the 9th April, 1903, on the S. S. "Dahome," then being in Demerara; also for an assault and battery on board the "Dahome," then being on the high seas.—*Held*, that, as the month of April might cover an assault and battery other than that of the 9th, there ought to be particulars in order to prevent surprise at the trial. An assault is such an easy thing to commit that notice of the particular occasion should be given. *Watson* v. *Leukton*, 23 C. L. T. 247.

Action for damages — *Counterclaim—Trespass to lands — Plea of justification—Payment into Court—Acceptance by plaintiff—Costs—Practice—N. S. Order 20, Rule 1 (e).*]—In an action for damages for assault, defendant appeared, but did not require delivery of statement of claim. It was delivered and then followed defence and counterclaim:—*Held*, statement of claim rightly delivered, and costs thereof allowed. *Benoit* v. *Delorey*, 7 E. L. R. 161.

Bodily injuries — *Accident.*] — In an action to recover damages for bodily injuries resulting from an accident, the Court has no power to order the plaintiff to submit himself to a physical examination by a surgeon, if he refuses to do so. *Mousseau* v. *Montreal*, 4 Que. P. R. 38.

Bodily injuries—*Assault.*]—In an action to recover damages for bodily injuries caused in an assault the Court will order the plaintiff to submit himself to surgical examination. *Baxter* v. *Davis*, 4 Que. P. R. 153.

Bodily injury — *Police officer arresting woman for drunkenness—Technical assault—Notice of action—Plea.*]—Action for damages against a chief of police for assault. The defendant believing the female plaintiff while on the street was under the influence of liquor, which it was proved she was not, placed his hand on her arm:—*Held*, this was done with intention of making an arrest for which there was no justification. Small damages allowed as illness in question did not arise from the assault. *Iler* v. *Gass*, 7 E. L. R. 98.

Cabman and passenger — *Action for damages—Excessive fare—Right of cabman to detain and carry away passenger's luggage.*]—New trial ordered, the verdict being against the weight of the evidence. As to the assault, it was justified and there was no excess. *McQuarrie* v. *Duggan*, 8 E. L. R. 5.

Civil action — *Bar — Previous conviction.*]—A summary conviction for assault, followed by execution, is an answer to a civil action for the recovery of damages for injuries caused by the same violence. *Hébert* v. *Hébert*, 34 Que. S. C. 370, 15 Can. Cr. Cas. 258.

Civil action to recover damages *for injuries caused by—Conviction of defendant for same assault on information laid by peace officer for higher offence — Amendment by magistrate — Consent — Criminal Code, s. 734.*]—Action for damages for injuries alleged to have been inflicted upon plaintiff by defendant with intent to do serious bodily harm. At the preliminary hearing, by consent of the Crown, the charge was reduced to one of assault. Plaintiff was not represented by counsel, and not consulted in the matter. Defendant pleaded guilty, was fined. Plaintiff brought this civil action for damages arising from the assault. Defendant denied the injuries:—*Held*, that the magistrate had no power to reduce the charge, even with consent of Crown counsel; that plaintiff's action for damages was not barred by s. 734 of the Code by payment of a fine. Judgment for plaintiff. *Goodwin* v. *Hoffman*, 10 W. L. R. 613, 15 Can. Cr. Cas. 270.

Criminal assaults—*See* CRIMINAL LAW.

Damages—*Small verdict—Certificate of trial Judge—Review by Court.*]—The Court has jurisdiction to review the discretion exercised by a Judge in certifying under 60 V. c. 28, s. 74, that there was good cause for bringing the action in the Supreme Court.—Where an action for assault and battery was brought in the Supreme Court, and the jury found a verdict for the plaintiff for only $35, but the trial Judge granted a certificate under the above section, on the ground that the plaintiff's attorney had reasonable grounds for thinking that the title to land would be brought into question:—*Held*, that a sufficient case had not been made out to induce the Court to interfere. *Cormier* v. *Broudreau*, 36 N. B. R. 6.

Evidence — Words constituting assault. *McLeod* v. *Ward*, 40 N. S. R. 630.

Justification—*Removal of intruder from legislative building—Authority of Speaker—Licensee — Damages.*] — To an action for assault, the defendant pleaded that he was chief messenger of the House of Assembly, and that it was one of his duties as such to preserve order and decorum in the House, and about the precincts and corridors thereof; that the plaintiff was creating a disturbance in the House, etc., and interfered with the members of the House in the discharge of their duties, and that the defendant, having first requested the plaintiff to cease making such disturbance, which the plaintiff refused to do, removed her, using no more force than was necessary; that the House of Assembly, through the Speaker, ordered the defendant to remove the plaintiff. It appeared on the trial that, at the time of the alleged assault, the House was not in session, and the jury were instructed that the defence that the defendant was an officer appointed for the purpose of preserving decorum, referred to a disturbance while the House and Committee were in session. The jury found in favour of the plaintiff and assessed the damages at $500:—*Held*, *per* Townshend, J., that the alleged assault having taken place outside the portion of the province building exclusively assigned to and

occupied by members during the session, the Speaker had no authority, as such, to interfere with the plaintiff, and the justification pleaded by the defendant, that he acted under the orders of the Speaker, would not protect him; that while the damages awarded were high, that was a matter peculiarly for the jury. *Per* Meagher, J., that no sufficient justification had been established, and the verdict could not be disturbed. *Per* Graham, E.J., that the plaintiff was only entitled to be, or remain, in and about the corridors, by virtue of some license, express or implied; that questions should have been submitted to the jury as to whether the plaintiff was there *bona fide* transacting business; whether a reasonable time had not expired; and whether there was not a disturbance constituting an abuse of the license; that either the Speaker or defendant had a right to request the defendant to depart, and had a superior right, which would justify her removal on her refusal to go; that evidence of the defendant acting in the preservation of order was proper evidence to be submitted to the jury. Per McDonald, C.J., that the seargeant-at-arms, or any oficer of the House, under the direction of the Speaker, may remove from the House and its precincts, during the session of the legislature, any person who obtrudes himself into the House, or its corridors, or remains there without permission, and in defiance of orders, causing annoyance, discomfort, or interruption to members; that the plaintiff being in the House against the orders of the Speaker, and conducting herself in such a manner as to incommode members in the transaction of public business, her removal was justified. *Hubert* v. *Payson*, 36 N. S. Reps. 211. Reversed, 24 C. L. T. 168, 34 S. C. R. 400.

Passenger — *Assault on—Duty of conductor—Damages—Reduction—New trial.*]—The plaintiff, a passenger on a railway train, was assaulted shortly after beginning his trip by an intoxicated fellow-passenger. He complained to the conductor, who promised to get a policeman at the next station, but failed to do so. The assailant having become more quiet, the plaintiff did not anticipate a further attack, but was assaulted a second time, which was also reported to the conductor, who took no action, and a third assault having been made, the plaintiff left the train and completed his journey on the following day. In an action against the railway company the plaintiff obtained a verdict for $3,500, which was sustained by the Court of Appeal:—*Held*, affirming the judgment of the Court of Appeal, 5 O. L. R. 334, 23 Occ. N. 65, that the defendants were liable; that it was the duty of the conductor, on being informed of the first assault, to take precautions to prevent a renewal, and his failure to do so gave the plaintiff a right of action. *Pounder* v. *North Eastern Rw. Co.*, [1892] 1 Q. B. 385, dissented from:—*Held*, also, that, as the plaintiff did not anticipate the second assault, the conductor could not be assumed to have foreseen it, and the jury having evidently given damages for that as well as the third, the amount recovered should be reduced to $1,000, and a new trial had if this sum were not accepted. *Blain* v. *Can. Pac. Rw. Co.*, 5 O. L. R. 334, 2 O. W. R. 76, 24 C. L. T. 49; *S. C.*, *sub nom. Can. Pac. Rw. Co.* v. *Blain*, 34 S. C. R. 75.

Police constable—*Acting virtute officii—Malice—Reasonable and probable cause—Excess of violence—R. S. O. 1897, c. 88.*]—The defendant, a police constable of a city, on being directed by the clerk of the market having the superintendence of the market grounds and buildings, and of the persons, horses, and vehicles frequenting it, acting in the supposed performance of, and with a *bona fide* intention of discharging his duty without any malice, compelled the plaintiff, a driver of a watering cart, to move with his cart from a position he had taken in the market place, in consequence of which a scuffle ensued in which the plaintiff was assaulted and injured. In an action for the assault, the jury found in favour of plaintiff and awarded $300:—*Held*, on appeal, that the defendant came within the protection afforded by R. S. O. 1897 c. 88, s. 101, which applies even to officers acting illegally, where they do so in the supposed performance of their duty. 4 O. W. R. 4, 24 C. L. T. 349, 8 O. L. R. 251. Judgment appealed by plaintiff to the Court of Appeal, which restored the judgment at the trial. *Kelley* v. *Barton*, 26 O. R. 608, affirmed 22 A. R. 522, followed. *Moriarity* v. *Harris*, 6 O. W. R. 232, 10 O. L. R. 610.

Police officer — Assaulting. See *R.* v. *Sabeans*, 37 N. B. R. 223. Digested under ARREST.

Police officer—*Unnecessary violence.*]—On appeal, judgment for damages for false arrest and assault was sustained, the Court holding that there was no claim for false arrest, but was for assault, the defendant, a police officer, having struck the plaintiff after he was lodged in police station. Defendant went farther than was necessary for any legal purpose and farther than his duty required him. *Hehsdoerfer* v. *Payzant*, 9 W. L. R. 262.

Proceedings before magistrate — *Summons — Prohibition — Jurisdiction.*]—Order *nisi* for writ of prohibition discharged. An information for assault had been laid by D. against P. before magistrate S. Before any evidence taken, S. was served with an order *nisi* for a writ of prohibition and desisted from any further proceedings. The last mentioned order *nisi* was discharged, see 6 E. L. R. 274. Subsequently another information was laid before magistrate B., who was requested to act by S. When P. appeared with his counsel, the latter, who was also clerk of the peace, told B. he had no jurisdiction. B. dropped the matter, no evidence having been heard. Then a third information was laid before magistrate R., acting at request of S.:—*Held*, that R. had jurisdiction. *Ex parte Peck, Re Rhodes*, 7 E. L. R. 207.

Provocation — *Evidence—Mitigation of damages—Finding of jury—Verdict—Nominal damages—New trial.*]—In an action for an assault the jury found the defendant guilty and that the plaintiff had not suffered any damage, and returned a verdict for the defendant. A subsequent application to the Judge of the County Court who had tried the cause to set aside the verdict and grant a new trial, or failing that, to enter a verdict for the plaintiff for nominal damages, was refused.—*Held*, on appeal, *per* Tuck, C.J.,

Hanington, Landry, and Gregory, JJ., McLeod, J., dissenting, that the Court had no power to set aside the verdict for the defendant and enter a verdict for the plaintiff, and that a new trial will not be granted merely for the purpose of enabling a plaintiff to obtain nominal damages, where no right is affected except a question of costs.—2. That evidence of provocation by words spoken three days before the assault by the plaintiff to the defendant was properly admitted in mitigation of damages. *Murphy* v. *Dundas*, 38 N. B. R. 563.

Railway companies are not liable in damages for an assault committed by their foreman upon a labourer caused through ill-temper or malice. *Roth* v. *Can. Pac. Rw. Co.*, 4 Can. Ry. Cas. 238.

Right of action—*Previous conviction—Payment of fine—Common assault—Criminal Code.*]—No action of damages for assault lies in favour of the party aggrieved against an assailant who has been convicted under s. 864 of the Criminal Code, and has paid the amount of the fine.—2. A summary conviction of assault causing bruises is one of common assault, under s. 864, and not of an assault occasioning bodily harm under s. 262. *Lavin* v. *Boyd*, 27 Que. S. C. 472, 11 Can. Cr. Cas. 74.

Teacher and pupil — *Criminal Code—Punishment—Excess.*]—The Criminal Code, s. 55, authorizes parents, persons in the place of parents, schoolmasters, etc., to use force by way of correction towards any child, etc., under his care, "provided such force is reasonable under the circumstances," but by s. 58, "everyone by law authorized to use force is criminally responsible for any excess." The defendant, a teacher in one of the public schools, was charged before a magistrate with assaulting, beating, and ill-using J. O., one of the pupils under his care, and was acquitted on the ground that there was no evidence of malice on his part or of permanent injury to the child:—*Held*, that the only question properly before the magistrate was whether the punishment was reasonable in the circumstances, or, in other words, whether there was excess:—*Held*, that there is no warrant in the Code for the test applied in the American case of *State* v. *Pendergrass*, 31 Am. Dec. 365, and adopted by the magistrate, that it is necessary for the prosecutor to prove either that the person inflicting the punishment was actuated by malice or that his act resulted in permanent injury to the child. *R.* v. *Gaul*, 24 C. L. T. 135, 36 N. S. R. 504.

Trespass — *Assault.*] — Defendant purchased farm at sheriff's sale and obtained sheriff's deed. Plaintiff's mother being in possession and plaintiff residing with her, defendant entered with his team to plough. Plaintiff struck defendant and defendant resisted. Plaintiff brought action of trespass for assault. On the trial the Judge told the jury that defendant had no right to enter, plaintiff and her mother being in possession. Verdict for plaintiff:—*Held*, (Peters, J.), defendant had right to enter. *McSwain* v. *Chappell* (1880), 2 P. E. I. R. 317.

Trespass—Excess. *Morash* v. *Geldert*, 2 E. L. R. 56.

Trespass—Striking horse causing it to run away—Personal injuries sustained—Action for damages — Judgment for plaintiffs with costs. *Harris* v. *Burt, King* v. *Burt* (1903), 2 O. W. R. 474. Affirmed by D. C. 3 O. W. R. 400.

Trespass—*Forcible removal of trespasser—Excess.*]—In an action for damages for unlawfully assaulting and beating the plaintiff, the defendant pleaded that at the time the acts complained of were committed the defendant was the owner of and engaged in carrying on a lobster factory, and that the plaintiff entered and created a disturbance, and refused to leave when requested, and that the defendant thereupon removed the plaintiff, using no more force than was necessary:—*Held*, that the defendant was justified in using such force as was necessary to effect the removal of the plaintiff from his premises, but as, by his own admission, he did more than this, the plaintiff was entitled to recover for the excess, and the verdict of the jury in the defendant's favour must be set aside. *Doucette* v. *Therio*, 38 N. S. R. 402.

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ASSESSMENT AND TAXES.

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1. ASSESSMENT OF PROPERTY.

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i. *Assessments Generally.*

Alberta Local Improvement Act, 1907, s. 91 — *Liability of land company entitled to patent for land, to assessment before patent—Dominion railway land grant —Property of the Crown—B. N. A. Act, s. 125—Beneficial interest in company—Legal estate in Crown—"Belonging to"—Charge in favour of Crown — Forfeiture — Personal assessment—Interest in land.*]—*Held*, that the patentees were liable to assessment in respect of the lands in question prior to patent. *Re Confirmation of Local Improvement Tax Return*, 12 W. L. R. 573.

Assessor — *Qualification — Nullity — Omission.*]—A person who is only a usufructuary is not eligible for the office of assessor for a municipality.—However, the fact that one of the assessors has not the necessary qualification is not alone sufficient to make the assessment roll void.—The assessment roll will not be annulled because the assessors have omitted to make in it a separate assessment of a piece of ground forming part of a lot estimated on the roll as a whole, especially when the omission has been made upon the demand of the owner of this piece of ground, and no complaint on this subject has been made at the time of the revision of the roll. *Seneeal* v. *Parish of L'Ile Bizard*, Q. R. 17 S. C. 268.

Buildings on mineral lands.]—Plaintiffs were assessed for $37,650 in respect of 300 acres of surface rights in the town of Bruce Mines, and the buildings thereon. No attempt was made to assess any of the machinery or mining plant comprised in any of these buildings nor the mineral rights of plaintiffs in some 500 acres additional in said town. On appeal by plaintiffs to the Ontario Railway and Municipal Board from the local Court of Revision, the Board after a personal inspection of all the properties owned by plaintiffs reduced the assessment to $31,243, as representing their assessable value. Plaintiffs appealed to the Court of Appeal, contending that this sum should be further reduced, because certain buildings upon the lands were what is called in the Assessment Act "mineral lands" used for mining purposes, and therefore should not have been assessed: Court of Appeal *held* that these buildings used for mining purposes were properly assessed under the Ont. Assessment Act, 4 Edw, VII. c. 23, and the amount was a pure question of fact. Appeal dismissed. *Per* Garrow, J.A. The Assessment Act, s. 36 (3), intended that all buildings which add to the value of the land for any purpose are to be assessed. The question whether the buildings were assessable was one of law and a proper subject for appeal to the Court of Appeal under Ont. Rw. & Mun. Board Act (1906), s. 51. *Can. Oil Fields Co.* v. *Oil Springs* (1907), 13 O. L. R. 405, 8 O. W. R. 480, 9 O. W. R. 118, specially referred to. *Bruce Mines, Ltd.*, v. *Bruce Mines* (1910), 15 O. W. R. 253, 20 O. L. R. 315; *Coniagas Mines* v. *Cobalt* (1910), 15 O. W. R. 258, 20 O. L. R. 322.

Business assessed by floor space occupied—*Edmonton city charter — Power to impose license fee — Double taxation— Method of assessment when more than one business carried on on premises.*]—The Edmonton city charter provides (title 32, s. 3, s.-s. 2): "The mode of assessing businesses shall be as follows. The assessors shall fix a rate per square foot of the floor space (irrespective of partitions, elevators, stairways, or other obstructions) of each building or part thereof used for business purposes, and shall, as far as they deem practicable, classify the various businesses, and may fix a different rate for each, and in doing so may place a wholesale business in a class distinct from a retail business of otherwise the same class, and may classify each building or part thereof, according to the class of business carried on therein, and may fix a different rate for different classes of business carried on under the same roof, and for storehouse and warehouse or other like appurtenant building, than that fixed for the principal building, and may fix a different rate for different flats of buildings. Such rate shall not exceed $5 per square foot, except in the case of banks, loan companies, or other financial institutions, in which case such rate shall not exceed $10 per square foot. And the assessor shall submit to the council a statement shewing all the various classifications and ratings which he proposes to apply in the assessment of businesses, and the assessor shall make his assessment in accordance with the directions which the council shall make upon a consideration of such statement. Sub-section 4: "No person who is assessed in respect of any business . . . shall be liable to pay a license fee in respect of the same business. . . ." By-law No. 187 provides: "No person shall carry on the business of keeper of a feed stable until he shall have procured a license therefor, the fee for which is $25 per annum." The appellants carried on a livery, feed, and sale business on premises which comprised 1,500 square feet (after making all deductions provided for by the charter). They were assessed for 1,000 square feet in respect of their livery business, and were not assessed for any other business. The appellants were convicted for conducting a feed stable without a license, contrary to by-law 187 above set out:—*Held*, that the provisions of title 32, s. 3, s.-s. 4, did not apply to the business of the "feed stable;" that, under s.-s. 2 of the above section, the assessor is authorized to allot a fair proportion of the floor space to each of the several businesses carried on thereon without specifying the different portions so allotted; that the appellants, having been assessed for floor space only in respect of the "livery" business, were liable for the breach of the by-law above mentioned in respect of the "feed" stable. *Rex* v. *Larose*, 1 Alta. L. R. 281.

Business assessment—Office of mining and industrial companies—Assessment Act, s. 10 (h). *Re Coniagas Mines, Limited*, 13 O. W. R. 55.

Club — "*Business tax.*"]—A club incorporated for social purposes only—the members having no proprietary interest, meals and liquors being furnished to members and

their guests—occupying land, is liable to assessment for a "business tax" under the Assessment Act, 4 Edw. VII. c. 23, s. 10 (*e*), in addition to the assessment of the club premises, although having no shareholders and paying no dividends, and depending for its revenue mainly on the entrance fees and subscriptions of members. *Rideau Club* v. *City of Ottawa*, 12 O. L. R. 275, 8 O. W. R. 106.

Express company—*Government contract—Exemption from taxation—Construction of statute, 5 Edw. VII. c. 6.*]—The defendant company work the railways owned by the Government and other public utilities pursuant to a legislative contract made in 1898; the Government defining the conditions under which the various services are to be performed. The company established an express company as one branch of their business. The Government passed an Act, 5 Edw. VII. c. 6, annually taxing the express company $2,000. The company claimed exemption from taxation on the ground that by the contract a part of the payment and consideration for which the contractor (Sir R. G. Reid) entered into it, was the right to establish a parcel or package express, and to have the profit free from any tax:—*Held*, that the defendants carried on the business of an express company within the meaning of the statute and must pay the tax levied. Judgment of the Supreme Court of Newfoundland, affirmed. *Rex* v. *Reid-Newfoundland Co.*, C. R., [1908] A. C. 251.

Express company—*Liability to "business assessment"—Land "occupied or used and mainly for the purpose of its business"—4 Edw. VII. c. 23, s. 10 (O.)*]—The plaintiffs, an express company, agreed with a navigation company, which carried passengers, mails, and all kinds of freight, and had wharf accommodation in the defendant municipality, that the agent of the navigation company should act as agent of the plaintiffs during the season of navigation. The plaintiffs paid part of the salary of the agent and his clerk, and used the wharf premises, which were assessed to the navigation company:—*Held*, that the land was not used by the express company "mainly for the purpose of their business," and that they were not liable to be assessed for a "business assessment" under the provisions of 4 Edw. VII. c. 23, s. 10 (O.):—*Held*, also, that the question whether the amount of the assessment was excessive could not be raised in this action, but was for the Court of Revision. *Dominion Express Co.* v. *Town of Niagara*, 10 O. W. R. 513, 15 O. L. R. 78.

Express company—*Liability of "business assessment"—4 Edw. VII. c. 23, s. 10—Judicature Act (O.), s. 81 (2).*]—Action to declare a business assessment against plaintiffs illegal and void. H., a druggist, acted as telephone agent and also as agent for plaintiffs:—*Held*, that the land occupied by the druggist is not "occupied or used mainly for the purpose of its business." Declaration as claimed. *Dominion Ex. Co.* v. *Alliston* (1909), 14 O. W. R. 196.

Express company — *Provincial tax — Municipal business tax—Illegal assessment—Corporations Taxation Act — Assessment Act.*]—Section 3 of the Corporations Taxation Act provides that every express company doing an express business shall pay a tax to the province; and s. 18 provides that, where a company pay the tax, no similar tax shall be imposed or collected by any municipality in the province:—*Held*, that a business tax imposed by a city corporation in respect of the premises occupied by an express company in the city, under the Assessment Act, 63 & 64 Vict. c. 35, s. 2, was a "similar tax" to that imposed by the province, which had been paid by the express company; and was, therefore, illegal and void.—The Assessment Act and the Corporations Taxation Act having been assented to on the same day, it was intended that s. 18 of the later Act should govern and exclude the tax imposable under the earlier. *Dominion Express Co.* v. *Brandon* (1910), 15 W. L. R. 26.

Homestead — *Crown.*] — The plaintiff's husband, in 1892, became the holder of a homestead claim, part of the Dominion railway belt, and in October, 1897, a Crown grant was issued to the plaintiff at the instance of her husband and herself. The defendants sought to assess the land for taxes from 1892 to 1897:—*Held*, that where the fee still remains in the Crown, the interest of the holder of a homestead claim is not subject to taxation by a municipality, although the holder personally is. *King* v. *Municipality of Matsqui*, 22 Occ. N. 42, 8 B. C. R. 289.

Hotel license.]—Montreal has the right to be collocated by privilege upon the amount realized from the sale of a hotel license for the amount due for taxes by the insolvent hotel-keeper. *Mitchell, In re, Chartrand* v. *Montreal*, 11 Que. P. R. 53:—*Held* (reversing above judgment), the privilege granted by the civil Code and the particular provisions contained in its charter, do not give to the city of Montreal, for the payment of taxes due it, any right upon the incorporeal rights or interests of its debtor.—The city of Montreal is therefore beyond its rights in being collocated by privilege for the amount of taxes due by hotel-keeper who has become insolvent upon the price realized from the sale of a retail liquor license. *In re Mitchell, Chartrand* v. *Montreal* (1909), 11 Que. P. R. 151, 38 Que. S. C. 11.

Income assessment — *Banks—Deduction for outgoings—Method of computing—British Columbia Assessment Act.*]—By the Assessment Act, B. C., 1905, c. 2, it is provided that banks shall be taxed upon their actual gross income derived from business transacted with the province, subject to certain deductions which are set out in form 1 of the Act. Form 1 provides, *inter alia*, a deduction on account of outgoings or necessary expenses incurred and actually paid by the bank in the production of income. The Bank of Hamilton, operating two branches in British Columbia, were allowed as a deduction of four per cent. on the average of the weekly sums which in the books of the head office were debited to these branches. In ascertaining the profits made by the different branches, the practice of the head office was to charge against each branch this four per cent. The evidence did not shew whether this sum (debited weekly against the branches in the books of the head office) in fact corresponded with the amount of money employed by the bank in their banking business in British Columbia in ob-

taining income. The charge of four per cent. was made up of two items: three per cent. was charged as representing the interest paid to depositors in Ontario on moneys borrowed from them by the bank, and one per cent. was a charge representing the general expenses of the bank in connection with deposit accounts, including, as appeared from the affidavit of the general manager, a certain allowance made for the loss arising from the fact that a considerable sum of money on which interest was paid by the bank remained unproductive. The principal question argued on the appeal was whether these deductions should have been allowed by the Court of Revision:—*Held*, that, had there been proper evidence before the Court of Revision that the moneys debited by head office to the British Columbia agencies were moneys on which the head office paid depositors in Ontario three per cent., and that these moneys had actually been employed in the British Columbia business, then the three per cent. should have been deducted from the gross income as an outgoing in the production of income, but that there was not sufficient evidence of these facts before the Court of Revision to warrant the allowance of this deduction:—*Held*, also, that the deduction of one per cent. was rightly not allowed by the Court of Revision, as it included elements which did not properly enter into the computation of the statutory deductions. *In re Bank of Hamilton*, 12 B. C. R. 207.

Income of foreign company—*Commercial corporation — Provincial Treasurer — Statement.*]—The defendant company manufactured cotton thread in England, but sold its products in Canada, including the province of Quebec. R., a manufacturers' agent, carrying on business at Montreal, represented this company. He had an office at Montreal, with the name of this company and others upon the door. The name of this company also figured in advertisements published by R. The company sent goods to Montreal which R. sold for them on commission. The office expenses were paid by R. and also the expenses relating to the trade in the company's goods, including insurance and advertising, but the sales were for the benefit of the company:—*Held*, that the company came within the statute imposing taxes on commercial corporations (59 V. c. 15, Q.), and in particular were subject to the penalty imposed for default in transmitting to the Provincial Treasurer the statement required by this statute. *Lambe* v. *Dewhurst & Son (Ltd.)*, Q. R. 16 S. C. 326.

Income of foreign insurance company — *Investments.*]—An insurance company, having its head office in Scotland, had ceased to do any new business in Canada, but invested some of its money there, and had an agent in Toronto who collected premiums on the old business and adjusted losses, and also employed a solicitor in Toronto and maintained an advisory board to look after investments, none, however, being made without reference to the home board. Payments of interest on some investments were made to the solicitor and by him deposited to the credit of the company in a Toronto bank, and other payments were remitted by the borrowers by draft direct to the company:—*Held*, that the money paid into the bank was in the possession of an agent for the owner, a person non-resident within the province, within the meaning of s. 11 of the Assessment Act, and was personal property of an incorporated company, within s. 39, and was therefore assessable, Toronto being "the usual place of business" of the company, within s. 40. *City of Kingston* v. *Canada Life Assurance Co.*, 19 O. R. 453, distinguished. *Phœnix Insurance Co.* v. *City of Kingston*, 7 O. R. 343, and *Re North of Scotland Mortgage Co.*, 31 C. P. 552, followed.—But the interest remitted direct to Scotland was not assessable as income or personal property. *In re Edinburgh Life Ins. Co.*, 21 Occ. N. 38.

Income of foreigner—*Domicil—Change of—Intention.*]—By the St. John City Assessment Act, 59 V. c. 61, s. 2, "for the purposes of assessment any person having his home or domicil, or carrying on business, or having any office or place of business, or any occupation, employment, or profession, within the city of St. John, shall be deemed . . . an inhabitant and resident of the said city."—J. carried on business in St. John as a brewer, up to 1893, when he sold the brewery to three of his sons, and conveyed his home and furniture to his adult children, in trust for them all. He then went to New York, when he carried on the business of buying and selling stocks and other securities, having offices for such business and living at a hotel, paying for a room in the latter only when occupied. During the next four years he spent about four months in each at St. John, visiting his children and taking recreation. He had no business interests there, but attended meetings of the directors of the Bank of New Brunswick during his yearly visits. He was never personally taxed in New York, and took no part in municipal matters there. Being assessed in 1897 on personal property in St. John, he appealed against the assessment unsuccessfully, and then applied for a writ of *certiorari*, with a view to having it quashed:—*Held*, that, as there had been a long continued actual residence by J. in New York, and as on his appeal against the assessment he had avowed his *bona fide* intention of making it his home permanently, or at least for an indefinite time, and his determination not to return to St. John to reside, he had acquired a new home or domicil, and that in St. John had been adandoned, within the meaning of the Act. *Jones* v. *City of St. John*, 20 Occ. N. 112, 30 S. C. R. 122.

Income of Government officials.] — The income which a person receives as an employé of the Government of the North-West Territories is taxable, by virtue of the Municipal Ordinance, notwithstanding that the General Revenue Fund of the Territories, from which income is paid, is formed in part of a grant from the Dominion Government made "for schools, official assistance, printing, etc." *Robson* v. *Town of Regina*, 4 Terr. L. R. 80.

Income of locomotive engineers.]—The earnings of railway locomotive engineers who receive pay according to the number of miles they run their locomotives, are not "income" within the meaning of that term as used in the Assessment Act prior to the Amendment of 1901, and are therefore not liable to taxation. Decision in 9 B. C. R. 60 reversed. *In re Assessment Act*, 9 B. C. R.

209. P. C, *held*, that, on the true construction of the British Columbia Assessment Act (R. S. c. 179), the word "income" includes all gains and profits derived from personal exertions, whether such gains and profits are fixed or fluctuating, certain or precarious, whatever may be the principle or basis of calculation. Judgment in *In re Assessment Act*, 9 B. C. R. 209, reversed. *Attorney-General of British Columbia* v. *Ostrum*, [1904] A. C. 144.

Income tax—*Mining company*—"*Income derived from the mine.*"]—The Assessment Act, 4 Edw. VII. c. 23, s. 36, s.-s. 3 (O.), provides: "In estimating the value of mineral lands, such lands and the buildings thereon shall be valued and estimated at the value of other lands in the neighbourhood for agricultural purposes, but the income derived from any mine or mineral work shall be subject to taxation in the same manner as other incomes under this Act:"—*Held*, that the net receipts for the year's work of a mine, left after deducting working expenses, etc., is "the income" derived from the mine, within the meaning of the above section, at any rate where, as in this case, dividends have been declared based upon the net receipts as ascertained. *In re Coniagas Mines Co. and Town of Cobalt*, 15 O. L. R. 386, 10 O. W. R. 1007.

Income tax—*Real estate tax — Assessment not leviable on both real estate and its profits—Profits of business—"Each succeeding year," meaning of.*]—The P. E. Island Statute 43rd V., c. 15, authorized an assessment for civil purposes on real property, income and polls. The Act provided for an assessment, confined to real estate, for a half year in 1880, and then went on to say, "and all further assessments for the year 1881 and subsequent years, upon either real property, incomes or polls, shall be due and payable within ninety days next following the 4th Wednesday in January in each and every succeeding year." An assessment was levied for 1881, and defendant being assessed raised the questions: (1) Whether the tax could be levied and made payable in 1881. (2) Whether the Act authorized the assessing and levying the income tax during the currency of 1881. (3) That the assessment was not to be paid yearly in each year, but that 1881 was to be an exception. (4) If the income tax was assessable on all income whether derived from within or without the city. (5) Was the income tax assessable on the profits of business. (6) Was the tax imposed on real estate and also on the income derived therefrom:—*Held* (Palmer, C.J., Hensley, J., concurring), that the statute authorized taxes to be levied for 1881, and also authorized the assessing and levying of an income tax during the currency of that year.—That the income tax was assessable on the net income of residents and the profits of business, and in the case of persons not engaged in business, on their income derived from within, but not upon that from without the city limits. That the tax was not a double one and was not, therefore, imposed both on real estate and on the profits therefrom. *Charlottetown* v. *Heartz* (1882), 2 P. E. I. R. 444.

Interest of lessee from Crown—*Local improvements—Sidewalk.*]—Under an agreement of the 20th March, 1889, entered into by the Crown, as representing the University of Toronto, and the city of Toronto, confirmed by 32 V. c. 53 (O.), College street in the city of Toronto has become so far a public highway of the city as to make the interest of a lessee from the Crown of land fronting on that street liable to assessment for the due proportion of the cost of the construction, as a local improvement, of a sidewalk in front of the leased land, even though the lease has been made before the agreement. *In re Leach and City of Toronto*, 22 Occ. N. 406, 4 O. L. R. 614, 1 O. W. R. 661.

Irregularity in assessment—*Recovery of taxes paid.*]—Where an assessment levied in the ordinary manner has been acquiesced in by the person assessed, and paid without protest, and without any complaint being laid before the assessors, or the institution of any appeal provided by law from their decision, an action will not lie for the recovery of the amount, as a void assessment illegally exacted, on the ground that there was an irregularity in the method of fixing the valuation. *Bogie* v. *City of Montreal*, Q. R. 16 S. C. 593.

Land and improvements belonging to Dominion Government—*Assessment of occupier of — Description — Municipal Clauses Act—Court of Revision—Appeal—Action.*]—The defendant was the occupier of one of several stores on the ground floor of a building belonging to the Dominion Government, and was assessed under s. 168, s.-s. 4 (*a*), of the Municipal Clauses Act, for taxes in respect of land and improvements. The assessment roll described the property as "parts of lots 1, 605, and 1, 607, block 1; measurement 23 x 66; Government street; land, $12,650; improvements, $920; total, $13,570:"—*Held*, that the defendant was an occupant of part of the improvements only, and not of the land. 2. The assessment was invalid because the lands and improvements were insufficiently described. 3. The Act provides no procedure for such an assessment. 4. Where an assessment is illegal, the person assessed is not bound to appeal to the Court of Revision but may successfully raise the question of his liability in an action to recover taxes. *Victoria* v. *Bowes* (1902), 22 C. L. T. 218; 8 B. C. R. 363.

Land and plant of companies—*2 Edw. VII. c. 31, s. 1 (O.)—Application to oil company.*]—The provisions of s. 18 of the Assessment Act, as amended by 2 Edw. VII. c. 31, s. 1, relating to the assessment of the land and other property to be regarded as land, of certain companies, apply only to companies of the specific description therein mentioned, and therefore do not apply to such a company as the Canadian Oil Fields, Limited, carrying on the business of procuring and transmitting crude petroleum. *In re Canadian Oil Fields, Limited, and Township of Enniskillen*, 24 Occ. N. 82, 7 O. L. R. 101, 3 O. W. R. 253.

Mercantile company—*City of Halifax charter—Taxation of companies — Ejusdem generis — Exception.*] — The Halifax City Charter, Acts of 1891, c. 58, s. 313, as amended by the Acts of 1897, c. 44, provides that "every insurance company or association, accident and guarantee company, es-

tablished in the city, or having any branch office, agent, or agency therein, shall pay the license fee thereinafter mentioned, viz. (stating the amounts). It then proceeds: "Every other company, corporation, association, or agency doing business in the city . . . (banks, etc., excepted) shall pay an annual license fee of $100." The city assessed a number of carriages which had been forwarded by the defendant company to M., a city dealer, for sale on commission, and also imposed a license fee of $100 on the defendants as a company "doing business in the city" within the words of the section quoted: —*Held*, that the words of the section constituted a class, and that the defendants were not a company *ejusdem generis* with the class so constituted.—*Semble*, that the exception in favour of banks and other institutions, not similar in nature to those previously mentioned, was made *ex abundanti cautela*, and that the institutions referred to would not have been included within the terms of the enactment, even if there had been no such express exception. *City of Halifax* v. *McLaughlin Carriage Co.*, 1 E. L. R. 58, 39 N. S. R. 403.

Mining company—Income tax—Surplus from year's operations after paying expenses —Distribution in dividends—"Income derived from the mine"—Assessment Act, s. 36 (3). *Re Coniagas Mines Co. and Town of Cobalt*, 10 O. W. R. 1007.

Mining lands — *Value as agricultural lands—Buildings—Plant — Wrongful assessment—Illegality—Jurisdiction—Provisions of Assessment Act.*] — Mining lands were assessed at their value as agricultural lands under s.-s. 3 of s. 36 of the Assessment Act of 1904. The assessor also assessed the buildings and mining plant as such, and adding the two latter together entered them on the roll as the assessed value of the buildings:—*Held*, that that method was an attempt to evade the fair meaning of the Act, and that the assessment of the exempted property, the plant, was illegal. It was not for the assessor in the exercise of his judgment to assess the exempted property for taxation at any amount; and the illegality being established the Court had jurisdiction to deal with the matter outside of the machinery provided by the Assessment Act for dealing with such a complaint. Judgment of Boyd, C., 8 O. W. R. 480, reversed. *Canadian Oil Fields Co.* v. *Village of Oil Springs*, 9 O. W. R. 118, 13 O. L. R. 405.

Mistakes in copying, omissions or defects in form — *Designation of an immovable in schedule of lands affected (62 Vict. c. 58, s. 450) under a number not its own, attributing the property to a wrong owner—Lapse of three years.*]—The designation of an immovable as part of lot number 161, instead of number 174, and attributing the ownership of the lot to the gas company of Montreal instead of the Canadian Pacific Railway Company, in a schedule prepared by virtue of statute (62 Vict. c. 58, s. 450 Que.), are not mistakes in copying, omissions or defects in form which a Superior Court or one of its Judges may at his discretion permit the rectification of in the terms of s. 457 of the same statute. Especially as more than three years have passed since the deposit and putting in force of the schedule and the conditions under which the real owner would be called upon to contest it, might no longer be those under which he would have done so when it was made. *Montreal* v. *C. P. R.* Que. R. 18 K. B. 294.

Ownership of property at time assessment made.]—Assessment confirmed, as the appellant company owned the property at the time the assessment roll was completed. *Re Bell Telephone and Indian Head*, 11 W. L. R. 446.

Personal property—Choses in action—Property not already assessed—Court of revision. *Re Nasmith and City of Toronto*, 1 O. W. R. 238.

Personal property of bank—"*Diligent inquiry*"—*Statute—Imperative or directory—Notes and cheques on other banks.*]—The failure of an assessor to make "diligent inquiry," is not fatal to the validity of the assessment; the provision in the Municipal Ordinance in that respect being merely directory. Commercial paper (such as notes and cheques on other banks) held by a branch of a chartered bank are "personal property," and a branch bank holding such paper is liable to assessment in respect thereof. *Union Bank of Canada* v. *Town of Macleod*, 22 Occ. N. 310, 4 Terr. L. R. 407.

Property purchased by railway company for right of way, but not used as such—Assessment as of lands of private owners. *Re City of Edmonton and Canadian Pacific R. W. Co.* (Alta.), 6 W. L. R. 786.

Provincial assessment of bank—*Deduction for losses written off*—"*Transaction*"—*Period of credit—Appeal by Bank of Montreal from an assessment by the Provincial Government of British Columbia.*]—The statute in form No. 1 provides that deductions may be made by losses written off within six months from the time they were ascertained and not covering transactions antedating that date not more than eighteen months. Appellants, the Bank of Montreal, held to be entitled to deduct a loss admittedly written off within the year in which the assessment was made. *Re Bank of Montreal Assessment*, 11 W. L. R. 214.

Railway—*Assessment on buildings—Railway Assessment Ordinance*—"*Lands*"—*Valuation—Presumption—Onus.*]—*Held*, that the buildings of a railway company are assessable under s. 3 of the Ordinance respecting the Assessment of Railways, the word "lands" therein being properly interpreted as including the buildings.—*Held*, also, that the assessment must *prima facie* be taken as being correct in amount. *Canadian Pacific R. W. Co.* v. *Macleod School District*, 5 Terr. L. R. 187, followed. *Canadian Northern R. W. Co.* v. *Omemee School District*, 4 W. L. R. 547, 6 Terr. L. R. 281.

Railways—*Business of—Municipal by-laws—Construction of statute — Voluntary payment—Recovery back.*]—The statute 29 V. c. 57, consolidating and amending the Acts and Ordinances incorporating the city of Quebec, by s.-s. 4 of s. 21 authorizes the making of by-laws to impose taxes on persons exercising certain callings, "and generally on all trades, manufactories, occu-

pations, business, arts, professions, or means of profit, livelihood or gain, whether hereinbefore enumerated or not, which now or may hereafter be carried on, exercised, or in operation in the city; and all persons by whom the same are or may be carried on, exercised, or put in operation therein, either on their own account or as agents for others; and on the premises wherein or whereon the same are or may be carried on, exercised or put in operation." *Held*, that the general words of the statute are sufficiently comprehensive to authorize the imposition of a business tax upon railway companies; and, further, that the power thus conferred might be validly exercised by the passing of a by-law to impose the tax in the same general terms as those expressed in the statute. *Held*, per Strong, C.J., that where taxes have been paid to a municipal corporation voluntarily and with knowledge of the state of the law and the circumstances under which the tax was imposed, no action can lie to recover the money so paid from the municipality.—Judgment in Q. R. 8 Q. B. 246, affirmed. *Canadian Pacific R. W. Co.* v. *City of Quebec, Grand Trunk R. W. Co.* v. *City of Quebec*, 30 S. C. R. 73.

Railway buildings — Construction of Assessment Ordinance — "Lands"—Valuation of buildings—Appeal—Costs. *Re Can. Nor. Rw. Co. & Omemee School District* (N. W. T. 1906), 4 W. L. R. 547.

Railway works — Agreement between railway company and municipal corporation —Powers of corporation—Exemption for 15 years—57 V. c. 62—"Industrial enterprise." *Canadian Pacific R. W. Co.* v. *Town of Carleton Place*, 12 O. W. R. 567.

Right to assess—*Salary of civil servant — Powers of provincial legislature.*] — The salary of a civil servant of the Dominion Government, resident in the city of St. John, is liable to taxation in the city for municipal purposes, the provincial legislature having the specific power of legislation on the subject.—*Webb* v. *Outrim*, [1907] A. C. 81, applied and followed. *Ex p. Owen*, 20 N. B. R. 487, *Ackman* v. *Town of Moncton*, 24 N. B. R. 103; *Coates* v. *Town of Moncton*, 25 N. B. R. 605, overruled. *Rex* v. *City of St. John, Ex p. Abbott*, 38 N. B. R. 421, 4 E. L. R. 498.

Right to assess property of street railway company—*Contract with municipality—Designation of properties—Sufficiency —Prescription of taxes — Renunciation.*]—1. A municipal corporation which, by virtue of a special statute, grants to a tramway company, in consideration of the annual payment of a percentage of the profits, the privilege of laying tracks and erecting poles and other necessary constructions in the streets or elsewhere in the municipality, is not thereby deprived of the right to tax these constructions, etc., by virtue of the general powers which it holds under its charter.—2. The designation, on the valuation and collection rolls, of these properties as follows: "William St., St. Ann's ward, part of 1209, and motive power on subdivisions 1-8, 1218, pt. 1209, land $34,000; buildings $60,000, 1-8 1218, buildings $220,000;" is sufficient according to the terms of 62 V. c. 79, s. 375.—3. A written renunciation by a ratepayer of the prescription of his taxes is valid and hinders it from running. *City of Montreal* v. *La Compagnie des Chars Urbains de Montreal*, Q. R. 35 S. C. 321.

Street railway—Assessment of "immovable property" under Montreal city charter —Poles, wires, and rails—"Motive power." *City of Montreal* v. *Montreal Street Rw. Co.*, 3 E. L. R. 440.

Telephone poles and wires—*Real estate—Principle of valuation.*] — The poles, wires, etc., of a telephone company are immovable property by nature, and as such are taxable property within the meaning of Art. 709, M. C.—In the valuation of real property for the purpose of municipal assessment thereof, the cardinal principle to be observed is that of equality with valuation of other real estate, and to value any real estate at such appraisement as it would bring when taken down and removed, and therefore in the form of movables, is not valuing it as "real estate." *Bell Telephone Co.* v. *Township of Ascot*, Q. R. 16 S. C. 436.

Toll bridge over navigable waters—*—Liability to assessment—Real property — Easement—Assessment Act — Exemptions—Interest of Crown—Bridge forming part of toll road — Public road or way.*]—A toll bridge across the waters of the Bay of Quinté, and its approaches, erected by a company incorporated by 50 & 51 V. c. 97 (D.), and acquired by the plaintiffs, who were incorporated by 62 & 63 V. c. 95 (D.), was held to be liable to assessment, as regards the part situate in the township of Ameliasburg, as real property, within the meaning of the Ontario Assessment Act, 4 Edw. VII. c. 23. —The effect of the two Dominion statutes referred to is to confer a perpetual right in the nature of an easement to construct and maintain the bridge across the navigable waters of the Bay of Quinté; the words "real property," in s. 2 (7) of the Assessment Act, by virtue of s. 2 (8) of the Municipal Act, 1903, include an easement; and the bridge comes within none of the exemptions mentioned in the Assessment Act. The interest of the Crown in any property is exempt, but that leaves the interest of any person else not holding for the Crown, or in trust for the Crown, liable under the general words of the statute; and the plaintiffs were not agents or trustees for the Crown. Section 37 of the Act applies only to a bridge forming part of a toll road, and not to this bridge; nor is this bridge a public road or way, within the meaning of s. 5 (5) of the Assessment Act. *Niagara Falls Suspension Bridge Co.* v. *Gardner*, 29 U. C. R. 94; *In re Queenston Heights Bridge Assessment*, 1 O. L. R. 114, and *International Bridge Co.* v. *Village of Bridgeburg*, 12 O. L. R. 314, followed. *Belleville and Prince Edward Bridge Co.* v. *Township of Ameliasburg*, 10 O. W. R. 571, 988, 1080, 15 O. L. R. 174.

What rolls should shew—*Exemption.*] —The assessment roll for the town, following defendant's name, and under the heading "whole taxable property," contained the entry "$400."—*Held*, that it was not necessary to shew in the assessment roll that the property mentioned was defendant's taxable property over and above the exemption. *Town of Westville* v. *Munro*, 32 N. S. R. 511.

ii. *Appeals against Assessments.*

Against whole assessment—*Notice.*]—The provisions of the Municipal Ordinance respecting appeals against the assessment of third parties do not authorize a ratepayer to appeal generally against the assessment of every person on the assessment roll, without designating the names of all the ratepayers in a written request to the secretary-treasurer to notify them of the appeal. *Re Heiminck (P.) and Town of Edmonton*, 5 Terr. L. R. 459.

Assessment Act, s. 77—*Case stated for opinion of Court—Jurisdiction—"Question of general application" — Departmental store.*]—It is not a question of general application under s. 77 (1) of the Assessment Act, 4 Edw. VII. c. 23 (O.), whether a stated person is carrying on the business of a departmental store or retail merchant dealing in more than five branches of retail trade or business in the same premises, or in separate departments of premises under one roof, or in connected premises, within the meaning of clause (*e*) of s. 10, s.-s. 1, of the Act. The principle of *Re Norfolk Voters' Lists*, 15 O. L. R. 108, 10 O. W. R. 743, applied. Per Meredith, J.A., the words "upon an appeal of a person, partnership, or corporation assessed," in s. 77 (1) of the Act, refer to the appeal to the County Court Judge, and are not referable to the earlier appeal to the Court of Revision. *Re Knox (S. H.) & Co. Assessment*, 12 O. W. R. 499, 17 O. L. R. 175.

Assessment Act, s. 10 (1) (e)—*Departmental store—Question of fact—Decision of Ontario Railway and Municipal Board.*]—The Ontario Railway and Municipal Board cancelled the business assessment of the respondents in respect of a retail business. The city of Toronto claimed the business was that of a departmental store. On appeal the Court of Appeal held the question is one of fact, therefore the Court has no jurisdiction to entertain an appeal. *Re Knox Assessment*, 13 O. W. R. 823, 18 O. L. R. 645.

Illegal assessment.]—Where an assessment is illegal, the person assessed is not bound to appeal to the Court of Revision, but may successfully raise the question of his liability in an action to recover taxes. *City of Victoria* v. *Bowes*, 22 Occ. N. 218, 8 B. C. R. 363.

Onus.]—In assessment appeals the onus is upon the appellants who assert that their property is assessed at too high a figure, to prove it affirmatively. *Re McDougall and Town of Edmonton, Re Carruthers and Town of Edmonton*, 5 Terr. L. R. 465.

Reduction of assessment — *Appeal—Resolution of council.*]—Every landowner, being a municipal elector, may appeal from the decision of the municipal council reducing the amount of the assessment of lands in the municipality, and that even when he has no right to the land in question and was not present at the meeting of the council at which the assessment of these lands was reduced. The resolution of a municipal council, adopted in the month of September, declaring that at the time of the annual revision of the assessment roll, in the month of July previous, the council had by mistake reduced the assessment of a parcel of land, and fixing the amount at which that parcel should have been valued, is illegal. *Bastien* v. *Parish of St. Vincent de Paul*, Q. R. 16 S. C. 561.

Value of lands and buildings — *Burden of proof.*]—Under ordinary circumstances, it is incumbent upon an appellant who complains that he is assessed too high to shew that the property is not worth the amount for which he is assessed, but where, although this is not shewn, it appears that, under the general scheme of assessment, lands of a particular description are assessed generally at a certain fixed sum per acre, and that the appellant's lands of that description, which are of no greater value either by reason of their situation or otherwise, are assessed at a larger amount, the assessment should be reduced to accord with the general scheme of assessment. A school district assessor assessed certain of the appellants' lands at $800, and the dwelling houses thereon at $2,000:—*Held*, that the assessment should stand, although the more correct course would have been to assess the whole as "land" and place a single value upon both soil and buildings as "land." *In re Canadian Pacific Ry. Co. and MacLeod Public School District*, 5 Terr. L. R. 187.

iii. *Actions to set aside Assessments.*

Charter of a municipal corporation provided that its collection rolls for taxes must be contested within a fixed delay. A ratepayer, who has a special right, under a contract, to refuse payment of the tax, is not bound to act thereon within the delay so fixed. He may stand by until called upon to pay, and then set up his right, though the time in which to contest the roll has expired. *Joyce* v. *Outremont* (1909), Q. R. 18 K. B. 447.

Contestation — *Prescription — Interruption—Injunction.*]—The contestation of a special assessment roll by a person named therein has not the effect of interrupting prescription as regards other persons subject to such assessment. 2. Even where the party contesting obtains a temporary order enjoining the city against making any collection under the roll attacked, prescription is not interrupted as regards other persons named in the assessment roll, where the making of such order is not objected to by the city, and where no steps are subsequently taken by the city to obtain its rescission. *City of Montreal* v. *Land and Loan Co.*, Q. R. 23 S. C. 461.

Non-resident ratepayer — *Failure to give notice—Assessment Act, R. S. N. S. c. 73 — Assessment invalid — Certiorari — Costs.*]—The Assessment Act, R. S. N. S. c. 73, s. 16, provides that the assessors, on the completion of the assessment roll, shall give notice to the parties assessed, by "(*b*) serving each person . . . not residing . . . within the district . . . with a notice in writing shewing the respective amounts at which his real and personal property has been assessed upon such roll." Sub-section (2) provides that "no such assessment shall be rendered invalid by fail-

ure to serve such notice." The assessment of property of G. was increased from $1,200 to $8,800, and the assessors, expressly relying upon the provisions in s. 16, s.-s. (2), of the Act, omitted to give G. notice of any kind, thus depriving him of the right of appeal. The assessment was brought up by *certiorari*:—*Held*, that *certiorari* would lie. 2. That the words of s.-s. (2) did not take away the right of the party assessed to notice, and that, in the absence of such notice, the assessment was invalid and must be set aside with costs. Per Drysdale, J., that the costs taxed should not include affidavits read on the question of value, such question not being open to review on this application. *In re Gillies Assessment*, 42 N. S. R. 44.

Quashing roll—*Appeal.*]—One may proceed by petition, by virtue of Art. 100, C. M., to demand the quashing of an assessment roll for illegalities making it void. However, where the complaint is only of the assessment of a part of the properties on the roll, the quashing of the whole roll cannot be asked: in such a case review by way of appeal under Art. 1061 is the remedy. *Sénécal* v. *Parish of L'Ile Bizard*, Q. R. 17 S. C. 267.

Recourse of ratepayers complaining of their individual valuations, is by petition to the Circuit Court under provisions of 1 Edw. VII. c. 26, and not by petition under the Town Incorporation Act, as taken in present case. *Percival* v. *Montreal West*, 16 R. de J. 8.

Valuation roll — *Illegality — Quashing —Jurisdiction of Judge—Names improperly inserted — Notice — Overvaluation.*] — By virtue of s. 4376, R. S. O., a Judge in Chambers has jurisdiction on petition to quash a valuation roll for illegality. 2. The facts that the names of persons who are not owners are inscribed upon a roll as such, or that the properties are valued above or below their real value, constitutes an illegality. 3. In such case notice should be given to the persons whose names it is sought to strike off. *Truchon* v. *Town of Chicoutimi*, Q. R. 25 S. C. 55.

Valuation roll—*Petition to set aside—Parties—Interest.*]—Valuators must proceed strictly according to law, and it cannot be said, in answer to a petition to set aside a valuation roll, that they have acted in the exercise of their discretion or according to an established practice. 2. It cannot be alleged that the party who contests a valuation roll is acting in the interest of other persons, unless it is also alleged that the petitioner himself is without any interest whatever. *Leitch* v. *Town of Westmount*, 5 Q. P. R. 225.

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2. CHARGES ON LAND.

City of Halifax charter—*Sale of land after assessment—Vendor's personal liability for taxes.*] — Under the provisions of the Halifax city charter, s. 303, the annual assessment is to be rated on the owners of real and personal property by an equal dollar rate upon the value of real and personal property within the city. By s. 302, the annual assessment is to be prepared and delivered to the city collector not later than the 15th March in each year. The defendant was the owner of a lot of land which was assessed for the purpose of rates and taxes for the year 1903-1904, and on the 15th March the book of general assessment was delivered to the collector of rates and taxes in the form prescribed by law. Several weeks later the defendant conveyed the lot of land so assessed to a purchaser, who went into possession:—*Held*, that, in addition to the lien on property for taxes, there is also a personal responsibility, and the mere fact of the defendant parting with the land by conveyance, after it had been duly assessed, could not in any way affect the liability imposed upon the owner when once the property had been properly assessed in his name. *City of Halifax* v. *Wallace*, 38 N. S. R. 564, 1 E. L. R. 18.

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3. COLLECTION OF TAXES.

i. *Generally.*
(*No cases.*)
ii. *By Distress*, 254.
iii. *By Action*, 257.
iv. *Collectors.*
(*No cases.*)
v. *Recovery back of Taxes paid*, 259.

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i. *Generally.*
(*No cases.*)

ii. *By Distress.*

Change of ownership — *Chattel mortgage—Purchase from mortgagee.*] — Goods purchased from the chattel mortgagee thereof are not "claimed . . . by purchase, gift, transfer or assignment" from the mortgagor within the meaning of R. S. O. c. 224, s. 135, s.-s. 4 (*b*), so as to make them liable in the purchaser's hands to distress for taxes due by the mortgagor. Judgment in 31 O. R. 301, 20 Occ. N. 11, affirmed. *Horsman* v. *City of Toronto*, 20 Occ. N. 349, 27 A. R. 475.

Default of collector to levy taxes on land—Existence of chattels on land—Assessment Act, R. S. O. c. 224, s. 147—Imperative enactment—Right of municipal corporation to sell land for taxes—Lien on land—Assessment Act, 4 Edw. VII. c. 23, s. 89—Non-retroactivity — Rule of construction. *Jasperson* v. *Township of Romney*, 12 O. W. R. 575, 734.

Defect in assessment—*Action for illegal distress — Estoppel — Appeal to Assessment Court—Jurisdiction.*]—There was a radical defect in the assessment of the plaintiff's farm under R. S. N. S. 1900 c. 73. The plaintiff appealed to the Assessment Court of Appeal, which reduced the amount of the assessment. The plaintiff subsequently brought an action against the town corporation for taking and selling his horse under warrant for the tax fixed by the Appeal Court:—*Held*, that, as the Assessment Court had no jurisdiction, the assertion of an appeal to that Court by the plaintiff, and its decision,

did not estop him from bringing the action. *Cossitt* v. *Town of Sydney*, 40 N. S. R. 454.

Distress for arrears—*Ont. Assessment Act, R. S. O. (1887), c. 193, s. 135—Imperative or directory—Failure to distrain—Enforcing payment in subsequent year.*]—The provisions of s. 135 of the Ontario Assessment Act, R. S. O. 1887, s. 193, in respect to taxes on the roll being uncollectible, and what the account of the collector in regard to the same shall shew on delivery of the roll to the treasurer, and requiring the collector to furnish the clerk of the municipality with a copy of the account, are imperative. Taxes on the roll not collected cannot be recovered by distress in a subsequent year, unless such arrears have accrued while the land in respect of which they were imposed was unoccupied. Judgments in 26 A. R. 459, 19 Occ. N. 263, and 30 O. R. 16, 18 Occ. N. 402, affirmed. *Caston* v. *City of Toronto* (1900), 20 Occ. N. 321, 30 S. C. R. 390.

Excessive and unreasonable distress—*Action for damages—Costs.*]—Plaintiff, a tenant under lease expiring 1st June, 1908, failed to pay $250 rent due 31st May, but continued to occupy part of the premises. About the middle of August, collector seized 50 tons flax, for 1907 and 1908 taxes:—*Held*, that landlord could have distrained for the rent, consequently collector was entitled to do so for 1907 taxes and costs, but not for 1908 taxes, and having regard to value of goods seized, $645, it was manifest that the quantity distrained was excessive and unwarranted, and plaintiff was entitled to his actual damages. *Campbell* v. *Wallaceburg* (1909), 14 O. W. R. 473.

Illegal distress — *Action for — Mortgagee's bailiff.*]—Under s. 135 (*a*) (1) 3, added to the Assessment Act, R. S. O. 1897, c. 224, by 62 V. (2) c. 27, s. 11, goods which are not in the possession of the person assessed in respect of them cannot be distrained for the taxes assessed against them. Goods which had been mortgaged were when seized in the possession of the mortgagee's bailiff, who had taken possession upon default:—*Held*, that the bailiff had a right to bring an action for illegal distress. *Donahue* v. *Campbell*, 2 O. L. R. 124.

Notice or demand—*Removal of goods—Warrant for distress—"Good reason to believe" — Onus.*] — It is essential to the validity of a notice or demand under R. S. O. c. 224, s. 134 (1), that it should, as required by s.-s. (2), contain a schedule specifying the different rates, etc. The question whether the collector has such "good reason to believe" a ratepayer is about to remove his goods as would justify him in obtaining a magistrate's warrant of distress under s. 135 (4) is one for the jury, the onus being upon the collector to prove that he had:—*Held*, under the circumstances of this case, that he had not, and that the plaintiff was entitled to recover damages for illegal distress. *McKinnon* v. *McTague* (1901), 21 Occ. N. 207, 1 O. L. R. 233.

"Owner"—*Agent for mortgagees — Conditional purchase.*] — The plaintiff agreed with mortgagees in possession of the mortgaged land to purchase it at a sum equal to principal, interest and costs, such purchase to be carried out so soon as the mortgagees should obtain a final order of foreclosure, and in the meantime that he should, as their agent, manage the property:—*Held*, that the plaintiff, who had not been assessed for the property in question, and against the name the taxes in question had not been charged on the collector's roll, was not an "owner" of the premises within s. 35, s.-s. 3, of the Assessment Act, R. S. O. 1897, c. 224, whereby the collector is authorised to levy unpaid taxes "upon the goods and chattels of the owner of the premises found thereon;" and such taxes could not be levied upon his goods. *Lloyd* v. *Walker* (1902), 22 Occ. N. 256, 4 O. L. R. 112, 1 O. W. R. 383.

"Owner"—*Agreement for purchase — Part performance—Local improvement rates—Distress warrant — Abandonment of distress.*]—A purchaser, who has gone into possession and made part payment of the purchase money under an agreement for the sale of land unexecuted by the vendor, which provides for payment by the purchaser of the taxes, rates and assessments rated or charged from the date of the agreement, is an "owner" within s. 135 of the Assessment Act, and is liable for the taxes accruing during his occupancy, although they may have been assessed against a former owner. Local improvement rates grouped with other taxes under the Assessment Act, and included in the collector's roll, are taxes, in a broad sense, and may be collected or realized by uniform statutory process. 2. A warrant of distress specifying two bailments is unobjectionable. 3. Where one bailiff has rightly entered and seized, and had afterwards withdrawn by reason of the misstatements of the owner, it was held competent for another bailiff to return forthwith and continue the first lawful taking. *McDougall* v. *McMillan* (1873), 25 C. P. 75, 92, followed. *Sawers* v. *City of Toronto* (1902), 22 C. L. T. 25, 38 C. L. J. 27, 2 O. L. R. 717. Affirmed 22 C. L. T. 380, 1 O. W. R. 656, 38 C. L. J. 686, 4 O. L. R. 624.

Seizure of personal property for arrears — *Public officer — Office of town treasurer filled by a woman—N. S. Town Incorporation Act, s. 112.*]—Plaintiff claimed a horse which had been seized for taxes. She and her brother lived together, he owning the farm, she managing it:—*Held*, on evidence, that she is not the owner of the horse.—*Held*, further, under s. 112 above, a woman may perform the duties of town treasurer. A warrant signed "act. town treasurer," for "acting town treasurer," is valid. *Hagarty* v. *McGrath*, 7 E. L. R. 79.

Special notice mentioned in Arts. 961 C. M., and 4550 R. S. Que. and s. 544 (2) of 52 V. c. 80 (Q.), is not required as a condition precedent to the levy of municipal taxes by way of seizure of movables or immovables. The expression "when proceedings are taken" used in s. 552 of 52 V. c. 80, refers to a seizure of movables or immovables for levying taxes. *Morgan* v. *Sorel*, 15 Que. K. B. 247.

Taxes on goods of tenant—Liability of tenant—Injunction. *Campbell* v. *Town of Wallaceburg*, 12 O. W. R. 697.

Tender of part—Statute labour—Illegal assessment — Statute — Imperative pro-

vision — Costs — Set-off — Solicitor's lien. *Wacchter* v. *Pinkerton*, 2 O. W. R. 645, 6 O. L. R. 241.

iii. *By Action.*

Contestation of roll — *Limitation of actions—Interruption—Statute.*] — The prescription of three years in respect of taxes provided by the Montreal city charter, 52 V. c. 79 (Q.), runs from the date of the deposit of the assessment roll, as finally revised, in the treasurer's office, when the taxes became due and exigible, and the prescription is not suspended or interrupted by a contestation of the assessment roll, even although the contestation may have been filed by the proprietor of the lands assessed. Judgment appealed from reversed, Girouard and Nesbitt, JJ., dissenting. *City of Montreal* v. *Cantin*, 25 Occ. N. 3, 35 S. C. R. 223.

Contestation of roll—*Quebec Act, 52 V. c. 79, ss. 120, 144, 231—Civil Code, Arts. 2227, 2232, 2236—Construction—Action to recover assessed amounts—Assessment due on filing of the roll.*]—Under s. 231 of city of Montreal charter, 1889, 52 V. c. 79, the amount of assessment becomes due and recoverable on filing of the roll of assessment in office of city treasurer. In an action by city to recover after the period of prescription enacted by s. 120, calculated from date of filing, had elapsed, it appeared that respondent's predecessor had been a party to proceedings had for its annulment:—*Held*, that the period was not interrupted thereby within meaning of Art. 2227 Civil Code, for there had been no acknowledgment of liability. 2. That there had been no impossibility to sue within meaning of Art. 2232, for right of action was not by above Act suspended during such proceedings. 3. The debt in suit was not dependent on condition within meaning of Art. 2236; though s. 144 of the Act limited the time within which the roll might be annulled, it did not make the date of its coming into force conditional on the roll not being either attacked or annulled. Judgment in 25 Occ. N. 3, 35 S. C. R. 223, affirmed. *Montreal* v. *Cantin*, [1906] A. C. 241, Q. R. 15 K. B. 103.

Cost of road-work—*Personal liability of purchaser.*]—A municipal corporation has no right of action to recover the costs of road-work against the subsequent purchaser of the land assessed, but must first take judgment against the person liable for such work. *Township of Roxton* v. *De Lorimier*, Q. R. 24 S. C. 57.

Infraction of the charter of the city of Montreal—*Quo warranto — C. P. 45, 1066; 62 V. c. 58, s. 338.*]—The recourse permitted by s. 338 of the charter of the city of Montreal which permits the causing to be paid back by an alderman of the taxes he has illegally voted, and to cause him to be disqualified as such, is a special recourse which ought to be enforced by an ordinary civil action appealable to the Court of King's Bench. The final judgment rendered in the Court of first instance in this action is capable of appeal in virtue of common law and of the charter of the city of Montreal. *Lapointe* v. *Larin* (1909), 10 Q. P. R. 346.

Means of defence—*Illegality of rolls prepared — Means of quashing.*]—The taxpayer sued to recover municipal taxes is not at liberty to raise the question of setting aside the tax rolls, which he might have done within the time allowed by the statute, but which has now expired. *Cameron* v. *Westmount*, Q. R. 18 K. B. 300.

Ordinary remedy by action is open to municipalities for recovery of taxes, without it being specially given. The expression "when proceedings are taken" used in s. 552 of 52 V. c. 80, refers to a seizure of movables or immovables for levying taxes; and does not apply to the remedy by action. In exercising the latter the corporation cannot demand the addition of 10 per cent. provided by the section. *Morgan* v. *City of Sorel*, Q. R. 15 K. B. 247.

Property not been regularly charged—*Error in valuation roll—Proof—Nature of the action to recover municipal taxes—M. C. 20, 718, 743, 948, 951.*]—1. In an action taken by a municipal corporation to recover taxes claimed to have been imposed upon lot 18 and declaring that it was the intention of the valuators to assess lot 17, defendant's property, the plaintiff will not be permitted, even by the valuators' evidence, to establish such claim; the valuation roll is an essential document and for which the law requires special formalities; there is no law which would authorize the Courts to correct or add to such document by proof of what may have been the intention of the valuators. 2. According to the provisions of 948 and 951 M. C., the law requires that the taxes be imposed on the property responsible for them. Under the provisions of the same Code, it is not necessary that the name of the proprietor or of the occupant or of the subsequent purchaser of such property should appear upon the valuation roll, but it is absolutely necessary that a particular lot should be charged with a fixed sum for taxes before the occupant can be forced to discharge any such municipal tax. 3. For the purposes of description, any lot or part of a lot should, in obedience to the provisions of M. C. C. 718, be described by the number of the cadastre, and this is an essential formality. 4. The action to recover taxes exists in virtue of the law alone and not in virtue of a quasi-contract, and the result is that the occupant of a lot cannot be forced, by a personal action, to pay such taxes unless the lot has been lawfully charged with a determined portion of such taxes. So long as a lot has not been entered upon the roll, it is impossible to tax it, and it is only by means of such roll that the amount of the taxes can be legally determined. *Cowansville* v. *Noyes* (1910), 16 R. de J. 376.

Validity of assessment — *Special tribunal—Failure to appeal—Proof of assessment—Pleading—Evidence.*]—In an action to recover the amount claimed to be due for rates and taxes, the defendant pleaded among other things that, at the time of the assessments, defendant was not the owner of more than a one-quarter interest in the ship assessed:—*Held*, following *Town of Westville* v. *Munro*, 32 N. S. Reps. 311, that the defendant having received notice of the assessment, if he

was dissatisfied therewith should have brought the matter before the assessment appeal Court, established for that purpose by s. 341 of the Halifax city charter, 1891, and, having failed to do so that the assessment was conclusive, and could not be attacked in an action to recover the amount assessed. The only evidence before the Court of the assessment and the rate due thereon was the city collector's certificate of taxes unpaid, and s. 362 of the city charter, which provides that all rates and taxes shall become due on the 31st May in each year, and that it shall be the duty of the city collector, immediately thereafter, to take proceedings, etc. There was no evidence to prove the collector's signature to the certificate, or that he was collector:—*Held*, that the evidence was wrongly received:—*Held*, nevertheless, that, as the defendant in his defence admitted that he was assessed for the amount claimed, and that the rate alleged to be due on such assessment was correct, it was not necessary for the plaintiffs to prove the assessment or the rate due thereon. *City of Halifax* v. *Farquhar*, 33 N. S. R. 209.

iv. *Collectors.*

(*No cases.*)

v. *Recovery back of Taxes paid.*

Evidence—*Assessment roll—Prima facie case — Rebuttal — Ownership of property.*]—An assessment roll only proves the status as owner of one whose name is inscribed thereon as such, until the contrary is established. Therefore, one who has paid taxes upon the land, because his name has been inscribed upon the assessment roll as the owner of land, has a right to recover back the taxes paid, if he proves that he was not the owner of it at the time when these taxes were imposed. *Couture* v. *Corporation of St. Etienne de Lauzon*, Q. R. 31 S. C. 395.

Mistake—*Court of Revision.*]—Certain of the plaintiff's lots were by by-law of the defendant municipality "exempted from payment of taxes," for the year 1899 and other years. The said lots were assessed for taxes for the said year "for school purposes only." Thereafter the plaintiff received from the defendant a statement and demand for payment within 30 days of the taxes on the said lots for the said year, and "in consequence of the said demand" paid the same:—*Held*, that, assuming the plaintiff was entitled to exemption from taxation for school purposes, this did not amount to such an involuntary payment as would entitle the plaintiff to recover the amount so paid. Effect of decision of Court of Revision discussed. *Spring-Rice* v. *Town of Regina*, 5 Terr. L. R. 171.

Non-resident merchant — *Payment of taxes under protest—1 Edw. VII. (Que.), c. 44.*]—The tax which defendant is permitted, under 1 Edw. VII. (Que.), c. 44, to levy upon non-resident merchants who sell or offer for sale goods in Three Rivers, can only be claimed from outside merchants, and not upon those who have a place of business and their residence therein. A merchant who, for purpose of avoiding seizure of his property, pays such tax under protest, has the right to an action to recover same from the corporation, when, as in present case, the tax was illegally levied. *Kiely* v. *Three Rivers* (1910), 16 Que. R. de J. 326.

Payment under constraint—*Warrant—Illegal arrest—Action for.*]—A warrant for taxes alleged to be due to the defendants was issued by the town treasurer and placed in the hands of a constable for collection. The constable went to the plaintiff's place of business to collect the amount, but, it being Saturday night, an arrangement was made between the constable and plaintiff that the latter would go up on Monday morning and see about the taxes. The plaintiff went to the treasurer's office and contended that the amount claimed in the warrant had been paid, but, as the treasurer insisted that the amount had not been paid, the plaintiff handed him the amount claimed. It appeared that the amount in dispute was due in respect of a property which the plaintiff sold to Y., who agreed to pay the taxes upon it, and paid the same to the treasurer, intimating that it was paid on account of the plaintiff's property, but that the treasurer appropriated the amount in payment of a like amount due by Y. personally. The plaintiff brought an action for illegal arrest, and claimed as special damage, "amount wrongfully extorted from the plaintiff, as set forth in paragraph 4 of the pleading, $8.25." Paragraph 4, referred to, detailed the issue of the warrant "whereby the plaintiff was unlawfully compelled to pay an illegal demand of the defendants, to wit, the sum of $8.25:" — *Held*, that, even on the plaintiff's own evidence, the action must fail. *Walker* v. *Town of Sydney*, 36 N. S. Reps. 48.

Payment under protest—*Appeal from assessment—Judgment confirming—Res judicata—Estoppel—Money had and received.*]—J., having been assessed in 1896 on personal property as a resident of St. John, N.B., appealed without success to the appeals committee of the common council, and then applied to the Supreme Court of New Brunswick for a writ of *certiorari* to quash the assessment, which was refused. An execution having been threatened, he then paid the taxes under protest. In 1897 he was again assessed under the same circumstances, and took the same course, with the exception of appealing to the Supreme Court of Canada from the judgment refusing a *certiorari*, and that Court held the assessment void and ordered the writ to issue for quashing: 30 S. C. R. 122, 20 Occ. N. 11. J. then brought an action for repayment of the amount paid for the assessment of 1896:—*Held*, affirming the judgment of the Supreme Court of New Brunswick, 21 Occ. N. 52, that the judgment refusing a *certiorari* to quash the assessment in 1896 was *res judicata* against J., and he could not recover the amount so paid. *Jones* v. *City of St. John*, 21 Occ. N. 401, 31 S. C. R. 320.

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4. COURTS OF REVISION.

Jurisdiction of a Court of Revision and the Courts exercising appellate jurisdiction therefrom, is confined to the question of valuation, namely, whether or not the assessment is too high or too low. Whether the property is assessable or not is for the assessor alone to determine, from which there

is no appeal. *Toronto Rw. Co.* v. *City of Toronto*, [1905] A. C. 809, followed. There is, therefore, no jurisdiction in the appellate Courts to determine whether or not a business or income tax should be imposed. *Re International Bridge Co. & Bridgeburg* (1906), 7 O. W. R. 497, 12 O. L. R. 314.

Jurisdiction of Court of Revision is confined to the question whether the assessment was too high or too low. *Re Crow's Nest Pass Coal Co.'s Assessment*, 13 B. C. R. 55.

Street railway — *Items — Appeal.*]—Although a street railway is operated as a continuous system through all the wards of a city, the portion of the rails, poles, and wires in each ward must be assessed in that ward, and in making the assessment the rails, poles, and wires must be treated as so much dead material, and not as necessary portions of a going concern.—Bridges built and used by a street railway as part of their system are subject to assessment, but must be assessed in the same way as the rails, poles, and wires.—*Consumers' Gas Co.* v. *City of Toronto*, 27 S. C. R. 453, *In re Bell Telephone Company Assessment*, 25 A. R. 351, and *In re Toronto Railway Company Assessment*, 25 A. R. 135, applied.—Upon an appeal to a board of County Court Judges from the Court of Revision coming on for hearing, the board, at the request of the city corporation, and without any previous notice or assessment or application to the Court of Revision, added to the items of assessable property of a railway company, a certain amount as the value of the portion of the streets of the city "occupied" by the company:—*Held*, that the board of County Court Judges had no jurisdiction to make this addition, the amendment made by s. 5 of 62 V. c. 27 not then being in force.—*Semble*, that the railway company were not liable to assessment in respect of the portions of the streets occupied by them. *In re London Street Railway Assessment*, 20 C. L. T. 62, 27 A. R. 83.

Valuation roll—*Revision—Time — Statute—Directory provisions.*]—The terms of Art. 746a, M. C., so far as regards the revision of the valuation roll "in the months of June or July," are directory only, and the municipal council charged by law with the duty of revision, is not divested of authority to make such revision where the time specified in the article has expired before the duty has been performed. *Can. Pac. Rw. Co.* v. *Allan*, 19 Que. S. C. 57.

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5. Equalization of Assessments.

Appeal to County Court Judge—*Time for judgment—Imperative enactment.*]—The provision in s.-s. 7 of s. 88 of the Assessment Act, R. S. O. 1897 c. 224, that the judgment of the County Court Judge on appeal from the equalization by the county council of the assessment of the county shall not be deferred beyond the 1st day of August next after such appeal, is imperative. Proceedings for equalization of the assessment, and the rolls of that financial year are to be equalized, considered. Judgment in 3 O. L. R. 169, 22 Occ. N. 48, reversed. *In re Township of Nottawasaga and County of Simcoe*, 22 Occ. N. 172, 4 O. L. R. 3, 1 O. W. R. 278.

Fixed assessment — *Assessment Act (1904) c. 23, ss. 22, 80, 81—Con. Mun. Act (1903), c. 19, ss. 403, 405, 591, 591 (A.g.).*] — The town of Sarnia by various by-laws fixed the sums at which certain industrial properties, established in that town, were to be assessed for a certain number of years, under what is now Con. Mun. Act (1903), c. 19, s. 591, 591 (A.g.). On equalizing the assessment of the local municipalities of the county of Lambton, the county council added $462,500 to the assessment of Sarnia, as being the "actual values" of said properties over and above their fixed assessments. Sarnia appealed to a board composed of His Honour Judge Snider of the county of Wentworth, His Honour Judge McWatt, of the county of Lambton, and A. MacLean, registrar of the county of Lambton, appointed by the Lt.-Gov. in Council:—*Held*, that the proper way to rate said properties is on their fixed assessments and not on their actual cash values. *Re Town of Sarnia and County of Lambton* (1909), 1 O. W. N. 184, 14 O. W. R. 1279.

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6. Exemptions.

Action for taxes—*Defence—Assessment—Appeal Court.*]—In an action to recover an amount for taxes, defendant disputed her liability on the ground that she was a widow and was exempt by law to the sum of $400, and that such exemption had not been made:—*Held*, that it was not competent to defendant to raise this defence in an action for the taxes, but that it should have been raised and argued in the Court of Assessment Appeals. *Town of Westville* v. *Munro*, 32 N. S. Reps. 511.

Benevolent society—*Hall and building rented for public purposes—Basis of valuation for assessment.*]—Plaintiff, a benevolent society, owned a hall, part of which they rented for a show room. The tenant agreed to pay all taxes chargeable against the premises by reason of their use. The lessor agreed, however, to pay regular and ordinary taxes. Assessment was increased after premises were rented:—*Held*, that plaintiff must pay taxes on the increased assessment. *St. Mary's* v. *Albee*, 6 E. L. R. 582.

Book debts.]—Book debts are assessable in the city of St. John under s. 121 of 52 V. c. 27 (N.B.), as amended by 63 V. c. 43. Railway bonds secured by mortgage are not exempt under these Acts. *Rex* v. *Sharp, Ex p. Turnbull*, 35 N. B. Reps. 477.

"Catholic freeholder"—*Secular corporation.*]—The expression "Catholic freeholder," in a statute permitting levying of a tax, does not apply to a corporation formed for secular purposes. *Syndics of the Parish of St. Paul de Montreal* v. *Compagnie, des Terrains de la Banlieue de Montreal* (1906), Q. R. 28 S. C. 493.

Charitable institution — *Buildings—"Grounds actually necessary"* — *Vancouver Incorporation Act, s. 16, s.-s. 3—Court of*

Revision—Onus — Certiorari.]—Sub-section 3 of s. 46 of the Vancouver Incorporation Act, 1900, provides for the exemption from taxation of the buildings and grounds of any incorporated charitable institution, so long as such buildings and grounds are actually used and occupied by such institution, provided that such grounds shall not exceed in extent the amount actually necessary for the requirements of the institution; the question as to what amount of land is necessary shall be decided by the Court of Revision, whose decision shall be final.—The assessor assessed the whole of the lands in the city of Vancouver of the St. Paul Hospital, not covered by buildings, belonging to the Sisters of Charity of Providence in British Columbia, an incorporated institution. The Sisters complained to the Court of Revision, and that Court, instead of dealing with the particular exemption by itself, passed a resolution exempting all charitable institutions from taxation to the extent of the area occupied by the buildings thereon, and an additional amount of land equal to 25 per cent. of the area occupied by the buildings. The Sisters did not produce evidence to shew the quantity of land required for the purpose of the hospital. Afterwards the Court, acting on their resolution, reduced the assessment from $38,250 to $28,585:—*Held*, that there was no ground for the issue of a *certiorari* to remove the decision of the Court of Revision into the Supreme Court. The onus of proving that the conditions mentioned in the sub-section were fulfilled was upon the applicants for the exemption, *i.e.*, the Sisters. *Per* Martin, J.A. (doubting as to the onus), that, as the Court of Revision had ceased to exist, for the time being, before the application for a *certiorari*, the writ would be inoperative. *Re Sisters of Charity* v. *Vancouver* (1910), 14 W. L. R. 450.

Charitable institutions—*Exemptions—Liberal construction of statute.*]—Although the general rule is that statutes of exemption should be strictly construed, the rule is not applicable where the work performed is charity, and involves the assumption of a portion of the burden that would otherwise fall upon the public.—Where the purpose of a statute is to exempt educational and charitable institutions from taxation, the statute should not be strictly construed, but should be interpreted in such manner as to exempt all institutions of this nature that can fairly be brought within its language. *City of Halifax* v. *Sisters of Charity*, 40 N. S. R. 481.

Club—*Business tax—4 Edw. VII. c. 23, s. 10 (O.).*]—The object of s. 10 of the Assessment Act, 4 Edw. VII. c. 23 (O.), is to reach the income derived by the land holder from the various occupations, mentioned in the section, carried on by him upon the land, and perhaps indirectly the stock-in-trade and personal property belonging to the business, and the word "business" in that section means something which occupies time and attention and labour, and is followed for profit.—A social club, having no capital stock, and consequently no dividends, profits, or earnings to be divided among its members, although it furnishes meals and liquors to them and their guests, is not a club within the meaning of s.-s. (*e*) of the section, and is not liable to a "business assessment." Judgment of Mabee, J., 12 O. L. R. 275, 8 O. W. R. 106, reversed. *Rideau Club* v. *City of Ottawa*, 10 O. W. R. 519, 15 O. L. R. 118.

Construction of covenant — *Taxes — Partial exemption.*] — A society owned a building worth about $20,000 which, by statute, was exempt from municipal taxation so long as it was used exclusively for purposes of the society. A portion of the building having been used at intervals for other purposes, was assessed at a valuation of $1,000 and the society paid the taxes thereon for some years. Such portion was eventually leased for a term of years to be used for other purposes than those of the society, and the valuation for assessment was increased to $10,000. The lease contained this covenant:—"The said lessees . . . shall and will well and truly pay or cause to be paid any and all license fees, taxes or other rates or assessments which may be payable to the city of Halifax, or chargeable against the same premises by reason of the manner in which the same are used or occupied by the lessees hereafter, or which are chargeable or levied against any property belonging to the said lessees (the said lessor, however, hereby agreeing to continue to pay as heretofore all the regular and ordinary taxes, water rates and assessments levied upon or with respect to said premises, and the personal property thereon belonging to the lessor)."—The society was obliged to pay the taxes on such increased valuation and brought action to recover amount so paid from lessees:—*Held*, Fitzpatrick, C.J., and Anglin, J., dissenting, that the taxes so paid were "regular and ordinary taxes" which lessors had agreed to pay as theretofore and lessees were not liable therefor on their covenant. *St. Mary's* v. *Albee*, 6 E. L. R. 582, affirmed (1910), 30 C. L. T. 530, 7 E. L. R. 435, 43 S. C. R. 288.

Crown—*Property bought for school—Collector's roll.*]—An immovable bought by the government of the province to establish upon it a normal school is not, by the acquisition of it for that purpose, made exempt from municipal taxes.—2. A municipal tax does not become a charge upon immovables which it affects, until the coming into force of the collector's roll. *Corporation of Notre-Dame de Quebec* v. *The King*, Q. R. 25 S. C. 195.

Discrimination — Judgment based on ground not argued. *Carleton Woollen Co.* v. *Woodstock* (1906), 2 E. L. R. 137.

Discrimination — *Municipal by-law — Ultra vires — Pleading — Judicial notice of statute.*]—Judgment of Barker, J., 3 N. B. Eq. 138, 26 C. L. T. 315, affirmed. *Carleton Woollen Co.* v. *Town of Woodstock*, 2 E. L. R. 137, 37 N. B. R. 545.

Electric railway company—*Cars—Res judicata—Court of revision—Appeal.*]—Under R. S. O. 1897, c. 224, the personal property of the appellant railway company is exempt from assessment (s. 39, s.-s. 2), while its real estate (s. 2, s.-s. 9) includes everything affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty:—*Held*, that its electric cars are personal estate, inasmuch as they are not part of the railway and are not fixed in any sense to anything

which is real estate:—*Held*, also, that a decision between the same parties by the Court of Revision, established under s. 62 of the above Act, and of the Courts in appeal therefrom, to the effect that the electric cars were assessable, is not *res judicata*. By s. 68 the jurisdiction of those Courts is confined to the amount of assessment, and does not extend to validate an assessment unauthorized by the statute. Judgment of the Court of Appeal (1 O. W. R. 441, 2 O. W. R. 579, 6 O. L. R. 187, 22 Occ. N. 206), reversed. *Bank of Montreal* v. *Kirkpatrick*, 2 O. L. R. 113, overruled. *Toronto Rw. Co.* v. *City of Toronto*, [1904] A. C. 809.

Income—Exemption—Superannuated civil servant—Retiring allowance. *Bucke* v. *City of London*, 6 O. W. R. 406, 10 O. L. R. 628.

Income assessment—*Dividends on shares in Ottawa Electric Railway Company—Agreements between company and city corporation—Exemptions—Assessment Act, 1904—Business assessment.*]—By an agreement dated the 28th June, 1893, between the corporation of the city of Ottawa and the two companies which were amalgamated under the name of the Ottawa Electric Railway Company, by statutes which confirmed the agreement, it was provided, *inter alia*, that "the corporation shall grant to the said companies exemption from taxation and all other municipal rates . . . on the income of the companies earned from the working of the said railway:"—*Held*, that the plaintiffs' income from dividends upon shares of the capital stock of the Ottawa Electric Railway Company was not, by reason of the agreement in part above recited, nor by reason of an earlier agreement, exempt from municipal taxation:—*Held*, also, that the Ottawa Electric Railway Company is not a company which would, but for the agreements mentioned, be liable to be assessed for income under the provisions of the Assessment Act, 1904; and therefore s. 5, s.-s. 17, does not apply to exempt dividends or income from the stock.—The Assessment Act does not confer upon the shareholders of a company which is not liable to income assessment, but is liable to business assessment, an exemption from assessment upon their dividends from stock in the company, except as contained in s. 10, s.-s. 7. Judgment of Teetzel, J., affirmed. *Goodwin* v. *City of Ottawa*, 12 O. L. R. 236, 7 O. W. R. 204, 8 O. W. R. 77, 541.

Income assessment—*Exemption—Superannuated official of Dominion.*]—The annual income allowed under the Superannuation Act, R. S. C. 1886, c. 18, to an official of the Dominion who has been superannuated and is no longer in the active service of the Dominion, is not exempt from municipal taxation. *—Leprohon* v. *Corporation of Ottawa*, 2 A. R. 522, distinguished. — Judgment of the County Court of Carleton reversed. *Bucke* v. *City of London*, 10 O. L. R. 628, 6 O. W. R. 406.

Manufacturing company—*Act of incorporation—Construction—Scope of exemptions—"Law"—"County."*]—The plaintiffs were given power by their Act of incorporation (Acts of 1899, c. 84, s. 6) "to purchase, acquire, hold, use, occupy, sell, and convey real estate," &c.—By s. 14 it was provided that, if the plaintiffs should locate any of their works in any part of the county of Cape Breton, all the property, income, and earnings of the plaintiffs should be exempt from taxation "under any law, ordinance, or by-law of any municipal or local authority;" provided that such exemption should not apply "to any building used as a dwelling house, or for any purpose not connected with the business of the company, nor to land on which the same is erected." — The defendant municipality sought to assess lands not purchased for the works or operations, or in connection with the operations, of the plaintiffs, and which were offered to the public for sale at a price greater than that paid for them:—*Held*, that the word "law," as used in s. 14, must be read in the sense of general law of the province relating to assessment, there being nothing in the context to restrict its meaning; that the word "county" must be read as meaning the whole geographical area of the county, including any city or town within its borders; and that the wording of the statute made it clear that, with the exception specifically mentioned, the exemption given to the plaintiffs was intended to apply to all taxation, whether general assessment for the county or local. *Dominion Iron and Steel Co.* v. *City of Sydney*, 37 N. S. Reps. 495.

Parsonage—*Occupation.*]—Under 3 Edw. VII. c. 62, s. 36 (Que.), a parsonage is a house set apart by a church or congregation for the residence of its priest or minister, and actually occupied by him as such. Failing either of these two conditions, a house is not exempt from taxation under the statute. *City of Montreal* v. *Meldola de Sola*, Q. R. 32 S. C. 257.

Personal property—Exemptions—Trustees—Non-resident beneficiaries — Income of trust estate. *Re Macpherson and City of Toronto, Re Hamilton and City of Toronto*, 1 O. W. R. 234.

Personal property owned out of province—Exemptions—Cash in banks—Trustees. *Re Leadlay and City of Toronto*, 1 O. W. R. 239.

Personal property of military persons — *Government building.*] — Under the provisions of the Halifax city charter, Act of 1891, c. 85, s. 336, the following, amongst other property, is exempted from assessment, "All personal property of military persons residing in government buildings, or barracks," etc.:—*Held*, that a private house in the city, under leave to His Majesty's Principal Secretary of State for the War Department, for the purpose of being used as a place of residence by a military person, for whom there was no suitable accommodation in any barracks in Halifax, was a "government building" within the meaning of the statute, and that personal property contained in such building was exempt from taxation for civic purposes. *Smith* v. *City of Halifax*, 35 N. S. Reps. 373.

Portion of building—*Assessment of remainder.*]—The fact that a portion of a building assessed for taxes under the Municipal Ordinance, is occupied by the Crown under lease, and is therefore exempt under s. 121, s.-s. 1, of that Ordinance, does not prevent the remaining portion being assessed for a

proportionate part of the value of the whole. *Macleod Improvement Co.* v. *Town of Macleod*, 5 Terr. L. R. 190.

Property of companies — "*Plant and appliances*"—*Public streets of municipality.*]—The words "plant and appliances" used in s.-s. 4 of the new s. 18 of the Assessment Act, substituted by 2 Edw. VII. c. 31, s. 1, are confined to any plant and appliances located upon the streets, roads, highways, and other public places in the municipality, such words taking this limited meaning because they must be referred to the words "rolling stock" which immediately precede them in the same sub-section, and because it was manifestly the intention of the Legislature in enacting a new s. 18 to deal only with the method of assessing so much of the property of the companies named in s.-s. 2 as was situate upon the public streets of the municipality. *In re City of Toronto Assessment*, 22 Occ. N. 390.

Property of municipality situate in another municipality.]—Upon the proper construction of s. 7, s.-s. 7, of the Assessment Act, R. S. O. 1897 c. 224, providing that "the property belonging to any county or local municipality" shall be exempt from taxation, property acquired by the corporation of a town, under a special Act, 62 V. c. 64 (O.), as amended by 2 Edw. VII. c. 53, situate in a neighbouring township, at a distance of 19 miles from the town, and consisting of land, buildings, machinery, and plant for the purpose of generating and transmitting electrical energy to the town for lighting, heating, manufacturing, and such other purposes and uses as might be found desirable with power to distribute, sell, and dispose of such electrical power in the town and elsewhere within a radius of 25 miles, is exempt from taxation by the township corporation. *In re Town of Orillia and Township of Matchedash* (1904), 24 Occ. N. 216, 7 O. L. R. 389, 3 O. W. R. 91.

"Public hospital."]—A hospital carried on by and for the benefit of two medical practitioners, and used chiefly by patients paying fees, though to some extent by indigent patients, and in receipt of a Government grant under the Charity Aid Act, R. S. O. c. 320, is a public hospital within the meaning of s.-s. 5 of s. 7 of the Assessment Act, R. S. O. c. 224, and exempt from taxation. —Judgment in 30 O. R. 116, 19 Occ. N. 34, affirmed. *Struthers* v. *Town of Sudbury*, 20 Occ. N. 202, 27 A. R. 217.

Railway — *Branch lines — Buildings — "Superstructure"—Valuation.*] — Clause 16 (relating to exemption from taxation) of the agreement between the Canadian Pacific Railway Company and the Government of Canada, as embodied in 44 V. c. 1, is not applicable to the Crow's Nest Pass Railway, but is applicable only to the main line of the Canadian Pacific Railway Company, and to such branches thereof as the company was authorized by clause 14 of the agreement to construct from points on the main line, and does not extend to other distinct lines of railway which the company may have been subsequently authorized to construct. Under the Ordinance respecting the Assessment of Railways, C. O. 1898 c. 71, s. 3, the roundhouses, station, or office buildings, section houses, employees' dwellings, freight sheds, and other buildings of like nature belonging to a railway company and situated upon it, are not included in the term "superstructure," but may be assessed separately as personal property under the Municipal Ordinance. Such buildings should not be valued as part of the railway as a going concern, and as having a special value as such, but merely at what they are worth separate and distinct from other portions of the railway. When only two and a half stalls of a roundhouse were situated within the municipality, and the round-house was shewn to be worth $900 a stall the assessment was fixed at $2,250. *In re Canadian Pacific Rw. Co. and Town of Macleod*, 5 Terr. L. R. 192.

Railway—*General Assessment Act—Construction—Application to railways of coal company.*]—The Assessment Act, R. S. N. S. 1900 c. 73, s. 4, s.-s. (p), (as amended by Act of 1902, c. 25), exempts from taxation "the road, rolling stock, bed, track, wharves, station houses, buildings, and plant used exclusively for the purpose of any railway either in course of construction or in operation under the authority of any Act passed by the legislature of Nova Scotia:"—*Held*, that this exemption extended to all lines of railway built, owned, or operated by the plaintiffs, including road bed, right of way, piers, and plant and appurtenances of extensions sought to be assessed by the defendants, but not to lands which formed no part of the land used exclusively for railway purposes, or which, having been at one time so used, had been abandoned or appropriated to other purposes, or to a steamer used solely for the company's own purposes.—It could not have been the intention of the legislature, in granting exemption, to permit a general system of railways and connections to be so cut up that certain parts should be liable to taxation while other parts were exempted. Neither is it sufficient to deprive a company of the benefit of exemption that, at the time in question, only coal mined by the company is carried over one of its extensions, there being provision under the Railway Act to compel it, if necessary, to carry freight for any other person or company. *Dominion Coal Co.* v. *City of Sydney*, 37 N. S. Reps. 504.

Railway—Track along highway—Orders in council—Statutes—Contract. *Re Grand Trunk Rw. Co. and City of Toronto*, 2 O. W. R. 602, 4 O. W. R. 450, 6 O. W. R. 27, 852.

Railway—*Imposition of Tax — Date — Municipal Act.*]—Section 3 of R. S. N. S. 1900 c. 73 (Assessment Act) exempted from taxation "the road, rolling stock . . . . used exclusively for the purpose of any railway, either in course of construction or in operation, exempted under the authority of any Act passed by the Legislature of Nova Scotia." Prior to the passing of this Act the appellants' railway had always been exempt from taxation, but all former Assessment Acts were repealed by these Revised Statutes, so that it was not "exempted" when the latter came into force. By 2 Edw. VII. c. 25, assented to on the 27th March, 1902, the word "exempted" was struck out of the above clause, and in May, 1902, the appellants were included in the assessment roll for that year for taxation on their railway:

—*Held, per* Taschereau, C.J., that under the above recited clause the railway was exempt from taxation:—*Held, per* Davies, Nesbitt, and Killam, JJ., that, if the railway could be taxed under the Assessment Act of 1900, the rate was not authorized until the amending Act of 1902, by which it was exempt, had come into force, and no valid tax was, therefore, imposed. *Dominion Iron and Steel Co.* v. *McDonald*, 24 Occ. N. 286, 35 S. C. R. 98.

Railway lands—*Sale of—Authority to assess—School district.*] — Lands vested in the Canadian Pacific Railway Company subject to a provision that the same should "until they are sold or occupied, be free from taxation for 20 years," were by the company agreed to be sold and conveyed to the appellants as trustees, who were to sell them, accounting for an interest in the proceeds to the company. At the date of the assessment of the lands, the consideration owing by the trustees to the company had been paid:—*Held*, that the lands had ceased to be exempt from taxation.—*Held*, also, Wetmore, and McGuire, JJ., *dissenting*, that, in view of the Ordinances relating to municipalities, and to schools, the lands being situated partly within and partly without the municipality, the school district was authorized to assess, and need not make a demand upon the municipality to do so. *Angus* v. *Calgary School Trustees*, 1 Terr. L. R. 111.

Railway lands—*School taxes—By-law—Validating statute.*]—In 1881 the plaintiffs passed a by-law, No. 148, providing for a bonus to the defendants in consideration of certain works to be undertaken by the defendants, and also providing that the defendants should be forever exempt from all "municipal taxes and rates, levies and assessments, of every nature and kind." In 1883 the Legislature of Manitoba passed an Act making valid by-law No. 148 of the city of Winnipeg, describing it as a by-law for a bonus, but omitting all reference to the exemption clause:—*Held*, affirming the judgment in 12 Man. L. R. 581, 19 Occ. N. 287, that the statute made valid the whole by-law 148, that relating to exemption from taxes, as well as the portion recited in the Act:—*Held*, also, reversing the judgment, that under the by-law school taxes were included in the exemption from "all municipal taxes." *City of Winnipeg* v. *Canadian Pacific Rw. Co.*, 20 Occ. N. 433, 30 S. C. R. 558.

Railway lands—*Subsidies of the Canadian Pacific Railway — Extension of the boundaries of Manitoba—Statutes—Contract—Grant in praesenti—Cause of action—Jurisdiction—Waiver.*]—The land subsidy of the Canadian Pacific Railway Company authorized by 44 V, c. 1 (D.), is not a grant in *praesenti*, and, consequently, the period of 20 years of exemption from taxation of such lands provided by clause 16 of the contract for the construction of the Canadian Pacific Railway begins from the date of the actual letters patent of grant from the Crown, from time to time, after they have been earned, selected, surveyed, allotted, and accepted by the Canadian Pacific Railway Company. The exemption was from taxation "by the Dominion, or any province hereafter to be established, or any municipal corporation therein:"—*Held*, that when, in 1881, a portion of the North-West Territories in which this exemption attached was added to Manitoba, the latter was a province "thereafter established," and such added territory continued to be subject to the said exemption from taxation. The limitation in respect of legislation affecting the territory so added to Manitoba, by virtue of the Dominion Act 44 V. c. 14, upon the terms and conditions assented to by the Manitoba Acts, 44 V. (3rd sess.) cc. 1 and 6, are constitutional limitations of the powers of the legislature of Manitoba in respect to such added territory, and embrace the previous legislation of the Parliament of Canada relating to the Canadian Pacific Railway and the land subsidy in aid of this construction. Taxation of any kind attempted to be laid upon any part of such land subsidy by the North-West Council, the North-West Legislative Assembly, or any municipal or school corporation therein, is Dominion taxation within the meaning of clause 16 of the Canadian Pacific Railway contract providing for exemption from taxation. *Per* Taschereau, C.J.C.:—In the case of the Springdale School District, as the whole cause of action arose in the North-West Territories, the Court of King's Bench for Manitoba had no jurisdiction to entertain the action or to render the judgment appealed from in that case, and such want of jurisdiction could not be waived. Judgment in 14 Man. L. R. 382, 23 C. L. T. 159, varied. *North Cypress* v. *Can. Pac. Rw. Co.*, *Argyle* v. *Can. Pac. Rw. Co.*, *Springdale School District* v. *Can. Pac. Rw. Co.*, 25 C. L. T. 102, 35 S. C. R. 550.

Railway mortgage bonds.]—The whole of an estate of a deceased person, liable to be assessed in the city of St. John, may be rated in the names of the resident trustees under 52 V. c. 27, s. 135, though one of the three trustees in whom it invested, is resident abroad. Railway bonds, secured by a mortgage, are not mortgages within the meaning of s. 121, as amended by 63 V. c. 43, and are not exempt from taxation. *Rex* v. *Sharp, Ex p. Lewin*, 35 N. B. Reps. 470.

Rural telephone companies—*No statutory provision as to Assessment Act (Ont.), s. 14 (2), (3).*]—Doyle, Co.C.J., *held*, that local telephone companies are liable for assessment and taxes under the Ontario Assessment Act, s. 14. *Re North Huron Telephone Co. & Turnberry; Re Wroxeter Rural Telephone Co. & Turnberry* (1910), 17 O. W. R. 273; 2 O. W. N. 187.

Street railway — Exemptions — Land leased from Crown—Agreement with municipality—Construction—Storage battery—Real or personal property—*Ejusdem generis* rule—Fixtures—Constitutional law — Assessment Act—Property of Dominion. *Ottawa Electric Rw. Co.* v. *City of Ottawa*, 10 O. W. R. 138.

Street railway—Land leased from Crown —Agreement with municipality—Construction —Storage battery—Real or personal property —Ejusdem generis rule—Fixture. *Ottawa Electric Co.* v. *Ottawa* (1906), 7 O. W. R. 481.

Timber licenses—*Lumber camps—Business tax—Slides and dams — Assessment Act.*]—The company, being manufacturers of

lumber, held licenses to cut timber on Crown lands for 1906 and 1907. They were assessed in 1907 upon their licenses, and upon their lumber camps, and for business tax at the camps, and upon slides and dams. The company were not the owners of any land, nor had they any office or mills in the township wherein they were assessed, nor did they carry on any business therein, but cut timber there, and hauled and floated it to their mills at Bracebridge, where they owned a mill and factory, and which was their chief place of business, and where they were assessed on such factory and mill and also on business:—*Held*, that timber licenses are not assessable, not being real property within s. 5 of the Assessment Act, 3 Edw. VII. c. 23 (O.), and also because there is nothing to remove the land from the category of property of the Crown exempt from taxation. What the holder of a timber license acquires is a right to convert into personal property, and to thereby acquire a title to himself in, that which until the act of conversion is real property belonging to the Crown.—2. Lumber camps are not assessable. They are mere temporary constructions, and are removed from time to time, so that it is quite possible, they may be in one municipality one day and in another the next.—3. The company were not assessable for a business tax, under the conditions mentioned, with respect to their camps.—*Semble*, under s. 10, for a business to be assessable, the land occupied or used for the purpose of the business must be land subject to taxation.—4. Slides and dams constructed on streams running through Crown lands out of logs the property of the Crown, and of no value as timber, and used by all persons who have the right to float down logs, are not assessable. Meredith, J.A., dissented. *Re Shier (J. D.) Lumber Co. and Township of Lawrence, Re Mickle, Dyment, & Son and Townships of Sherborne, Livingston, and McClintock*, 9 O. W. R. 605, 14 O. L. R. 210.

Trustees—*Income.*]—Under s. 46 of the Assessment Act, R. S. O. 1897 c. 224, the income derived from property vested in trustees must be regarded for the purpose of assessment as their own income, and is subject to assessment although the trustees have no personal interest in it. Its ultimate destination and mode of expenditure are immaterial, and the obligation of the trustees to pay it to the beneficiaries is not a debt to be set-off against it:—*Quære*, whether the amendment to the section by 63 V. c. 34, s. 3, affects the question. *In re McMaster and City of Toronto*, 21 Occ. N. 559, 2 O. L. R. 474, 1 O. W. R. 98.

Unoccupied lands of Crown — *Land grant of Canadian Pacific Railway Company.*]—Crown lands which have been set apart for the land grant of the Canadian Pacific Railway Company, and earned by that company as part of its land grant under the schedule to 44 V. c. 1, "An Act respecting the Canadian Pacific Railway," but which have never been sold or occupied by the company, are exempt from taxation by school districts in the Territories, by virtue of s. 16 of the schedule. Construction of statutes discussed. *Balgonie Protestant Public School Trustees* v. *Canadian Pacific Rw. Co.*, 5 Terr. L. R. 123.

Y. M. C. A. buildings—*Exemption under 62 V. c. 140 (Ont.)*—"*Purposes*"—*Dormitories—Dining rooms.*]—Action to have it declared that plaintiffs' buildings and grounds were exempt from taxation under 62 V. c. 140, s. 11. At trial Clute, J., *held*, that the assessment for 1909, was illegal and void, except as to so much of the land and buildings as was or might be used as bed-rooms, dormitories, or for purpose of lodging or giving meals, which he held was not exempt. Divisional Court *held*, that above section covered the plaintiff's entire property. Appeal allowed with costs here and below; defendants' cross-appeal dismissed with costs. *Ottawa Y. M. C. A.* v. *Ottawa* (1910), 15 O. W. R. 666, 20 O. L. R. 567.

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7. Local Improvements.

Assessment by wrong name—*Mistake in acreage—Directory statute—Time for assessing—Notice—Order in council — Exceptional tax—Powers of Legislature of Territories.*]—The defendants were sued by their proper corporate name, but were assessed as "the Hudson's Bay Company:"—*Held*, that the assessment was not void, no injury being shewn; nor would an error in acreage avoid the assessment. The statute is merely directory on these points. 2. Under s. 17 of c. 17 of the N. W. T. Ordinances of 1899, in a district constituted under s. 14, the assessment may be made at any time of the year; and although the district was only constituted on the 21st July, 1899, under an Ordinance which came into force on the 24th April, 1899, an assessment made on the 24th July, 1899, for the whole year 1899, was valid. 3. The formalities prescribed by s. 3 of c. 73 of the Consolidated Ordinances are unnecessary, except the publication in the *Gazette* of a notice of the order constituting the district; and a mistake in the number of the district in the publication in the *Gazette* was not fatal. 4. The district was legally constituted by order in council of the 21st July, 1899; the area was independent of municipalities and villages within its boundaries. 5. The Ordinances respecting public improvements enacted by the Legislative Assembly, under the provisions of which this district was constituted and the assessment complained of made, rendering taxable equally and without exception or discrimination all lands within its limits, do not infringe upon the condition of clause 11 of the Imperial order in council of the 23rd June, 1870, by exceptionally placing a tax upon the lands in question; and from such construction there has been no departure by the Ordinances referred to. *McGowan* v. *Governor and Company of Adventurers of England Trading into Hudson's Bay*, 21 Occ. N. 64.

Assessment for drain.]—A special assessment for the construction of a drain, levied and payable in a single amount, overdue, is an "arrear of municipal taxes" within the meaning of Art. 4555, R. S. Q., and is prescribed by three years. Judgment in Q. R. 15 S. C. 417 affirmed. *City of St. Henri* v. *Coursol*, Q. R. 9 Q. B. 115.

Flat rate—*Authority of dyking commissioners — Drainage, Dyking, and Irrigation Act.*]—In assessing certain lands under the

provisions of the Drainage, Dyking, and Irrigation Act, the commissioners fixed upon a flat rate, reaching their conclusions from their personal knowledge of the lands, extending over many years, and without making a personal inspection:—*Held*, that the assessment so made was good. *British Columbia Land and Investment Agency Limited* v. *Featherstone*, 13 B. C. R. 190.

Establishment of district—*Notice — Error in number—Wrong name—Time for assessing—Exceptional tax — Construction of taxing statutes — Conditions subsequent.*]—The designation of a local improvement district by an incorrect number, while its name was otherwise correctly stated in the notice in the *Gazette* constituting the district, did not invalidate the notice. 2. The assessment of the defendants was not invalid by reason of their being assessed under the name of "The Hudson's Bay Company"—a name by which they were commonly designated by themselves and the public. 3. That, though the district in question was not constituted until July, 1899, and the defendants not assessed till August, 1899, they were liable for the whole amount for which they were assessed, the rate of assessment being a fixed rate per acre, irrespective of time, and the assessor being expressly authorized to assess at any time during the year. 4. That the assessment of the defendants under the Ordinances in question is not an exceptional tax upon them within the meaning of the Imperial Order in Council of 23rd June, 1870, inasmuch as it was equal and uniform throughout the district. The construction of statutes generally and of the Ordinances relating to local improvements in particular discussed. The construction of taxing statutes discussed. The effect of non-fulfilment of statutory conditions subsequent discussed. *McGowan* v. *Governor and Company of Adventurers of England Trading into Hudson's Bay*, 21 Occ. N. 64, 5 Terr. L. R. 147.

Notice — *Dominion lands — Personal liability.*]—On the 9th May, 1899, an order in council was passed and published in the *Gazette* ordering that a certain defined area should be formed into a local improvement district:—*Held*, that as the lands comprised exceeded 72 square miles, the authority for creating it was to be found in s. 14 of c. 17 of the Ordinances of 1899, amending the Local Improvement Ordinance, R. O. c. 73:—*Held*, that the conditions prescribed by R. O. c. 73, as to municipalities in the district, population, and notice of intention to erect a district, did not apply to districts formed under s. 14 of the Ordinance of 1899. 2. That, although the district was not constituted till May, 1899, the levy of the whole of the taxes for that year was authorized by the Ordinance. 3. That the defendants were properly assessed as occupants of Dominion lands comprised in a lease, and the fact that the lands were not enclosed and that the defendants permitted the stock of other persons to run or graze upon them did not relieve them from liability as occupants. 4. That it is the owners or occupants, and not the lands, that are to be assessed. *Crosskill* v. *Sarnia Ranching Co.*, 21 Occ. N. 577.

Owner—"Taxable person" — Petition—Two-thirds in number of owners—One-half in value of real property benefited—Charge on land—Distress—Invalid by-law — Validating statute—Effect of—Frontage tax — Special rate. *McDonnell* v. *City of Toronto*, 1 O. W. R. 433, 494, 4 O. L. R. 315.

Powers of district council—*Resolution — Validity — Money payment—Commutation — Day labour—Posting up—Assessment roll—Time for adding names—Imperative or directory enactments.*] — The posting required by Local Improvement Ordinance (N. W. T. 1903, 2nd session, c. 24, s. 53) refers to the act of the secretary in depositing the roll on completion in his office (s. 51); and the limitation of two months contained in s. 53 for additions to the roll is "mandatory" or "imperative" and not merely "directory."—*Semble*, per Stuart, J., that under the Ordinance the council of a local improvement district may still provide by resolution for commutation of taxes by labour, and fix the rate or credit to be allowed.—The council of a local improvement district passed the following resolution: "That the assessment rate be 4 cents per acre, 80 cents to be paid in money and the balance to be worked out by day labour at $1.40 per day of ten hours or $2.80 for a man and team, the overseers to give ratepayers 14 days' notice by mail or 3 days' in person. Any ratepayer failing to appear on the overseers' notice to forfeit his right to work, and shall pay his taxes in money. If ratepayers elect to work part of the assessment, they must notify the secretary-treasurer to that effect and pay 80 cents by the 1st May or forfeit their right to work." By a resolution of the council, it was decided that the councillor for each division be a standing committee to appoint one or more overseers for his division and specify the places to be worked on:—*Held*, by Stuart, J., that the real effect of this resolution was to impose a rate of 4 cents per acre on all assessable land in the district, but with an option to the ratepayers to make a contract with the district to do work at a certain rate per day, which would be accepted as payment of the tax; but, if the option were not taken up according to the terms of the resolution, the obligation to pay in money would be final. *Local Improvement District No. 26* v. *Walters*, 8 W. L. R. 176, 1 Alta. L. R. 188.

Sidewalk—*General By-law — Irregularities in procedure.*]—The defendant corporation provided, by a by-law under s. 667 of the Municipal Act, that every petition for or against the construction of a sidewalk as a local improvement should be left with the clerk of the council, whose duty it should be to examine it, and to report at the next meeting of council whether it was sufficiently signed, what real property would be benefited, and the respective frontages, and the probable lifetime and probable cost of the sidewalk. A petition for the construction of a sidewalk as a local improvement was handed to the clerk, who examined it and came to the conclusion that it was signed by two-thirds of the owners. It was on the same day presented to the council, who resolved that the petition should be granted, and that the clerk should determine forthwith whether the petition was sufficiently signed. The clerk immediately reported that it was sufficiently signed, and his report was received and adopted, but he did not report as to the other matters. The council then proceeded under s. 672 to have

the work done, and on its completion the clerk prepared, and certified to the correctness of the schedule of the frontages and assessments, etc., and the council passed a by-law directing the assessment of the lands, and subject to appeal to the Court of Revision, adopted the particulars set out in the schedule and directed notice to be given to the owners affected:—*Held*, that the assessment was valid, the clerk's failure to observe the provision as to reporting at the next meeting of the council being a mere irregularity and not a fatal objection. Judgment of Falconbridge, C.J., 2 O. W. R. 732, affirmed. *Canada Co.* v. *Town of Mitchell*, 24 Occ. N. 210, 7 O. L. R. 482, 3 O. W. R. 478.

Special frontage assessment — *Local improvement—Half lots abutting on street—Irregularity—Special Act—Construction.*] — The special frontage assessment provided for in the Medicine Hat charter (6 Edw. VII. c. 63), title 34, is governed by the number of lineal feet measured along the front or other abutting portion of the land; and the fact that the abutting lots vary in depth does not render improper assessment by the frontage method proportionate to the benefits received. Consequently, where a lot was divided so that one-half fronted on the street, and the other half on another street:—*Held*, that each half was liable to the full assessment by the frontage method, but only in respect of improvements on that street upon which such half lot fronted or "abutted." *Brotherton* v. *City of Medicine Hat*, 7 W. L. R. 187, 1 Alta. L. R. 119.

Unenclosed lands under lease from Crown—"*Occupant*"—*Personal liability.*] —Where lands are held under lease from the Crown, and, though they are not enclosed or fenced, the lessee uses them as pasture for his sheep, the lessee is an "occupant" of the lands within the meaning of the Local Improvement Ordinance, C. O. 1898 c. 73, s. 15. Notwithstanding the wording of s. 16, s.-s. 2, and of s. 17, of the said Ordinance, the effect of the provisions of ss. 15, 20, and 23 is to create a personal liability to pay, upon which the occupant may be sued. *Crosskill* v. *Sarnia Ranching Co.*, 21 Occ. N. 577, 5 Terr. L. R. 181.

Validity—Formalities prescribed by Assessment Act—Certificate appended to collector's roll — Form—Deviation—Interpretation Act—By-law imposing rate—Description of land—Sufficiency—Preparation of assessment roll — Drainage Act, s. 23—Division Courts — "According to equity and good conscience." *Township of Tiny* v. *Archer*, 12 O. W. R. 255.

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8. School Taxes.

Assessment made before commencement of year—*Change of ownership—Taxes paid under protest — Recovery.*]—An assessment made by school trustees towards the close of one year, as an assessment for the next year, is not a compliance with s. 6 of the School Assessment Ordinance. And where the plaintiff had paid taxes under protest, to prevent the sale of goods seized for alleged arrears: *Held*, that, in the circumstances set out in the judgment, he could waive the tort, and recover the amount so paid. *Brantz* v. *White Whale Lake School District*, 7 W. L. R. 164, 1 Alta. L. R. 14.

Assessment to be made *as of date of completion of roll—Change of ownership—Canadian Pacific Railway Act, 44 Vic. c. 1, s. 16—Construction—Stations — "Required and used"—School assessment—Transfer of lands from rural to urban district — Assessment made before transfer—Double taxation —Business tax—Excessive valuation.*]—Appellants, the Bell Telephone Company, were owners of certain lands when the assessment roll was being made up, but 6 days before its completion these lands became vested in the Crown:—*Held*, that the roll must be amended by striking out the appellant's name. In s. 16 above "required and used" refers to "all stations and station grounds," as well as to "workshops, buildings, yards, etc." Lands taxed for rural school purposes cannot be taxed during the same year for urban school purposes on these lands becoming annexed to the city. *Re City of Regina Assessment*, 11 W. L. R. 441.

County school fund—*Liability of incorporated towns to contribute—3 Edw. VII. c. 6, s. 7—Special and general statutes—Implied repeal.*]—Prior to incorporation of town of D. the inhabitants of the town and their property were liable, under provisions of Education Act, to contribute their proportion of the county school fund, but under provisions contained in the Act incorporating the town, is was held exempted from making such contribution, and thereafter received and disbursed the government grant, and also its own rates, without contributing to county fund or receiving any share thereof. Subsequently, by Acts of 1903, c. 6, s. 7, it was enacted as follows: "The clerk of the municipality of every county or district shall annually add to the amount required for county purposes a sum sufficient . . . to yield an amount equal to 35c. for every inhabitant . . . of the municipality, and of all incorporated towns which before incorporation territorially formed part of such county or district." —Then followed provisions for collection and division of the amount between municipality and incorporated towns, in same proportion as the county fund, and a provision, "notwithstanding" the provisions of any statute of Nova Scotia, that every incorporated town should annually, on or before a fixed date, pay to the treasurer of the municipality of the county or district of which it before incorporation territorially formed a part, its proportionate part of said sum:—*Held*, that the language of this Act referred directly to the Act incorporating towns, including town of D., and its effect was to displace the implication from expressions in the Act of incorporation under which the town had been held exempted from contribution to the county fund. And that the maxim *generalia specialibus non derogant* was not applicable, the Act incorporating the town being general in its character, while the Act in question was a special one containing special terms and dealing with a special subject, viz., the contribution to be made by incorporated towns to county school fund.—*Semble*, there is a difference between rendering inoperative implications placed upon expressions contained in an Act and repealing them. *Halifax*

v. *Dartmouth*, 38 N. S. R. 1. Affirmed by Supreme Court of Canada, *Dartmouth* v. *Halifax* (1906), 37 S. C. R. 514.

Debts—*Situs — Double domicile—School Ordinance.*] — The School Ordinance, C. O. 1898 c. 75, s. 131, s.-s. 2, interprets "personal estate" and "personal property" as including *inter alia* "accounts and debts contracted within the district;" and s. 132 provides that "All real and personal property situated within the limits of any school district . .. shall be liable to taxation"—subject to certain exceptions and exemptions:—*Held* (against the objections, (1) that debts have no situs, and therefore cannot be situated anywhere; and (2) if they can have a situs, it is, in the case of a creditor being a person, his domicile; and of a corporation, the place of its head office); that choses in action, including debts, have a situs; that debts contracted within a school district are, for the purposes of taxation, situate within the district, and are assessable by the district notwithstanding that the creditor, if a person, has not his domicile therein, or if a corporation has not its head office situated therein. If the situs of a debt is the domicile of the creditor, a person as well as a corporation may have, if not for all, at all events, for some purposes, more than one domicile, namely: (1) at the head office of the corporation, and at the actual residence of the person; and also (2) where the business of the corporation, or person, is actually carried on; and, therefore, where the Hudson's Bay Company, whose head office is in London, England, carried on at Battleford an ordinary merchant's business, and Macdonald, whose actual residence was in Winnipeg, Manitoba, also did the same, debts contracted to them at the Battleford places of business were, for the purpose of taxation, situated in Battleford. *Hudson's Bay Co.* v. *Battleford School District*, *Macdonald* v. *Battleford School District*, *Clinkshill* v. *Battleford School District*, 4 Terr. L. R. 285.

Distress for arrears.] — Defendant, bailiff for school trustee, seized 75 horses, of which 73 belonged to plaintiff:—*Held*, that seizure was regular, and not a nullity, as taxes were due even if all claimed were not. That seizure was made under another warrant at the same time will not make the seizure null or irregular:—*Held*, further, that seizure was excessive and damages given. *Robertson* v. *Harper*, 12 W. L. R. 5.

Exemption—*By-laws — Acts of Legislature.*]—Stratford passed by-laws exempting two manufacturing companies from taxation on certain conditions. The Legislature of Ontario passed Acts 62 Vic. c. 82, 63 Vic. c. 98, confirming these by-laws. MacMahon, J.: —*Held*, 14 O. W. R. 437, following the rule of interpretation of statutes as laid down by Maxwell, 3rd ed., p. 113: "Legislatures do not intend to make any alterations in the law beyond what it explicitly declares," that the words "to be given exemption from taxation," must be construed as limiting the exemption to such taxes as the municipality had the power of exempting, and the city had no power to exempt the companies from school taxes. Court of Appeal *held* (Meredith, J.A., dissenting), that the words "to be given exemption from taxation," must be construed as limiting the exemption to such taxes as the municipality had the power of exempting, and the city had no power to exempt the companies from school taxes. *Can. Pac. Rw. Co.* v. *Winnipeg* (1909), 30 S. C. R. 558, and *R. ex rel. Harding* v. *Bennett* (1896), 27 O. R. 314, distinguished.—*Held*, also, that the proper measure of relief is under the circumstances of a declaration applicable to the future only. Judgment of MacMahon, J., 14 O. W. R. 437, affirmed with variation. *Pringle* v. *Stratford* (1910), 15 O. W. R. 38; 20 O. L. R. 246.

Exemption — Canadian Pacific Railway Company—Lands in 24-mile belt granted to company, still unsold and unoccupied—Constitutional law—School Assessment Ordinance, N. W. T.—Effect of, after establishment of new province by Alberta Act—Period of exemption — Crown — Trust — Land subsidy — Time for making land grant. *Re Spruce Vale School District No. 209 and Canadian Pacific Rw. Co.* (N. W. P.), 6 W. L. R. 526.

Exemption — Crown lands — Homestead —Cancelled entries—Rural school district— Interest of homesteader—Liability of subsequent homesteader—Lien on land. *Osler* v. *Coltart* (N. W. P.), 6 W. L. R. 536.

Exemptions from municipal rates. *Re Osmest and Town of Indian Head* (N. W. P.), 6 W. L. R. 114.

Hypothec — *Registration — Judgment— Sale — Interest — Costs — Prescription.*] — School rates constitute a privileged claim upon immovables (Art. 2009, 2011, C. C.), and are exempt from the formality of registration (Art. 2084, C.C.). 2. Where, under a specific provision of the law, a hypothec exists without registration, a judgment upon the debt does not need to be registered in order to preserve the hypothec, nor does sale purge the property therefrom. 3. The hypothec also covers interest and the costs of a personal judgment against the debtor, such interest and costs being accessories of the debt (Art. 2017, C.C.). 4. An action and judgment against the principal debtor interrupt the three years' prescription as against those who acquire the property from him. *Westmount School Commissioners* v. *Pitt*, Q. R. 24 S. C. 7.

Hypothec—*Registration — Personal liability of purchaser.*]—A person who acquires land after the imposition of a school assessment upon it, is not personally liable for the payment thereof, although the assessment is a special charge upon such property, bearing hypothec without registration. *Roxton School Commissioners* v. *De Lorimier*, Q. R. 24 S. C. 48.

Illegality — *Quashing.*] — A motion to quash the rate brought into the Supreme Court by *certiorari*, 24 Occ. N. 95. In fixing the rate the assessors levied no poll tax, as required by law, thus increasing the tax on property of all the ratepayers:—*Held*, that the whole rate should be quashed. *In re Cape Breton School Section No. 121*, 24 Occ. N. 238.

Lands of the Crown—*Occupation under grazing permit — Principal of valuation — Actual value — Proportionate assessment.*]— C. held lands owned by His Majesty under a grazing permit.—*Held*, that C. is liable to be

assessed therefor at actual cash value of the lands, not of his interest therein:—*Held*, on the evidence, that the lands should be assessed for $8 per acre. *Re Cunningham and Wauchope*, 11 W. L. R. 399.

Returns of treasurers of school districts—Confirmation — Unoccupied and unpatented lands — Homestead holdings—Liens of loan company — Constructive occupancy. *Re Attorney-General for North-West Territories and Canada Settlers Loan and Trust Co.* (N.W.T.), 1 W. L. R. 225.

Village district—*Business tax—Bank—Taxable property—Deposits—Bills and notes—Fixtures — Specie—Loans — Over-valuation.*] — Village districts cannot impose a business tax. Section 13 of above Ordinance does not make a stock-in-trade a third class of taxable property. It must be assessed as personal property. Bank deposits or a bank's own notes are not assessable, but a bank's fixtures, fittings, specie, other bank's bills, Dominion bills, and loans represented by bills of exchange taken as security, are. *Re Union Bank and Long*, 11 W. L. R. 444.

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9. SPECIAL TAXES.

Bonus by-law—*Clerk—Collector's roll—Debentures, sale of.*]—While a by-law of a township corporation provided for the raising by the issue and sale of debentures of a certain sum to be paid by way of bonus to a railway company, and for the levying of an annual rate for the purpose of paying the debentures:—*Held*, that it was the duty of the township clerk under s. 129 of the Assessment Act, without any further direction or authorization, to insert in the collectors' rolls the amount with which each ratepayer was chargeable under such by-law; and it was not necessary that the amount leviable each year under such by-law should be mentioned in the annual by-law authorizing the levy of sums for ordinary expenditure; and s. 402 of the Municipal Act had not the effect of making it necessary. *Clarke* v. *Town of Palmerston*, 6 O. R. 616, distinguished.—2. That the rate could be levied notwithstanding that none of the debentures had been sold.—3. That the failure to collect the rate for the first year after the passing of the by-law did not cause the failure of the whole scheme.—*Semble*, that if the scheme should fail and nothing be paid to the railway company, the ratepayers could recover their money from the corporation. *Bogart* v. *Township of King*, 20 Occ. N. 384, 32 O. R. 135.

Fire insurance company—"*Doing business.*"]—Action to recover $400, being the amount of special tax imposed by the city of Montreal upon fire insurance companies doing business within the city. The defendant company contended that it did not come within the provisions of the by-law in question, since it took no risks in the city, although its chief office was there:—*Held*, that the issue of a policy in Montreal was the acceptance of a risk in the city, even though the property thereby insured was situated outside the city. *City of Montreal* v. *Union Mutual Fire Ins. Co.*, 21 Occ. N. 52.

Frontage assessment — Local improvement—Half lots abutting on street—Irregularity of assessment—Constitution of special Act incorporating city. *Re Brotherton and City of Medicine Hat* (Alta.), 7 W. L. R. 187.

Interest.]—In the case of municipal corporations subject to the general enactments concerning towns, arrears of taxes, even special taxes, are subject to a three years' prescription, and the same prescription operates against interest on such taxes. The prescription is interrupted when the ratepayer has asked and obtained an extension of time for payment, and does not begin to run, until the expiration of such extension. *Lapierre* v. *Renaud*, Q. R. 17 S. C. 273.

Local tax—*Insurance company—Agency.*]—In an action against an insurance company under the Fire Companies' Aid Amendment Act of 1871, which applies only to Victoria, for taxes due by it as a company issuing policies within the city limits, it was held at the trial, dismissing the action, that the plaintiff had failed to establish agency:—*Held*, by the full Court, dismissing plaintiff's appeal, that the action was misconceived; that the tax sought to be recovered was not on the company directly, but in respect of a special form of agency described in the statute, and the evidence negatived the existence of such an agency. *Dowler* v. *Union Assurance Society*, 9 B. C. R 196.

Lottery—*Permit—Date of payment—Exorbitancy—Constitutionality.*] — The date at which a tax, under the form of a permit, imposed on every person or company carrying on the business of a lottery, ought to be paid, is sufficiently indicated when the by-law imposing it declares that such permit is a tax payable annually within the periods fixed by the city charter, that it will expire on the 1st May after it has been issued, and will be renewed every year upon demand.—2. A tax cannot be called exorbitant when it does not exceed the amount fixed by the charter of the city for the particular thing to which such tax applies.—3. The legislature has power to authorize the imposition of taxes, under the form of permits, to persons or companies carrying on lotteries. *Société des Ecoles Gratuites* v. *City of Montreal*, Q. R. 19 S. C. 148.

Montreal city charter—*Construction—"Current year"—Limitation of action—Local improvements — Special tax.*]—By s. 120 of the charter of the city of Montreal, 52 V. c. 9 (Q.), the right to recover taxes is prescribed and extinguished by the lapse of "three years, in addition to the current year, to be counted from the time at which such tax, etc., became due." A special assessment for local improvements became due on the 14th March, 1898, and action was brought to recover the same on the 4th February, 1902:—*Held*, affirming the judgment in Q. R. 15 K. B. 479, Fitzpatrick, C.J.C., and Duff, J., dissenting, that the words "current year" in the section in question, mean the year commencing on the date when the tax became due, and that the time limited for prescription had not expired at the time of the institution of the action. *Vanier* v. *City of Montreal*, 39 S. C. R. 151.

Poll tax — *Municipality — Non-resident—Civil servant—Recovery back.*]—The plaintiff, an employee in the library of the Provincial

Legislature in the city of Quebec, sued the city corporation to recover back $26 paid by him at the rate of $2 a year for thirteen years in respect of a capitation tax imposed by virtue of 40 V. c. 52, s. 3. The plaintiff did not live in the city, but performed his daily duties there:—*Held*, that he was not liable to the tax, and was entitled to recover back the amount paid. *Desjardins* v. *City of Quebec*, Q. R. 18 S. C. 434.

Special assessment roll — *Contestation —Prescription — Interruption — Injunction —Rescission.*]—Under the former charter of the city of Montreal (52 V. c. 79), the contestation of a special assessment roll, by a person assessed therein, had not the effect of interrupting prescription as regards other persons subject to such assessment.—2. The fact that the person contesting the roll obtained a temporary order enjoining the city against making any collection under the roll attacked, did not constitute an interruption of prescription as regards other persons assessed by the same roll, where such order was made without objection on the part of the city, and no steps were subsequently taken by the city to obtain the rescission of the order. Judgment in Q. R. 23 S. C. 461 affirmed. *City of Montreal* v. *Land and Loan Co.*, Q. R. 13 K. B. 74.

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10. Statute Labour.

Assessment Act—*Imperative provision—Separate assessment of distinct lots.*]—Section 109 of the Assessment Act, which in effect provides that if the assessment is for more than 200 acres the statute labour shall be rated and charged against every separate lot or parcel according to its assessed value, is imperative, and not merely directory. Where, therefore, on an assessment of 600 acres, instead of the amount chargeable against the several lots owned by the plaintiff being rated and charged against each lot, a bulk sum was assessed for statute labour and charged against the whole of them, the assessment was held invalid. *Love* v. *Webster*, 26 O. R. 453, followed. *Waechter* v. *Pinkerton*, 6 O. L. R. 241, 2 O. W. R. 645.

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11. Tax Sales.

i. *Actions to Confirm, Enforce or Set aside Sale*, 281.
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i. *Actions to Confirm, Enforce or Set aside Sale.*

Application to confirm — Dispensing with service of summons on registered owner —Evidence. *Re Allingham* (N.W.T.), 5 W. L. R. 441.

Application to confirm—Time for redemption—Statutes — Retroactivity—Amendment—Administrator ad litem — Costs. *Re Baker* (Sask.), 7 W. L. R. 69.

Arrears—Notice — Assessment roll—Distress — Evidence — Onus — Parties — Costs —Locatee — Status as plaintiff. *Fisher* v. *Parry Sound Lumber Co.*, 6 O. W. R. 381.

Arrears — Notice—Assessment roll—Distress—Evidence — Onus — Parties—Costs—Locatee—Status as plaintiff. *Fisher* v. *Parry Sound Lumber Co.* (1906), 7 O. W. R. 55.

Assessment rolls—Defective description of land—Validating statute—Authority to Assessment Commissioner to purchase for municipality—Waiver—Plaintiff as alderman voting for resolution—Absence of notice to owner —Setting aside sale. *Russell* v. *City of Toronto*, 9 O. W. R. 288.

Assessment roll — *Indefinite description of land.*]—In 1900 Toronto sold to defendant for 1901 and 1902 taxes 9 feet of lot 19 on N. side of Lennox St. The land advertised for sale was "part of lots 18 & 19, plan 120, 42 x 53, commencing," etc. Upon the assessment roll for 1901 & 1902 the land was set down as a vacant lot on Bathurst St., "rear 767-9, 53 x 50," etc. Neither lot 19 or 18 on N. side Lennox St. had any frontage on and neither lot touched Bathurst St.:—*Held*, that the sale was invalid as no valid assessment of the land was made in 1901 & 1902, and, therefore, no taxes were legally imposed for which it could be sold. If the assessment could be treated as one of lots 18 & 19 according to a registered plan, the joining of them in one assessment was improper, and the assessment was, therefore, invalid, and the defect was not cured by s. 172 of the Assessment Act (1904). *Christie* v. *Johnston* (1906), 12 Gr. 534, followed. *Semble, per* Meredith, C.J.C.P., that, as the land was occupied by defendant when assessment was made, and was owned by a person not resident in Ont., who had not required her name to be entered on the assessment roll, it should have been assessed in name of and against defendant, and she, for the purpose of imposing and collecting taxes upon and from the land, was to be deemed owner of it (R. S. O. 1897, c. 224, s. 22); and therefore she was not entitled to become the purchaser at the tax sale, and so deprive owner of part of her land, because the unpaid taxes would have been payable by defendant, if the assessor had done his duty. Judgment of Riddell, J., 14 O. W. R. 241, affirmed. *Blakey* v. *Smith* (1910), 15 O. W. R. 62, 20 O. L. R. 279.

Defect in proceedings—Failure to notify owners of liability of lands to sale—Other omissions—Declaration that sale void —Lien of purchaser for purchase money and subsequent taxes. *Mackenzie* v. *Wadson*, 9 O. W. R. 26.

Invalidity—*Lands not included in list of lands liable to sale—Vague description in assessment rolls — Non-compliance with Assessment Act — Lien for purchase money—Lien for subsequent taxes—Interest—Rents and profits—Improvements.*]—A sale to the defendant on the 10th April, 1901, and a subsequent conveyance of lots 2 and 3 in block B. on the east side of Gladstone avenue

on plan 396, in the city of Toronto, for the arrears of taxes thereon for the years 1893 to 1898, inclusive, were set aside, for the direct breach of s. 176 of the Assessment Act, R. S. O. 1897 c. 224, the provisions of which are imperative, by selling in April, 1901, without having either in the preceding January or in January, 1900, which preceded the date of the mayor's warrant, included the two lots in the list of lands liable to sale furnished to the clerk under s. 152; and also because the description of the lands in the assessment rolls from 1893 to 1898 was too vague and indefinite to be a compliance with the Act: see ss. 13, 29, 34.—The assessments being invalid, the defendant was not entitled to a lien under s. 218 for the amount of the purchase money paid by her, but was entitled to a lien for taxes paid by her for the years 1900 to 1906, inclusive, the assessment for those years being sufficient, and interest thereon, but less the rents and profits derived therefrom, subject to a deduction for repairs, improvements, etc.—*Fenton* v. *McWain*, 41 U. C. R. 239, and *Wildman* v. *Tait*, 32 O. R. 274, 2 O. L. R. 307, followed. *Carter* v. *Hunter*, 9 O. W. R. 58, 13 O. L. R. 310.

Invalidity — *Onus* — *Proof of taxes in arrear* — *Assessor's return* — *Irregularity*—*Limitation of actions.*]—In action brought on the 23rd April, 1902, to set aside a sale of land made on the 7th October, 1898, for arrears of taxes for 1895, 1896, and 1897, and a deed made in November, 1899:—*Held*, that the onus of proof of the invalidity of the tax title rested on the plaintiffs. Taxes for the whole period of three years next preceding the 1st January, 1898, being due and in arrear and unpaid, and those for the year 1895 having been in arrear for three years next preceding that day, the lot was, by s. 152 of the Assessment Act, R. S. O. 189, c. 224, liable to be sold in 1898 for such arrears. The proceedings leading up to the sale were substantially regular, with one exception, the omission of the clerk of the municipality to furnish the treasurer, as he is required to do by the last clause of s. 153, with a true copy of the list furnished by the latter under s. 152, with the assessor's return, certified to by the clerk under the seal of the corporation.—*Quære*, whether this requirement of s. 153 was of so essential a character as, conceding that taxes were in arrear, to render a sale invalid if attacked before any statutory limitation upon an action came into operation. *Love* v. *Webster* (1895), 26 O. R. 453, distinguished:—*Held*, however, that as in this case the omission worked no injury to the plaintiffs, who had all the notices and delays to which they were entitled, and in respect to whose land all the other conditions essential to a valid tax sale existed, and as the action was brought more than three years after the sale and more than two years after the deed, it should be dismissed. *Kennan* v. *Turner* (1903), 23 Occ. N. 195, 5 O. L. R. 560, 2 O. W. R. 239.

Occupied and improved land—Sale as vacant land—Invalidity—Taxes recoverable by distress — Mesne profits — Conversion of chattels—Costs. *Radford* v. *Disher*, 12 O. W. R. 207.

Opposition—*Motion to reject*—*Delay*—*Substitution* — *Curator* — *Parties* — *City charter*—*Statement of Treasurer*—*Effect of.*]—A Court which is moved, by virtue of Art. 651 of the new Code of Procedure, to reject an opposition to the sale of realty, ought to reject it if it is convinced that the object is, not to protect the opposing party from an injustice, but to delay the sale without reason.—2. If the same party has already made several oppositions which have been rejected, there is a strong presumption that the new opposition has for its object nothing but to delay the sale unjustly.—3. The fact that land advertised for sale by the sheriff is comprised in a substitution, the curator of which has not been made a party, is not a legal reason for opposition to the sale.—4. When the sheriff, having already made a seizure of the land, receives from the treasurer of the city of Montreal a statement prepared in accordance with Arts. 396 to 399 of the new charter, stating that taxes are due to the city, upon the property in question, he ought to announce it for sale; he has no right to contest himself with noting the statement as an *opposition à fin de conserver*.—5. A statement prepared by the treasurer of the city of Montreal by virtue of Arts. 396 and 399 of the new charter is equivalent to a judgment for the amount of taxes there set down, and the fact that the valuation roll upon which the taxes appear is contested cannot be invoked in opposition to the sale of the land mentioned in the statement. *City of Montreal* v. *Maudeville*, 2 Q. P. R. 377.

Order confirming—*Notice.*]—An order, under s. 151 of the Municipal Clauses Act Amendment Act of 1898 and amendments of 1899 and 1900, confirming a tax sale, will not be made without notice of the petition for the order being given to the persons whose property is being sold. *Re South Vancouver Tax Sale*, 9 B. C. R. 572.

Parties — Municipal corporation—Non-compliance with provisions of Assessment Act—Fatal objections — Proof of plaintiff's title — Redemption — Costs — Judgment—Death of plaintiff. *Ruttan* v. *Township of Shuniah*, 6 O. W. R. 356.

Prior tax sale—Purchase by municipality—Lien—Redemption — Costs — Interest. *Hime* v. *Town of Toronto Junction*, 1 O. W. R. 740.

Refusal to confirm — Land vested in Crown — Recommendation of patent for homesteader—Costs — Witnesses. *Re Cann* (N.W.T.), 1 W. L. R. 206.

Sale by provincial assessor—*Property of municipality*—*Purchaser* — *Agent* — *Fiduciary relationship.*]—The city of Nelson was incorporated in March, 1897, and in September, 1898, land situated therein was sold by the provincial assessor for taxes for the years 1896 and 1897, levied under the provisions of the Assessment Act:—*Held*, setting aside the tax deed, that there was no authority to hold the tax sale, as the Assessment Act does not apply to municipalities. In July, 1897, a real estate agent on behalf of the owner negotiated with a prospective purchaser, but the attempted sale fell through, and after that the agent and the owner ceased to have any dealings with each other. In September, 1898, the agent bought the property at a tax sale at a very low figure:—*Held*, that at the time

of the sale the agent was not in a fiduciary relation to the owner. *McLeod* v. *Waterman*, 10 B. C. R. 42.

Sale of wrong lot — *Reconveyance by purchaser—Recognition of validity of sale—Third parties.*]—The sale of anything belonging to another person is radically void; thus the sale of an immovable made in error, for municipal taxes due upon the adjoining immovable, is void, and does not purge the hypothecs by which the immovable sold is affected. 2. In this case the reconveyance which the true owner obtains from the purchaser or his assigns is not to be interpreted as a recognition of validity of such a sale; and, even where a sale is recognized as valid by the true owner, such recognition can only be considered as a new sale made by the true owner and not affecting the rights of third parties. *Humphreys* v. *Desjardins*, Q. R. 24 S. C. 250.

ii. *Certificates and Deeds.*

Description of land—Assessment roll—Deed—Arrears. *Quinlan* v. *City of Brantford*, 2 O. W. R. 730.

Description of land — Sufficiency of—Possession—Rights of entry. *McLellan* v. *Hoocy*, 1 O. W. R. 215, 707.

Invalidity—*Tax deed—Recitals—Onus—Prescription—Municipal Code.*]—1. Sale of immovables for taxes not assessed upon them, or for an amount in excess of such taxes, is null and void.—Recitals in deed of sale, under Arts. 1008 and 1009, M.C., do not afford a presumption *juris et de jure* of valid sale, and evidence of its nullity is admissible, *e.g.*, to shew the taxes for which it was made were not due, and that formalities required by law were not complied with.—Burden of proof of legality of sale is upon purchaser when it is challenged or impugned by original owner, or by those claiming under him.—A deed of sale for taxes which is void as stated firstly above, is not a title (*juste titre*) that can avail as a ground for prescription by 10 years, nor does prescription of 2 years of Art. 1015, M.C., apply to it. *Cameron* v. *Lee* (1906), 27 Que. S. C. 535.

Land Titles Act, 1894 — *Confirmation of tax sale—Transfer—Treasurer.*]—Though a purchaser at a municipal tax sale does not, within one month after the expiration of the time for redemption, make a demand upon the treasurer for a transfer, nor pay to him the $2 for such transfer, and it is not until long after the expiration of the said month that such demand and payment are made and such transfer executed, the treasurer has authority to execute the transfer to the purchaser. *In re Prince Albert Tax Sales*, 4 Terr. L. R. 198.

Onus—*Proof of validity of assessment and subsequent proceedings — Easement—Extinction by tax sale—"Privilege."*]—The onus of proving a valid sale for taxes is upon the party setting up title under a tax deed; the production of the deed is not enough; further evidence must be given going to the foundation on which the deed rests, in order that the validity of the assessment and all subsequent proceedings may be exhibited. *Jones* v. *Bank of Upper Canada*, 13 Gr. 74, and *Stevenson* v. *Traynor*, 12 O. R. 804, followed.—The defendant contended that an easement or right of way enjoyed by the plaintiff over ten feet of land sold for taxes was extinguished by the sale in 1893, as being included in the word "privilege" used in the Consolidated Assessment Act, 1892, s. 137, then in force:—*Semble*, that the law of Ontario does not provide for the taxation of easements; and the title to an easement cannot be extinguished by the sale for taxes of the servient tenement, without notice to the person who uses it and without opportunity for him to exonerate the land by the payment of taxes. *Essery* v. *Bell*, 18 O. L. R. 76, 13 O. W. R. 395.

Possessory action.]—The purchaser, at a tax sale for municipal taxes by virtue of Arts. 1000 and 1001, M.C., of part of a lot, and who receives the certificate provided for by Art. 1004, M.C., the situation and boundaries not being fixed, however, does not thereby acquire a possession giving him the right to have recourse to a possessory action. Under these conditions, such action must be dismissed, reserving recourse, particularly when it is found impossible, from the proof, to determine, without a preliminary fixing of the boundaries, the location, in one or the other of two municipalities, of the land in dispute, and, consequently, the validity of its sale. It is not necessary to give the notice required by Arts. 961 and 1006, M.C., to purchasers of immovables who have not made known, in conformity with the provisions of Art. 746, M.C., a change in the ownership, nor to absentees who have not appointed agents as required by Art. 222, M.C. *St. Appollinaire* v. *Roger* (1909), 36 Que. S. C. 520.

iii. *Conduct of Sale.*

Adjournment—*Collusion at sale—Mandamus to compel treasurer to make searches, and together with the corporation execute a deed under s. 165 of Assessment Act.*]—Plaintiff purchased certain lots at an adjourned tax sale held at Sault Ste. Marie, Nov. 7th, 1907. The lands not having been redeemed, plaintiff demanded that the treasurer make searches under s. 165, c. 23, 4 Edw. VII., and send out notices. The treasurer, on instruction from town council, refused to make searches or issue deeds, on ground that sale was irregular, and that there was collusion on part of plaintiff and others attending sale. Plaintiff brought action for mandamus against treasurer to compel him to make searches, and against the town of Sault Ste. Marie to restrain them from exercising any control over the treasurer to prevent him from making searches, and for an order compelling the corporation to issue a tax deed to plaintiff:—*Held*, that the corporation and the treasurer both stand in the relation of trustees—First, of the municipality to which the taxes are payable, to see that as much as possible of the taxes are paid, and secondly to see that the owners' interests in the lands sold at the tax sale are not sacrificed; that the defendants were entitled to attack the original tax sale held on Oct. 28th, 1907, and when irregularities in that sale were brought to their attention they were justified in refusing to proceed any fur-

ther, or to issue tax deeds under the adjourned sale on Nov. 7th, 1907; that the conduct of those present at the adjourned sale in sitting together, bidding in rotation, buying practically the same number of lots and at practically a uniform price, shewed collusion, notwithstanding that it was not proved there was any agreement in express words between the parties—a "mere arrangement or understanding" being sufficient; that what took place at the adjourned tax sale was of such a character that a deed obtained of these lots could not be supported, and if a deed could ought not to go against the treasurer to compel him to do what is necessary, so that afterwards he could give a deed to the plaintiff. Action dismissed with costs. *Quære:* Whether under the Act the date of the adjourned sale should be fixed and announced immediately the first parcel of land cannot be sold at the first sale, or whether it it sufficient to fix and announce the date of the adjourned sale at any time before the first sale proceedings are ended. *Dawson* v. *Sault Ste. Marie & McCrea* (1909), 15 O. W. R. 230.

iv. *Persons Entitled to Buy.*

Purchase by municipality—*Authority for reeve to bid at sale—Assessment Act, R. S. M. 1902 c. 117, s. 176.*]—Under s. 176 of the Assessment Act, R. S. M. 1902, c. 117, which provides that a municipality may bid for lands within its boundaries which are being sold for arrears of taxes and become the purchaser through the mayor or reeve, or any member of the council duly authorized by the council so to bid, it is not sufficient that the council should authorize the reeve to attend the tax sale on behalf of the municipality; and a purchase by the reeve without express authority to bid is invalid and ineffectual to pass title to the municipality or to a purchaser from it.—None of the curative clauses of the Act avail to support the claim of the purchaser in such a case. *Bannantyne* v. *Pritchard*, 5 W. L. R. 478, 16 Man. L. R. 407.

v. *Objection to Validity of Sale.*

(a) Validity of Assessment, 287.

(b) Proceedings Irregular or Invalid, 289.

(a) Validity of Assessment.

Description of lots—*Block assessment—Plan — Owner — Defects — Curative provisions.*]—An assessment of lots as "water lots 436 x 660" is invalid as not identifying them. An assessment of lots *en bloc* after they have been sub-divided by registered plan, and without shewing the known owner against whom particular parcels are assessable, is invalid as disregarding the essential requirements of R. S. O. c. 224, s. 13. The requirements of ss. 147, 152-5, inclusive, as to the duties of the collector, treasurer, clerk, and assessor, with reference to the list of lands liable to be sold, were not complied with; and the defects were not cured by s. 208, which makes the tax deed binding if the land is not redeemed in one year, nor by s. 209, by which the deed is valid if not questioned within two years. The judgment of MacMahon, J., 32 O. R. 274, 21 Occ. N. 30, affirmed for the reasons therein stated, as regards the invalidity of the tax sale in question:—*Held*, however, that the language of s. 218 of the Assessment Act, R. S. O. c. 224, has no application to cases where the taxes have not been lawfully imposed, or where the taxes for which the land was sold were not in arrear. The grantee of the tax purchaser was, therefore, not entitled to the lien which he claimed in respect of the sums alleged to be due for taxes for the years 1890 and 1891, for there was in these years no valid assessment, and therefore no taxes in arrear as to them; but the case as to 1892 and 1893 was on a different footing; for the assessment for those years was a valid one and not affected by the error in the statement as to the depth of the lots, which might be rejected as *falsa demonstratio*, and the taxes for 1892 and 1893 were, therefore, validly imposed and in arrear at the time of the sale. Judgment below varied. *Wildman* v. *Tait* (1901), 21 Occ. N. 465, 2 O. L. R. 307.

Meetings of council and Court of Revision not held in municipality — *Municipal Act, 1894, s. 15—Unanimous consent inferred from absence of objection—Presumption of regularity after great lapse of time—Validating statute—Tax sale by-law—Failure to observe requirements of—Acquiescence — Waiver—Publication of notice—Proof of "expenses"—Ex parte order confirming sale—Effect of—Validity—Remedy of plaintiff—Redemption—Tender.*]—In an action to set aside a sale made in 1898 by the municipality of South Vancouver of lands in that municipality for the taxes of the years 1893 to 1897 the plaintiff alleged that there was never a valid assessment or levy during all those years by reason of the fact that the various meetings of the municipal council and of the Court of Revision at which the question of taxes was dealt with were held not within the limits of the municipality but in the city of Vancouver:—*Held*, that there was no reason in law (apart from statute) why the meetings of the council, whether for ordinary business or as a Court of Revision, should not have been held at any place without the limits of the municipality, and the provision in the Municipal Act of 1892, s. 103, had no relation to this question.—The Statute of 1894, s. 15, provides that "all meetings of the municipal council shall take place within the limits of the municipality, except where the council have unanimously resolved that it would be more convenient to hold such meetings, or some of them, outside of the limits of the municipality":—*Held*, that the existence of this unanimity on the part of members of the council might be proved otherwise than by the passing of a formal resolution entered in the minutes. No hint of objection from any members of the council or from any one else appeared upon the minutes or otherwise during all these years; and, in these circumstances, the condition mentioned in the Act of 1894 was complied with. After so great a lapse of time, the presumption that the meetings were regularly held was insurmountable. Meetings of the council sitting as a Court of Revision were in the same position as ordinary meetings:—*Held*, also, that any illegality such as alleged, if it existed, was cured by statute. The various assessment by-laws of 1898 were valid muni-

cipal enactments, being *ex facie* valid, and not moved against, and were validated by s. 126 of the Municipal Act, 1892, notwithstanding any want of substance or form; and that enactment continued in force until 1899.—It was also alleged that in certain respects the municipality did not observe the requirements of their own tax sale by-law, passed in 1898, under which this sale took place:—*Held*, upon the evidence, that the plaintiff must be taken, by his inaction and apparent acquiescence with full knowledge, to have been a consenting party to the sale, waiving the non-observance of any provisions in his favour as to notice, publication, etc.—*City of Toronto* v. *Russell*, C. R., [1908] A. C. 455, followed:—*Held*, also, that there was no substance in any of the objections advanced, such as that public notice of the lands for sale was not given in the manner prescribed, that the notice to the plaintiff was not posted in the proper post office, and that there was no proof of "expenses" incurred, the sale being made to satisfy expenses as well as taxes.—On the 5th April, 1899, an order confirming the sale was made by a Judge of the Supreme Court, upon an application by the municipality *ex parte*:—*Held*, that the order was properly made *ex parte*, under the statute then in force, c. 35 of the British Columbia Statutes of 1898, s. 14.—*Re South Vancouver*, 9 B. C. R. 572, remarked upon.—*Held*, also, that, even if the order was invalid, the plaintiff could not in this action take advantage of the invalidity. The plaintiff must, if he desired to put an end to the interest of the tax sale purchaser, pursue the remedy provided by the Statute of 1898, s. 15, namely, tender to the municipality the purchase price paid. That he has not done; and, even if the confirming order was a nullity, he had nothing more than a right of redemption, enforceable only as set out in the statute. *Anderson* v. *South Vancouver* (1910), 13 W. L. R. 226.

(b) Validity of Proceedings.

Action by plaintiff personally and as trustee for his wife—*Irregular notices—Sale "super non domino."*]—Under the deeds registered and filed in this cause, the plaintiff, personally and as trustee for his wife, being vested with the ownership and possession of the property in question in this cause had, as such, the right to institute the present action.—The sale of the property in question in this cause effected by corporation defendant to the *mis-en-cause*, is null and void, the notice for sale having been made for taxes, while defendant's claim was in reality for water rates; taxes having been illegally added on the day of the sale, and such sale having been effected "*super non domino*," without notice nor claim upon plaintiff, as the registered owner of such property, as required by the charter of the city of Hull, 1893, Arts. 345, 349, 350. *McConnell* v. *Hull* (1910), 16 R. de J. 413.

City corporation becoming purchaser—*Agreement for redemption—Resolution of council—Necessity for by-law—Title—Estoppel—Real Property Act.*]—1. The making of a contract for the sale of land vested in the corporation is not one of the powers which the council of the city of Winnipeg, under its charter, 1 & 2 Edw. VII. c. 77, can exercise by resolution, as s. 472 says that the power of the council shall be exercised by by-law when not otherwise authorized or provided for. *Waterous* v. *Palmerston*, 21 S. C. R. 556, followed.—2. The defendants were not estopped from insisting on the absolute title acquired by them, under the Real Property Act, R. S. M. 1902 c. 148, to lands formerly owned by the plaintiff and purchased by them at a tax sale, by reason of the facts that, after the issue of the final certificate of title in 1902, the city assessor assessed the land to the plaintiff, the Court of Revision confirmed the assessment, the usual assessment notice was sent to the plaintiff, and the tax collector sent to him the usual notice and demand for the taxes of that year, as these steps had all been taken by the city officials in accordance with their statutory duties and without any special authority or instructions from the city council.—3. *Per* Howell, C.J.A.:—Although the city council passed a resolution authorizing a sale of the lands to the plaintiff for a named amount, and the resolution was entered in the minutes, which were afterwards signed by the mayor and city clerk, yet there was no writing signed in such a manner as to be binding under the Statute of Frauds.—4. *Per* Mathers, J.:—If the defendants had sued the plaintiff for the taxes for 1902, relying on s. 387 of the charter, it would have been a good defence to shew that he was not the owner of the lands at the time of the return of the assessment roll and its final revision, and, therefore, it could not be said that the defendants were asserting two absolutely inconsistent rights. *Ponton* v. *City of Winnipeg*, 7 W. L. R. 702, 17 Man. L. R. 496.

vi. *Effect of Statutes.*

Assessment Act, 1897 — *Purchase by city—Irregularity in sale—Notice under s. 184—Construction of Toronto Act, 3 Edw. VII. c. 86—Waiver—Time for redemption.*]—Where land was sold under the Assessment Act, 1897, for taxes due upon it, an inaccurate or insufficient description of the land in the assessment roll was a "failure to comply with the statutory requirements," which was cured by the Toronto Act, 3 Edw. VII. c. 86, s. 8, and the failure to give proper notice of the sale is also cured by said s. 8. Where the city purchased the land the owner must redeem within one year from the purchase, subject to said s. 8. Judgment of the Court of Appeal for Ontario, 11 O. W. R. 23, 15 O. L. R. 484, and of Hon. Mr. Justice MacMahon, 9 O. W. R. 288, set aside. *Russell* v. *Toronto*, C. R. [1908] A. C. 455, [1908] A. C. 493, 78 L. J. P. C. 1, 99 L. T. R. 738, 24 T. L. R. 908.

Assessment Act, R. S. M. 1892 c. 101, ss. 166, 188, 191—*Statutory effect of vesting certificate as evidence of regularity of tax sale proceedings — Estoppel—Assessment of land—Irregularities.*]—1. Although, by s. 166 of the Assessment Act, R. S. M. 1892 c. 101, vesting certificates issued by a municipality in its own favour, upon sales of land for taxes bought in for the municipality, are to have the same effect in all respects as deeds of sale of land for taxes, and by s. 191 of the same chapter, as re-en-

acted by 55 V. c. 26, s. 7, a tax deed is made conclusive evidence of the validity of the assessment of the land, the levy of the rate, the sale, and all the other proceedings leading up to the execution of the deed, yet it does not follow that such vesting certificate should have the same effect as evidence as tax deeds would have, and the mere production and proof of the vesting certificate does not shift the onus from the municipality claiming title under it, of furnishing proof of the validity of the tax sale.—*Alloway* v. *Campbell*, 7 Man. L. R. 506, and *Ryan* v. *Whelan*, 20 S. C. R. 65, followed.—2. The provisions of ss. 6 and 7 of 55 V. c. 26, as to the evidential value of a tax sale deed, do not apply to vesting certificates, and leave it open to the former owner to shew, if he can, that there was no legal assessment or levy for the years in respect of which the land was sold for taxes.—3. A municipality is estopped from questioning the regularity of its own proceedings relating to a tax sale, or of the assessment upon which the same were founded, as against a purchaser in good faith who has paid the purchase money and obtained a deed under the corporate seal of the municipality. *Re Laplante and Peterborough*, 5 O. R. 634, followed.—4. The assessment of the land in question for the year 1891 was null and void, because: (a) the assessor had not signed the assessment roll, as required by 53 V. c. 45, s. 42, although he had signed the certificate appended to the roll, as required by s. 43 of the same chapter; and (b) the land was only described as the "N. W. quarter 27," without any mention of the township or range. *Alloway* v. *Rural Municipality of St. Andrews* (1896), 3 W. L. R. 13, 16 Man. L. R. 255.

Description in deed—Uncertainty—Invalid assessment roll—Assessment Act, s. 211—No arrears of taxes—Conveyance of right of re-entry — Effect of repeal of section — Champerty and maintenance—Improvements—Set-off—Rents and profits. *Eede* v. *Pulford*, 3 O. W. R. 179.

Lapse of ten years from making of levy — *Manitoba Real Property Limitation Act, ss. 11, 24—Application to "proceeding" to sell for taxes—Manitoba Assessment Act, s. 40 — Lien for taxes.*]—Action to restrain defendants from enforcing a levy for taxes made by them on the lands in question upwards of 10 years prior to the commencement of the pending proceedings:—*Held*, that the lien, by s. 40 above, is not extinguished, although no action, suit or other proceedings to realize can be brought at law or in equity. The defendants have the right to proceed to sell the plaintiff's lands for taxes so levied. Such a proceeding is not barred by s. 24 above. *Royce* v. *Macdonald*, 11 W. L. R. 277. Reversed (1910), 12 W. L. R. 347.

Municipal Ordinance—*Land Titles Act — Transfer — Conclusiveness — Operation of statute.*]—Under ss. 201 and 202 of Municipal Ordinance (C. O. 1898, c. 70), a transfer of land by secretary-treasurer of a municipality, on a sale for taxes, is conclusive after one year, and the sale can only be questioned on grounds specified in s. 202. Courts are bound to give effect to the unequivocal language of a statute. *O'Brien* v. *Cogswell*, 17 S. C. R. 420, distinguished. Ordinance c. 10 of 1900 does not affect proviso in s. 202 of Municipal Ordinance. *Re Donnelly Tax Sale* (1906), 6 Terr. L. R. 1.

Non-compliance with statute — *Invalidity—Curative provisions.*]—In a sale of land for taxes there was a failure to distrain, although sufficient goods were on the premises to have paid the taxes; the account furnished by the collector did not, as required by s. 140 of R. S. O. 1887, c. 193, shew the reason why the taxes had not been collected; there as no delivery to the collector by the clerk of the list furnished him by the treasurer, as required by s. 141; no notification, as also required by that section, by the collector to the occupants or owners of the lands of their liability to be sold for taxes; no certificate verified by oath as required by s. 142; nor any list furnished by the clerk to the treasurer of the lands which had become occupied or were incorrectly described, as required by s. 143:—*Held*, that the sale was invalid; and the invalidity was not cured by ss. 189, 190, which validate a sale on the expiration of two years from the making of the tax deed. *Boland* v. *Jenkins*, 21 Occ. N. 125, 32 O. R. 358.

Omission to furnish list of lands to be sold — *Limitation sections of Assessment Act — Port Arthur Special Act — Conveyance by owner after sale — Repeal of Act after action brought.*]—The omission of the treasurer of the municipality to furnish to the clerk a list of the lands liable to be sold for taxes is a fatal objection to the validity of a sale for taxes, and neither the limitation sections of the Assessment Act, nor the provision of the special Act relating to sales for taxes in Port Arthur, 63 V. c. 86 (O.), are a protection to the tax purchaser. The owners of land sold for taxes conveyed it after the tax sale to the plaintiff, who then brought an action against the tax purchaser to set aside the sale. The statute 32 Hen. VIII. c. 9 was in force when the conveyance was made, and when the action was brought, but was repealed before the trial of the action:—*Held*, that the prohibition of the statute applied, and that the action could not be maintained. Judgment of Ferguson, J., 1 O. W. R. 509, affirmed. *Ruttan* v. *Burk* (1904), 24 Occ. N. 85, 7 O. L. R. 56, 3 O. W. R. 167.

Proceeding by municipal corporation — *Registered owner — Claimant — Status — Unregistered title — Decree — Nullity.*] — One who, by title registered in registry office immovable is situated, appears to be owner of it, is regarded as being in possession *animo domini*, within meaning of Art. 699, C. P. C., especially when the immovable is wild land upon which no ostensible act of possession has been done. Therefore, where such immovable is seized and sold for taxes charged against it, in a suit by municipal corporation against the person who appears to be owner as mentioned, the decree is valid, and a third person who asserts ownership by virtue of a title preferable to that of the defendant, has no status to intervene and nullify the decree as against plaintiff corporation. Right of ownership of an immovable by virtue of an unregistered title may be ex-

tinguished by sale under a decree. *Outremont* v. *Cabana* (1906), Q. R. 14 K. B. 366.

Purchaser at — *Liability for taxes of year of sale—Statutes—Amendment.*]—Certain lots in the city of Calgary were on the 27th June, 1896, sold for arrears of taxes due thereon for certain years prior to 1896; the sales were duly confirmed by the Court, and on the 10th July, 1897, and 27th June, 1898, the purchaser received certificates of title in due form from the Registrar of Land Titles, and entered into and remained in possession of the lots as owner. The lots were duly assessed for taxes for the year 1896, but no rate was struck until after the sale. The said taxes for 1896 remained unpaid for two years. Section 81 of the Ordinance Incorporating the city of Calgary provides that the transfer from the treasurer to the purchaser shall vest in the purchaser all the rights of property of the original holder of the land, and purge and disincumber it from all incumbrances of whatever nature other than existing liens of the city and the Crown:—*Held*, that the lots in question were liable to be sold for taxes for the year 1896, and that, under s. 51 of the same Ordinance, the purchaser was personally liable to the city for the amount of the taxes. Section 81 was amended by Ordinance 1900, c. 39, s. 4, by the addition after the word "Crown" of the words "including all taxes unpaid upon such land at the day of the date of such transfer, and whether imposed before or after the day of the date of the tax sale at which said lands were sold:"—*Held*, that this amendment did not raise the presumption that the section as it originally stood had not the same meaning; that the amendment was probably made to remove doubts that may have existed. *In re Lougheed and City of Calgary*, 5 Terr. L. R. 200.

Rights of purchasers in good faith—*Certificate of sale—Prior registration of deed from defaulting owner—Redemption—R. S. O. 1897, c. 26, ss. 10, 17, 23, 24, 25, 28, 29—4 Edw. VII. (Ont., 1904), c. 23, s. 168.*]—*Held*, that the purchaser of lands at a Government sale for non-payment of taxes, has an absolute title (if not redeemed by owner within the period prescribed by statute), which he may perfect by deed from the Provincial Treasurer:—*Held*, also, that where the purchaser failed to obtain his deed under R. S. O. 1897, c. 26, s. 23, and register it as required by 4 Edw. VII. (Ont., 1904), c. 23, s. 168, a conveyance from the original owner, although previously registered, would not displace his title in the absence of evidence that such conveyance had been taken in good faith, for valuable consideration. Judgment of the Court of Appeal for Ontario, 8 O. W. R. 916, discharged; judgment of Mr. Justice Street, at trial, 7 O. W. R. 11, restored. *Beatty* v. *McConnell*, C. R., [1908] A. C. 166, 77 L. J. P. C. 25, 11 O. W. R., [1908] A. C. 82.

Valid assessment — Irregularities — Collector's return not verified by oath—Late return—Non-compliance with provisions of Assessment Act—Sale of lands not included in list furnished by treasurer to clerk—Failure to redeem within one year after sale—Curative provision of statute—Special Acts—Setting aside sale. *Laird* v. *Neelin*, 10 O. W. R. 429.

vii. *Redemption of Property.*

Application to confirm—*Time for redemption — Statutes — Retroactivity—Land Titles Act—Tender.*]—*Held*, that an order permitting redemption by the original owners of land sold for taxes cannot be made under the provisions of s. 2 of c. 12 of the Ordinances of 1901, as amended by s. 1 of c. 9 of 1903, unless it be proved affirmatively by the applicant for redemption, on the hearing of the application for confirmation, that, before the time of the actual hearing of the application, the person entitled to redeem has endeavoured to do so, but by reason of inability to ascertain the amount due has been unable to tender the necessary amount:—*Held*, also, that the decision of the Supreme Court of Canada in *North British Canadian Investment Co.* v. *St. John School District*, 35 S. C. R. 461, is applicable to sales held prior to the passing of the Land Titles Act, 1894. *In re Baker (John)*, 7 W. L. R. 69, 1 Sask. L. R. 7.

City corporation becoming purchaser—*Agreement for redemption—Resolution of council—Necessity for by-law—Title—Estoppel—Real Property Act.*]—After the defendants, a municipal corporation, had become purchasers of lands within the city, sold for arrears of overdue taxes, and had obtained a certificate of title therefor under the Real Property Act, a resolution of the city council was passed agreeing that the land should be re-conveyed to the former owner on payment of the taxes in arrear with interest and costs:—*Held*, that the defendants were not bound by the resolution, as the re-conveyance of the lands could be made only under the authority of a by-law as provided by the city charter. *Waterous Engine Works Co.* v. *Town of Palmerston*, 21 S. C. R. 556, and *District of North Vancouver* v. *Tracy*, 34 S. C. R. 132, followed. Judgment appealed from 6 W. L. R. 730, 7 W. L. R. 702, 17 Man. L. R. 496, affirmed. *Ponton* v. *City of Winnipeg*, 41 S. C. R. 18.

Exercise of privilege—*Rights of person redeeming—Obligation of purchaser—Reconveyance.*] — The privilege of redemption of an immovable sold for taxes by virtue of the statute, 62 V. c. 58, s. 402 (Q.), in the same way as the power of *réméré* provided under the title "Sale" in the Civil Code, can only be exercised by a reciprocal act of retrocession. Such powers operate as a condition *resolutiore*, and are exercised, by those who have the right, by a unilateral deed manifesting the intention, the effect of which is to put matters in the same condition as if the sale had not taken place. The parties continue to have their respective rights, except the legal obligations to which the redemption or *réméré* is subject. Therefore, one who exercises the power of redemption cannot exact from the purchaser the making or signing of a deed or declaration relating to it, especially if it introduces clauses from which obligations would arise. *Parent* v. *Kennedy*, Q. R. 33 S. C. 55.

Judgment establishing right — *Purchaser's right to reimbursement for improvements.*]—The owner of an immovable sold by the sheriff, by virtue of 62 V. c. 58, s. 401 (Q.), for taxes due to the city of Montreal, or his representative, who redeems according to the terms of s. 402 of the same

statute, has a right of action against the purchaser in order to establish judicially the exercise which he has made of the option of redemption and the fulfilling of the required formalities. The purchaser cannot set up as a defence to this action, the cost of repairs which he had made since the sale, but he reserves the right of exacting reimbursement therefor when a demand for possession of the immovable is made upon him. Judgment in Q. R. 33 S. C. 55, varied. *Parent* v. *Kennedy*, Q. R. 34 S. C. 535.

Land Tax Act, 11 V. c. 7, s. 12—*Offer to redeem made within two years sufficient—Rule to redeem may be taken out later—Legal tender.*]—The land was sold for non-payment of land-tax on 30th September, 1859. The affidavit of plaintiff's agent states that the redemption money was tendered on 24th May, 1861, and the rule to redeem was taken out on 7th January, 1862. The defendant shewed that no money was produced, and no offer was made which would amount to a legal tender. Against the application defendant contended (1) that as plaintiff did not take out his rule until after the expiration of the two years allowed to redeem he was too late, even though the tender had been made in time; (2) that no legal tender having been made the rule must be discharged:—*Held*, Peters, J., that it was sufficient to satisfy the statute if the tender was made within two years, even though the rule was not taken out until after the two years had elapsed. Although an actual tender is not in all cases necessary, yet here there was no offer which could amount to a legal tender of any amount, and, therefore, the rule must be discharged. *Sullivan* v. *Ramsay* (1862), 1 P. E. I. R. 215.

Land Tax Act, 11 V. c. 7, s. 12—*Power of Supreme Court—Equity of redemption—Application to redeem — Charges disallowed.*]—Application to redeem land sold for non-payment of land-tax. The statute gives an equity of redemption for two years from sale on payment of the purchase money with lawful interest and reasonable expenses, and a fair allowance for improvements. In this case the plaintiff tendered £6, but defendant claimed £11 6s. 8d., in which he included charges for clearing land, attending the sale, attending to register deed, attending to pay land-tax, having land surveyed, etc. The defendant contended that the Supreme Court had no jurisdiction, and that plaintiff must resort to the Court of Chancery:—*Held*, Peters, J., that the Court had jurisdiction, and that during the two years the purchaser could neither commit waste nor claim remuneration for improvements which a mortgagor in possession could not claim, and, therefore, the charge for clearing land could not be allowed. Also, that in the absence of positive allegations in defendant's affidavit supporting the charges for surveying and attending to register they could not be allowed, and that the charges for attending the sale and to pay land-tax could not be allowed in any case. *Sullivan* v. *Ramsay* (1862), 1 P. E. I. R. 209.

Land Tax Act—*Redemption — Tender when purchaser has secretly assigned to third party.*]—C. bought at land-tax sale and subsequently conveyed to Ramsays, but no notice of the conveyance was given to the former owner. Ramsays lived with their mother, who had been the lessee and should have paid the tax, and C. was her son-in-law. DeBlois, S.'s agent, tendered the redemption money to C. subsequent to the latter's conveyance, and in ignorance of it, but it was refused. C. and his brother, in their affidavit, asserted that DeBlois, when making his tender, did not express that he was making it for the plaintiff, and that he did not refer to him as owner of the land, and hence it was insisted the tender was bad. Under the circumstances it was clear that Carr knew that plaintiff was owner:—*Held*, Peters, J., that the tender was good, and the plaintiff was entitled to redeem notwithstanding the assignment to Ramsays. *Sullivan* v. *Carr & Ramsay* (1863), 1 P. E. I. R. 228.

Owner and purchaser — *Compensation for improvements.*]—The owner of land sold for land-tax applied to have the amount of redemption money ascertained, and to compel purchaser on re-payment thereof to reconvey. The purchaser was owner of the dower, and had been in possession, at time of sale, under an agreement to purchase. He submitted an account for £19 3s. 2d., made up of £5 13s. 2d. for purchase money, £3 10s. for ploughing and fencing, and £11 for erecting a house. The Act gives the owner a right to redeem within two years on re-payment of the purchase money with interest and all reasonable expenses, and a fair allowance for improvements. The question arose here as to whether the items for ploughing, fencing and building a house, were such as a purchaser had a right to make, or for which, if made, he was entitled to compensation:—*Held*, Peters, J., that the purchaser, until the expiration of two years, is only an equitable mortgagee, and as such is allowed for necessary expenditure in keeping the place in repair, but not for other improvements, such as new buildings, except under special circumstances. That there being no necessity shewn for the improvements defendant ought not to be allowed for them. That as owner of the dower defendant was himself bound to pay one-third of the purchase-money. That on payment of the balance of the purchase-money, etc., the defendant must execute a re-conveyance to plaintiff. *Compton* v. *Pope* (1861), 1 P. E. I. R. 181.

Right of owners to redeem—Extension of time for—Special Act, 2 Edw. VII. c. 49—Construction—Payment to town treasurer by tenant in common—Agreement to take back money — Pleading — Amendment — Costs—Title to land. *Ray* v. *Kilgour*, 9 O. W. R. 641.

School taxes — Confirmation of sale — Time for redemption—Extension—Terms. *Re Lewis and Phalen* (N.W.T.), 1 W. L. R. 36.

Time for redemption—*Statute—Retroactivity—Constitutional law.*]—Section 80 of the charter of the city of Calgary (Ordinance 33 of 1893) provides that if land sold for taxes be not redeemed within one year after the date of the sale, the purchaser shall be entitled to a transfer, which shall have the effect of vesting the land in him in fee simple or otherwise, according to the nature of the estate sold; and s. 81 provides that the trans-

fer shall not only vest in the purchaser all rights of property which the original owner had therein, but shall purge and disincumber such land from all payments, lien charges, mortgages and incumbrances whatever, other than existing liens of the city and the Crown. Certain lots in the city of Calgary were sold for taxes on 16th April, 1900, and a transfer was given to the purchaser on 8th May, 1901, the owners not having offered to redeem within the year:—*Held*, that s. 2 of Ordinance 12 of 1901, "an Ordinance respecting the Confirmation of Sales of Land for Taxes," passed 12th June, 1901, giving a right to redeem at any time before the hearing of the application for confirmation, is not retrospective, and that the original owners could not take advantage of its provisions.—*Held*, further, that ss. 80 and 81 of the charter of the city of Calgary are not *ultra vires* as being in conflict with ss. 54 and 57 of the Land Titles Act, 1894. *Wilkie* v. *Jellett*, 2 N. W. T. Reps. No. 1, p. 125, 26 S. C. R. 282, applied. *In re Kerr*, 5 Terr. L. R. 297.

Unpatented lands sold as patented—*Breach of warranty—Misrepresentations — Damages—Assessment Act—Redemption.*]—When the secretary-treasurer of a municipality, acting under s. 162 of the Assessment Act, R. S. M. 1902 c. 117, advertises lands to be sold for arrears of taxes as "patented," although in fact they are unpatented, and the purchaser, relying on that statement, buys without making any investigation of the title, he is entitled to recover from the municipality as damages for a breach of warranty the amount he paid for the lands, also all sums paid for subsequent taxes on them with interest. Such statement should be held to be a positive statement of fact made with the intention that it should be relied upon, and not merely an expression of opinion, and, being untrue, amounts to a misrepresentation, excluding the operation of the rule of *caveat emptor*. *McSorley* v. *St. John*, 6 S. C. R. 544, *De Lasalle* v. *Guildford*, [1901] 2 K. B. 215; *Chapman* v. *Brooklyn*, 40 N. Y. 379, and *Pearson* v. *Dublin*, [1907] A. C. 351, followed. *Austin* v. *Simcoe*, 22 U. C. R. 73, and *McLellan* v. *Assiniboia*, 5 Man. L. R. 265, distinguished on the ground of differences in statutory enactments.—*Held*, also, that s. 166 of the Act does not prevent the plaintiff in such a case from recovering back his money. 2. That, notwithstanding s. 229 of the Act, the Court could add the subsequent taxes paid by the plaintiff to the amount paid by him for the land in the first place, and treat the whole as damages suffered by reason of the breach of warranty. 3. That the defendant municipality should be allowed one month within which to redeem the lands under s. 168 of the Act, as having been sold through error, and that, in case of redemption within that time, the judgment should be for costs only. *Alloway* v. *Rural Municipality of Morris*, 18 Man. L. R. 363, 8 W. L. R. 726, 9 W. L. R. 392.

viii. *Miscellaneous Cases.*

Highway included in land sold—Void sale—Deviation road—Sale subject to right of way—Misconduct of plaintiff—Costs. *McCabe* v. *Armstrong*, 3 O. W. R. 808.

Injunction — *Exemption—Court of revision—Appeal to—Estoppel.*]—An injunction may be granted to restrain a tax sale. The limits of such jurisdiction discussed. It is not necessary that exemption from taxation should be raised before the Court of Revision; and a person wrongfully assessed by reason of exemption is not estopped by appealing to the Court of Revision. *Canadian Pacific Ry. Co.* v. *Town of Calgary*, 1 Terr. L. R. 67.

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12. VALUATION OF PROPERTY.

Appeal — *Married woman — Circuit Court—Amendment of roll—Time — Resolution of council.*]—A married woman who is the owner of real estate in a municipality, whose name is on the valuation roll as such, and who is a taxpayer, is qualified and has the right to take the appeal to the Circuit Court given in clause 4 of Art. 1061, M. C. Amendments of the valuation roll, in any year in which a new roll is not made, can only be made in the district of Quebec in the month of June or July. Hence, resolutions passed by a local council in the district of Quebec in the month of September, to erase the names of proprietors inscribed on the valuation roll, and to substitute in their stead the names of a large number of other persons, are null and void and will be quashed upon appeal. *Boucher* v. *Corporation of Limoilou*, Que. R. 31 S. C. 178.

Bridge over Niagara river between Ontario and the United States was built by a bridge company for the passage over it of trains having connecting lines on either side of the river:—*Held*, that the rule of valuation to be applied is that provided by s. 43, s.-s. 2 (*a*), of the Assessment Act, 4 Edw. VII. c. 23 (O.), namely, that part of the structure within the province is to be valued as an integral part of the whole, and at its cash value as the same would be appraised upon a sale to another company possessing similar powers, rights and franchises, and subject to similar conditions and burdens, and incorporating the provisions and basis of the Assessment Act, set forth in s. 42, s.-s. 2. *Re International Bridge Co. and Village of Bridgeburg*, 12 O. L. R. 314, 7 O. W. R. 497.

Companies Ordinance—*Gas and water company — Mains and pipes — Real estate —Land — Fixtures — Exemptions—Double taxation.*]—Where a waterworks company were assessed for certain lots, and opposite the entry under the heading on the assessment roll, "value of lot in parcel without improvements," was placed "$315," and under the heading "value of buildings or other improvements," was placed "$100,000," and in this latter sum it was intended to include the company's water mains and pipes laid on the streets of the city:—*Held*, following *Consumers' Gas Co. of Toronto* v. *City of Toronto*, 27 S. C. R. 453, that the company's water mains and pipes were assessable as "land." 2. That, however, the form of the assessment did not include the mains and pipes, and that the attempted assessment of them was ineffective, and that the roll could not be amended, in view of the fact that the value of the mains and pipes had not been made a question in the proceedings. 3. That

the fact that the city charter gave power to assess the shares of the company did not prevent the city from exercising the power also given thereby to assess any part of the company's real or personal property. 4. That the fact that the mains and pipes were laid under the authority of an agreement with the city in that behalf did not exempt them from assessment. *Calgary Gas and Waterworks Co.* v. *City of Calgary*, 2 Terr. L. R. 447.

Deposit — *Notice — Time — Revision — Municipal council — Discretion — Interference by Court.*]—Notice of the deposit of a valuation roll, under Art. 732, M. C., and of its revision by the municipal council, under Art. 736, may be given simultaneously by one and the same document, no interval of time being required to elapse between the two. Municipal councils, in revising valuation rolls, have a discretion, with which the Courts will not interfere by the exercise of their reforming power, except in cases of evident injustice amounting to oppression. *Ledoux* v. *Municipalité du Canton de Ste. Edwige de Clifton*, Que. R. 30 S. C. 29.

Discrimination against non-residents — *Petition to County Court Judge — Authority of agent of ratepayer—Time for petition—Objection made to assessors—Notice—Waiver—Payment of school tax—Certiorari—Grounds.*]—In a petition for relief by a non-resident ratepayer under 44 V. c. 9 (N.B.), it is sufficient evidence of authority to warrant the County Court Judge in acting, that the person petitioning describes himself as the agent of the person aggrieved in the matter of the assessment, and swears to the truth of the statements in the petition. The time within which the petition must be presented under the Act does not begin to run until after the assessment complained of has been made up from the corrected list and filed with the county secretary, and then within one month, either from notice of the assessment from the county officer charged with the duty of giving notice, or from the time the person assessed first heard or knew of such assessment. It is no objection to an application under the Act that objection to the valuation of the property was made to the assessors under C. S. c. 100, s. 59, and that the objection might have been further prosecuted before the valuators under s. 68. Where one of the objections under the Act is that the property of residents had been greatly undervalued, the effect of which was to increase the rate of non-residents, it is not necessary that the residents, the valuation of whose property is attacked, should have notice of the application. The right to apply for relief from general county taxes is not waived by payment of the school tax. The petition under the Act must contain facts from which it can be collected that the petitioner is aggrieved, or must state the fact. The specific grounds upon which a *certiorari* is granted must, under Rule 7, Mich., 1899, be stated, and a general statement, *i.e.*, "also all other grounds taken at the hearing in the Court below," is objectionable. *Rex* v. *Wilkinson*, 35 N. B. Reps. 538.

Gas pipes—Natural gas company. *Re United Gas and Oil Co. of Ontario and Township of Colchester South*, 1 O. W. R. 642.

Illegality as a ground for setting them aside—*Over valuation in particular cases — Complaint and appeal — Valuation according to instructions—Swearing in of valuators—Irregularities in rolls—Duties of valuators.*]—The valuation roll of a town may be set aside by the Superior Court, on a petition to that effect, "by reason of illegality." R. S. O. ch. 4376. Such illegality must be of a kind that vitiates the roll, as a whole, and overvaluation in particular cases affords no ground for such a proceeding. The party affected, in such a case, has a right of complaint to the town council, on appeal from the decision of the latter to the Circuit Court within a prescribed delay. The remedy by petition to the Superior Court, and that by complaint and appeal to the Circuit Court, are distinct in their purposes, and a party using the former will not be allowed to so amend his petition as to make it include the other. Allegations in a petition to quash setting forth in substance that, in making the valuation roll, the valuators did not give their own estimated value of the property therein, but, at the bidding of the council, over-valued it in order to make the borrowing of money by the corporation more easy, are not demurrable, as they amount to charges of illegality for which, if proved, the roll should be set aside. The oaths of office of valuators need not be in writing. When no substantial wrong is shown, a valuation roll will not be set aside for mere irregularities, such as insufficient notices, irregular adjournments of sessions of the town council, the refusal to examine the valuators at the hearing of a complaint, or mistakes as to valuation in particular cases. When the valuators are two or more in number, they are not bound to jointly visit or inspect the properties they have to value. *Percival* v. *Montreal West* (1910), 37 S. C. (Que.) 456, 16 R. de J. S. 11 Que. P. R. 69.

Improvements — *Selling value.*] — The measure of value of improvements for purposes of taxation prescribed by s. 38 of the Vancouver Incorporation Act, 1900, is the actual cash selling value, and not the cost. *In re Municipal Clauses Act and J. O. Dunsmuir*, 8 B. C. R. 361, followed. *In re Vancouver Incorporation Act, 1900, and B. T. Rogers*, 9 B. C. R. 373, not followed. *In re Vancouver Incorporation Act, 1900, and B. T. Rogers*, 9 B. C. R. 495.

Income — *Basis of assessment—Exemption.*]—Although a person assessed for income tax under the Municipal Ordinance was not during the previous year a resident of the municipality, the previous year's income, wherever earned, may be taken as a basis for determining the amount for which he should be assessed. Income to the extent of $600 is exempt. *Lamontaigne* v. *Town of Macleod*, 5 Terr. L. R. 199.

International bridge — *Assessable value.*]—In assessing for the purpose of taxation that part of a bridge, crossing the Niagara river, lying within a township in Canada, regard cannot be had to its value in proportion to the value of the franchise or of the whole bridge, or to the cost of construction, but only to the actual cash price obtainable for the land and materials situate within the township. *In re Bell Telephone Company Assessment*, 25 A. R. 351, and *In*

re London Street Railway Company Assessment, 27 A. R. 83, applied. *In re Queenston Heights Bridge Company Assessment* (1901), 21 Occ. N. 112, 1 O. L. R. 114.

Lands acquired for railway — *Real value—Farm purposes—Village lots.*]—The railway company had acquired a parcel of land of more than 200 arpents for the purposes of their railway, but, changing their intention, they leased it as a farm, by a lease for a year, renewable from year to year, with the condition that it should not be used except for the purposes of pasturage, for which it was quite unfit. The company had prepared a plan of subdivision of the land into lots, and had made application to the corporation and the government to have it adopted and registered. They had also advertised the sale of the property in lots:—*Held*, that the land should be valued for assessment purposes according to its real value, and not according to the value which it might have for agricultural purposes only. *In re Canadian Pacific Rw. Co. and Village of Verdun*, Q. R. 20 S. C. 194.

Lands in city—*Strathcona City Charter, tit. 31, s. 3—"Fair actual value"—Situation and use—Farm lands—Reduction of assessment by County Court Judge—"Gross" difference—No evidence of relative values—Right of appeal from decision of County Court Judge—Municipal Ordinance, sec. 138 (12) — Unanimous vote of city council — Majority of members present — Forum for hearing appeal—Procedure on appeal—Absence of notes of evidence taken before Judge —Re-examination of witnesses before Court en banc.*]—Clause 12 of s. 138 of the Municipal Ordinance provides that "the decision and judgment of the Judge" (*i.e.*, a District Court Judge, upon appeal from an assessment) "shall be final and conclusive in every case adjudicated upon, and can only be appealed from by a unanimous vote of the council:—"*Held*, that although a right of appeal was not expressly given, this clause must be interpreted as permitting an appeal if the council by a unanimous vote authorised it—a provision within the powers of the legislature; and, although no provision as to the Court for hearing the appeal or the machinery of appeal was made, in order to give effect to the right of appeal, it must be assumed that the appeal should be to the same Court and in the same manner as any other appeal from the decision of a District Court Judge.—The Strathcona city charter provides that a majority shall be present for the purpose of the transaction of business:—*Held*, that, although only 6 of the 8 aldermen of the city were present when the council voted in favour of an appeal, as the 6 were unanimous, and were a majority of the 8, the vote was a unanimous vote of the council within the meaning of clause 12 of sec. 138 of the Municipal Ordinance.—Upon the hearing by the District Court Judge of the appeal from the assessment, neither he nor any other person present took notes of the evidence:—*Held*, that the city corporation, appealing from his decision, should not thereby be deprived of their appeal; and the witnesses who gave evidence before the County Court Judge were called before the Supreme Court en banc, and gave, as far as possible, the same evidence as was given below, but no new evidence.—*The Crescent*, 41 W. R. 535, followed.—The lands in question, 309 acres, within the city, were purchased by a syndicate, more than a year before the appeal, for $350 an acre. They were assessed at $250 an acre, and that was reduced by the District Court Judge to $150 an acre. Section 3 of title 31 of the Strathcona charter provides that "land shall be assessed at its fair actual value," and continues: "In estimating the value, regard shall be had to its situation and the purpose for which it is used, or, if sold by the present owner, it could and would probably be used in the next succeeding 12 months." There was no evidence of any depreciation in value since the syndicate bought; but the evidence shewed that the lands were situated at the outermost point of the city, a mile from the nearest subdivided portion of the city, 2 miles or more from the chief business portion of the city, and having no communication by roads or streets with other parts of the city; that the lands were not at present used for any purpose, and were covered with bush, and, even if sold, would not probably be used for building within the next 12 months; there was no suggestion of any other use, except for farming purposes; and the assessor stated that adjoining farm lands were assessed at $100 an acre:—*Held*, that the rates fixed by the County Court Judge was the fair actual value of the property.—Section 3 of title 31 further provides that there shall be no reduction, unless the difference between the value and the assessment be gross, if the assessment bears a fair and just proportion to the assessment of other lands in the immediate vicinity:—*Held*, that this provision had no application, because the difference was gross, and because there was no evidence from which the relative values of this and other adjoining lands could be ascertained. *Re Strathcona & Edmonton & Strathcona Land Syndicate* (1910), 15 W. L. R. 254

Measure of value — *Municipal Clauses Act, B.C.*]—The measure of value for purposes of taxation prescribed by s. 113 of the Municipal Clauses Act is the actual cash selling value and not the costs. *In re Dunsmuir*, 8 B. C. R. 361.

Mineral lands—*Principle of assessment.*] —Buildings and plant—Scheme of assessment Act, 1904—Clerical error. *Can. Oil Fields* v. *Oil Springs* (1906), 8 O. W. R. 480.

Modification by Judge—*Error in principle.*]—The Judge ought not to vary the valuation of a property made upon oath by the assessors of a municipality, unless it has been made in consequence of an erroneous principle, or is so evidently erroneous that a competent and honest man could not arrive at the same result. *Baag* v. *Town of St. Louis*, Q. R. 20 S. C. 149.

Municipal assessment is for municipal purposes only, and is from the point of view of municipal revenue; usually it does not represent the real value nor the market value of the property. Hence municipal assessments cannot and ought not, as a general rule, to be an absolute standard in fixing the value of the property expropriated, especially when the expropriation takes only

a part of the real estate. *Can. Nor. Que. Rw. Co.* v. *Frenette* (1909), 10 Que. P. R. 318.

Petition to set aside.]—Court of Review has no jurisdiction to hear an appeal from a judgment on a petition to set aside a municipal valuation roll. When an inscription in review is dismissed for want of jurisdiction, it will be so ordered without costs, if the want of jurisdiction was raised by the Court itself. *Martel* v. *Marston*, 11 Que. P. R. 11.

Putting two lots on plan in one parcel—*Sale of real estate for municipal taxes —Sale of two lots as forming only one— Mode of division on accepting part.*]— (1) The union of two lots on plan as forming only one block, on the assessment rolls for municipal purposes, is at most an irregularity that the owner assessable ought to have separated within the time allowed. When that time has expired he is not entitled, without proof of damage, to move to set the assessment aside. On the list taxes remaining unpaid prepared by the secretary-treasurer of the local council and on the copy he transmits to the secretary-treasurer of the county, the same as in the list published by the latter for the sale, the whole as provided for in arts. 371, 373, 998 and 999 C. M., these lots ought to be described in the same way as on the assessment rolls as forming only one parcel. After the sale the purchaser on taking less provided for in art. 1001 C. M., is entitled to a fraction of the two lots thus united, forming one parcel. Hence, an offer to pay the amount to release and the costs, providing for the adjudication as to one of the lots, is not a legal release, and the sale of the one the arbitrator chooses, and the certificate given to him, are void. *Donais* v. *County of Shefford* (1909), Q. R. 36 S. C. 367.

Railway buildings—Construction of Assessment Ordinance—"Lands"—Valuation of buildings—Appeal—Costs. *Re Can. Nor. Rw. Co. & Omemee School District* (N.W. T. 1906), 4 W. L. R. 547.

Railway lands—*Right of way.*]—*Held*, following *Rouse* v. *Great Western Rw. Co.*, 15 U. C. R. 168, that the grading of a railway could not be assessed, and that in order to ascertain the value of the railway property consisting of the right of way and station houses and yards, a fair test was to take the average value per acre of the tier of lots through which the railway ran, and, after making a reduction from that for the value of buildings and improvements on the farm, to value the railway lands at the same value per acre as the lots through which they passed. Applying this rule, and taking the value of each lot adjoining, it was found that (including the buildings upon them) the lots were assessed at an average value of $45 per acre. The railway company's lands, valued at this figure, were found to be worth $5,175, from which a deduction of $387, being 7½ per cent., was made on account of the average difference in the value of buildings on the adjoining farms. Subtracting this amount from $5,175 left a balance of $4,788, at which the assessment of the railway company's lands was fixed. *In re Township of Chatham and Canadian Pacific Rw. Co.*, 21 Occ. N. 534.

Vacant land — *Municipal Ordinance — Construction—Appeal—Onus.*]—The onus is on the appellant to shew that vacant land in towns comes within the exceptions mentioned in s.-s. 1 of s. 127 of the Municipal Ordinance (C. O. 1898, c. 70); otherwise it is properly assessed under s.-s. 2. Where vacant land is shewn to be "bona fide enclosed," as mentioned in s.-s. 1, and used in connection with a residence as a garden, "position and local advantage" are to be considered in addition to an annual rental in fixing the value for assessment purposes, and persons making use of valuable lands for the purposes of a garden, park, etc., should be assessed for it in the same proportion of value as other lands in the vicinity. *Re Heiminck (Isabella) and Town of Edmonton*, 5 Terr. L. R. 462.

Vancouver Incorporation Act, 1900, ss. 38, 56—*Valuation of improvements — Mode of—Decision of Judge on appeal from Court of Revision—Appeal from.*]—No appeal lies from the decision of a Judge on an appeal from the Court of Revision, had under s. 56 of the Vancouver Incorporation Act. An objection to an appeal on the ground that the Court has no jurisdiction to hear it is not a preliminary objection within s. 83 of the Supreme Court Act. Although the full Court has no jurisdiction to hear appeals, it has jurisdiction to award costs in dismissing it. Under s. 38 of the Vancouver Incorporation Act, 1900, all ratable property for assessment purposes shall be estimated at its actual cash value, as it would be appraised in payment of a just debt from a solvent debtor.—In estimating the value of an expensive residence built by its owner, it is fair to assume that the owner will not permit his property to be sacrificed, and therefore a valuation approaching to nearly the actual cost is not excessive. *In re Vancouver Incorporation Act and Rogers*, 23 Occ. N. 72, 9 B. C. R. 373.

Waterworks company—*Valuing plant —1 Edw. VII. c. 29, s. 2—Retroactivity — Construction.*]— *Held*, that the statute 1 Edw. VII. c. 9, s. 2, amending the Assessment Act by inserting ss. 18a and 18b, is not retroactive, and therefore does not affect the assessment in question, which was made by the assessor and confirmed on appeal to the Court of Revision for the city, before the Act came into force; but doubted, even if the Act is retroactive, whether in any way it affects or changes the principle of assessment governing corporations like the appellants. All that it enacts is, that the property shall be valued as a whole, or as an integral part of a whole, instead, as formerly, by wards separately. Thus it leaves untouched and unaltered the law laid down in *In re Bell Telephone Company Assessment*, 25 A. R. 351, *In re London Street Railway Company Assessment*, 27 A. R. 83, and *In re Queenston Heights Bridge Assessment*, 1 O. L. R. 114, that as real property it shall be estimated at its actual cash value, as it would be appraised in payment of a just debt from a solvent debtor. This standard by the Act of last session is now applied to the property in its larger area as extended by the statute, but the standard remains the same:—*Held*, also, that the evidence of witnesses fixing value by wards (when one of the elements of such value is the possibility

of a franchise in such ward, distinct from other wards, being obtained at some future time), is too remote to prevent the application of the law as settled by the cases, as also is the chance at some future time of getting a franchise to connect the wards with one another. *In re Stratford Waterworks Co. and City of Stratford*, 21 Occ. N. 479.

Wild lands—*Valuation—Assessor acting on instructions from superior officers—Exemption—Jurisdiction of Court of Revision.*] —In assessing 500,000 acres of wild land, consisting largely of inaccessible mountains and valleys, the assessor acted on instructions received from his superior officers and fixed the value at $1 per acre for the whole tract. On appeal to the Court of Revision and Appeal, evidence was taken, and an average value of 45 cents per acre was fixed. An appeal was taken to the full Court, on the grounds that the valuation was too high, and that, so far as some of the lands were concerned, they were exempt from taxation under the company's Subsidy Act, and on the argument counsel for the company asked the Court to fix the assessable value of the lands at the specific sum of $47,986.23:—*Held*, per Drake, J., that, as some of the land was of some value and some of it of no value, the fixing of a flat rate was not a compliance with s. 51 of the Assessment Act, 1903, and that the assessment should be set aside with costs. Per Irving, J., that the evidence did not enable the Court to form any opinion as to the value of the land within the meaning of s. 51, and, as the assessment was improperly levied at the outset, the Court should simply declare that there was no proper assessment in respect of which an appeal will lie:—*Held*, per Drake and Irving, JJ. (Duff, J., dissenting), that by the operation of s. 3 of the amending Act, with respect to all the lands granted to the company, the exemption from taxation conferred by s. 7 of the Subsidy Act expired with the expiration of the period of ten years, beginning with the 8th April, 1893, and that therefore the lands claimed to be exempt were assessable. *In re Nelson and Fort Sheppard Rw. Co.*, 24 Occ. N. 385, 10 B. C. R. 519.

ASSESSMENT OF DAMAGES.

See DAMAGES.

ASSESSMENT ROLL.

See ASSESSMENT AND TAXES.

ASSESSORS.

See SHIP.

ASSIGNMENT.

Acts. *See* BANKRUPTCY AND INSOLVENCY—CHARGE ON LAND—CONSTITUTIONAL LAW—MORTGAGE.

Benefit of Creditors. *See* BANKRUPTCY AND INSOLVENCY.

Chattels. *See* CHATTELS.

Chose in Action. *See* ATTACHMENT OF DEBTS—CHOSE IN ACTION.

Contract. *See* VENDORS AND PURCHASERS.

Damages. *See* DAMAGES.

Costs. *See* COSTS.

Dower. *See* DOWER.

Fraudulent Assignment. *See* BANKRUPTCY AND INSOLVENCY — CANCELLATION OF INSTRUMENTS—CRIMINAL LAW.

Insurance. *See* INSURANCE.

Judgments. *See* JUDGMENTS.

Lease. *See* LANDLORD AND TENANT.

Mortgage. *See* MORTGAGE.

Patent. *See* PATENTS FOR INVENTION.

Policy. *See* INSURANCE.

Preferences. *See* BANKRUPTCY AND INSOLVENCY—CERTIORARI.

Salary. *See* ATTACHMENT OF DEBTS.

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ATTACHMENT OF DEBTS.

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1. GENERALLY—WHAT DEBTS ATTACHABLE.

Alimentary allowance — *Claim for maintenance of natural child—Ancestors.*]—The obligation resulting from a natural relationship does not extend to the ancestors of the father and mother of the natural child. 2. Alimentary debts, for the payment of which an income bequeathed for alimentary purposes may be attached, are such as are due to a creditor who has furnished aliments to the person entitled to the allowance and his family, and not those which such person may be under an obligation to furnish for his natural child. *McAulay* v. *McLennan*, Q. R. 23 S. C. 419.

Alimentary allowance—*Pension.*] — A pension granted by the Montreal Harbour Commissioners to a sick pilot, from the "De-

cayed Pilots' Fund," is an alimentary allowance, and is exempt from seizure, under Art. 599, s. 9, C. C. P., except for an alimentary debt. 2. An alimentary pension can only be seized for an alimentary debt incurred while the pension is in force, and not for a debt incurred before the pension began to run. *Hamelin* v. *Perrault*, Q. R. 21 S. C. 51.

Alimentary allowance—*Prior and subsequent.*]—According to the Quebec procedure, under Art. 599, paragraph 4, there is no distinction, as regards the right to attach alimentary allowances, between a debt prior to and one subsequent to the act by virtue of which the allowance is paid. 2. Allowances may, therefore, be attached to answer all alimentary debts. 3. The distinction which in France results from Art. 582 of the Code of Procedure does not exist in our law. *Labrecque* v. *Gauthier*, 2 Q. P. R. 494. (*Contra*, *Madden* v. *O'Regan*, Q. R. 7 S. C. 401.)

Amount due under agreement for sale of land—*Variation of agreement after service of garnishee summons—Right of garnishee to deduct money paid for taxes and interest—Statement filed by garnishee—Admission—Estoppel.*]— A garnishee summons was served on the garnishee on the 18th March, 1909. On the 6th April, 1909, the garnishee filed a statement shewing that she was indebted to the defendant in the sum of $2,652 for purchase money of land, under an agreement made on the 28th October, 1908, but that by an agreement made on the 5th April, 1909 (that is, after service of the garnishee summons), no instalments would be due until the 1st November, 1909, when $150 and interest would be due and payable. The plaintiff (garnishing creditor) apparently accepted that statement, and after the 1st November, 1909, moved for an order that the garnishee pay $150 into Court:—*Held*, that the service of the garnishee summons attached the liability of the garnishee to the judgment debtor as it existed on the day of service; and the subsequent agreement could not affect that liability to the prejudice of the attaching creditor; but, at any rate, the garnishee was estopped from setting up, on this application, another state of facts from that disclosed by her filed statement; and that the plaintiff was entitled to judgment against the garnishee for $150 and interest. *Randall* v. *Lithgow*, 12 Q. B. D. 525, followed. *Semble*, that the garnishee had the right to deduct from the amounts falling due to the vendor under the agreement such moneys as she had paid out (for taxes and interest) to protect her rights under the agreement, and possibly what she was liable to pay, and the service of the garnishee summons did not affect that right. *Beauchamp* v. *Messer* (1910), 13 W. L. R. 404, 3 Sask. L. R. 59.

Annuity—*Parent and child—Alimentary allowance—Surrender—Rights of creditor.*]—An annuity payable as part of the price of an immovable sold by a father to his son, will not be held to be *insaisissable* under the pretext that it is alimentary. It could not even be stipulated to be such, being constituted *à titre onereux*.—2. The proof that the person entitled to a life rent payable by his son has come to live with the latter, and has not since exacted payment, does not establish the extinction by surrender of the obligation to pay it, as against a third person who has attached the amount as payable to the father. *Lamoureux* v. *Blanchard*, Q. R. 32 S. C. 150.

Annuity — *Payment by son to father where land conveyed to son—Proportion attachable—Date of payment.*]— A life rent stipulated for in an onerous contract is subject to the rights of creditors.—Where the father in a deed of bargain and sale to his son has charged the latter with the payment to him of a sum each year, the parties cannot afterwards validly agree that the payment shall be made in kind instead of in money. The son, being served as garnishee with a *saisie-arrêt* issued by a judgment creditor of the father, will be ordered to pay over to the creditor the amount accrued due in proportion to the total sum payable annually; but payment over need not be made until the time mentioned in the deed. *Lamoureux* v. *Blanchard*, 8 Q. P. R. 317.

Assignment of fund—Contingency — Ascertainment. *Evans* v. *Clancy*, 2 O. W. R. 522.

Assignment of future salary — *Appointments "during pleasure"—The Public Service Act, ss. 12 and 26.*]—The salary of a civil servant whose appointment is "during pleasure" accrues from day to day irrespective of when the salary may have been made payable by Order-in-Council, Departmental Regulation, or otherwise. A power-of-attorney authorising the attorney to collect a sum of money does not *per se* operate as an equitable assignment of the fund, if, however, it appears from all the surrounding circumstances that it was the intention of the parties that the fund should be assigned, an equitable assignment is established. The rule of law that the salaries of public officers cannot be assigned as being contrary to public policy does not extend to the case of a junior clerk. Salary to be earned in the future is assignable. *Crouch* v. *Martin*, 2 Vern. 595, 23 E. R. 987, followed. *Traders Bank* v. *McKay* (1909), 2 Alta. L. R. 31.

Assignment of moneys earned by machinery—*Other machinery used in earning moneys attached—Equitable assignment—Assignment of future debts—Practice — Affidavits.*] — The defendant purchased certain machinery from the Waterous Engine Works, and, on the purchase, executed a document by which he assigned to the Waterous Engine Works "all moneys owing to or earned by the purchaser (the defendant) for work done either wholly or partly with or by the aid of said machinery, or any part thereof." The plaintiff attached certain moneys earned by the defendant in threshing with a portion of such machinery, and the Waterous Engine Works claimed such moneys under the assignment. It was agreed that the issue should be determined in a summary way upon affidavits:— *Held*, that the claimant, being really the plaintiff in an issue, was entitled to file affidavits in reply to those filed by the plaintiff in the action. —(2) That the intention of the parties in stating that moneys earned by part of the machinery should be assigned, was not to limit the amount to the part of the moneys that might be earned by the machinery used

but to describe the debt; and all moneys earned, whether with the whole or a part of the machinery, were by the assignment assigned to the claimant. — (3) That an equitable assignment may be made of a mere possibility or expectancy of future property. *Lynberg* v. *Tarbox*, 1 Sask. L. R. 492, 9 W. L. R. 347.

Balance in bank — *Appropriation by bank to payment of unmatured note, without consent of debtor.*]—The plaintiffs commenced this action on the 18th November, 1909, and issued a garnishee summons against a bank, which was served upon the bank on that day. On the 17th November the defendant had a balance to his credit in the bank of $756.20; but the bank held a promissory note of the defendant for $700, maturing on the 13th December; and on that day, the 17th November, the bank charged the note to the defendant's account, allowing a rebate for the days it had to run, and thus, if this was effective, reducing the defendant's balance to $60. This was done without the knowledge or consent of the defendant:—*Held*, that the garnishee summons effectively attached the whole sum of $756.20. *Bower* v. *Foreign and Colonial Gas Co.*, 22 W. R. 740, followed. *McCready* v. *Alberta Clothing Co.* (1910), 13 W. L. R. 680.

Balance of purchase money of business of partnership—*Promissory note in favour of wife of one partner—Rights of creditors of firm and of individual partners — Novation—Legal or equitable debt—Fraud—Form of issue—Garnishee proceedings ineffective.*]—A firm composed of A. and B. were indebted to the extent of $500 to another firm composed of X. and Y. By mutual arrangement between the two firms, A. one of the partners, made his promissory note for $500, payable to Mrs. X., wife of one of the partners of X. and Y., in payment of the debt from A. and B. to X. and Y. D. recovered a judgment against X. for $378, and issued and served a garnishee summons upon A. alone. E. recovered a judgment for $95 against X. and Y., and issued and served a garnishee summons upon A. alone. F. recovered a judgment against X. and Y. for $30.50, and issued and served a garnishee summons upon A. alone. G. recovered a judgment against X. and Y., and issued and served a garnishee summons upon A. and B.:—*Held*, that the garnishee summonses were all ineffective.—(*a*) Assuming the *bona fides* of the transaction whereby Mrs. X. became holder of the note, because there was nothing due or accruing due from A. and B., or either of them, to X. and Y., or either of them.—(*b*) If the transaction in question were alleged to be fraudulent, on the ground that under the garnishee issue, as directed, the question of fraud could not be tried (following *Hull* v. *Donohoe*, 24 S. C. R. 683):—*Held*, in any event, that the garnishee summons issued by D. was ineffective, because: (1) a debt owing to a firm cannot be attached in an action against an individual member of a firm; (2) an attachment against an individual who is a member of a firm cannot affect a debt owing by the firm; and, for the second reason, the garnishee summonses issued by E. and F. were alike ineffective.—*Semble*, that but for the debt having by reason of the note ceased to be a debt from A. and B. to X. and Y., the garnishee summons issued by G. would have been effective; and that a garnishee summons can be issued against a firm in the firm name. The effect of a garnishee summons in this respect distinguished from that of an order for attachment of debts under the English practice. *Minger* v. *Anderson*, 8 W. L. R. 428, 1 Alta. L. R. 400.

Bank deposit—*Attachment for debt of depositor—Claim of true owner—Intervention.*]—The fact of a person depositing sums of money in his own name in a bank does not take away from the true owner of such sums the right of recovering such sums. The true owner, as the third party, may assert his rights of recovering such sums. The true owner, as a third party, may assert his rights by intervention in a garnishing cause, and have annulled the *saisie-arrêt* of such sums by the garnishing creditor. *Stephens* v. *Higgins*, 5 Q. P. R. 1.

Commission of agent—*Portion attachable—Set-off.*]—The defendant was the agent of the garnishees, an insurance company, earning a salary of one dollar a year and a commission which he retained upon premiums which he received for the company, to whom, after making the deduction, he remitted the balance of the premiums. In answer to the garnishing process, the garnishees declared these facts, adding that they owed the defendant nothing. Subsequently, upon an order that they should declare the amount of the commission which the defendant had retained upon premiums collected since the service of the garnishing process, the garnishees declared that the defendant had retained $80.70 for commission, adding, however, that he owed them more than that amount.—*Held*, that the act of the agent in retaining the commissions being the act of the company, the latter was to be regarded as having paid the amount of the commissions thus retained, and these payments having been made since the service of the process, the plaintiff was entitled, without contesting the declaration of the garnishees, to demand that they should pay him the amount.—2. But the commission thus kept back by the defendant fell under Art. 599, C. P. C., paragraph 11, and the attachment, therefore, extended only to one-fifth of the amount so paid.—3. The garnishees could not set off against such commissions the amount which the defendant owed them, set-off not operating to the prejudice of the garnishing process. *Gauthier* v. *Huot*, Q. R. 16 S. C. 242.

Company — *Debts of servants to.*] — There is nothing to hinder the garnishing in the hands of employees of a defendant company of moneys which the employees personally owe to the company. *United Counties Rw. Co.* v. *Letendre*, 3 Q. P. R. 295.

Company—*Liability of purchaser of assets to indemnify subscriber against calls—Subject to garnishment—Purchase by one company of stock in another—Illegality — Objection not raised at trial—Estoppel.*]—1. The purchaser of the assets of a company incorporated under the Manitoba Joint Stock Companies Act, R. S. M. 1902, c. 30, who agrees to assume the liabilities of the company, is bound to indemnify the company against their liability for payment of future

calls on shares of stock held by them in a fire insurance company, which were only partly paid up at the time of the sale, although no mention of such liability was made at the time, the purchaser being aware thereof; and such liability is attachable at the suit of the fire insurance company under Rules 759 and 761 of the King's Bench Act, for the purpose of realising on a judgment obtained for the amount of unpaid arrears of subsequent calls on the shares.—2. Per Dubuc, C.J.—An objection based on s. 68 of the Joint Stock Companies Act, that no company incorporated under that Act can use any of its funds in the purchase of stock in any other corporation unless expressly authorised by a by-law confirmed at a general meeting, and that there was no evidence of any such by-law having been passed, cannot be given effect to on the hearing of an appeal when it was not raised at the trial.—*Proctor* v. *Parker*, 12 Man. L. R. 528, and *Hughes* v. *Chambers*, 14 Man. L. R. 163, followed.—*Per* Perdue, J., dissenting. — Although not raised at the trial, such objection should be given effect to on this appeal. Cases cited distinguished on the ground that here the evidence all went to shew that no such by-law had ever been passed, and if the objection had been raised at the trial the plaintiffs could not have given any evidence to overcome it.—3. Per Dubuc, C.J., the statute does not prohibit a joint stock company from holding stock in another corporation; it provides only that its funds shall not be used for such purpose unless expressly authorised by by-law confirmed at a general meeting; and, if it were shewn that such shares had been acquired otherwise than by using any of the funds of the company, the holding would be legal.—4. Per Perdue, J.—The recovery of the judgment by the plaintiffs against the company did not estop the garnishee from setting up the defence arising out of s. 68 of the Joint Stock Companies Act. *Victoria Montreal Fire Ins. Co.* v. *Strome and Whyte Co.*, 15 Man. L. R. 645.

Costs due to solicitor—Agreement with client to throw off—Fraud upon creditors. *Waller* v. *Malone*, 3 O. R. 774.

Damages for personal injuries — *Alimentary claim—Limited attachment.*] — Damages awarded as compensation for personal wrongs, bodily injuries, and medical attendance rendered necessary thereby, are in the nature of an alimentary claim, and are not attachable for a debt other than one which has been created for the purpose of assuring the payment of such damages or the preservation of the plaintiff's right thereto. *Lafond* v. *Marsan*, Q. R. 24 S. C. 22, 5 Que. P. R. 326.

Damages for personal injuries — *Judgment—Alimentary provision — Attachment before judgment.*]—The right of a person injured in an accident to recover from the person who caused the accident the damages suffered, is a purely personal right, and cannot be exercised by the ordinary creditors of the person injured. But when the person injured exercises the right the amount of damages or indemnity recovered is not in the nature of an alimentary provision, but becomes part of the property or means of the injured one; and therefore such a sum may be seized or attached by his creditors, and they may proceed by way of attachment even before judgment in the action brought by the person injured. *Molsons Bank* v. *Lionais*, 8 D. C. A. 176, followed. Judgment in Q. R. 25 S. C. 188 reversed, and judgment in Q. R. 24 S. C. 282, restored. *Cochrane* v. *McShane*, Q. R. 13 K. B. 505, 6 Que. P. R. 465.

Deposit in bank—*Double attachment—Foreign Court.*]—A deposit was made in the branch office in Manitoba of the bank, garnishee, and subsequently, the depositor having died, the amount of the deposit was paid into Court by the bank, under an order made by the Court in Manitoba, in proceedings taken in that province concerning the estate of the deceased. The same sum having been subsequently attached in the province of Quebec, where the head office of the bank is situated:—*Held*, that the garnishee was bound to obey the order made in the proceedings in Manitoba, and could not be compelled to pay the money a second time. *Harris* v. *Cordingley*, Q. R. 16 S. C. 501.

Deposit made by solicitors with security company—*Contract—Garnishment by creditor of solicitors' client.*]— Where advocates make an agreement with a security company to furnish security for their client for the purposes of an appeal, in consideration of the deposit of a sum equal to that for which the security is given and the payment of a commission, the company, when discharged from the security, are debtors to the advocates in respect to the sum deposited, by virtue of the contract between them; and therefore the deposit is not attachable in the hands of the company by a creditor of the client-appellant in the cause in which the security was given. *Bernard* v. *Royal Trust Co.*, Q. R. 16 K. B. 323.

Division Court — *Cheque — Payment stopped — Payment into Court — Sale of Goods.*]—A vendor of goods, after receiving payment therefor, fraudulently sold them to another purchaser, who bought in good faith, giving in payment his cheque drawn on a bank at T. but cashed at a bank in O. on payment being guaranteed by an indorser. The second purchaser on being served by the first with a garnishee summons issued out of a Division Court, stopped payment of the cheque, and paid the amount into Court. The indorser, meanwhile, paid the bank at O.:—*Held*, that he was entitled to the money paid into Court. *Wilder* v. *Wolf*, 22 Occ. N. 293, 4 O. L. R. 451, 1 O. W. R. 481.

Equitable assignment—Disputed facts —Issue. *Wilkinson Plough Co.* v. *Perrin*, 2 O. W. R. 541.

Fees of bailiffs—*Exemptions—Liability of solicitors.*]—The fees of bailiffs are attachable in their entirety, and are not included in the exemptions which are enumerated in Art. 599, C. P. C. In spite of stipulations previously made to the contrary, solicitors are personally liable to the bailiffs they employ for payment of their fees, and that although they have not received payment from their clients. *Lachance* v. *Casault*, Q. R. 26 S. C. 90.

Fees of curator in insolvency.] — The curator appointed for the purpose of liquidating the property of an insolvent is a public functionary, whose fees are, according to the terms of art. 599, C. P., not garnishable. *Snyder* v. *Gagnon*, 3 Que. P. R. 271.

Foreign corporation—*Debts due by.*]—Moneys payable in a foreign country, by a foreign corporation, for services performed in that country, under a contract made there, are not seizable under a writ of *saisie-arrêt* issued out of a Court of this Province, although the foreign corporation may have a branch office and be served with the process in this Province. *Goodhue* v. *O'Leary*, Q. R. 17 S. C. 201.

Gold dust delivered to garnishee in parcel to be handed to judgment debtor—Whether garnishable under Rule of Court. *Barnard* v. *Freeman* (Y.T.), 8 W. L. R. 721.

Income from trust fund—*Assignment of fund and income.*]—An attaching order under 45 V. c. 17 will not lie against the income of a trust fund, unless there are trust moneys actually in the hands of the trustees at the time the order is served; nor will an attaching order operate upon debts of which the judgment debtor has divested himself by assignment, even though the assignment may be void as against creditors under 13 Eliz. c. 5. *Ex p. Black*, 34 N. B. Reps. 638.

Insurance money—*Foreign corporation garnishee—"Within the province."*] — The judgment debtor was insured under an accident policy in a company incorporated under a Dominion statute, having its head office at Toronto, represented in the province of Prince Edward Island by a local agent, who had authority to solicit applications and forward them to the head office of the company for approval. The insured, having met with an accident, gave the required notice, and furnished the necessary proofs of claim to the company according to the conditions in the policy. After the proofs of claim had been received at the head office, a copy of an attaching order was served upon the local agent in Prince Edward Island:—*Held*, that the insurance company was a foreign corporation within the meaning of s. 30 of 44 V. c. 4, s. 4 (P.E.I.). 2. That the company was within the province and doing business therein by an authorized agent. 3. That there was an attachable debt due by the company to the judgment debtor within 48 V. c. 4, s. 1. *Seaman* v. *Seaman*, 25 Occ. N. 109.

Insurance moneys—*Hypothecary creditor—Contingent debt.*]—The indemnity due by an insurance company, in case of fire, is a simple debt resulting from a contingent contract, and, except in the case of an assignment of the anticipated indemnity, an hypothecary creditor has no preferential claim upon such indemnity, and therefore the indemnity cannot be attached in the hands of the insurance company. *Leroux* v. *Cholette*, 4 Que. P. R. 193.

Insurance moneys — *Insurance upon goods exempt from seizure—Opposition.*]—The plaintiff, having obtained a judgment against the defendant, issued garnishing process. The garnishees declared that they owed the defendant a certain sum as insurers of goods of the defendant which had been burnt. Upon this declaration they were condemned to pay such sum to the plaintiff. The plaintiff launched an *opposition à fin de conserver*, by which he asked to be collocated upon this sum because it represented goods which were exempt from seizure. The plaintiff attacked this opposition by a defence in law:—*Held*, that exemption from seizure is a privilege, and a matter of strict law, and the law has not declared the price of the goods exempt from seizure, still less the fruits of the insurance upon them, the insurance being but an indemnity for their loss.—2. Even if the defendant had the right to be collocated upon the insurance moneys, he could not be until he had set aside, by means of a *tierce opposition*, the judgment by which the garnishee was condemned to pay the plaintiff. *St. Charles* v. *Cabana*, Q. R. 17 S. C. 233.

Insurance moneys — *Insurers — Third party — Policy — Execution.*]—By virtue of art. 5604, R. S. Q., a policy of insurance effected on the life of a husband in favour of his wife is not exigible while it is in force, and money in the hands of the insurer after the maturity of the risk is not garnishable; but as soon as the proceeds of such a policy are in the hands of a third party they are garnishable. *Thibaudeau* v. *Warren*, Que. R. 17 S. C. 347.

Insurance moneys — Judgment against married woman, payable out of separate estate—Proceeds of insurance on life of husband—Trust for wife. *Doull* v. *Doelle*, 4 O. W. R. 525, 5 O. W. R. 238, 253, 413, 6 O. W. R. 39.

Insurance moneys — *Proofs of loss—Option to replace destroyed property—Equitable execution.*]—Under Rules 741 and 742 of the Queen's Bench Act, 1895, as amended by 60 V. c. 4, the claim of the assured, under a policy of insurance against loss by fire, which provides that the loss should not be payable until thirty days after the completion of the proofs of loss usually required, cannot be attached by garnishing order before such completion, although the property insured has been burnt.—*Howell* v. *Metropolitan District Ry. Co.*, 19 Ch. D. 508, and *Central Bank* v. *Ellis*, 20 A. R. 364, followed.—*Canada Cotton Co.* v. *Parmalee*, 13 P. R. 308, not followed.—2. The only kind of liability which may be attached under the above Rules is a purely pecuniary one, and must be absolute and not dependent upon a condition which may or may not be fulfilled; and, therefore, where a policy of fire insurance contained a condition giving an option to the company to replace the destroyed property instead of paying the insurance money, if they should so decide within a certain time, a garnishing order would be of no avail, if served before the expiration of that time, as an attachment of the insurance money, since it would not then be certain that any pecuniary liability would ever arise under the policy; *Simpson* v. *Chase*, 14 P. R., *per* Osler, J.A., at p. 286.—3. The provision in the Rules as to claims and demands which could be made available under equitable execution have not the effect of making such a liability subject to attachment thereunder. *Lake of the Woods Milling Co.* v. *Collin*, 20 Occ. N. 285, 13 Man. L. R. 154.

Insurance moneys—*Quebec law—Creditors of former owner—Impeached transfer—Fraud—Insurable interest.*]—The lessor of real estate (in Quebec) insured the leased property "in trust," and notified the insurers that the lessee, his son, was the real beneficiary. The lessee paid all the premiums, and, the property having been seized in execution of a judgment against the lessor, the lessee purchased at the sheriff's sale and became owner in fee. He afterwards increased the insurance, the insurers acknowledging, in the second policy, the existence of the first in his favour. The property having been destroyed by fire, payment of the amount of the first policy to the lessee was opposed by a judgment creditor of the lessor, and the money attached in the hands of the insurers:—*Held*, that the lessee, having had an insurable interest when the first policy issued, and being when the loss occurred the only person having such interest, was entitled to payment. Even if the lessor knew that his father was embarrassed at the time he took the lease and when he purchased the property at the sheriff's sale, that would not make the transaction fraudulent as against the father's creditors. A creditor who was a party to the action against the lessor in which the property was sold in execution subject to the lease, and who did not oppose such sale, could not afterwards contest payment of the amount of the policy on the ground of fraud. *Langelier* v. *Charlebois*, 24 Occ. N. 74, 34 S. C. R. 1.

Interest of debtor under will—*Residuary legatee.*]—A primary creditor in a Division Court, by garnishee summons served on the executors, attached the interest of the primary debtor, as residuary legatee, in the estate of a testator who had died within a year of the attachment. A receiver was subsequently in a High Court action appointed to receive his interest. The Judge in the Division Court gave judgment against the garnishee, and an application for a new trial by the garnishee, on the ground that such interest was not attachable, was dismissed, but on an appeal to a Divisional Court:—*Held*, that the residuary legatee's interest was not such a debt as could be attached; and the garnishees were discharged. *Hunsberry* v. *Kratz*, 23 Occ. N. 185, 5 O. L. R. 635, 2 O. W. R. 448.

Interpleader — *Jurisdiction — Ontario Rule 920.*]—An execution creditor, C., obtained an attaching order attaching moneys in hands of the defendants, the C. P. R. Company. Plaintiffs and defendant T. claimed the moneys, C. abandoning his claim. An issue was directed between the claimants; —*Held*, that C. abandoning did not take away the jurisdiction of the District Court, which directed an issue under Rule 920 above. P. had a contract to build houses for defendant company. He wrote the railway company directing them to pay plaintiff certain sums out of the moneys due him on his building contracts with the company:—*Held*, this was a good assignment to plaintiffs. P. having failed to complete his contract it was finished by the company:—*Held*, that the company, by so doing, did not appropriate any moneys owing to P., so as to give T., an employee of P., a lien on such moneys. Judgment for plaintiffs. *Knight* v. *Turner & Can. Pac. Rw. Co.* (1909), 14 O. W. R. 517.

Judgment against mine-owner—*Attachment of funds representing proceeds of ore sold by mine-owner—Lien of attaching creditors upon fund under British Columbia Mechanics' Lien Act—Severed ore.*]— Defendant's superintendent foreman at the mine from which ore sold and delivered was extracted, is not entitled to a lien on the proceeds of the ore. The lien is a charge under above Act upon the mine itself, not on the funds arising from the sale of severed ore. *Law* v. *Mumford*, 11 W. L. R. 16.

Judgment in action for debt or liquidated demand — Claim for proceeds of sales by agent—Claim for goods sold and delivered—Rule 384. *Stimson* v. *Hamilton* (N.W.T.), 3 W. L. R. 72.

Juror's indemnity.]—Money due to a petit juror for his indemnity, as such, is not garnishable. *Brouillard* v. *Shawl*, 4 Que. P. R. 181.

Legacy—*Alimentary allowance—Previous alimentary debt.*]—Sums bequeathed by will as aliments, with a proviso that they are to be insaisissable, cannot be garnisheed for an alimentary debt arising prior to the will. *Kelly* v. *Masson*, Q. R. 23 S. C. 97.

Life rent—*Reservation by donor of immovables.*]—A life rent reserved by the donor of immovable property, in his own favour, and secured by hypothec, does not fall under the provisions of art. 599 (4), C. P.; and is not exempt from seizure by creditors of the donor. *Bradford* v. *Lasnier*, Q. R. 24 S. C. 53.

Money awarded as damages—*Insaisissabilité—Law of exception—Extension.*]—*Insaisissabilité* is a law of exception, because by common law the property of the debtor is the pledge of his creditor, and it is a principle that laws of exception must not be extended. Therefore, a sum awarded as damages, if it does not come under the head of aliments, is attachable in the whole, and Courts should not in such a case attribute to it an immunity which the law does not accord. *Dorval* v. *Corporation of Lévis*, Q. R. 33 S. C. 184.

Money of Union — *Judgment against members of unincorporated association in representative action — Trust.*] — Action against an association. Certain members were authorised by the Court to defend the action on behalf of themselves and all other members:—*Held*, 1, that the association was not a corporation, individual, partnership, nor a quasi-corporate body. 2. That its members could not be sued by their adopted name. Certain costs were ordered to be paid by defendant members. The plaintiffs sought to garnishee a certain account at the Dominion Bank, headed "Amalgamated Sheet Metal Workers' Union, No. 30":— *Held* could not be garnisheed, as order that the defendants shall pay money, without more, cannot be enforced against the property of any one except the defendants themselves. *Metallic Roofing Co. of Canada* v. *Local Union, No. 30, Amalgamated Sheet Metal*

Workers' International Association, 1 O. W. R. 573, 644, 2 O. W. R. 183, 266, 819, 844, 5 O. W. R. 95, 709, 6 O. W. R. 41, 283, 5 O. L. R. 424, 9 O. L. R. 171, 10 O. L. R. 108.

Moneys deposited in bank to credit of debtor's wife—*Arrangement with husband.*]—The plaintiff sought to attach as a debt due to the plaintiff's debtor, a sum of money deposited in a chartered bank by the debtor's wife in her own name. The evidence shewed that the money, in whole or in part, was obtained from profits earned in carrying on the business of the husband during his absence, and it appeared that it was received by the wife and deposited in her own name, by arrangement with the husband, for the purpose of protecting it against the creditors of the husband:—*Held*, in these circumstances, that the amount in question was not a debt due by the wife to the husband, and therefore not attachable under garnishing proceedings by the husband's judgment creditor. *St. Charles* v. *Andrea*, 2 E. L. R. 317, 41 N. S. R. 190.

Moneys due by Crown.]—A sum of money due to a school teacher, as a subsidy payable out of the fund appropriated by the legislature as allowance to institutions and superior schools, being money due by the government of the province, and not money due as to the salary of a public officer, is not seizable in the hands of the government under a writ of attachment by garnishment. *Beauchemin* v. *Fournier*, Q. R. 20 S. C. 272.

Moneys due to judgment debtor under mining contract—*Attachment by judgment creditors — Mechanics' liens — Order directing issue—Liability of garnishees to lien-holders.*]—On service of garnishee orders under the Attachment of Debts Act, 1904 (c. 7), the garnishees admitted a debt owing to the judgment debtor, but asked the protection of the Court as against mechanics' lien-holders claiming the fund. Thereupon an order was made directing the garnishee to pay the fund into Court to abide the determination of an issue between the attaching creditors and the lien-holders. In this issue the lien-holders failed, and proceeded upon their liens against the property:—*Held*, that the garnishees were not estopped from requiring an issue between themselves and the attaching creditors to ascertain what, if anything, was owing by the garnishees to the judgment debtor at the time of the service of the garnishee orders. *Power* v. *Jackson Mines Limited*, 13 B. C. R. 202; *Gabriele and Power* v. *Jackson Mines Limited*, 6 W. L. R. 324.

Moneys due under mortgage—Instalments falling due after service of garnishee summons—Priorities—Judgment creditors — Transferee of mortgage—Assignee of mortgage for benefit of creditors. *Macpherson Fruit Co.* v. *Hayden* (N.W.T.), 2 W. L. R. 427.

Moneys due under written instrument—*Form of—Promissory note—Moneys not attachable before maturity.*]—An instrument in the following form: "Winnipeg, June 20th, 1907. Received from A. B. the sum of five hundred dollars advance to be repaid at expiration of 9 months. C. D.," is a negotiable promissory note, and the money payable under it is not attachable by garnishment proceedings before its maturity. *Halsted* v. *Herschmann*, 8 W. L. R. 641, 18 Man. L. R. 103.

Moneys paid to clerk of County Court in another action—Not a garnishable debt—Assignment of debt attached — Validity. *Ross* v. *Goodier* (Man.), 5 W. L. R. 393, 16 Man. L. R. 534 n.

Moneys paid to clerk of County Court in another action—*Other remedies—Charging or receiving order.*]—Money paid into a County Court for the benefit of one of the parties to a suit in that Court is not attachable in the hands of the clerk of the Court by garnishee process at the suit of a creditor of such party.—*Dolphin* v. *Langton*, 4 C. P. D. 130, followed, in preference to *Bland* v. *Andrews*, 45 U. C. R. 431. —*Ross* v. *Goodier*, 5 W. L. R. 393, 16 Man. L. R. 534 n., approved.—*Quære*, whether the money could not be reached by way of charging order or equitable execution as by the appointment of a receiver. *Otto* v. *Connery*, 5 W. L. R. 403, 16 Man. L. R. 532.

Moneys payable to contractor *for building of school house—Terms of contract —Condition precedent not fulfilled when attaching order served—Saskatchewan Mechanics Lien Ordinance, s. 20 (3)—Statutory assignment.*]—*Held*, that at the time of service of the garnishee order there was no debt due or accruing due to the primary debtor. *Heward* v. *Barrett*, 11 W. L. R. 136.

Moneys payable on contract—*Liability of purchaser of land after assignment of agreement to third party—Order as to payments still to fall due—King's Bench Act, Rule 764.*]—A purchaser of land from a defendant, under an agreement providing for payment by successive annual instalments, cannot escape liability under a garnishing order, served upon him in a suit by a creditor of the defendant, by subsequently assigning his interest in the land to another person and procuring the latter to assume liability for the remaining instalments; and, although none of the instalments are due when the order is served, yet they are all covered by it to the extent necessary to satisfy the plaintiff's claim.—2. After the maturity of one of the instalments, the plaintiff is entitled, under Rule 764 of the King's Bench Act, to an order for payment not only of the overdue instalment, but also when due, of those still to fall due, until the judgment is satisfied. *Smith* v. *Van Buren*, 6 W. L. R. 12, 17 Man. L. R. 49.

Police constable's pay — *Service on treasurer of municipality—Payment to agent —Payment in advance.*]— On a motion to make absolute an order attaching all debts due by a municipal corporation to the defendant, a police constable, which was issued on the 27th February, and served on the treasurer of the corporation on the afternoon of the same day, it appeared that the defendant's salary was $900 a year, payable monthly at the end of each month:—*Held*, that, although the defendant was not a servant of the corporation, the treasurer was the proper person to serve.—*Held*, also, that the cheque for the defendant's salary for the month of February, which, according to cus-

tom, had been delivered to a messenger to leave at the police station for the defendant, but on service of the order, had been stopped by telephone and brought back to the treasurer, had not come into the hands of the defendant's agent before the service of the order. But there was no debt due, as the month's salary was not payable until the end of the month, and there is no law which forbids an employer to pay his servant's wages in advance. *Fallis* v. *Wilson*, 9 O. W. R. 418, 13 O. L. R. 595.

Proceeds of exempted chattels.] — The proceeds of chattels exempt from seizure and sale under execution, but voluntarily sold by a debtor, are attachable. *Slater* v. *Rodgers*, 2 Terr. L. R. 310.

Purchase money of land—*Debitum in præsenti, solvendum in futuro.*]—The defendants purchased land from R., and owed him $1,000 on the purchase, for which sum they had given a cheque to a bank manager, to hold at their order until they ascertained that R. had a good title to the land. On the 24th March, 1909, the plaintiff, a creditor of R., served on the defendants an order attaching the sum of $1,000 as due from them to R. At this date the cheque was still in the hands of the bank manager, and was subject to the defendants' order, and the sum of $1,000, though due to R. was not yet payable by him:—*Held*, that the debt was garnishable, and was attached by the service on the 24th March. *Gross* v. *Mihm & Dundas* (1910), 15 W. L. R. 172.

Purchase money of land — *Deed — Acknowledgment — Estoppel — Burden of Proof.*]—Where there is an acknowledgment under seal in a transfer of land that the consideration or purchase money has been paid, the vendor cannot, in the absence of fraud, maintain an action at law against the purchaser for such purchase money; he is estopped by his deed. *Baker* v. *Davey*, 1 B. & C. 704, and *Donohue* v. *Hull*, 24 S. C. R. at p. 689, followed. The vendor may proceed in equity, but in *rem*, by asserting a lien on the land sold for the purchase money (and as incidental to that relief may have a personal order against the deficiency, if any, as in *Sanderson* v. *Burdette*, 16 Gr. 119, 18 Gr. 419, and in *Skelly* v. *Skelly*, 18 Gr. 495). But the Court has no power in garnishee proceedings to give effect to such lien, or to order the purchaser to pay over the purchase money to the creditor of the vendor:—*Held*, also, in an issue arising out of a garnishing application, that the onus of proving the indebtedness of the garnishee to the judgment debtor was upon the judgment creditor, and he failed to satisfy it. *Genge* v. *Wachter*, 20 Occ. N. 158, 4 Terr. L. R. 122.

Purchase money of land — *Issue between judgment creditor and claimant — Scope of—Fraudulent conveyance—Husband and wife.*]—An issue was directed to try the question whether certain moneys in the hands of a garnishee were, at the time of the service of the garnishee summons, the moneys of the plaintiff in the issue, as a creditor of the judgment debtor, as against the defendant in the issue, the wife of the debtor.—The moneys were the balance of the purchase price of land sold by the judgment debtor's wife to the garnishee:—*Held*, per Rouleau, J., the trial Judge, 13 Occ. N. 472, that the Court on such an issue could not inquire into the question whether the land, having formerly been that of the judgment debtor, had been fraudulently conveyed to his wife. On appeal to the Court en banc:—*Held*, reversing the judgment of Rouleau, J., who adhered to his former opinion, that the Court could so inquire. *Hull* v. *Donohoe*, 2 Terr. L. R. 52. Reversed and judgment of Rouleau, J., restored, 24 S. C. R. 683, 15 Occ. N. 356.

Rent—*To whom due—Heirs of deceased landlord—Executors—Devolution of Estates Act.*]—Five plaintiffs, claiming as heirs-at-law of their father to be owners of a lot of land, brought an action for specific performance, which was dismissed with costs, subsequently taxed at $209.49. After the trial one of the plaintiffs, G. R., died, and probate of his will was granted to a sister and co-plaintiff, M. S., and the action was revived in the names of the remaining plaintiffs and M. S. as his executrix, and an appeal against the judgment was also dismissed with costs. It appeared that G. R. owned one-half of the lot, and the father the other half, and that the lot had been leased to a tenant by M. O'R., one of the plaintiffs, as administratrix of the estate of the father, who died in or before 1896, and M. S., as administratrix of the estate of G. R. No caution was registered under the Devolution of Estates Act:—*Held*, that the rent due from the tenant was garnishable for the costs payable by the plaintiffs. *Macaulay* v. *Rumball*, 19 C. P. 284, commented on. *McDonald* v. *Sullivan*, 23 Occ. N. 45, 5 O. L. R. 87, 1 O. W. R. 721, 723, 784, 840, 849; *Reilly* v. *McDonald*, 1 O. W. R. 196, 721, 723, 784, 849.

Rent — *Summons—Declaration—Service—Delays—Holiday exception to the form—C. P. 8, 174, 909, 935, 954.*]—In a case of attachment for rent, if no attachment is made because the defendant has paid the amount due between the issue and the service of the writ, plaintiff is not deprived of his right to have the copy of the declaration served upon the defendant, or deposited in the prothonotary's office, within the three days which follow the service of the writ. (1) In an action in ejectment, if the second day following the service of the writ is a Saturday, the writ may be returned into Court, and the copy of declaration deposited on the following Monday. *Lebeuf* v. *McGlynn* (1909), 10 Que. P. R. 380.

Salary—*Alimentary debt—Payment into Court.*]—The part of a salary which is not attachable to answer ordinary debts may be attached for an alimentary debt. The garnishee must pay into Court the whole sum owing to the judgment debtor; and in relying on the exemption provided by Art. 599, C. P. C., he excepts the rights of others. *Beattie* v. *Raper*, Q. R. 16 S. C. 508.

Salary—*Civil servant—Insolvency—Notification to other creditors.*]—If an employee of the province is insolvent, a creditor garnishing the employee's salary will be allowed to have the other creditors called in and notified to file their claims. *Gagnon* v. *Rowan*, 7 Que. P. R. 52.

Salary—*Deposit of portion attachable—Further attachments.*]—The deposit of the portion of salary attachable under 3 Edw. VII, c. 57, s. 1, has the effect of preventing further attachments, and this without the debtor requiring to give notice of such deposit to his creditors. *Godin* v. *Flanagan*, 7 Que. P. R. 6.

Salary—"*Due or accruing due.*"]—Where the salary of an employee was a fixed amount per month payable at the end of the month:—*Held*, that a garnishee summons served on the last day of the month did not bind the current month's salary, inasmuch as no part of the amount was due, that is, recoverable by the employee, till the last day of the month had expired, nor was any part accruing due, inasmuch as the liability of the employer to pay was contingent upon the completion of the month's service by the employee. *Main* v. *McInnis*, 4 Terr. L. R. 517.

Salary—*Husband working for wife.*] — The defendant's wife and her sister were carrying on business in copartnership. The defendant's wife was separated as to property. The defendant was the manager of the firm, but he had no stated salary, his wife being bound by the terms of the partnership agreement to provide a working representative without expense to the firm. On an attachment in garnishment by the plaintiff, of the value of the husband's services, in the hands of the wife:—*Held*, that where no fraud is proved, and a husband voluntarily looks after the affairs of his wife, a *marchande publique* and separated as to property, without any agreement as to remuneration, the Court will not hold that the services of the husband must be paid for, and will not fix a sum representing the value of such services, which sum would be subject to attachment for a judgment against the husband. *Arnoldi* v. *Stewart*, Q. R. 17 S. C. 252.

Salary—*Husband working for wife.*] — *Held*, affirming the judgment in Q. R. 15 S. C. 322, that a husband who works for his wife—in this case the husband had become a bankrupt, and the wife had continued his business, the husband working for the benefit of his wife as he had before done for his own benefit—has no right to any salary, and his creditors cannot, upon attachment of moneys in the hands of his wife, claim the value of his services. *St. Pierre* v. *Towle*, Q. R. 17 S. C. 361.

Salary — *Organist.*]—The salary of a church organist falls under the operation of Art. 599 (*a*), C. P. C., and is not garnishable except as to a proportion thereof as indicated in the enactment. *Bell* v. *Larivée*, Q. R. 16 S. C. 229.

Salary—*Police officer—Payment—Agent.*] —The salary of a police officer employed by the Board of Police Commissioners for a city was attached by a judgment creditor. Before the service of the attaching order upon the city corporation, a cheque for the salary had been handed by the city treasurer to a police inspector to be handed to the judgment debtor, but had not been handed to the latter. The attaching order was subsequently, and before the cheque reached the judgment debtor, served upon the inspector, who was not a party to or named in the order:—*Held*, upon the evidence, that the inspector was not the agent of the city corporation to pay the judgment debtor, but the implied agent of the latter to receive payment for him; and therefore payment had been made when the order was served. It was not the duty of the corporation to stop payment of the cheque, and they did not do so. *Cohen* v. *Hale*, 3 Que. B. D. 371, distinguished. *Verney* v. *Guthrie*, 20 Occ. N. 313.

Salary—*Public officer—Assessor.*]—*Held*, affirming the judgment in Q. R. 15 S. C. 262, that a city assessor is a public officer within the meaning of Art. 599, C. C. P., and his salary is not liable to garnishment. *Stewart* v. *Euard*, Q. R. 8 Q. B. 404.

Salary of choirmaster.]—The salary of the choirmaster of a Roman Catholic parish church in the province of Quebec is not garnishable. *Lefebvre* v. *Drolet*, 8 Que. P. R. 200.

Salary of Court stenographer—*Fees for depositions.*]—Amounts due to official stenographers for depositions taken in Court are regarded as salary, and are attachable to the extent of one-fifth. *Létourneau* v. *Collin*, 4 Que. P. R. 122.

Salary of harbour master — *Public officer.*]—The harbour master of Montreal, having by virtue of his office to administer a part of the public domain of the Crown, and acting in the general interest of commerce and navigation, must be considered as a public functionary, and his salary is not seizable under execution or attachable. *Cochrane* v. *McShane*, Q. R. 24 S. C. 283.

Salary of municipal officer—*Payment in advance—Set-off—Equitable assignment—Service—Costs.*]— Upon an application to garnishee the salary of an officer of a municipal corporation, it appeared that by virtue of a by-law his salary was payable monthly, and that the practice of the corporation was to pay all salaries on the first day of the month. The attaching order was served on the 30th April, between ten o'clock in the morning and one o'clock in the afternoon. The judgment debtor, before the service of the order, had been paid in full all his salary for the month of April, under an arrangement between him and the treasurer of the corporation that advances should be made on account of salary and stopped from the debtor's cheque at the end of the month:—*Held*, that nothing was due to the debtor by the corporation at the time of the service of the attaching order, for there had been actual payment of the salary by the corporation; or, if not payment, an advance by the corporation which they could set-off against a claim for salary; or, if the moneys advanced were to be regarded as misappropriated by the treasurer or the clerk and advanced personally by him to the debtor, there was a good (though verbal) equitable assignment of the salary by the debtor to the treasurer or clerk; and, per the Master in Chambers, a debt in respect of the salary, in any event, would not have accrued due until after the service of the attaching order. *Held*, also, per Meredith, C.J., in Chambers,

that the judgment debtor and the corporation, by its responsible officers, had so misconducted themselves that they should be deprived of costs, although the order of the Master in their favour was in other respects affirmed. *Wilson* v. *Fleming*, 21 Occ. N. 334, 1 O. L. R. 599.

Salary of partner.]—Where a garnishee partnership declares that the defendant is a member of the partnership and draws from it a weekly salary, the partnership will not be ordered to deposit any sum in Court, to its prejudice, but the attachment will be declared effective. *De Claude* v. *Hemond*, 4 Que. P. R. 71.

Salary of police magistrate—Public officer — Appointment and termination on resolution of county council—Public policy. *Lee* v. *Ellis*, 8 O. W. R. 396.

Salary of public officer — *Provincial Government of Quebec—Deputy registrar — Privilege — Exemption.*]— The expression every such registrar in Art. 5650b, S. R. O. (37 Vict. c. XLI.), includes the deputy registrar, and hence the salary of the latter as well as that of the former is not exigible. *Garand* v. *Mancotel* (Que.), 6 E. L. R. 180; *Guilbert* v. *Mancotel* (Que.), E. L. R. 564, Q. R. 18 K. B. 325.

Salary of public officer——Provincial Government of Quebec — Revenue officer. *Guilbert* v. *Mancotel*, 4 E. L. R. 564.

Salary of sheriff—*Judgment by default —Opposition.*]—The salary of a sheriff is insaisissable; and even where the government has paid several instalments of salary to a garnishing creditor, the sheriff, even when the attachment has been made absolute upon default of his appearance, may, by way of opposition to the judgment, have it set aside. *Mongeau* v. *Arpin*, Q. R. 18 S. C. 395.

Salary of teacher—*Exemption—Application after death—Crown—Provincial government—Public officer.*]—The salary of a teacher (*instituteur*) being by law exempt from attachment, the exemption subsists in favour of his children in respect of arrears due him at the time of his decease. 2. Money in the hands of the government of the province of Quebec cannot be attached unless in the case of salaries of public officers. *Beauchemin* v. *Fournier*, 4 Que. P. R. 138.

Sale of an hypothecary debt *made after sale, but before signification of the acte—Conflict of rights of the seizing creditor and of the assignee or buyer.*]— A creditor who causes an hypothecary debt due to his debtor to be seized by writ of attachment, is a third party, within the meaning of Art. 1571 C. C, as regards the buyer or assignee of the debt seized. Property under seizure, whether corporeal or incorporeal, is not assignable or alienable, as regards the seizing creditor, and hence the assignee of a debt before seizure thereof, cannot, after it has been made, perfect his title of signification and become "a subsequent transferee who has conformed to the requirements of Art. 2127 C. C." The words "every conveyance or transfer, whether voluntary or judicial," in Art. 2127 C. C., do not apply to the seizure of debts by writ of attachment. To make them do so would be in direct violation of Art. 1147 C. C. As a consequence of the above rulings, the assignment of a debt which has not been signified to the debtor is of no effect and cannot be set up against a creditor who causes the debt to be seized by writ of attachment. *Pinsonnault* v. *Coursol* (1908), Q. R. 18 K. B. 200.

Sum due by municipal corporation for work done under contract—*Claims for wages by workmen—Builders' and Workmen's Act, R. S. M., 1902, c. 14—"Contractor"—"Proprietor"—Garnishing creditors—Priority—Interpleader.*]—C. had a contract for grading roads for defendant municipality. Plaintiff, a workman, sued for his own wages, and another wage claim assigned to him:—*Held*, that s. 4 of above Act has made a statutory assignment to the workmen to the amount of their unpaid wages of the moneys payable by defendant to C. Plaintiff must therefore be paid in priority. The municipality is a "proprietor" within the Act. *Bryson* v. *Rosser*, 10 W. L. R. 317.

Sums due by shareholders on shares —*Judgment against company—Claim of liquidator in winding-up—Priority.*]—A creditor who, prior to the granting of a winding-up order, has served a garnishee summons on a shareholder, and obtained judgment against the company, is entitled to be paid the amount of his judgment out of moneys due by the shareholders for calls on stock at the time of the service of the garnishee summons, in priority to the claims of the liquidator in the winding-up proceedings. *Cross* v. *Alberta Brick Co.*, 1 Alta. L. R. 103.

Wages—*Builders' and Workmen's Act—Priority of wages over garnishing and other orders.*]—Section 4 of the Builders' and Workmen's Act, R. S. M. 1902, c. 14, making a proprietor directly liable for payment of the wages of workmen employed by a contractor doing any work for him, effects what may be termed a statutory assignment to the workmen, to the amount of their unpaid wages, of the moneys payable by the proprietor to the contractor, so that the workmen are entitled to priority over the claims of creditors holding garnishing or other orders against the proprietor in respect of such moneys, and such creditors are entitled to be paid out of any balance in the order in which notices of their several claims were given to the proprietor.—In such case it makes no difference that the proprietor has made a payment to the contractor which diminishes the amount available for such other creditors. *Bryson* v. *Municipality of Rosser*, 18 Man. L. R. 658, 10 W. L. R. 317.

Wages — Exemption—Board money — Deductions—Construction of statute. *Gordon* v. *Seabrooke* (Y.T.), 2 W. L. R. 105.

Wages—Exemption — Construction of Rule 395 (Y.T.) *Meacham* v. *Nugent* (Y. T.), 2 W. L. R. 301.

Wages—*Set-off.*]—Upon a declaration of the garnishees that the judgment debtor is employed by them as a driver; that he has

the use of a waggon and two horses every day, "the understanding being that he gives us every evening the half of the daily profit;" that since the service of the attaching order they have paid him $11.54, half of the receipts since made, while he still owes them $43:—*Held*, that the half of such receipts represents daily wages, and the part of such wages which can be seized may be garnisheed, and the attachment of it should be declared valid. 2. That a set-off cannot be made to the prejudice of the garnishors, between the wages of the debtor and arrears of receipts due by him to the garnishees before the attachment. *Payfer* v. *Beauchamp*, 3 Que. P. R. 347.

Wages of mariner—Exemption—Master of boat plying on inland waters. *N. A. T. and T. Co.* v. *Seaton* (Y.T.), 2 W. L. R. 559.

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2. PRACTICE AND PROCEDURE IN GARNISHMENT.

Action by judgment debtor against garnishee—*Special pleading.*]—In a suit to recover moneys which have been attached, brought by defendant in the attachment against the garnishee, the latter may, instead of proceeding regularly, file a declaration that he submits his rights to the Court, at the same time stating, with documents in support of his statements, the previous proceedings which prevent him from paying what he owes to the plaintiff, namely, the garnishing proceedings pending, a judgment already given requiring him to pay one-fifth to a creditor, and the fact that another creditor has made a motion for a declaration that the whole salary of the plaintiff is exigible. *Noel* v. *Corporation of Pilots for the Harbour of Quebec*, 5 Que. P. R. 90.

Affidavit — *Information and belief* — *Grounds.*]—The affidavit for attachment *en mains tierces*, when founded upon information or belief, must state the grounds of such belief and the sources of such information, and in the absence of such statement the seizure will be quashed on petition. *Duclos* v. *Beaumier*, Q. R. 20 S. C. 237.

Affidavit — *Irregularity* — *Claimant* — *Judge by consent trying issue summarily*—*Appeal*—*County Court.*]—The plaintiffs in County Court proceedings issued several garnishee summonses, and subsequently in Supreme Court actions judgment creditors of the defendants in the County Court actions issued attaching orders against the same garnishees. The judgment creditors in the Supreme Court actions contended that the County Court garnishee summonses were nullities, as they were issued on an affidavit which did not comply with the statute, and all the interested parties agreed that the County Judge might decide the matter in a summary way. He held that the County Court plaintiffs were entitled to the moneys garnisheed:—*Held*, on appeal, following *Eade* v. *Winser*, 47 L. J. C. P. 584, that the County Judge was in effect an arbitrator; and no appeal lay from his decision. Per Drake, J.—(1) The affidavit leading to a garnishee summons must verify the plaintiff's cause of action, and a garnishee is entitled to question the validity of the proceedings at the hearing. (2) The defect in the affidavit was an irregularity only, and payment into Court by the garnishees was a waiver by them of their right to object. (3) The plaintiff may specify in one affidavit several debts proposed to be garnished. *Harris* v. *Harris*, 22 Occ. N. 73, 8 B. C. R. 307.

Affidavit — *Insufficiency* — *Waiver.*]—*Held*, that the affidavit of an advocate, which on its face shewed that he had no personal knowledge of the facts, and which did not contain a positive statement of an indebtedness by the defendant to the plaintiff, is not a sufficient affidavit upon which to issue a garnishee summons under Rule 384, and a garnishee summons so issued was set aside. (2) That a garnishee summons so issued cannot be treated as a mere irregularity so as to be waived under Rule 539 by taking a fresh step. *Rumley* v. *Saxauer* (1), 6 Terr. L. R. 63.

Affidavit to obtain garnishing order —*Practice* — *Departure from forms prescribed*—(*Man.*) *Rule 769*—"*Deductions*"—"*Discounts*"—"*Jointly*" — "*Justly.*"]—Application to set aside attaching order. The affidavit on which this order had been obtained stated that defendants were "jointly" instead of "justly" indebted after making all "deductions" instead of "discounts" as in the form required. The above Rule says the affidavit may be in the prescribed form or "to the like effect":—*Held*, that this will cover "deductions," but not "jointly," although the latter was a typewriter's mistake. Attaching order set aside. *Johnson* v. *Chalmers*, 12 W. L. R. 506.

Ante-judgment summons — *County Court—Debt or liquidated demand—Affidavit verifying debt.*]—An application by the defendant to set aside a garnishee summons (and service) issued before judgment, and for payment out of Court of moneys paid in by the garnishee, was granted. Section 102 of the County Courts Act, R. S. B. C. 1897 c. 52, provides that "a plaintiff, at the time of issuing a summons for a debt or liquidated demand or at any time thereafter previous to judgment, upon filing . . . an affidavit verifying the debt . . . may obtain a summons" (i.e., garnishee summons), etc. The summons was issued claiming $2.50 for hire of horse and sleigh, together with $60 damages for the destruction of the sleigh through the defendant's negligence. The affidavit verifying the debt ran: "My claim against the defendant is for the sum of $2.50 for hire of rig hired by the defendant from me on the 14th day of February last, and for the sum of $60 damages for the destruction of the said rig or vehicle." *Lindburg* v. *McPherson*, 21 Occ. N. 425.

Assignment of debt attached—Claim under assignment—Issue between judgment creditor and claimant — Summary trial — Rule 393—Evidence — Affidavits — Onus—Parties—Sale of machinery—Moneys to be earned by use of part—Proof of use—Equitable assignment — Future earnings—Effectiveness. *Lynberg* v. *Tarbox*, 9 W. L. R. 347.

Assignment of debt attached—*Saisie-arrêt executed before service of notice of*

assignment — Right to moneys.]—A *saisie-arrêt* does not deprive the defendant of the debt attached, but leaves the debt in such a position that it cannot be disposed of to the prejudice of the attaching creditor. Therefore, the assignee of a debt, not being *saisi* as regards third persons, except by the service of notice of the assignment upon the debtor, cannot set up his title as against a creditor who has attached the debt in the hands of the debtor before such service. *Coursol* v. *Dubé*, Q. R. 33 S. C. 429.

Attaching order before judgment — *Nature of plaintiff's claim—Rule 384.*]—"*Debt or liquidated demand*" — *Necessaries for defendant's wife.*]—*Held*, that when a husband deserts his wife, or compels her to live apart from him, without properly providing for her, the wife becomes his agent, from necessity, to pledge his credit, and any debts so contracted by her are "liquidated demands" as against the husband, within the meaning of Rule 384, and garnishment proceedings before judgment may be based thereon, to attach moneys alleged to be due to the husband, the primary debtor. *Parkin* v. *Parkin*, 7 W. L. R. 66, 1 Sask. L. R. 206.

Attaching order before judgment — Nature of claim in principal action—"Debt or liquidated demand"—Action for partnership account—Amount involved—Promptness in proceeding with action where garnishee summons issued. *Alexander* v. *Thompson* (Alta.), 8 W. L. R. 659.

Attaching order before judgment — *Rule 759—"Claim or demand" — Unascertained damages in tort.*]—The words "claim or demand" used in Rule 759 of King's Bench Act, R. S. M. 1902, c. 40, are limited by the following words, "due and owing," and do not extend to a claim in *tort* for unascertained damages before judgment recovered therefor, so that a plaintiff having only such a claim is not entitled under that Rule to an order attaching moneys due by a third party to the defendant to answer the judgment of the plaintiff to be recovered. *Grant* v. *West*, 23 A. R. 533, followed. *McIntyre* v. *Gibson*, 8 W. L. R. 202, 17 Man. L. R. 423.

Attachment before judgment — *Affidavit—Agent.*]—An affidavit upon which a *saisie-arrêt* before judgment is granted, made by one who swears that he is the agent of the plaintiff, is regular, the word "agent" embracing the words "legal attorney" mentioned in art. 933, C. P. *Skinner (William) Manufacturing Co.* v. *Vineberg*, 8 Q. P. R. 201.

Attachment before judgment — *Affidavit—Requisites of.*]—The allegation, "the plaintiff verily believes that unless a writ of attachment before judgment be served upon the garnishee he will lose the amount owing him," in an affidavit for the issue of a writ of attachment before judgment, is sufficient and equivalent to the form of Art. 895, C.C., which says "that the plaintiff will thus be deprived of his recourse against the defendant." The affidavit need not give the reasons of belief and the sources of information of the deponent, unless these relate to withdrawal or concealment by the defendant. *Bois* v. *Fels*, 6 Que. P. R. 447, Q. R. 27 S. C. 34.

Attachment before judgment — *Discharge by failure of action—Unnecessary motion by garnishee—Costs.*]—If a defendant has been discharged by judgment from an attachment before judgment, the *tiers-saisi* is at the same time relieved from the seizure made in his hands; a motion by the *tiers-saisi* for a discharge will consequently be dismissed, but without costs, if the plaintiff did not appear to contest the same. *Holmes* v. *Woodworth*, 9 Que. P. R. 327.

Attachment before judgment — *Grounds for—Intention to quit province.*]—A statement made *ab irato* by a person of affluent means that he will within 24 hours sell all the property he has and go to the States, affords of itself no sufficient ground for proceeding against him by attachment of debts before judgment. *Daigle* v. *Dussault*, Q. R. 30 S. C. 215.

Attachment before judgment—*Petition to quash—Irregularities — Quality of deponent.*]—The defendant's remedy by petition to quash an attachment before judgment is collateral to the regular methods of defence, and must be strictly confined to the grounds permitted by Art. 919, C. P. 2. The petition to quash cannot allege irregularities in the writ and indorsement, default to leave copy of affidavit and declaration or the quality of the deponent, which are properly matters for exception to the form. *Canadian Pacific Rw. Co.* v. *Frappier*, 6 Que. P. R. 186.

Bailiff—*Offer of security—Refusal.*]—A bailiff who makes a seizure under a *saisie-arrêt* before judgment, cannot refuse to restore the goods seized to the defendant, if the latter offers good and sufficient sureties in accordance with Art. 938, C. P., under the pretence that he has no power to appraise the security. *Schwartz* v. *Ramch*, 6 Que. P. R. 396.

Contestation—*Costs.*]—Where a garnishee declares that he is not indebted, the defendant need not delay to take proceedings for the quashing of the writ until the plaintiff has determined whether or not he will contest the declaration; but if he chooses to file a contestation of the attachment instead of moving for his discharge from the seizure as allowed by Art. 688, C. C. P., he will only be allowed the costs of an appearance and a motion. *Pallascio* v. *Champeau*, Q. R. 17 S. C. 306.

Contestation—*Insolvency of defendant—Pleading—Amendment—Costs — Distraction—Scale of costs.*]—In a contestation of an attachment by the defendant, it is immaterial to the issue whether the original debtor whose heirs have been condemned by judgment on the principal action, was solvent or not. 2. A paragraph struck out from a pleading upon an inscription in law, will not be reinstated by amendment at the trial. 3. A writ of attachment after judgment cannot be issued for costs without the consent of the attorneys in whose favour distraction of costs was granted. 4. The costs awarded upon a contestation of attachment main-

tained as far as costs are concerned, will be governed by the amount of the costs for which attachment was improperly issued. *Montreal Land and Mortgage Co.* v. *Heirs of Mathieu*, 6 Que. P. R. 329.

Contestation—*Production of books.*] — The attaching creditor cannot obtain an order compelling a garnishee, especially when the latter declares that he does not owe, to produce books or prepare statements; the creditor's recourse is by way of contestation. *Baumar* v. *Carbonneau*, 8 Que. P. R. 333.

Contestation—*Undue delay.*]—The garnishing creditor will not be allowed to contest, after the delays, the declaration of a garnishee, if he has shewn no diligence in the matter. *Meloche* v. *Lalonde*, 7 Que. P. R. 161.

Corporation garnishee—*Declaration by attorney—Art. 686, C. P.*]—When in answer to an attachment in the hands of a corporation, such corporation makes its declaration by an attorney under a general authorisation, no question under Art. 686, C. P., can be put to such attorney. *Brodeur* v. *MacTavish*, 7 Que. P. R. 235.

County Court—*Garnishee summons before judgment—Partnership action.*] — An application by the defendant to set aside a garnishee summons issued under s. 102 of R. S. B. C. c. 52, which enables a plaintiff at the time of issuing a summons for a debt or liquidated demand, or at any time previous to judgment, upon filing an affidavit, etc., to obtain a garnishee summons. The action was brought to have a partnership dissolved and for an account and payment:—*Held*, that the action was not for a debt or liquidated demand; and the garnishee summons was set aside. *Walter* v. *Rooke*, 50 L. J. Q. 470, *Howell* v. *Metropolitan District Ry. Co.*, 51 L. J. Ch. 158, and *Randall* v. *Lithgow*, 53 L. J. Q. B. 518, referred to. *Cicognia* v. *McHeather*, 22 Occ. N. 309.

Debtor suing garnishee—*Discharge of garnishee.*]— The fact that the judgment debtor has, since the declaration of the garnishee, brought an action against him does not interrupt the latter's right to be discharged from the attachment if he owes nothing. *In re Banque Ville-Marie*, 7 Que. P. R. 169.

Declaration of garnishee—*Admissions—Judgment.*]—Answers given to interrogatories by a garnishee who declares that he owes the defendant nothing do not form part of his declaration, and do not justify the garnishing creditor in entering the matter for judgment upon such declaration. *Laframboise* v. *Rolland*, M. L. R. 2 S. C. 75, and *Grant* v. *Federal Bank of Canada*, 29 L. C. J. 333, followed.—In this case the garnishee having declared that he owed nothing to the debtor, but having added, in answer to interrogatories of the plaintiff, that the debtor was in his employment in receipt of a salary of $100 a month; that he had drawn $400 more than his salary during the previous year; that he, the garnishee, had paid nothing to the debtor since service of the attaching order; and that if the garnishing proceedings were discontinued, the defendant would have no right to draw anything:—*Held*, that the plaintiff had a right in law to contest the declaration of the garnishee; which declaration could not serve as the foundation for a judgment against the garnishee. *White* v. *Sabiston*, Q. R. 16 S. C. 597.

Declaration of garnishee——*Alimentary allowance—Married woman—Contestation in forma pauperis—Authorisation.*] — The Court may authorise a married woman to contest *in forma pauperis* the declaration of garnishee, when the latter had declared that he has in his hands moneys due for alimentary allowance. *Clermont* v. *Charest* (1906), 7 Que. P. R. 468.

Declaration of garnishee—*Conditional debt—Discharge.*]—If a garnishee declares that he owes nothing to the judgment debtor, but that there is a contract between them under which the judgment debtor is allowed to take insurance risks for the company of which the garnishee is an agent, the judgment debtor and the garnishee are not entitled upon such declaration to have the attachment proceedings dismissed, as they would be if the garnishee had declared simply that he owed nothing. *Quære*, is there ground, in the case of a conditional debt, to claim dismissal of the proceedings on the ground that the garnishing creditor has not had it declared that the attachment is binding. *Lamothe* v. *Piche*, 5 Que. P. R. 180.

Declaration of garnishee — *Contestation—Judgment — Inconclusiveness — Review—Remittal for amendment.*]—A judgment which maintains a contestation of the declaration of a garnishee, without condemning him either to produce the property in his possession belonging to the judgment debtor or to pay the sum due or the debt to the judgment creditor, is informal and violates Art. 541, C. P., not being such a judgment as can be executed; and upon inscription in review it will be sent back to the Court of first instance to be amended. *Lamoureux* v. *Fontaine*, Q. R. 34 S. C. 1.

Declaration of garnishee — *Contestation—Service on attorney—Married woman garnishee—Authorisation.*]—When a garnishee has appeared by attorney, a contestation of his declaration is regularly served upon the attorney.—When the wife, garnishee, is separate as to property, is a public trader, and the matters in dispute are those of his business, she does not require the authorisation of her husband to appear in judicial proceedings. *Frank* v. *Lafrance*, 8 Que. P. R. 305.

Declaration of garnishee — *Contestation by debtor—Status.*]—A debtor has no interest to support a motion for the rejection of the declaration of a garnishee, on the ground that the necessary stamps have not been affixed to it, or that the garnishee has not the status to make such declaration. *Montreal Loan and Mortgage Co.* v. *Mathieu*, 7 Que. P. R. 84.

Declaration of garnishee — *Contestation by defendant—Answer by plaintiff—Inscription for hearing.* —Where the declaration of the garnishee has been contested by the defendant (judgment debtor), and a copy of the contestation has been served on

the plaintiff, who has answered it, the latter may properly inscribe the cause for hearing on the merits. *Yep* v. *Lung*, 9 Que. P. R. 362.

Declaration of garnishee — *Contestation of—Claim for damages.*]—A garnishee is not obliged to declare hypothetical and possible debts; his declaration is sufficient if it admits debts of which he knows the cause and the amount. 2. Facts which may serve as the basis of an action for damages by a defendant against the garnishee do not justify a contestation of the declaration of the garnishee, when the additional claim of the defendant against the garnishee is not liquidated nor established nor stated in any manner, and when the garnishee cannot be presumed to have known it at the time of his declaration. 3. In this case, the garnishee, being indebted to the defendant in the sum of $100 by virtue of a judgment, was not obliged to declare that, besides such sum, he owed $200 as damages caused to the defendant by the allegations of a certain plea which he alleged to be false; and a contestation of the declaration of the garnishee based upon default of declaring something else besides an ascertained debt, was dismissed upon inscription in law. *Germain* v. *Dussault*, 5 Que. P. R. 96.

Declaration of garnishee — *Contestation of—Requirements.*]—When a *tiers-saisi* has declared that he owes nothing, it is not sufficient to allege, in contestation thereof, that it is false; a contestation of a declaration of a *tiers-saisi* has for its object a different basis of facts whereon to determine the liability of the garnishee from that furnished by his declaration; it must, if not less than the amount of the judgment, set forth the exact amount of the alleged indebtedness; it must be as specific as, and proved like, the contents of the declaration in an ordinary suit, and it creates a real cause, in which the *tiers-saisi* is a defendant. *Canadian Congregational Missionary Society* v. *Larivière*, 4 Que. P. R. 290.

Declaration of garnishee — *Cross-examination—Production of documents — Contestation—Issue.*] — When a garnishee declares that he is not indebted to the judgment debtor, although questions may be put to him tending to prove the contrary, he is not to be considered as an ordinary witness, or as a party examined on discovery. The Court will not, therefore, order him to produce accounts, books of account and correspondence. The proper course for the seizing creditor is to contest the declaration and to proceed to trial upon an issue joined. *Baumar* v. *Carbonneau*, Q. R. 32 S. C. 219.

Declaration of garnishee — *Default — Costs.*]— A garnishee in default for a declaration, who desires to make his declaration by virtue of art. 691, cl. 3, C. P., is only obliged to pay disbursements occasioned by his default, and attorney of the plaintiff cannot recover from him any fee. *Guilbault* v. *Dallaire* (1906), 8 Que. P. R. 96.

Declaration of garnishee — *Default of judgment—Appeal—Relief on terms.*] — A garnishee who has appealed from a judgment against him by default, and whose appeal has been dismissed, may still be relieved from his default to make a declaration upon paying all the costs incurred, including those of the appeal. *Saunders* v. *Boeckh*, 5 Que. P. R. 416.

Declaration of garnishee—*Dies non—Nullity.*]— A declaration of a garnishee made and sworn on a legal holiday is null and void, and will be struck out on motion. *Rattray* v. *Arthur*, 9 Que. P. R. 239.

Declaration of garnishee—*Expiry of time for contestation—Discharge—Service—Costs—Position of judgment debtor.*] — A *tiers-saisi* is entitled to be discharged from a *saisie-arrêt* on lapse of the delays for contestation of his declaration, even if a discharge of said seizure was put on record by the plaintiff, and which did not include costs, and was not served on said *tiers-saisi*.—2. A defendant is similarly entitled to be discharged from a *saisie-arrêt*, although a discharge was put of record by the plaintiff, but did not include costs, and was served on the defendant on the same day, and between the same hours as the defendant's motion to be relieved from said seizure. *Robertson* v. *Honan*, 9 Que. P. R. 282.

Declaration of garnishee — *Judgment —Moneys accruing due—New declaration.*] —In order that an attachment after judgment in the hands of a third party be binding, it must be so declared by judgment; in absence of a contestation of the garnishee's declaration within the legal delays, and of a demand within the same delay to have the seizure declared binding, a writ of attachment is without effect against the garnishee as regards the sums which may eventually become due; and a motion then made to make him declare *de novo* will be rejected. *Decelles* v. *Lafleur*, 5 Que. P. R. 439.

Declaration of garnishee — *Judgment —Reduction on appeal—Payment of solicitor's costs—Set-off.*]—A garnishee, who has declared that he was adjudged to pay to the defendant $100 damages by a judgment from which he has appealed, cannot afterwards, after the amount of the judgment has been reduced by the Court in review to $50, with costs of the hearing and review against the defendant, allege by a subsequent declaration that he has paid his solicitor the $50 allowed to him by the later judgment, which has been garnished before the decision. *Pieffer* v. *Campeau*, 5 Que. P. R. 135.

Declaration of garnishee—*Motion for judgment.*]—A plaintiff cannot set down a garnishing matter upon motion for judgment *ex parte* upon the declaration of the garnishee, when that declaration does not contain an admission pure and simple that a certain sum is due to the defendant. *White* v. *Sabiston*, 3 Que. P. R. 124.

Declaration of garnishee — *Place of making.*]— The declaration of a garnishee made in a district other than that where the writ of *saisie-arrêt* was issued, without notice to the garnishing creditor, will on motion therefor be rejected. *Duchesne* v. *Quintal*, 7 Que. P. R. 163.

Declaration of garnishee — *Place of making—Taxation of costs.*]—When a garnishee lives in a district other than the one

in which the attaching process has been issued, he may come to make his declaration before the clerk of the Court from which the writ has issued, and then he has the right to tax all his travelling and hotel expenses, and, besides, $1 per day for each day he is absent from home in making his declaration —and this although the expense of making his declaration before the prothonotary of his domicil would not have been so great. *Blouin* v. *Perrault*, Q. R. 25 S. C. 439.

Declaration of garnishee—*Statement—Default—Order for payment.*]—A garnishee who neglects to produce a statement complementary to his declaration may be ordered to pay just as though he were the primary debtor. *White* v. *Sabiston*, 3 Que. P. R. 193.

Declaration of garnishee — *Time for contesting—Dismissal of attachment proceedings—Separate orders in favour of judgment debtor and garnishee—Inscription in review—Deposit — Desistment.*] — In a summary cause the time for contesting the declaration of a garnishee is two days. 2. A plaintiff who complains of judgments dismissing his proceedings against the defendant and the garnishee, upon two separate motions, must make separate inscriptions in review in respect of each judgment and make a deposit in each case, in default of which his inscription will be set aside. 3. Where an inscription in review has been set aside, the Court of Review has no jurisdiction to adjudicate upon the validity of the desistment; that must be dealt with by the Court of first instance. *Lamothe* v. *Piche*, 5 Que. P. R. 164.

Declaration of garnishee—*Uncertainty as to amount owing—Motion for judgment.*] —Although a seizure may have been declared *tenante*, the plaintiff is not entitled to inscribe for judgment on the garnishee's declaration when the garnishee states that he owes the defendant nothing, and is not ready to say what portion of certain moneys in his first declaration stated to have been received from the defendant's attorneys, is returnable to them. *Baumar* v. *Carbonneau*, 7 Que. P. R. 213.

Declaration of garnishee dispensed with—*Costs of judgment debtor—Discharge of saisie-arrêt*]—If the garnishee has not made a declaration because the plaintiff (judgment creditor) has dispensed him from it, the defendant (judgment debtor) has, nevertheless, a right to have the *saisie-arrêt* discharged with costs against the plaintiff. *Robertson* v. *Honan*, 9 Que. P. R. 353.

Declaration of garnishees—*Contestation—Intervention.*]—Where garnishees have declared that they are not aware of having any money belonging to the defendant, the declaration having been contested, and an executor having intervened in the contestation, the garnishees cannot be called on to declare *de novo*, while the issues are still pending. *Brodeur* v. *McTavish*, 8 Que. P. R. 219.

Default of service on debtor—*Motion to dismiss.*]—A debtor who has been served with attachment process after judgment cannot appear and demand dismissal of the attachment. *Fafard* v. *Marsan*, 5 Que. P. R. 438.

Denial by garnishees of liability to judgment debtor—Cross examination of affidavits—Refusal to answer to liability of third person—Allegation of identity of third person with debtor. *Smith* v. *O'Dell*, 6 O. W. R. 47, 179.

Deposit by garnishee — *Amount — Costs.*]—The garnishee who fails to deposit a certain sum of money, in accordance with an order served upon him, cannot be condemned, in the absence of any mention in the record of other creditors of the judgment debtor, to pay any greater sum than the amount he should have deposited, and the costs of order and of the inscription for judgment against him. *Laforce* v. *Grant*, 6 Que. P. R. 370.

Desistment—*Notice—Practice.*]—A garnishee, who receives a notice of desistment from a *saisie-arrêt* before the day of its return, cannot by motion demand an act of desistment and dismissal of the proceeding; if he believes the desistment to be insufficient, he must appear at the process office and so declare. *Montreal Land and Mortgage Co.* v. *Heirs of Mathieu*, 6 Que. P. R. 274.

Desistment — *Notice — Withdrawal — Costs.*]—Where a garnishing creditor desists from the attachment proceedings without mentioning that the attachment was made with costs, and without giving notice of such desistment to the attorneys of the garnishee, a motion by the latter for withdrawal of the attachment will be granted with costs. *Levy* v. *Arkbulatoff*, 5 Que. P. R. 338.

Division Court—Liability of garnishees to primary debtor—Evidence of. *McLeod* v. *Clark* (1906), 8 O. W. R. 403.

Extension of time—*Garnishees—Ignorance.*]—Where on the return of a *saisie-arrêt* attaching salary alleged to be due to the judgment debtor by a railway company, they declared that they had not been able to ascertain whether the debtor was still in their employment, as he had been working at a great distance from their head office, the Court declared the seizure in the hands of the garnishees binding, and adjourned the hearing. *Donegan* v. *Cassidy*, 2 J. P. R. 451.

Foreign company garnishees—*Exception to form—Service—Illegality.*]—The service of a writ of *saisie-arrêt* upon a foreign company, garnishees, who have no business office nor agent, is irregular and illegal, and such garnishees have an interest sufficient to apply to set aside service by way of exception to the form. *Lachapelle* v. *Gagné*, 8 Que. P. R. 163.

Fraud—*Issue—Amount in controversy—County Court—Jurisdiction — Residence of garnishee—Receiving order.*]—Where it was charged by a judgment creditor that a fraudulent arrangement had been made between the judgment debtor and his employers, the garnishees, whereby a third person had been substituted for the debtor, as the servant of the garnishees, and money paid to such third person, while the debtor continued to do the work:—*Held*, that the judgment creditor was entitled to have an issue directed, to which

the third person should be a party, to determine whether there was at the time of the service of the attaching order any debt due or accruing from the garnishees to the debtor, without bringing home a case of fraud to the persons against whom it was charged; it was sufficient to shew unexplained facts and circumstances so unusual as to create a strong suspicion that fraud had been practised:—*Held*, also, that the Judge of a County Court in which the judgment has been recovered has power, when the amount claimed to be due from the garnishee is so large as not to be within the jurisdiction of the County Court, to make the garnishing summons returnable before himself, even where the garnishee resides in another county:—*Held*, also, that an order for a receiver should not be made in respect of a fund which may be reached by garnishing process. *Millar* v. *Thompson*, 20 Occ. N. 454, 19 P. R. 294.

Fraudulent collusion — *Setting aside judgment.*]—Although a judgment validating a garnishment constitutes a judicial transfer of the sum garnished, the garnishee (in this case the wife of the defendant), who after service of such judgment, has settled with the attaching creditor by means of an exchange of properties and a *dation en paiement*, will be ordered—at the suit of a creditor prior to the attaching creditor, and upon proof that the attachment and the judgment were the result of a fraudulent agreement to defraud the creditors of the defendant, with the knowledge of the garnishee and attaching creditor—to deposit in the record office for distribution the sum which she owes to the defendant, and the exchange of properties and the *dation en paiement* will be set aside. *Leroux* v. *Préfontaine*, Q. R. 19 S. C. 315.

Garnishee disputing liability—Application by defendant for order to determine question of liability—Status of defendant—Rule 390—"Plaintiff or any other person interested"—Refusal of order—Discretion—Appeal. *Woodley* v. *Harker* (N.W.T.), 6 W. L. R. 102.

Garnishee summons—Affidavit of judgment creditor—Information and belief — No grounds shewn—Setting aside proceedings—Non-disclosure of answer to summons — Præcipe for writ of execution—Judgment—Costs—Practice. *Sellander* v. *Jensen* (Y.T.), 5 W. L. R. 91, 6 W. L. R. 401.

Garnishee summons—*Affidavits—Practice—Rule 384.*]—A garnishee summons and subsequent proceedings founded thereon were set aside because the affidavits on which the summons was granted did not comply with the provisions of Rule 384. *Imperial Bank* v. *Miller* (1910), 13 W. L. R. 200.

Garnishee summons—*Affidavit of plaintiff—Nature of claim not shewn—Saskatchewan Rule 384 (A).*]—Garnishee summons and proceedings thereunder, set aside, as plaintiff's affidavit did not shew nature of his alleged claim against the defendants as required by above rule. *Richardson* v. *Roberts*, 10 W. L. R. 497.

Garnishee summons—Affidavit to lead —Late of making—Information and belief —Grounds of—No necessity for stating—Rule 384. *Addison* v. *Dickson* (Alta), 7 W. L. R. 291.

Garnishee summons—*Affidavit to lead not made by proper person — Rule 384—Defective summons—Application to set aside —Amendable defect—Intituling of affidavit—Rule 538—Objections not stated in summons to set aside—Rule 540—Defect more than an irregularity—Absence of prejudice—Amendment—Objection taken after money paid into Court by garnishee—Practice.*] — Rule 384 provides that a garnishee summons "may be issued by the clerk, upon the plaintiff or judgment creditor, his advocate or agent, filing an affidavit" proving the nature of the claim, the indebtedness of the garnishee, etc.:—*Held*, that to comply with the Rule the affidavit must be made by the plaintiff or his advocate or agent, and the affidavit of a student-at-law in the office of the plaintiff's solicitor is not a foundation for a summons:—*Held*, also, that this is not a defect which can be cured under Rule 538. —*Semble*, that another defect in the affidavit, viz., that it was not intituled in the cause, as required by Rule 294, might be cured under 538:—*Held*, also, Beck, J., dissenting, that the defendant was entitled to have the garnishee summons set aside, upon the first objection, although he himself, in his summons to set aside the garnishee summons, had not set out his objections, as required by Rule 540. That Rule refers only to motions to set aside for irregularity; and it is doubtful whether it applies to a defect which is more than an irregularity; but, in any event, the purpose of the Rule is simply to give notice to the opposite party, and if it is within the terms of Rule 538; and, if no prejudice has been caused by the failure to comply with the Rule, the motion should not be defeated thereby; and in this case there was no suggestion that the plaintiff had been in any way prejudiced by the defendant not having set out the objections in the summons, or that he was unaware of what the objections were. *Anlaby* v. *Praetorius*, 20 Q. B. D. 764, and *Saskatchewan Land and Homestead Co.* v. *Leadlay*, 6 Terr. L. R. 18, 82, followed. Per Beck, J.:—In Rule 540 the word "irregularity" is intended to cover such defects as are "more than irregularities"—the Rule is intended to apply to all grounds other than those based upon the merits. The summons to set aside the garnishee summons was, therefore, irregular, and the defendant was not entitled as of right to succeed in his application; and, as the justice of the case lay with the plaintiff, the defendant should not be granted the indulgence of an amendment. *Semble*, also, per Beck, J., that, the garnishee having paid the money into Court, it was too late for the defendant to object on technical grounds to the mode by which its payment into Court was procured. *Mohr* v. *Parks* (1910), 15 W. L. R. 250.

Garnishee summons—*Garnishee not disputing claim—Right of defendants to object that no debt due—Alberta Rules 385, 386—Claim to insurance moneys — Unliquidated damages not attachable.*] — Defendant company went into voluntary liquidation on 7th December. Plaintiff served a garnishee summons on an insurance company to attach certain insurance moneys under a loss to

defendants, but there had been no adjustment of the loss. On the 10th of the same month an order was obtained staying all actions. The claim against the insurance company is one for damages, and not one of debt. The garnishee did not dispute the claim:—*Held*, that the liquidator was entitled to apply to set aside the summons, which was accordingly set aside. *Hartt* v. *Edmonton*, 10 W. L. R. 664, 2 Alta. L. R. 130.

Garnishee summons before judgment —Nature of plaintiff's claim—Rule 384—"Debt or liquidated demand"—Claim for necessaries supplied to defendant's wife and daughter. *Parkin* v. *Parkin* (Sask.), 7 W. L. R. 66.

Garnishees — *Executors — Pleading — Costs.*]—Garnishees, testamentary executors, who declare that the legacy to the debtor is, under a clause in the will, unattachable, will be mulcted in costs if they reply to a dispute note of their declaration in place of submitting themselves to the Court, even if this dispute note accuses them of conspiring with the debtor. 2. A reply by the garnishees to a dispute of their declaration should in all cases be stamped as a pleading. *Richer* v. *Arnton*, 2 Que. P. R. 569.

Insolvency of debtor—*Judgment making garnishment absolute—Attack upon by another creditor.*]—After the creditor who has issued a writ of *saisie-arrêt* has obtained without fraud, a judgment ordering the garnishee to pay him the amount which the garnishee acknowledges he owes the debtor, another creditor of the latter cannot, by *tierce-opposition*, cause such judgment to be annulled on the ground of the insolvency of the debtor; the allegation of insolvency must be made before the judgment making absolute the *saisie-arrêt*. *Manseau* v. *Bruyère*, Q. R. 11 K. B. 16.

Insolvency of debtor—*Opposition by other creditors—Knowledge of attaching creditor.*]—In order that there may be ground for an opposition *à fin de conserver*, based upon the insolvency of the debtor, after judgment has been given upon a writ of *saisie-arrêt*, it is necessary that the attaching creditor should have known of the insolvency of the debtor. *Dansereau* v. *Bradshaw*, 4 Q. P. R. 198.

Insufficient time allowed after service — *Prejudice — Extension — Exception to form.*]—Where in an attachment of debts the time allowed to defendant after service is not sufficient, but defendant is not prejudiced thereby, he must ask Court for an extension of time, if required, and not proceed by way of exception to form. *Martin* v. *Hébert* (1906), 8 Que. P. R. 42.

Issue in course of action—*Service on defendant—Absence from jurisdiction.*]—An attachment of debts issued in the course of an action is itself an action separate and distinct from the original action, and if, since the commencement of the action, the defendant has left the province, service of the attachment should be made upon him as it would be in an action. Service made upon him at the record office, in accordance with the provisions of Art. 85, C. P. C., is a nullity. *Wasby* v. *Brown*, Q. R. 19 S. C. 424.

Issue of second writ of saisie-arret —*Costs of first writ—Declaration of garnishees — Contestation—Exception—Assignment to third person—Exception in law.*]—Where a second *saisie-arrêt* after judgment has been issued and served, before any order of dismissal has been pronounced or any costs adjudged upon the first *saisie-arrêt*, the defendant cannot demand the dismissal of the second one because the costs of the former have not been paid. The right to the amount or value in the hands of the garnishees can only be debated with the garnishees upon the contestation of their declaration; a defendant cannot set up by way of exception in law the right of a third person, not a party to the cause, in order to have a *saisie-arrêt* discharged, upon the ground that he has assigned to such third person his right to the amount which the garnishees have declared that they owe. *Coulombe* v. *Lavallée*, 8 Que. P. R. 214.

Judgment — *Irregularity — Questioning.*]—A defendant who has not, either by way of appeal or opposition, moved against a judgment which has all the judicial characteristics of a judgment of the Superior Court, but has been recovered against him *ex parte*, cannot contest garnishing process issued in execution of such judgment by pleading that it is tainted with irregularities and illegalities. *United Counties Rw. Co.* v. *Letendre*, Q. R. 9 Q. B. 52, 3 Que. P. R. 295.

Judgment against garnishee—*Consent to pay—Rights of other creditors.*]— The service upon the garnishee of an order attaching a debt due to the debtor creates a lien in favour of the garnisher, and this lien becomes absolute between the garnisher and the garnishee after a judgment against the garnishee or by reason of his consent to pay the garnisher as in the case of the transfer of a debt; and the other creditors, even in the event of the insolvency of the debtor, have no right to the fund attached. *Lacroix* v. *McGreevy*, 3 Que. P. R. 21, Q. R. 17 S. C. 187.

Judgment against garnishee by default — *Garnishee allowed in to defend — Debt of defendant secured by promissory notes current.*]—The garnishee applied to set aside a judgment entered against him for default of appearance. As it appeared his letter to the clerk of the Court advising that notes in question were not due for some time had been mislaid by the clerk, he was allowed in to defend on terms. *Hunter* v. *Collins*, 11 W. L. R. 85.

Judgment against garnishee—*Setting aside—Declaration—Time for—Judgment in default—Prothonotary entering — Long vacation.*] — A garnishee against whom judgment by default has been improperly entered, may apply to have it set aside. When called upon to make its declaration by a writ which does not state either the day or hour when it should be made, he must be considered as not properly before the Court; no default can be charged against him, and no judgment can be pronounced against him for default of a declaration. The prothonotary has no jurisdiction to sign judgment against a garnishee who has made default, and the

Court itself cannot pronounce such judgment against him during the long vacation. *Crapeau* v. *Tremblan*, Q. R. 7 S. C. 99, 156.

Judgment by default against garnishee—*Irregularity in service — Right of Appeal — Return — Consent.*]—A garnishee against whom a judgment has gone by default, without service of process personally or at his domicil, has the right to move against such judgment by way of appeal. 2. A party who garnishees after judgment cannot return his writ of *saisie-arrêt* after the three days following the day for such return without the consent of all the parties to the cause, and the consent of one of the defendants alone is insufficient. *Perrin* v. *Tate*, 5 Que. P. R. 116.

Judgment by default against garnishee — *Opening up — Terms — Costs.*] —A garnishee against whom judgment has been given by default, and who wishes to open up the judgment, must pay the costs of the motion and of the proof of the disbursements incurred upon his default, and a supplementary fee, if that was necessary. *St. Denis* v. *Goulet*, 4 Que. P. R. 318.

Judgment debt — *Execution — Stay — Payment into Court.*] — The fact that the debt of the plaintiff for which he has recovered judgment against the defendant has been attached does not hinder him from proceeding to execution of his judgment, and if the defendant desires to escape such execution, he has only to pay the amount into Court. *Lamb* v. *Kellan*, 4 Que. P. R. 42.

Judgment in action for debt or liquidated demand — Claim for proceeds of sales by agent—Goods sold—Rule 384. *Stimson* v. *Hamilton* (N.W.T.) 1 W. L. R. 20.

Jurisdiction of County Courts, B.C. —*Claim of judgment debtor against garnishee beyond competence of County Court —Prohibition.*]—On proceedings under Attachment of Debts Act in County Court to attach debt due on judgment obtained in Supreme Court, an order absolute attaching the debt was made. On an application for writ of prohibition to County Court Judge, prohibiting him from dealing with Supreme Court judgment:—*Held*, that where the claim sought to be attached is not one upon which County Court would have jurisdiction to adjudicate in suit brought to enforce it, the machinery of Attachable Debts Act cannot be applied. *Relyea* v. *Williams* (1906), 12 B. C. R. 226, 4 W. L. R. 457.

Lacombe Act—*Circuit Court—Superior Court.*]—Art. 1147a, C. P., prohibits issue of garnishing summons, in a general way, against defendant who has complied with its provisions, and there is no ground for distinguishing between garnishing summonses issued from Circuit Court and those issued from Superior Court. *Mace* v. *Gardner* (1906), 8 Que. P. R. 98.

Lacombe Act — *Opposition—Art. 1147a, C. P. C.—Circuit Courts—Superior Court.*] —Art. 1147a, C. P. C. (the Lacombe Act), applies only to *saisies-arrêts* in Circuit Court, and cannot be set up in opposition to a *saisie-arrêt* in execution of judgment of Superior Court. *Larochelle* v. *Lavoie* (1906), Q. R. 27 S. C. 534.

Lacombe Act — *Wages — Deposit — Superior Court — Circuit Court.*]—The deposit at the record office of Circuit Court of sworn declaration, and the salary of defendant, renders letter immune from any subsequent attachment of his wages, whether such attachment issue from Circuit Court or from any other Court. *Levinoff* v. *Fournier* (1906), 8 Que. P. R. 54.

Lacombe Act — *Wages — Deposit — Superior Court—Circuit Court.*]—In an attachment of debt before judgment in Superior Court, defendant cannot plead that he comes under Lacombe Act in Circuit Court, and that he regularly deposits the part of his salary which is garnishable; such an allegation will be struck out upon inscription in law. *Brunet* v. *Bastien* (1906), 8 Que. P. R. 88.

Money in Court — *Order — Nullity.*]— An order made by a County Judge that garnished moneys remain in Court to abide the event of a new action to be commenced forthwith (a former suit in respect of the same cause of action being dismissed by the same order) is not a nullity, and if not appealed against is valid. *King* v. *Boultbee*, 20 Occ. N. 421, 7 Brit. Col. L. R. 318.

Moneys attached claimed under assignment—Order directing trial of issue—Parties—Mesne assignee—Burden of proof—Plaintiff in issue. *Tosco* v. *Campbell* (Y.T.), 8 W. L. R. 719.

Moneys attached paid into Court by garnishees—Claim by assignees of judgment debtors—Judgment creditor setting up defence invocable by garnishees—Invalidity of contract—Foreign Companies Ordinance. *Beaver Lumber Co.* v. *Northern Construction Co.* (Sask.), 8 W. L. R. 782.

Moneys attached paid into Court—*Creditors' Relief Act—Rights of execution creditors—Payment out to sheriff.*]—In a dispute between a number of attaching creditors as to moneys paid into Court by garnishees: —*Held*, that such moneys should be paid to the sheriff for distribution under the provisions of the Creditors' Relief Act. *Ward (Robert) & Co. Limited* v. *Wilson*, 7 W. L. R. 37, 13 B. C. R. 273.

Moneys paid into Court by garnishees—Payment out to sheriff for distribution under Creditors' Relief Act—Equality among execution creditors—Garnishing creditors before judgment—Costs. *Ward (Robert) & Co. Limited* v. *Wilson* (B.C.), 7 W. L. R. 37.

Moneys paid to garnishee by debtor — *Fraudulent conveyance — Declaration — Contestation—Payment into Court.*]—Where a party demands, in a contestation of the declaration of a garnishee, that a deed of sale between the defendant and the garnishee shall be declared fraudulent and set aside, and that the garnishee shall be ordered to deposit in Court a sum representing the value of the property sold, the Court should not only declare the contestation well grounded,

but, besides, should order that such sum be deposited in Court, and that in default of the garnishee so doing, he shall personally pay such sum. *Beaudry* v. *Fontaine*, 9 Que. P. R. 47, 4 E. L. R. 53.

Nature of claim in principal action —"*Debt or liquidated demand*"—*Rule 384—Action between partners—Accounts—Extraordinary remedy—Terms* — "*Speeding the cause.*"]—Where one partner sues another for a specific sum, although an account may be necessary to determine the exact sum due, the action is for "a debt or liquidated demand," within the meaning of Rule 384, and, consequently, a garnishee summons can issue to attach a debt due or accruing due from a third person to the defendant; and, *semble*, that the same principle would apply to an action for an account, and payment of the amount found due.—*Semble*, that in all cases where the plaintiff takes advantage of an extraordinary interlocutory remedy, e.g., caveat, injunction, or garnishee summons, he may be put on terms to prosecute the action with special diligence. *Alexander* v. *Thompson*, 1 Alta. L. R. 501, 8 W. L. R. 659.

Nature of creditor's claim—*Notice to debtor—Alimentary debt.*]—A creditor desiring to garnish moneys declared *insaisissables*, by proving that his claim is of an alimentary nature, cannot so prove without notice to the debtor as well of the proof to which he intends to make as of the inscription for judgment. *Gratton* v. *McCready*, 4 Que. P. R. 155.

Order attaching debts — *Powers of deputy district registrar of Supreme Court—Interpretation Act — Attachment of Debts Act, 1904—Amount attached.*]—In an action in Supreme Court for account of certain rents and profits, the plaintiff obtained an order attaching all debts, obligations, and liabilities payable or accruing due from garnishee to defendant, to answer a judgment to be recovered by plaintiff against defendant up to amount of $6,245. Order was made and issued by the deputy district registrar at Vancouver, acting under the provisions of s. 3 of Attachment of Debts Act, 1904. Defendant applied to Morrison, J., in Chambers, to set aside this order, but the summons was dismissed, and defendant appealed: —*Held*, by the full Court, that as the term "district registrar" is expressly defined by Attachment of Debts Act, 1904, to mean district registrar of the Supreme Court, therefore district registrars are *personæ designatæ*, and it was not intended to confer on their deputies the power to make attaching orders; that the provisions of the Interpretation Act do not apply, as a general interpretation statute cannot be invoked to control the plain intendment of a special statute.—Per Irving, J., the Attachment of Debts Act, 1904, contemplates the attachment of a definite, ascertained amount, and a mortgagor suing for an account of moneys received by a mortgagee in possession cannot make the affidavit required by the statute as to the "actual amount of the debt." *Richards* v. *Wood*, 12 B. C. R. 182.

Persons in possession of choses in action are not chargeable as garnishee. *Heard* v. *Phillips* (1862), 1 P. E. I. R. 219.

Petition to quash saisie-arret before judgment—*Judgment debtor—Parties — Conclusions.*] — A creditor cannot, by means of a *saisie-arrêt* before judgment, restrain the *tiers-saisi* from paying certain sums to his debtor, made a party to the proceeding as *mis-en-cause* but against whom no conclusions are taken. 2. A petition to quash the *saisie-arrêt* on the part of the *mis-en-cause* is the proper proceeding in such a case. *Duckett* v. *Bayard*, 5 Que. P. R. 218.

Priority of attaching creditor—*Allegation of insolvency by other creditors — Salary of municipal employee.*]—A creditor who has obtained judgment on an attachment after judgment, has the right to make in preference to all other creditors of the debtor, the amount awarded him by this judgment, which operates as an assignment or subrogation in his favour.—An allegation of insolvency ought to be made by such other creditors before such judgment on attachment has been recovered, if they wish to obtain the benefit of Art. 694, and that although the subject matter of the attachment is the salary of the municipal employee mentioned in paragraphs 10 and 11 of Art. 599, C. P. *Maillioux* v. *Blackburn*, Q. R. 27 S. C. 91.

Proof of debt due by garnishee to judgment debtor — Burden of proof — Goods sold to garnishee—Debt due for price —Condition — Title of judgment debtor to goods. *Adolph* v. *Hilton* (N.W.P.), 6 W. L. R. 119.

Reduction of amount.]—Where a creditor claiming $3,500 attached a fund of more than $50,000 deposited to the defendants' credit in another cause, a motion to reduce the sum attached to the amount to the creditor's demand, plus an estimated sum for costs, was refused. *Copland* v. *Waterbury*, 2 Que. P. R. 384.

Remedy of Crown.]—Order 45 of the English Rules respecting garnishee process is not applicable to a proceeding by information by the Crown. The Crown's remedy is by writ of extent. *Regina* v. *Connolly*, 21 Occ. N. 279, 7 Ex. C. R. 32.

Requisites of saisie-arret after judgment—*Salary—Declaration of garnishee — Costs.*]—If a writ of attachment after judgment does not state the nature and place of the debtor's occupation, it does not constitute a seizure of salary which can be declared *tenante*, and a motion to that effect will be dismissed.—2. However, if the garnishee by his declaration has set forth the fact that the defendant was in his employ on salary, a motion to have seizure declared binding will be dismissed without costs, as the seizing creditor had some reason to believe that the seizure was recognized as one of salary. *Dronin* v. *Brunelle*, 5 Q. P. R. 371.

Rights as between claimant and plaintiff—*Defence open only to garnishee.*] The plaintiff attached certain moneys due the defendant, and the garnishees admitted liability and paid the money into Court. The money was claimed by a third party:—*Held*, that in determining the rights of the plaintiff and claimant to the fund in question, the garnishees having admitted liability, it

was not open to the plaintiff to raise as against the claimant a defence which could only be pleaded by the garnishees. *Beaver Lumber Co.* v. *Northern Construction Co.*, 1 Sask. L. R. 264, 8 W. L. R. 782.

Saisie-arret—*Affidavit for—Information and belief.*]—An affidavit in support of a *saisie-arrêt* before judgment which is simply based upon the belief of the deponent as to the loss of recourse by the plaintiff, in place of positively affirming such loss as a fact, is insufficient, and the *saisie-arrêt* will be set aside on petition. *Michaud* v. *Clement*, 5 Que. P. R. 25.

Saisie-arret—*Non-service — Motion to discharge.*]—A motion by the defendant for the discharge of a *saisie-arrêt* because it has not been served nor returned, will be dismissed with costs, because the defendant cannot apply for the discharge of a writ which has no existence. *Devlin* v. *Charlebois*, 4 Que. P. R. 281.

Saisie-arret — *Notice of desistment — Costs.*]—If a plaintiff desists from a *saisie-arrêt* and gives notice of his desistment, without mentioning the costs to the defendant and the garnishee, the defendant has a right to demand the dismissal of the *saisie-arrêt* by motion, and with costs. *Bank of British North America* v. *Laporte*, 5 Que. P. R. 67.

Saisie-arret—*Second writ—Exception de litispendance.*]— To afford ground for an exception *de litispendance* against a second *saisie-arrêt* after judgment, while the first is pending, it must appear that the second writ attached the same debt as the first writ. *Leith* v. *Hall*, 4 Que. P. R. 398.

Saisie-arret—*Time for plea to—Inscription.*]—In summary causes a defendant has two days to plead to the *saisie-arrêt*; if he does not plead within this time, the plaintiff has two days to contest the declaration of the garnishee; after this time, he may, if he does not contest it, inscribe the case for judgment in terms of the declaration. *Goldberg* v. *Griffin*, 4 Que. P. R. 376.

Saisie-arret—*Wages — Occupation of debtor.*]—The writ of *saisie-arrêt* must state the nature and place of the defendant's occupation; these formalities with respect to the seizure of salaries and wages are imperative. *Mason* v. *Armstrong*, 8 Que. P. R. 351.

Saisie-arret—*Wages — Occupation of defendant—Neglect to state.*]—Where in an attempt to garnish wages alleged to be due to a judgment debtor, the writ of *saisie-arrêt* did not state the occupation of the defendant, as required by Art. 678, C. C. P., the service of such writ was held to be of no effect. *De Sièyes* v. *Painchaud*, Q. R. 20 S. C. 230.

Saisie-arret before judgment—*Affidavit—Personal claim—Amount of security—Neglect to file copies of declaration and affidavit—Exception to form.*] — An allegation in the affidavit of a plaintiff applying for a *saisie-arrêt* before judgment, that the defendant is indebted to him in the sum of $1,000 for damages caused to him in his trade or business, sufficiently indicates a personal claim.—2. The fact that the plaintiff has not had the amount of security fixed by the Judge, by means of which the defendant could obtain the discharge of the *saisie-arrêt*, has not the effect of rendering the affidavit insufficient.—3. *Semble*, that the default of the defendant to file, within the time allowed, copies of the declaration and affidavit, should be invoked rather by way of exception to the form than by petition to quash the *saisie-arrêt*. *Cordasco* v. *Gualtieri*, 10 Q. P. R. 109.

Saisie-arret after judgment—*Contestation—Inscription.*]—It is not by way of motion that judgment is obtained upon a contestation of a *saisie-arrêt* after judgment, but by way of inscription, following the rules and delays of summary causes. *Beauchemin & Son Co.* v. *Girouard*, 8 Que. P. R. 294.

Salary—*Writ of attachment — Requirements of.*]— A creditor cannot attach his debtor's salary, wages, or commissions without stating in the writ of attachment the nature and place of the debtor's occupation, and consequently he cannot contest the garnishee's declaration, alleging that commissions have become due to his debtor, if the writ of attachment does not meet the requirements of law regarding seizures of salaries and wages. *Sieyes* v. *Painchaud*, 3 Que. P. R. 552.

Salary of civil servant — *Motion to declare attachment valid.*]—The attachment of the salary of a civil servant is regulated by s. 9 of Art. 599, C. P.; and Art. 697 does not apply thereto. A motion to declare the attachment of a salary binding will be dismissed as useless. *Garaud* v. *Boileau*, 4 Que. P. R. 158.

Service—*Officers of bank—Priorities.*]—Interpleader proceedings were taken by the Bank of Nova Scotia to determine the priority of attaching process served on it by two creditors of an absconding debtor. Order IX., Rule 8, of the Judicature Act, provides that process may be served on a corporation by serving the same on the principal officer thereof or on the clerk or secretary. One of the creditors served the president and secretary of the bank at its head office. The other creditor, before making any service in the same manner, and before the service of the first mentioned creditor, served the process on the manager of the branch of the bank in which the absconding debtor's money was deposited, and he contended that he thereby acquired priority:— *Held*, that priority must be given to the first service on the president at the head office. *Kinsman* v. *Onderdonk*, 22 Occ. N. 262.

Service of saisie-arret — *Domicil of judgment debtor—Death—Garnishable debt—Proceeds of sheriff's sale—Subsequent re-sale.*]—Art. 135 of the Code of Procedure which authorises service upon the heirs of a person deceased within the previous six months, at the former domicil of deceased, applies to proceedings against the heirs, and not to the service of a *saisie-arrêt* issued against the deceased himself, on a judgment obtained against him, the fact of his death, at the time of the service of the *saisie-arrêt*, being known to the plaintiff.—2. A collocа-

tion founded on the first sale of an immovable by the sheriff ceases to have effect when the same immovable is resold at *folle-enchère*, and a *saisie-arrêt* in the hands of the sheriff for the amount of such first collocation cannot be maintained. *Demers* v. *Gaudet*, Q. R. 23 S. C. 276.

Service of saisie-arret — *Effect of—Payment to debtor after service—Payment again to creditor — Declaration—Contestation.*]—It is the service of the writ of *saisie-arrêt* which establishes the claim of the garnishor against the garnishee. 2. From the moment of the regular service of the *saisie-arrêt*, the garnishee is prevented from paying to the judgment debtor, and, if he does so, will be obliged to pay a second time, whether he knew or not of the service being made; that is the consequence of the change made by Art. 679 of the new Code of Procedure in Art. 615 of the old. 3. When a garnishee commences his declaration by denying that he owes anything to the judgment debtor, and afterwards it is clearly established that he did owe him and had paid him after the service of the *saisie-arrêt*, it is not necessary to contest his declaration: the Court will order the garnishee to pay again. *Montambault* v. *Lapointe*, Q. R. 23 S. C. 413.

Service of summons — *Domicil of defendant—Writ—Stamps.*]—A writ of *saisie-arrêt* will be set aside if it has not been served on the defendant at his domicil of election, he having no real domicil in the district in which judgment in the principal action was obtained.—A writ is also void if it is insufficiently stamped and if the copies certified by the clerk of the Court have no stamps at all upon them. *Duchêne* v. *McAvoy*, 3 Que. P. R. 235.

Service of summons on garnishee — *irregularity.*] — Vaux issued a summons under the Absent Debtor Act, 20 Geo. III. c. 9, s. 2, which enacts that such summons "being duly served, and return being made thereof, under the hand of the sheriff or his deputy, shall be sufficient in law to bring forward a trial without any other or further summons." It was against McNutt, as trustee or garnishee of defendant, and was served by the clerk of Vaux's attorney, and there was no return thereof under the sheriff's hand. A similar summons was afterwards served on McNutt by Black, by whom motion was now made to quash the former summons on the ground that it could only be legally served by the sheriff. In reply it was contended: 1st, that the clause in the Act was merely directory, and that the service by the clerk was good. 2nd, that supposing it bad, the objection could only be taken by the defendant, Shaw, and not by another attaching creditor, who is no party to the proceedings objected to:—*Held*, (Peters, J.), that a mere irregularity in the service might be waived by defendant, but the absence of the sheriff's return was a defect which rendered the subsequent proceedings void, and could not be cured by any act or consent of the opposite party.—2. That the attaching creditor's judgment giving him a lien on funds in the garnishee's hands placed him in the defendant's shoes *quoad* those funds, and being, therefore, a privy in interest, he had a right to point out defects in proceedings affecting them. *Black* v. *Shaw*, (1862), 1 P. E. I. R. 194.

Set-off between defendant and garnishee.]—A debt due by the defendant to the garnishee which did not become due until after an attachment, cannot be set off against the debt of the garnishee to the defendant, being the debt attached. *Hogue* v. *Ogilvie*, 4 Que. P. R. 317.

Shares in company—*Validity of service upon company—Place of service.*]—Where at the time of the issue and service of the garnishing summons the garnishees (an incorporated company) had property in the province of Quebec, and had there an agent and an office where their principal books were kept:—*Held*, that service was validly made there for the purpose of declaring that the garnishment of shares of the defendant in the garnishee company was valid. *Skinner Manufacturing Co.* v. *Vineberg*, 8 Que. P. R. 107.

Solicitor's lien—*Costs in Court not having jurisdiction—Distribution of moneys attached—Insolvency — Opposition — Third party—Prescription.*]—There is no lien for costs incurred by an advocate before a Court which has been declared to have no jurisdiction, notwithstanding the contentions of the parties to the contrary. 2. Art. 673 applies, in the case of the alleged insolvency of the debtor, to all distributions of money which do not represent immovable property and for which he is not accountable by law. 3. When a garnishment has been declared binding there is no occasion for a subsequent judgment ordering the garnishee to pay over the moneys attached, the amount, unless there is an allegation of bankruptcy, being distributable according to Art. 697, C. P., and especially so if there is a seizure after a prior judgment. 4. An opposition by a third party is not prescribed, whatever be the date of the judgment attacked, if the third party has had knowledge of it only within a year. *Royal Electric Co.* v. *Pallister*, 3 Que. P. R. 340.

Statutes—*Effect of headings—Art. 1147a, C. P. C.—General application—Circuit Court —Superior Court.*]—Article 1147a, C. P. C. (the Lacombe Act), is a general provision, and notwithstanding the place given it in the Code under the heading "Proceedings before the Circuit Court," it applies to attachments of debts in execution of judgments of the Superior Court. Cf. *Larochelle* v. *Lavoie*, Q. R. 27 S. C. 534, a decision to the contrary. *Levinoff* v. *Fournier*, Q. R. 30 S. C. 416; *La Banque de St. Hyacinthe* v. *Desaulniers*, Q. R. 30 S. C. 512; *Mace* v. *Gardner*, Q. R. 30 S. C. 520.

Suit by another claimant — *Interpleader.*]—The person who owes a sum of money which has been attached in his hands cannot be ordered to pay it to another claimant, so long as the attachment subsists; therefore, such debtor may plead to an action by the other claimant the fact of the attachment, and ask the Court to decide to whom it should pay the sum claimed and to order the claimant to pay the costs of the action. *Shannon* v. *North American Life Assurance Co.*, Q. R. 19 S. C. 321.

Superior Court—*Circuit Court — Lacombe Act—Privilege of debtor — Personal right.*]—The privilege given to the debtor by

Art. 1147*a*, C. P. C., is a right exclusively attached to his person, and his creditors cannot exercise it for him.—This privilege can only be exercised by a debtor condemned by a judgment of the Circuit Court, and a creditor who has obtained a judgment of the Superior Court may execute garnishing process, event where the debtor has conformed to the provisions of Art. 1147*a*. *Larochelle* v. *Lavoie*, Q. R. 31 S. C. 317.

Trustee process—*Insufficient notice of assignment—Chose in action not assignable at law.*]—The defendant was sued under the trustee process by C. & C. as a debtor of McD. (an absent debtor), the present plaintiff. On 11th September, 1849, C. & C. issued their attachment against McD. under the Absent Debtor Act, and on the 11th December, 1849, served the summons on the defendant, who on the 12th made a deposition admitting £16 11s. indebtedness to McD., which was put in at Hilary Term, 1850. In July, 1848, McD. assigned all his effects and credits to J. McD. as trustee for certain creditors mentioned in the assignment, which was by deed poll executed by McD. only, neither the trustee nor any of the creditors being privy to it. On 11th December, 1849, this action was commenced by the trustee in McD.'s name against defendant, who was also sued under the trustee process by C. & C. C. & C. had recovered judgment in the Absent Debtor suit against McD. and the defendant had paid the amount due McD. to the sheriff on an execution issued by C. & C. under their judgment against McD. The defendant had no notice of the assignment when he made his deposition. The first notice of it was given in Court when the defendant's deposition was put in and read. —It was contended on behalf of the defendant: 1. That he had not sufficient notice of the assignment and having admitted assets was bound to pay the amount to the sheriff under C. & C.'s execution and was therefore discharged from liability to the trustee; 2. That the creditors had not assented to the assignment, which was therefore void as against C. & C.—*Held* (Peters, J.), that sufficient notice of the assignment had not been given.—2. That the assignment was not binding as against C. & C.—3. That the subject matter in dispute, being a chose in action, could not be assigned at law. *McDonald* v. *Longworth* (1852), 1 P. E. I. R. 49.

Writ of saisie-arrêt—*Mis-en-cause — Transferee of debtor—Petition to set aside writ.*]—The plaintiff, a creditor of the defendant, having judgment against him, issued a *saisie-arrêt* in respect of moneys in the hands of M. et al., also making C. F. B. et al. parties (*mis-en-cause*). By this writ of *saisie-arrêt* the garnishees and the *mis-en-cause* were ordered to appear and declare what property they had in their hands belonging to the defendant and what sum of money they owed him. In a declaration annexed to the writ, but to which the writ did not refer, the plaintiff alleged that C. P. B. had acted collusively with the defendant and as his *prête-nom* in certain transactions with some of the garnishees, by virtue of which a sum of money was deposited in the hands of a firm of solicitors, the other garnishees. The claim in the declaration was that the garnishees should be ordered to declare what sum they had paid or were to pay by virtue of certain acts of sale really entered into with the defendant but nominally with his son, C. F. B., and that the *mis-en-cause* should be ordered to appear and declare whether the debt was really due to the defendant or to C. F. B. The latter petitioned for the quashing as to him of the writ of *saisie-arrêt*:—*Held*, that the plaintiff could not, by means of a writ of *saisie-arrêt*, prevent the payment to the *mis-en-cause* of the sum which appeared to be due to him on the fact of the acts, but that the plaintiff should have proceeded against the *mis-en-cause* by way of a direct action to set aside the transaction, or by contesting the declaration of the garnishee.—2. That the *mis-en-cause* had the right by petition to demand the quashing of the writ. *Duckett* v. *Bayard*, Q. R. 25 S. C. 150.

ATTACHMENT OF GOODS.

See EXECUTION.

ATTACHMENT OF INTEREST IN MINE.

See EXECUTION.

ATTACHMENT OF PERSON.

See ARREST.

ATTAINDER.

See CRIMINAL LAW.

ATTESTATION.

See WILL.

ATTORNEY.

See SOLICITOR—POWER OF ATTORNEY.

ATTORNEY-GENERAL.

See CONSTITUTIONAL LAW—CRIMINAL LAW —CROWN—INJUNCTION — MINES AND MINERALS — MUNICIPAL CORPORATIONS —PENALTY — PLEADING—STREET RAILWAYS.

ATTORNMENT.

See MORTGAGE—VENDOR AND PURCHASER.

AUCTION SALES.

Memorandum of sale — *Statute of Frauds—Surname of purchaser—Terms of sale—Authority to rescind.*]— A memoran-

dum is "signed" within the Statute of Frauds, if only the surname of the purchaser is written on it by the auctioneer.—Merely formal terms of sale will be implied by law.—An auctioneer, authorised to sell, has no authority to rescind the sale. *Farquhar* v. *Billman*, 40 N. S. R. 289.

Purchaser at—*Payment of price —Attachment of person — Nullities — Acquiescence.*]—At a judicial sale of chattels by auction, the knocking them down to a person makes him the owner, even if he does not pay the price immediately.—A rule to attach the purchaser for refusal to produce the goods seized or to return them will be discharged.—The Quebec Code of Procedure recognizes no nullities except those formally prescribed by law.—A person cannot claim the nullity of a sale which he has acquiesced in by filing an *opposition à fin de conserver* which remains on the record. *Duchêne* v. *Collins*, Q. R. 17 S. C. 136.

Sale of land — *Completion—Title — Damping sale — False representations — Grounds for annulling sale.*]—The sale by auction of an immovable is completed by adjudication to the highest bidder and the entry of his name in the sale-book by the auctioneer. Upon the purchaser's complying with the conditions of the sale and paying the amount of his bid, the seller is bound to give him a valid title to the immovable sold. — The seller who declines to do so, on the ground that the purchaser chilled the sale by means of false representations and statements must establish both that they were false and did deter intending purchasers from bidding. Hence a statement that he who bought the property would suffer from disagreeable and noticeable odours, when the neighbourhood of a large livery stable made the fact patent, and the further statement that, in consequence of prior deeds and covenants, the property could only be put to certain restricted uses, without proof that any one was influenced by it, do not afford grounds for annulling the sale. *Campbell* v. *Eno*, Q. R. 31 S. C. 147.

See EXECUTION—LICITATION — LIMITATION OF ACTIONS—SALE OF GOODS—SCHOOLS —VENDOR AND PURCHASER.

AUDIT.

See ACCOUNT—BILLS, NOTES AND CHEQUES —COMPANY — ESTOPPEL — PARTICULARS—PRINCIPAL AND AGENT.

AUTHOR AND PUBLISHER.

See CONTRACT—COPYRIGHT.

AUTOMOBILES.

See MOTORING—NEGLIGENCE—WAY—

AUTOPSY.

See CORPSE.

AUTREFOIS ACQUIT.

See CRIMINAL LAW.

AUTREFOIS CONVICT.

See CRIMINAL LAW.

AWARD.

See ARBITRATION AND AWARD.

BAIL.

Action populaire—*Delay.*]—A motion for bail in an *action populaire*, under Art. 180, C. P., is subject to the delay of preliminary exceptions, and will be dismissed if it is served the fourth day after production. *Yale* v. *Monette*, 2 Q. P. R. 480.

Estreat—Condition of recognizance — "Next Court of competent jurisdiction"—Notice to estreat—Short notice — Holding over proceedings—Surrender of defendant—Relief of bail. *Rex* v. *Bailly's Sureties*, 3 E. L. R. 74.

Estreat—*Discharge of forfeited recognizance—Jurisdiction of single Judge—Appeal —Criminal Code, s. 922.*]—An application to discharge a recognizance of bail forfeited by reason of the non-appearance of a prisoner is a civil, not a criminal proceeding; and the Court *en banc* has power to entertain an appeal from an order made by a Judge. A single Judge has no power to make an order discharging such a recognizance except upon the ground that the non-appearance was justifiable. Application on any other ground must be made to the Court *en banc*. *Re McArthur's Bail*, 3 Terr. L. R. 37.

See ADMIRALTY—ARREST—CRIMINAL LAW.

BAIL EMPHYTHEOTIQUE.

See LANDLORD AND TENANT.

BAILIFF.

Appointment of bailiffs under County Courts Act, P. E. I. *Larkin* v. *McNutt* (1880), 2 P. E. I. R. 300.

Bailiffs' corporation — *Admission of member — Examination — Refusal — Appeal.*]—There is no appeal by petition to the Superior Court from the decision of the Board of Examiners of the Corporation des Huissiers of the district of Montreal, refusing a certificate of qualification to a candidate who has failed to pass the examination of the Board. *Lalonde* v. *Corporation des Huissiers du District de Montreal*, Q. R. 26 S. C. 426.

Charges — *Travelling expenses—Searches —Return.*]—A bailiff serving process has no right to charge for travelling expenses, costs of *recherches*, nor for a return of *non est inventus*. *Mayrand* v. *Gingras*, 9 Que. P. R. 396.

Corporation of bailiffs of Montreal is bound to guarantee to every one that each of its members will faithfully and diligently discharge the duties of his office. Such obligation creates a relationship of such a nature between the corporation and one of its members that it is not necessary, when suit is taken against the corporation, to call the bailiff in default into the case. *Ouimet* v. *Montreal Bailiffs*, 11 Que. P. R 84.

Costs of judicial sale—*Right to retain.*] —Whether there is or is not opposition *à fin de conserver*, the bailiff who has made a judicial sale has the right to keep his costs out of the moneys which he returns, provided such costs have been taxed. *Turgeon* v. *Shannon*, 4 Que. P. R. 274.

Distress.]—Bailiff may use force necessary to ascertain if door is fastened. *McKinnon* v. *McKinley* (1856), 1 P. E. I. R. 113.

Fees of—*Responsibility of advocates for —Partnership — Registration — Profits.*] — Advocates are personally responsible for the fees of bailiffs employed by them in connection with the cases which they are conducting before the Courts. Such liability, where a partnership of advocates exists, is joint and not joint and several. 2. A partnership of bailiffs does not fall under Arts. 1834 and 1835, C. C., and registration of such partnership, not being required or authorized by law, is without effect. Therefore the provisions of Art. 1835, as to disproof of the allegations of the declaration of partnership, do not apply to a declaration of partnership made by a firm of bailiffs so far as their business as bailiffs is concerned. 3. Although bailiffs cannot act, in the performance of their duties, under a partnership name, they are not precluded from forming a partnership as regards the financial return from their individual work, nor from contracting, as a partnership, for the payment of individual services rendered by one or several of them. *Decelles* v. *Bazin*, Q. R. 19 S. C. 399, 4 Q. P. R. 92.

Incorporated society—*Trial of members —Domestic tribunal — Appeal.*]—It is only the Board of Examiners of the Corporation of Bailiffs of the district of Montreal who have the right to try in the first instance members of that corporation accused of breaches of the rules, and the Superior Court has no jurisdiction except upon appeal. *Montreal District Bailiff's Corporation* v. *Proulx*, Q. R. 24 S. C. 244.

Removal—*Interest of party seeking.*] — One who petitions to have a bailiff removed from office must have a special interest. *Normand* v. *Aumais*, 7 Que. P. R. 59.

Removal — *Jurisdiction of Superior Court.*]—Bailiffs, notwithstanding by-law of their corporation, continue to be officers of the Court, subject to its jurisdiction, and liable to be removed from their position by the Court or a Judge thereof. *Beaulieu* v. *Decelles* (1906), 7 Que. P. R. 323.

Service of notice of transfer of debt —*Return.*]—A bailiff has no quality as such to signify transfers of debts, and prove such signification by a mere return under his official oath. *Dagneau* v. *Decarie*, 8 Que. P. R. 141.

Service of papers — *Report — Amendment.*]—A bailiff effecting service of a proceeding commits a grave irregularity if he corrects his report after it has been filed in Court. *Hall* v. *Kenton*, 4 Que. P. R. 375

Service of petition—*Judicial districts— Concurrent jurisdiction.*]—The statute which gives concurrent jurisdiction in the county of Verchères to all the officers of the Courts of the districts of Montreal and Richelieu, applies to the bailiffs of these districts; a petition may, therefore, be regularly served by a bailiff of the district of Montreal, although issued in the district of Richelieu. *Lefontaine* v. *Lafontaine*, 8 Que. P. R. 295.

Suspension from corporation of bailiffs.]—Art. 50 of the by-laws of Montreal Bailiffs' Corporation, respecting suspension of members in default in payment of their fees, is not contrary to provisions of its charter. Art. 27 of said charter does not apply to cases where members are suspended for non-payment of fees. A bailiff who is suspended may at any time be relieved by paying his fees without its being necessary for him to make application in writing or paying any additional sum. If parties to a case raise issues for part of which each party fails, costs should be divided. C. C. 362. C. C. P. 549, 50 Vict. c. 43, ss. 18, 27, 29. By-laws of the National Bailiffs' Corporation, Arts. 27, 50. *Lavery* v. *Montreal Bailiffs* (1910), 16 R. L. n.s. 137, 38 Que. S. C. 236.

BAILMENT.

Acceptance of goods *under agreement to sell and account — Obligation to exercise care—Damages on default—Pleading —Amendment — Parties.*] — A company in Halifax, of which defendant was president, was engaged in the business of selling gasoline engines and supplies, and, in connection with their business, acted as agents for the Toronto Gas and Gasoline Engine Co. An engine belonging to the latter company had been placed on board a boat belonging to the Halifax company for the purpose of testing it and exhibiting its capacity.—An agent of the Toronto company was about taking possession of the engine for the purpose of returning it to Toronto, but, after conferring with defendant, agreed to allow it to remain on the boat for a time on the understanding that defendant would endeavour to sell the boat and engine together, in which case the sum of $350 was to go to the Toronto company for the engine and the balance to the Halifax company for the boat. Defendant carried on business as a shipbroker, and the boat, while lying at his wharf, was damaged in a storm, and partly filled with water. Defendant had insured the boat and made a

claim upon the insurance company as for a total loss, which the company declined to recognize, and beyond this he took no steps for the protection of the boat or the engine, both of which were eventually lost, and he gave no notice to the company of the risk to which their property was exposed:—*Held*, that defendant was not a gratuitous bailee and that when the owners of the engine entrusted their property to defendant's care they had a right to expect that he would hold it with the skill which his profession or occupation implied, and, as he had neglected to use such skill, he was responsible in damages for the consequences.—The action was brought in the name of plaintiff company to whom the Toronto company has assigned, but it appeared at the trial that the transactions between the parties upon which the action was based occurred prior to the assignment:—*Held*, that the trial Judge had jurisdiction to order an amendment making the Toronto company co-plaintiffs, and that his direction that they be so joined was sufficient, and that the Court on appeal had jurisdiction to amend the order to make it conform to the direction so given, the order having been taken out in a different form, viz., substituting the Toronto company as plaintiff, instead of making it a co-plaintiff as directed. *Can. Gas Power Launches* v. *Crosby* (1910), 30 C. L. T. 340, 8 E. L. R. 10.

Agistment of cattle — *Contract—Liability for loss—Exception as to disease—Death from disease by mismanagement.*]—The plaintiff, who owned 47 head of cattle, made an agreement with the defendant to feed, salt, and winter them for $4.50 per head; the defendant to feed the cattle sufficient good feed to bring them through the winter in good condition, and to deliver them to the plaintiff in the spring of 1904 as soon as there was green pasture sufficient to feed the cattle. The defendant agreed that he would be responsible for the loss of any of the cattle through getting lost or killed or any other way, except dying from ordinary disease. While in the defendant's charge 29 of the cattle died; he housed them in a building so low and small that there was not sufficient ventilation. They were so crowded at night that they became overheated; as a result they were chilled when turned out and contracted colds resulting in catarrh, which caused their deaths. The defendant was warned by a veterinary surgeon that the building was not large enough:—*Held*, that the exception from liability provided by the agreement, in case of death from ordinary diseases, could not be held to apply to disease resulting directly, as was the case here, from the defendant's own mismanagement. *McLenaghan* v. *Hood*, 25 Occ. N. 19, 1 W. L. R. 422.

Agistment of cattle—*Loss of—Reasonable care—Price paid—Custom of locality—Negligence.*]—Although one who takes animals to pasture them should give them the care of a "*bon père de famille*," the extent of this obligation is, nevertheless, dependent on the price paid for such pasturage, and the custom of the locality. Therefore, it is unreasonable to expect that for a moderate price a man should watch the animals constantly; and if one of them disappears, it is the owner who should bear the loss, at least, unless he can prove negligence on the part of the owner of the land. *Nadon* v. *Pesant*, Q. R. 26 S. C. 384.

Destruction of goods stored, by fire — *Liability of bailee.*] — The respondents, butchers, had caused to be slaughtered by the appellants, as they were bound to be by the by-laws of the city of Montreal, eighteen hogs, which they had the right to leave in the ice-houses of the appellants during the following night and for at least twelve hours without paying for storage. During such night and while the meat was in the ice-houses, a fire consumed the abattoirs, and the respondents' meat was destroyed:—*Held*, that the storing of such meat was not a necessary storing.—2. That the appellants having proved that they had used in the care of such meat the diligence of a *bon père de famille*, and that the fire had occurred by reason of no fault of theirs, they were not responsible for the loss suffered by the respondents.—3. That the appellants were not obliged to prove the origin of the fire. *La Compagnie de L'Union des Abattoirs de Montreal* v. *Leduc*, Q. R. 10 K. B. 289.

Fire—*Damages—Sale of goods.*]—The defendants agreed to make for the plaintiff certain tools used in making hubs of a special kind, and, in consideration of being allowed to use the tools, to make also a number of the hubs:—*Held*, that the use of the tools was an unconditional appropriation thereof to the contract, so that the property in them had passed to the plaintiff; that while using them the defendants were bailees thereof for hire, and after ceasing to use them, gratuitous bailees; that the defendants, having neglected to send the tools to the plaintiff after repeated requests, were liable to him in damages; but that these damages were nominal only, and that the plaintiff could not, upon the destruction of the tools by an accidental fire while retained by the defendants, recover from them their value, that destruction not being damage such as might fairly and reasonably be considered as arising from the breach, or in contemplation of the parties. *Leggo* v. *Welland Vale Manufacturing Co.*, 21 Occ. N. 374, 2 O. L. R. 45.

Gratuitous bailee — Loss or theft of bank notes—Liability — Negligence — Notes contained in registered dead letter—Notice—Inquiry. *Consentino* v. *Dom. Express Co.* (Man.) (1906), 3 W. L. R. 391, 4 W. L. R. 498.

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

Hire of horse and carriage—*Injury to —Negligence—Res ipsa loquitur.*]—A bailee for hire who returns the property bailed in a damaged condition, and who, being the only person with full knowledge of the circumstances causing the damage, fails to give any explanation of the same, is presumed to have been negligent.—This applies to the hirer of a horse and carriage from a livery stable keeper. *Gremley* v. *Stubbs*, 39 N. B. R. 21, 6 E. L. R. 33.

Hire of horse and carriage—Injury to, when driven by bailee—Negligence—Liability —Damages. *Gremley* v. *Stubbs*, 6 E. L. R. 33.

Hire of machinery—Contract for work—Loss of part of outfit—Damages for breach of contract—Rental of machinery — Notice terminating—Agreement to return—Condition—Impossibility of performance. *Oke* v. *Great Northern Oil and Gas Co.*, 5 O. W. R. 429.

Innkeeper — Lost luggage—Liability—Authority of clerk or manager. *Delagorgendiere* v. *Acaster*, 7 W. L. R. 467.

Involuntary bailees—*Loss or theft of bank notes — Negligence.*] — The plaintiff, wishing to send $1,010 to his brother in Toronto, procured at the office of the defendants an envelope such as they use in forwarding money by express, enclosed bank notes to the amount of $1,010, and mailed the letter and registered it. The letter reached Toronto, but was not delivered, owing to its being defectively addressed. The officials of the dead letter department at Toronto, guided by the printed matter on the outside of the envelope, enclosed the letter in one of their envelopes used for returning such letters, addressed it and sent it by registered mail to the defendants in Winnipeg. In due course it was delivered to the defendants' cashier, who received it in a protected cage or pen in which he performed his duties. After receiving the package, the cashier, in ignorance of its contents, laid it unopened on the chief clerk's desk, which stood open to the public and to all the defendants' officials. The chief clerk was not at his desk when the package was placed there, and said he never saw it, and there was nothing to shew what became of it afterwards. The defendants' Winnipeg office had never before, apparently, received a registered dead letter, or lost a registered letter:—*Held* (Perdue, J., dissenting), that, under the circumstances, the defendants owed no duty to the plaintiff to take care of the letter, and the plaintiff could not recover. *Cosentino* v. *Dominion Express Co.*, 3 W. L. R. 391, 4 W. L. R. 498, 16 Man. L. R. 563.

Loan of chattels — *Detention after demand for return.*] — Defendants borrowed from plaintiffs a rotary saw:—*Held*, that the saw returned was the one borrowed, but plaintiffs not entitled to rent. As not returned on demand nominal charges allowed. Doubted if counterclaim can be converted into a set-off. *Corbin* v. *Stephen*, 6 E. L. R. 585.

Loss of article deposited—*Liability of bailee—Value of article—Damages—Remoteness.*]—A bailee who, by reason of the loss of the article deposited, is not in a position to restore it, is bound to pay the value to the bailor, but he is not responsible for the loss of profits which the latter might have derived from the article. Therefore, the owner of a drawing left with an engraver to be reproduced in proper form for advertising purposes may recover the value if the article is not returned, but not damages for the loss of profits which might have accrued from the publicity which the distribution of the article ordered would have procured. *Gignac* v. *Woodburn*, Q. R. 29 S. C. 431.

Machine—Repairs—Lien for—Contract—Rental of machine — Reasonable sum for—Possession—Implied contract of letting—Implied contract to pay for value of use—Amount expended in repairs. *Barbeau* v. *Piggott*, 9 O. W. R. 234, 10 O. W. R. 715.

Negligence.]—Defendants received fresh meat from plaintiffs to be frozen and kept frozen until called for. After a few months the meat was found spoiled. Plaintiffs claimed damages alleging negligence:—*Held*, that the evidence shewed that the meat was good when received by defendants; that the defendants' warehouse was of first-class modern type, properly constructed for cold storage, had sufficient power and was operated with knowledge to conduct it satisfactorily; that the real cause of the meat spoiling had not been disclosed; that plaintiffs had failed to establish negligence on the part of the defendants, and that the action should be dismissed. *Charrest* v. *Manitoba Cold Storage Co.* (1908), 17 Man. L. R. 539, affirmed; (1909), 42 S. C. R. 253.

Negligence—*Storage—Duty of periodical examination.*]—The defendants were keepers of an elevator, and on the 24th April, 1897, received from the plaintiff a quantity of corn for storage, and stored it in several large bins. On the 22nd May, 1897, desiring to use one of these bins (No. 49) for another purpose, the defendants removed the corn over into another bin, and in so doing discovered that it had become heated, whereupon, by exposing it to the air, they stayed the process of heating, and the corn recovered. They also notified the plaintiff by telegram of the discovery in the bin No. 49, but they did not themselves examine the remainder of the corn to see whether it also was becoming heated, nor did the plaintiff ask them to do so. When on the 3rd June, the corn was run out to be shipped, a quantity of it was found to be in an advanced condition of fermentation:—*Held*, that the defendants had been guilty of negligence, under the above circumstances, and were liable to the plaintiff for the loss sustained by him. *Dunn* v. *Prescott Elevator Co.*, 22 Occ. N. 257, 4 O. L. R. 103, 1 O. W. R. 75, 404.

Particular article—*Destruction by fire—Liability.*]—The plaintiff, a butcher, killed three oxen at the defendants' abattoir, upon the ordinary terms, one of which was, that the meat should be kept by the defendants for at least 24 hours, on ice, afterwards to be delivered to the plaintiff on demand. During the 24 hours the defendant's building, containing the plaintiff's meat, was destroyed by fire, from an unknown cause:—*Held*, that the defendants were not discharged from their obligation to deliver the meat by alleging and proving that the building was destroyed by a fire of which the cause was unknown; it was necessary to shew that it was accidental or caused by *vis major* and not from any cause for which the defendants could be held responsible. *Versailles* v. *La Compagnie de L'Union des Abattoirs de Montréal*, Q. R. 16 S. C. 227.

See SALE OF GOODS.

Stable-keeper—*Injury to horse—Negligence—Contract—Estoppel.*] —The plaintiff's mare, kept for him in an open stall in the defendant's stable, was kicked by a horse, kept in the adjoining open stall, which had broken his halter shank during the night and got loose. This horse had got loose in the stable on several previous occasions, and on one of such occasions the plaintiff's mare had received a slight injury to one of her legs,

which defendant supposed had been caused by the same horse. In the opinion of the majority of the Court, it was not proved that the horse was a vicious one, or that he had ever broken a halter shank before, or that the shank he broke on that night was not as strong as halter shanks usually are. The plaintiff's mare shortly afterwards died as a result of the kicking:—*Held*, that the defendant was not liable for the loss; Perdue, J., dissenting. After the first injury, the plaintiff's son, in the absence of his father, asked the defendant to put his father's mare in a box stall, saying that his father on his return would pay the extra charge. The defendant did so, but, a day or two before the injury, put the mare back into the same open stall without the knowledge of the plaintiff or his son:—*Held*, that there was no contract binding on the defendant to keep the mare in the box stall; Perdue, J., dissenting. *Templeton* v. *Waddington*, 24 Occ. N. 151, 14 Man. L. R. 495.

Storage of wheat—Conversion—Dispute as to quality redelivered—Evidence—Certificate of weighmaster. *Seeley* v. *Imperial Elevator Co.* (N.W.T.), 2 W. L. R. 273.

Storage of wheat—Increase of bailor's wheat by leaking from neighbouring bins—Damage to bailor's wheat by reducing grade—Claim and counterclaim—Costs. *Welwyn Farmers' Elevator Co.* v. *Byrne* (N.W.T.), 2 W. L. R. 333.

Storage of wheat for shipment—*Shortage in quantity shipped—Liability of warehousemen — Carriers — Manitoba Grain Act—Surrender of storage receipts—Estoppel.*]—*Held*, that as defendants had not accounted for all the wheat they had received there must be judgment for plaintiff. It was a "special bin" contract. Plaintiff is not estopped from claiming an account by reason of the shipping bill having been made out by him, or by reason of the surrender of the storage receipts inasmuch as there was no evidence that the position of the parties was changed. Judgment for plaintiff. *Brentwell* v. *Western*, 11 W. L. R. 372.

BAKER.

Bread Sales Act, 1910 (Ont.)—"*Small bread*" — *What is?* — *Several small loaves baked together—Necessity to detach before offering for sale—Conviction for not so doing—Conviction quashed.*]—Morson and Monck, Co.C.JJ., *held*, that when "small bread" loaves have been baked together in large pans, that the Bread Sales Act, 10 Edw. VII. c. 95, s. 3 (Ont.), does not require that the "small bread" should be separated in loaves before they are offered for sale. *R.* v. *Nasmith Baking Co.* (1910), 17 O. W. R. 116, 2 O. W. N. 116.

Court of Appeal overruled above in *Re Bread Sales Act* (1911), 18 O. W. R. 251; 2 O. W. N. 736.

BALLOTS.

See ELECTIONS.

BANK ACT.

See BANKS AND BANKING.

BANKER.

See BANKS AND BANKING.

BANKRUPTCY AND INSOLVENCY.

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1. ABANDONMENT BY INSOLVENT.

Authorization to sue; *in which district should it be obtained?* — *The curator represents the creditors—Curator's solvency—Dilatory exception—C. P. 177, 862, 877.*]—The authorization given to a curator to an insolvent estate to sue should be obtained from the Court of the district in which the abandonment is made, and the Superior Court of another district in which the suit is taken is without jurisdiction to order the curator to obtain another authorization.—2. The insolvency of the curator cannot be a ground justifying the dismissal or the suspension of the suit.—3. The law which authorizes the curator to take suit for the insolvent gives him the quality of representing the mass of the creditors for the purposes of such suit and at the same time makes him the representative of the insolvent; the creditors cannot afterwards take individual suits having the same object as the former one under the pretext that they are exercising the rights of one and the same debtor. *Lamarche* v. *Wilson* (1910), 11 Que. P. R. 347.

Declaration of insolvent — *Place of filing—Domicil—Nullity.*] — To constitute a valid abandonment of property, the declaration and statement of the debtor must be filed in the office of the Superior Court for the district in which the debtor has his principal place of business or his domicil.—2. If the declaration and statement are filed in any other district than the above, the abandonment is illegal, and all proceedings therein are null and void. *In re Rivard*, Q. R. 22 S. C. 190.

Demand—*Retired trader — Refusal to assign—Arrest—Capias.*]—It is not necessary that a person be actually engaged in trade when a demand of abandonment is made upon him. Even where he has ceased for several years to carry on trade, he is

nevertheless subject to a demand of abandonment based on a commercial debt contracted by himself or his firm while he was engaged in trade; and consequently, in such case, under Art. 895, C. C. P., he is liable to arrest under *capias* for refusal to make an abandonment. *Carter* v. *McCarthy*, Q. R. 6 Q. B. 499, followed, and *Roy* v. *Ellis*, Q. R. 7 Q. B. 222, distinguished. *Perkins* v. *Perkins*, Q. R. 22 S. C. 72.

Demand of abandonment — *Contestation—Petition — Deposit — Practice—Hearing.*]—The contestation of a demand of abandonment is not governed by the rules governing pleadings, but is made by summary petition, which need not be accompanied by a deposit, even if it questions the jurisdiction of the Court in the office of which the demand is filed. 2. If a debtor, by his petition, urges that a delay was granted to him by the creditor demanding abandonment, the adjudication on his petition, and on a motion to reject the same, will be deferred until after proof is made by both parties of their respective allegations. *Mussen* v. *Filion*, 5 Que. P. R. 170.

Demand for assignment—*Justification—Temporary embarrassment of trader—Failure to meet obligations—Actual solvency.*]—Failure by a trader to meet due bills through a temporary embarrassment, following upon the burning of his premises and pending a settlement with his insurers, when his assets largely exceed his liabilities, is not a cessation of payments such as to entitle a creditor to make a demand of abandonment of property upon him. *Béland* v. *Colloridi*, Q. R. 33 S. C. 210, 9 Que. P. R. 161.

Demand of assignment—*Right of creditor—Holder of bill for collection.*]—Holder for collection of a due bill of exchange, is a creditor of acceptor, within meaning of Arts. 853 and 854, C. C. P., and has right to make demand of abandonment of property upon him. *Dibs* v. *Smith* (1906), Q. R. 27 S. C. 446.

Distribution of insolvent's estate—*Landlord's privilege — Statutes — Retroactivity.*]—Where insolvent tenants judicially abandoned property for benefit of creditors, and statute law (61 V. c. 46, Q.), at date of abandonment restricted lessor's preference to two years' rent, ranking them as ordinary creditors for balance, while no such restriction was enacted by law as it stood at date of the leases:—*Held*, the existing statute applied to all liquidations which arose after its enactment, and governed lessor's privilege unless expressly excepted therefrom. *Ross* v. *Beaudry* (1906), Q. R. 14 K. B. 544 (Privy Council).

Fraudulent secretion of assets — *Proof of—Discrepancy in statements—Penal provisions of Code.*]—1. Proceedings instituted under Art. 885, C. C. P., against a debtor who has made a judicial abandonment, are of a penal nature, and the rules and principles which govern evidence, and its effects in criminal cases, must be applied, and to justify a conviction the guilt of the debtor as to omission to enter property in his statement; or secretion of property must be established by clear and conclusive evidence.—2. A discrepancy between two statements made by the debtor,—one made 31st December, 1900, shewing a surplus of $1,227, and the other, made 26th July, 1901, shewing a deficit of $1,849, while it raises a presumption of mismanagement of his business and of extravagance in his business and of extravagance in his expenses, does not shew conclusively any omission to enter property belonging to him, in the statement filed with his declaration of abandonment, or secretion of any part of his property. *Bryce* v. *Wilks*, Q. R. 11 K. B. 464.

Insolvent's immovables—*Can a creditor have them sold?—Costs—C. P. 549, 863, 870, 871.*]—After his debtor has made an abandonment, a creditor cannot have the immovables belonging to the insolvent sold, and the curator, acting in his quality, has the right to oppose such sale, even in case the seizure was made before the abandonment. The costs occasioned by the seizure of immovable property before the abandonment of his estate by an insolvent are privileged. *Taylor* v. *Wilks* (1903), 11 Que. P. R. 270.

Landlord's claim for rent—*Distribution of insolvent's estate—Effect of 61 V. c. 46—Retrospective legislation.*]—Where insolvent tenants judicially abandoned their property for the benefit of their creditors, and statute law (61 V. c. 46) at the date of the abandonment restricted the lessor's preference to two years' rent, ranking them as ordinary creditors for the balance, while no such restriction was enacted by the law as it stood at the date of the leases:—*Held*, that the existing statute applied to all liquidations which arose after its enactment, and governed the lessor's privilege unless expressly excepted therefrom. Judgment in *In re Bulmer, Beaudry* v. *Ross*, Q. R. 12 K. B. 334, reversed. *Ross* v. *Beaudry*, [1905] A. C. 570.

Pretended abandonment — *Fraudulent conduct—Judgment—Estoppel.*]—A pretended abandonment, whereby the defendant states that he has no assets whatever, cannot avail against a judgment of the Court declaring that the defendant has fraudulently done away with his property, and absconded from the province, especially where the said pretended abandonment has been intituled and filed in another cause, where the plaintiff was not a party, and has not been followed by the appointment of a curator or any other proceeding. *Roumilhac* v. *Vianez*, 3 Q. P. R. 362.

Trader—*Compulsory abandonment.*] — A trader who neglects to pay at maturity the claims of two of his creditors, which compose more than half of his debts, will be ordered to make an abandonment of his property. *Lemay* v. *Parizeau*, 6 Que. P. R. 40.

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2. Acts of Insolvency.

Second hypothec — *Vente à réméré — Impairment of first security.*] — A debtor having on the 8th May, 1901, executed an instrument hypothecating his immovables for an advance payable at the end of three years, subsequently, in order to defray the costs of an action, the existence of which his creditor knew at the time of the loan, and which was afterwards decided against him, borrowed from another person the amount necessary

to pay these costs, and gave to this new creditor a *vente à réméré* upon the immovables already hypothecated. He was sued by his first creditor upon the hypothec not yet due, and for a declaration that he was insolvent and had impaired the security which he had given:—*Held*, that, in executing the *vente à réméré*, he had not made himself insolvent, that he had done no injury to the security which he had given to his first creditor, and that what he did did not come within the provisions of Art. 1092, C. C. *Danjou* v. *Vaillancourt*, Q. R. 22 S. C. 316.

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3. ASSIGNMENT FOR BENEFIT OF CREDITORS.

Account of assets—*Concealment—Presumption.*]—A debtor who makes an assignment of his property and deposits his schedule is bound, in case of contestation by a creditor, to account for the assets by a creditor, to account for the assets which he had in his possession in the year preceding the assignment. His inability to do so is equivalent to proof of the concealment aimed at in Art. 888, C. P. C. *Clément* v. *La Banque Nationale*, Q. R. 14 K. B. 493.

Action by assignee for creditors *to set aside conveyance by insolvent* — Fraudulent conveyance—Statutory presumption—Rebuttal—Onus—Knowledge of grantee—Parties—Fraudulent grantor. *Crawford* v. *Magee*, 6 O. W. R. 44.

Action by assignee for return *of goods transferred by insolvent before assignment — Title of transferee — Pledge for advances—Conspiring to defraud creditors.*]—Appeal from judgment 11 W. L. R. 363, dismissed. *Newton* v. *Rein*, 12 W. L. R. 490.

Action by assignee to set aside *chattel mortgage and land mortgage made by insolvent* — Previous agreement — Absence of knowledge of insolvency by mortgagee—Imputed knowledge—Presumption—Rebuttal—Costs — Discretion—Appeal. *Wade* v. *Elliott*, 10 O. W. R. 206, 11 O. W. R. 38.

Action by assignee to set aside *assignment of interest in land made by debtor within sixty days of assignment — Assignments Act, s. 42—Application to subsequent conveyances—Right of assignee for creditors—Trust — Statute of Frauds—Pleading.*]—A few days before making a general assignment for the benefit of his creditors to the plaintiff, W. assigned to his wife, one of the defendants, his interest under an agreement for sale of land, on which he had paid $200, and had erected on the land a building, the money for which was supplied by his wife, on the understanding that she was to have the property. Three months earlier she had entered into an agreement, with the knowledge and consent of W., to transfer this property to S., the other defendant, in consideration of a promissory note for $1,200 made by W. and indorsed by her, the property to be retransferred on payment of the note with interest. At this time all the parties considered that the property was hers. Just before the general assignment, when the vendors under the agreement for sale were pressing for payment, W. made the assignment to his wife, who then assigned to the defendant S., who subsequently paid the balance due to the vendors, and obtained title. In an action to set aside the transactions and make the property available for W.'s debts, it was held by the trial Judge that the transactions were *bona fide*, but should be set aside under s. 42 of the Assignments Act, because the transfer by W. was made within 60 days before the general assignment:—*Held*, that the provisions of s. 42 are not wide enough to authorize that result; the section is limited to conveyances made by the debtor, and does not apply to any subsequent conveyance; and an assignee's rights are only such as conferred by the statute. The most that could be done, therefore, would be to set aside the assignment by W. to his wife, which would be of no effect:—*Held*, also, that, as W. was in effect a trustee for his wife, who had the beneficial interest under the agreement for sale, he was not assigning his own interest, but hers; and, the Statute of Frauds not being pleaded and no amendment having been asked, it was not necessary to consider whether it applied. Judgment of Beck, J., 12 W. L. R. 585, reversed. *Smith* v. *Sugarman* (1910), 13 W. L. R. 671.

Action by assignee to set aside *conveyances to insolvent trader's wife* — Misstatement of consideration—Conveyances for value—Absence of intent to defraud—Action brought after expiry of statutory period—Evidence—Costs. *Attwood* v. *Pett*, 9 O. W. R. 173, 748.

Action by assignee to set aside *transaction with creditor as a preference* — Creditor's want of knowledge of insolvency—Imputed notice—Absence of fraudulent intent—Novation—Acceptance by creditor of third person as debtor in lieu of insolvent—Sale of assets by insolvent to same person — Manitoba Assignments Act—Payment — Covenant — Release — Surety. *Newton* v. *Lilly* (Man.), 3 W. L. R. 537.

Action by assignee to set aside *transfer of moneys by insolvent as preferential and void — Evidence — Intent —Knowledge of insolvency—Correspondence —Recovery of moneys transferred.*]—Action by official assignee to set aside a transfer of moneys as fraudulent and void. Transfer set aside as there was intent to prefer as to both creditor and debtor. *Jagger* v. *Turner*, 12 W. L. R. 588.

Action by creditors against assignee—Lien—Distribution—Costs. *Lucas* v. *Tegart*, 2 O. W. R. 548.

Action by curator without authorization—*Exception to form—Petition—Costs.*]—Where a curator to an assignment for the benefit of creditors begins an action in the name of the creditors without judicial authorization, and the defendant by exception to the form invokes the want of authorization, the Court may, upon petition of the plaintiff, the curator, authorize him to take the proceedings in question, on payment by him of the costs of the exception to the form and of the petition. *Savage* v. *Legendre*, 9 Q. P. R. 254.

Action by insolvent before assignment—*Continuance thereafter — Consent of curator.*]—A plaintiff who has sued the de-

fendants to recover damages for illegal arrest, and who, since the commencement of the action, has made an assignment of his property for the benefit of creditors, may, nevertheless, continue the action in his own name, especially where the curator declares that it is not in the interest of the insolvent's estate to continue the action, and authorizes the plaintiff to continue it in his own name. *De Paris* v. *Seifert*, 9 Q. P. R. 22.

Agreement of creditor to postpone claim in order that business of insolvent might be carried on—Construction of agreement—Right of creditor to rank with others in distribution of assets—Receiver. *Fowler* v. *Barnard, Re Barnard*, 7 W. L. R. 624.

Alberta Assignments Act, s. 5—Assignment not made to official assignee—Consent of majority of creditors at time of execution of assignment—Necessity for—Effect of absence of consent—Assignment void—Claim by assignee in interpleader—Status attacked by execution creditors—Costs. *Fairchild Co.* v. *Myrum*, 9 W. L. R. 277.

Assignment not made to official assignee.]—Plaintiffs, execution creditors, had caused sheriff to seize certain goods of defendant which were now claimed by M., the assignee for benefit of creditors of defendant. The sheriff interpleaded: Section 45 of the Alberta Assignments Act provides that "nothing in the last preceding sections shall apply to any assignment made to an official assignee or with the consent of the majority of the creditors . . . computed according to the provisions of the twenty-second section of this Act, to any other person resident within the province," etc., etc. Section 5 provides: "Every assignment for the general benefit of creditors . . . not made to an official assignee nor to some other person resident of the province, with the consent of the proportion of the creditors prescribed by the forty-fifth section of this Act, shall be absolutely null and void to all intents and purposes."—*Held*, that as at time of assignment to M. the majority of the creditors had not consented thereto although they had since done so, the assignment was absolutely null and void under s. 5 of the Alberta Assignment Act, and the assignee was barred. The difference between the Ontario and Alberta Acts on this point discussed:—*Held*, that since the appellants in this case could gain nothing by attacking the assignment, and their objection to it was purely technical, without any substantial merit, they were not entitled to costs either of the appeal or of the interpleader proceedings. *Fairchild* v. *Myrum, Ex p. Madore*, 1 Alta. L. R. 472, 9 W. L. R. 277.

Assignments Act, Manitoba—*Fraudulent preference—Sale of stock to person who assumes liability of insolvent to creditor—Notice of insolvency—Surety—Discharge.*]—A trading firm being indebted to G. in a large amount, and G. being dissatisfied with the payments received and the manner in which the firm carried on its business, but not knowing or having reason to believe that they were unable to meet their liabilities, an arrangement was made and carried out whereby the traders sold their stock in trade to L., and received the price in cash, less the amount of G.'s claim, which was assumed by L., G. giving time to L. for payment, and releasing the traders. Within sixty days the trading firm made an assignment to the plaintiff under the Assignments Act, R. S. M. 1902, c. 8, for the benefit of creditors generally: — *Held*, that, as the sale to L. was not impeached, the agreement whereby L. was to pay the insolvent's debt to G. could not be set aside as a fraudulent preference under s. 41 of the Act: that the effect of it was the same as if L. had paid the full purchase money to the insolvents, and they had paid G. in full out of it; and so the case came within the saving clause of the Act, s. 44, protecting payments of money; and that there was no assignment or transfer of anything by the insolvents to G. which could be declared fraudulent and void under s. 41. *Gibbons* v. *Wilson*, 17 A. R. 1, and *Johnson* v. *Hope*, 17 A. R. 10, followed *Burns* v. *Wilson*, 28 S. C. R. 207, explained:—*Held*, also, that the transaction attacked could not be held void under s. 45 of the Act, which is limited in its scope to transfers of considerations other than money, such as bills, notes, or goods:—*Quære*, whether, if the plaintiff had been held entitled to the relief asked for, G. would then have had the right, under s. 46 of the Act, to have restored to him the claim he had previously held against a surety for the insolvents, it being urged that the discharge of the insolvents discharged the surety also. *Newton* v. *Lilly*, 3 W. L. R. 537, 16 Man. L. R. 39.

Assignments Acts, Nova Scotia—Company—Validity of assignment by—Action by assignee—Trover. *McDonald* v *McAdam*, 40 N. S. R. 596.

Balance in hands of trustee—*Repayment to debtor—Collection of debts—Employment of attorney — Findings of referee—Appeal.*]—A trustee under a deed of assignment for the benefit of creditors was ordered to pay the debtor the balance of the estate in his hands, where 18 years had elapsed from the time of the assignment, though but two creditors had executed the deed, it not appearing that other creditors, if there were any, had ever shewn an intention of assenting to the deed, and the Court being of opinion that they would now be precluded from doing so.—A trustee under a deed for the benefit of creditors may employ an attorney to collect debts due the estate.—Where an attorney employed for the purpose by a trustee under an assignment for the benefit of creditors collected $211.38 of $1,028.45 book debts due the estate, and it appeared that mostly all of them were for small amounts, many being for less than a dollar, and that one of the reasons for making the assignment was the difficulty experienced by the assignor in collecting even good debts, it was held that the trustee should not be charged with a sum as for debts that he should have got in.—The finding of a referee upon questions of fact depending upon evidence taken *viva voce* before him will not be disregarded except in case of manifest error. *Thibideau* v. *LeBlanc*, 2 E. L. R. 422, 3 N. B. Eq. 436.

Claim of father of insolvent to rank on estate as creditor—Contract of insolvent to pay father $500 in the event of his selling land conveyed by father—Assignment not equivalent to sale—Purchase by father from assignee. *Ryan* v. *Malone*, 11 O. W. R. 575.

Claim of sister of insolvent to rank on estate as creditor — Allegation that claimant a partner of insolvent—Evidence—Moneys advanced — Wages as assistant in business — Mortgage—Claim as mortgagee—Insurance of mortgaged premises by insolvent—Insurance clause in mortgage—Construction—Insurance moneys paid to assignee—Right of mortgagee to payment over. *Wood* v. *Jagger*, 9 W. L. R. 120.

Claim of wife of insolvent to rank on estate—Transactions between husband and wife—Price of land conveyed by wife—Money lent—Interest—Costs. *Pett* v. *Attwood*, 9 O. W. R. 178, 748.

Claim on insolvent estate—Priorities—Insolvent carrying on business with consent of majority of creditors—Agreement—Claim for price of goods supplied by creditor—Preferred claim—Wages of insolvent—Remuneration of assignee. *Re Matejka* (N.W. P.), 5 W. L. R. 1.

Claim to rank on estate—Declaration—Costs. *Smith* v. *Harkness*, 2 O. W. R. 171.

Claim to rank on estate by secured creditors—Valuing security—Claim for balance—Manitoba Assignments Act—Duty of assignee—Realization of securities—Balance—Revaluation. *Bank of Ottawa* v. *Newton* (Man.), 3 W. L. R. 422.

Conveyance by insolvent to creditor—Action by assignee to set aside—Grantee's ignorance of solvency — Secured for debt — Wages — Interest — Redemption — Costs. *Casserley* v. *Hughes*, 5 O. W. R. 599, 6 O. W. R. 70.

Creditor for wages and disbursements—Right to rank on estate—Preferential claim—Costs. *Regan* v. *Langley*, 12 O. W. R. 1101.

Creditor valuing security and claiming to rank for balance of debt—Absence of election by assignee—Time—Delay — Acquiescence—Subsequent realization by creditor from part of security of more than amount of valuation of the whole—Rights of creditor — Re-valuation — Assignments Act—Transfer of balance of security—Right to rank on estate for balance originally asserted. *Bank of Ottawa* v. *Newton* (Man.), 4 W. L. R. 508.

Declaration of right to rank—*Division Court.*]—An action for a declaration of the right to rank against an insolvent estate vested in an assignee under the Assignments Act, R. S. O. 1897 c. 147, is not within the jurisdiction of a Division Court. *In re Bergman* v. *Armstrong*, 23 Occ. N. 14, 4 O. L. R. 717, 1 O. W. R. 799.

Demand—*Cessation of payments—Costs.*]—The cessation of payments is an essential condition of a demand for an assignment of property for the benefit of creditors. However, if the defendant, by his default, has occasioned the demand for an assignment, and has not since discharged his obligation, but, on the contrary, has caused considerable expense to the creditor requiring the assignment, the demand for an assignment will be dismissed without costs. *Hetu* v. *Poirier*, 4 Que. P. R. 242.

Demand — *Contestation — Discovery by Debtor.*]—There is no provision of the Code of Civil Procedure whereby a debtor, contesting a demand of assignment made upon him, can be ordered to exhibit and give communication, to a creditor of his books of account, letterheads, or any documents or books of whatsoever nature. *Wistar* v. *Dunham*, 5 Que. P. R. 79.

Demand—*Contestation — Time — Order extending.*]—The plaintiff having made a demand upon the defendant for an assignment of his property, the latter did not contest the demand within the time fixed by art. 857, C. P. C. Afterwards, by leave obtained ex parte from a Judge of the Superior Court, he filed a contestation, and the plaintiff asked to have the contestation dismissed as having been filed too late:—*Held*, that art. 205, C. P. C., applies to proceedings for the assignment of property, as well as to all other causes, and that the plaintiff, not having appealed from the order allowing the filing of the contestation, could not, by reason of its filing after the time allowed, demand the dismissal of it. *Mussen* v. *Filion*, Q. R. 24 S. C. 308.

Demand — *Petition to set aside — Affidavit—Notice of presentation.*]—There is no need of an affidavit in support of a petition to set aside a demand for an assignment of property, even if the facts relied upon do not appear upon the record. 2. It is not necessary to give notice of the presentation of such petition for a day fixed, a notice of filing it as part of the record being sufficient. *Dufresne* v. *Superior*, 5 Que. P. R. 28.

Demand—*Service of—Irregularity — Demand based on debt assigned—Proof of.*]—A demand for assignment of property served at the residence of the manager of the debtor, will not be dismissed on an exception to the form, if it is shewn that it was sent to the debtor, and that he has not been prejudiced by the irregularity of the service. A demand for assignment based on a debt transferred to the creditor in writing under seal, will be dismissed if the creditor does not prove the writings containing the assignment, which, by themselves, are not evidence against the debtor. *Smith* v. *Timbers*, 7 Que. P. R. 29.

Demand of—*Contestation — Petition — Filing—Service—Notice—Costs.*]—*Held*, that a delay of two days between the filing of a petition to contest a demand of abandonment and the service thereof upon the claimants, is not unreasonable. 2. That such a petition will not be rejected on motion because it was not accompanied with a notice of the time when it would be presented. 3. That the costs of a motion to reject such petition will abide the final issue on the petition. 4. That proceedings upon such a petition must be carried on in the same manner as upon petitions to quash a writ of *capias*. *Manson* v. *Forand*, 2 Que. P. R. 362.

Demand of—*Evidence — Acquiescence—Admission in bilan—Interest—Mise en demeure.*]—The fact that the defendant acquiesced in a demand of abandonment made upon

him based on the claim sued for, and that in his *bilan*, deposited with the abandonment made by him upon such demand, he acknowledged an indebtedness to the plaintiff in the sum sued for, constitutes sufficient evidence of the indebtedness, in the absence of any proof that in acquiescing in the demand of abandonment and in admitting the debt in his *bilan* the defendant acted in error. 2. A demand of abandonment acquiesced in by the debtor, constitutes a sufficient *mise en demeure* to cause interest to run on the debt, on which the demand of abandonment was based, from the date of such demand. *Laberge* v. *Brosseau*, Q. R. 16 S. C. 430.

Demand of—*Security for debt—Transfer of claims.*]—A transfer made by a debtor to his creditor of a right of redemption in land, with the stipulation that the creditor shall exercise such right "*si bon lui semble*," is not a *garantie* to the creditor which will prevent him from demanding an assignment of the property of his debtor. The transfer by the same debtor to his creditor of an unliquidated claim for repairs and improvements made upon such land is not a payment in full of the creditor's claim, even when he afterwards becomes the owner of the land, but is only a part payment to the extent of the actual proved value of the repairs and improvements; and if, after giving credit for such value, there remains due a larger sum than $200, he still has a right to demand an assignment. *Bastien* v. *Pagnuelo*, O. R. 17 S. C. 139.

Demand of—*Service — Affidavit.*]—It is sufficient to serve on the debtor the demand for an assignment, and to file it at the record office with a claim under oath and the documents justifying it. The service of the claim under oath upon the debtor at the same time as the demand for the assignment is not necessary: Art. 856, C. P. *Lamontagne* v. *Levert*, 3 Que. P. R. 272.

Demand of assignment—*Place of service — Irregularity — Contestation—Domicile.*]—When the report of a bailiff declares that a demand for an assignment for the benefit of creditors has been served on the alleged insolvent at his place of business, the insolvent having no domicile, he cannot in contesting the demand complain of the service as irregular unless he indicates a domicile. *Deslongchamps* v. *Davies Limited*, 8 Que. P. R. 386.

Demand of assignment — *Refusal — Saisie-arrêt before judgment—Time.*] — A *saisie-arrêt* before judgment based upon the fact that the defendant is a trader, who has stopped payment, and who refuses, although required to do so, to make an assignment of his property for the benefit of his creditors, cannot be issued before the expiration of the second day after the demand for an assignment. *Davies Limited* v. *Deslongchamps*, 8 Que. P. R. 387.

Demand of assignment—"*Trader*"—*Art. 853, C. P. C.—Person following trade—Bailor and bailee*—"*Creditor*"—*Article deposited.*]—One who follows a trade (e.g., leather dressing) consisting in work upon goods belonging to others, and which he does not buy for the purpose of reselling, is not a "trader" ("*commercant*") within the meaning of cl. 2 of art. 853, C. P. C.; and he is, therefore, not bound to comply with a demand made upon him for an assignment of his property.—The bailor is not the creditor of the bailee for the value of the deposit, within the meaning of art. 853, C. P. C.; and therefore, a debt which amounts to $200 only by adding to it a claim for the value of the deposit, gives no right to the bailor to demand an assignment of the property of the bailee. *Vermette* v. *Vermette*, Q. R. 30 S. C. 533.

Demand of assignment without other proceedings—*Copartnership — Dissolution of firm — Existence for purpose of liquidation—Recours en garantie.*]—A demand for an assignment of property made upon a commercial firm and not followed by the deposit of the declaration and schedule required by art. 859, C. P. C., nor by any subsequent proceeding, does not constitute a state of insolvency so as to cause its dissolution. A commercial firm dissolved by insolvency continues to exist as an entity, and may act as such for the purposes of its liquidation. In both cases the firm sued is in a position to exercise *recours en garantie* against third persons. *Block* v. *Carrier*, Q. R. 30 S. C. 37.

Distribution of insolvent's estate—*Dividend sheet—Contestation by creditor—Payment of creditor's claim—New dividend sheet.*]—Where, upon the contestation of a dividend sheet by a creditor, who complains that he is not allowed thereon the whole amount of his privileged claim, a judgment is given maintaining the creditor's claim and ordering the curator of the insolvent estate to prepare another dividend sheet, it is sufficient to remove the interest of the creditor by paying his claim, and in that case the curator is not obliged to prepare a new dividend sheet. *Guimont* v. *Damphousse*, Q. R. 30 S. C. 358.

Distribution of insolvent's estate—*Lien of execution creditors—Alberta Assignments Act, 1907, s. 8—Retroactivity—Preference — Executions delivered to sheriff — "Bind"—Costs—Payment into Court—Appeal—Stay of proceedings.*]—Section 8 of the Alberta Assignments Act, 1907, is not retroactive so as to affect the rights of execution creditors whose writs were in the hands of the sheriff for execution prior to the passing of the Act. Delivery of a writ of execution to the sheriff for execution creates a lien or "charge" on the property of the execution debtor in favour of the execution creditor; and seizure, though creating a special property in the sheriff, does not enlarge the lien of the execution creditor. The meaning of the word "bind" discussed. Lien of execution creditor for costs under s. 4, Creditors' Relief Ordinance, discussed. Payment of moneys into Court by arrangement between the sheriff, the execution creditor, and the assignee, does not affect the lien of the execution creditor; the proceeds stand in the place of the goods. Stay of proceedings pending appeal. Costs of both parties payable by assignee out of the estate. *Deering* v. *Gibbon*, 7 W. L. R. 178, 1 Alta. L. R. 7.

Execution after time provided in deed — *Originating summons — Costs.*]—A proceeding by originating summons to deter-

mine the rights of certain creditors who executed a deed of assignment for the benefit of creditors after the expiration of the time provided in the deed, but before any dividend was paid. Some of the creditors had not learned of the assignment until after the time had elapsed; others had sent instructions and power of attorney to execute within the time, but the same miscarried, and the execution did not take place until after the time had elapsed. The assignment contained no release:—*Held*, on the authority of *Whitmore* v. *Turquand*, 3 D. F. & J. 107; *Haliburton* v. *DeWolfe*, 1 N. S. D. 12, and *Douglas* v. *Samson*, 1 N. B. Eq. 137, that the creditors who executed after the expiration of the time limited in the assignment, but before payment of a dividend, were entitled to participate *pari passu* with the creditors who executed within the period. — *Held*, also, following *Gunn* v. *Adams*, 8 C. L. J. 211, that the costs of all parties should be paid out of the estate. *Capstick* v. *Hendry*, 22 Occ. N. 35.

Execution against lands—*Assignments Act, s. 8—Lien for costs.*]—An execution creditor, whose execution against lands has been placed in the sheriff's hands, and has by him been transmitted to the Registrar of Land Titles, has a lien for all his costs, under s. 8 of the Assignments Act, and is entitled to be paid them by the assignee of the execution debtor under an assignment for the benefit of creditors, made subsequently to the filing of the execution, in precedence to all other debts. *Re Scribner & Wheeler* (1910), 14 W. L. R. 524, 3 Sask. L. R. 185.

Exemptions—*Alien—Costs.*] — An alien is entitled to the statutory exemption of a part of his property from seizure and sale under execution. He is not barred therefrom by s. 3, s.-s. 1, of the Naturalization Act. Where an alien made an assignment for the benefit of his creditors of all his property not exempt by law, an order for payment of the costs of certain proceedings by the creditors out of a fund representing the value of his exemptions, was reversed. *In re Demaurez*, 21 Occ. N. 457, 5 Terr. L. R. 84.

Exemptions—*Creditors' Trust Deeds Act —Remuneration of trustee — Costs.*]—The debtors, a firm of builders, assigned under the Creditors' Trust Deeds Act all their personal property, credits, and effects that might be seized and sold under execution. The assets were not sufficient to pay any part of the claims of ordinary creditors, and two members of the firm claimed as exemptions chattels to the value of $500 each (under the Homesteads Act) selected out of the lumber and materials around the factory of the firm:—*Held*, that by the form of assignment the claimants were precluded from claiming exemption. Trustee's remuneration fixed at 5 per cent. *In re Ley*, 20 Occ. N. 143, 7 Brit. Col. L. R. 94.

Exemptions—*Selection of — Executions Act.*]—When a debtor merchant makes an assignment in the form prescribed by the Assessment Act, R. S. M. c. 7, of all his stock-in-trade and personal property, etc., liable to seizure under execution, to a trustee for creditors, the assignee has a right to select such articles as would be exempt under the Executions Act R. S. M. c. 53, s. 43, in the absence of a selection by the debtor; and, if he appropriates and sells only a portion of the property coming under the head of any class of the statutory exemptions, and leaves to the debtor a sufficient quantity of the same kind of property to reach the prescribed value, he will not be liable to an action for the value or the proceeds of the portion sold. *Cloutier* v. *Georgeson*, 20 Occ. N. 138, 13 Man. L. R. 1.

Fi. fa. in sheriff's hands not executed —*Notice to assignor—Priority.*]—Where an execution has been placed in the hands of a sheriff, and the execution debtor, before the sheriff executes the writ, makes an assignment of his goods:—*Held*, that the trustee, who brings an action to recover the goods, must fail unless he shews want of notice of the execution on the part of the debtor, as well as on his own part. *Ross* v. *Creighton*, 40 N. S. R. 151.

Form of assignment—*Acceptance—Action by assignee.*]—A debtor, by indenture dated the 10th July, 1900, mortgaged all his real estate to the defendant; at and before the giving of the mortgage the debtor was, and knew himself to be insolvent; he had borrowed heavily and was largely in debt. On the 26th July the debtor made an assignment for the benefit of his creditors generally, to the plaintiff, who was a member of a firm who were creditors of the debtor. There was no evidence of acceptance of the benefits of the assignment by any creditor except the plaintiff, or even of communication of it to any other:—*Held*, that it was not necessary for the purpose that the assignment should be in the language of s. 3 of the Assignments Act, R. S. M. c. 7; the assignee was the proper person to bring an action to set aside the mortgage; he was a creditor and entitled to the benefit of the assignment; this circumstance rendered it irrevocable. *Schwartz* v. *Winkler*, 21 Occ. N. 574.

Further directions.]—*Law Society of Upper Canada* v. *Hutchison*, 1 O. W. R. 558.

Goods seized by sheriff under execution, but not sold—*Interpleader—Assignee claimed the goods—Who is entitled, assignee or execution creditors?—Assignment and Preferences Act, 10 Edw. VII. c. 64, s. 14—Creditors' Relief Act, 9 Edw. VII. c. 48, s. 6 (4).*]—Sheriff seized certain goods under execution. Debtor made an assignment for benefit of creditors. Assignee claimed the goods. Sheriff applied for interpleader order between assignee and execution creditors. Master in Chambers adjourned the application until after sheriff should have sold the goods. Assignee appealed, claiming under Assignment and Preferences Act, 10 Edw. VII. c. 64, s. 14. Creditors claimed under Creditors' Relief Act, 9 Edw. VII. c. 48, s. 6 (4). Clute, J., *held* (17 O. W. R. 197, 2 O. W. N. 102), that the sheriff was directed to sell by an order of the Court, and as that order was not appealed from, it was in full force; that the rights of the assignee were no higher than those of the debtor as against execution creditors. Order of Master in Chambers varied by declaring execution creditors entitled to proceeds of sale against the assignee. Divisional Court affirmed above

judgment. *Re Henderson Roller Bearings Ltd.* (1910), 17 O. W. R. 515, 2 O. W. N. 273. O. L. R.

Incomplete assignment — *Seizure of Immovables—Stay of execution — Art. 772, C. C. P. (old text).*]—Judgment in Q. R. 8 Q. B. 517, affirmed. *Birks* v. *Lewis*, 30 S. C. R. 618.

Inspectors of estate.]—The Court is not authorized by law to grant a petition for the appointment of additional inspectors of the estate of an insolvent assigned for the benefit of creditors. *Clément* v. *Desmarteau*, 9 Que. P. R. 91.

Interest of debtor in estate — Receivership order—Costs—Lien. *Reinhardt* v. *Hunter*, 6 O. W. R. 421.

Judgment—*Execution — Sheriff—Sale of land.*]—Under a writ of *fieri facias* a sheriff seized the interest of a judgment debtor in certain lands, and advertised the interest for sale. Three days prior to the time fixed for the sale the judgment debtor made an assignment for the benefit of his creditors pursuant to the provisions of R. S. O. 1897, c. 147. The assignee gave notice to the sheriff of the assignment and asked for a statement of the costs incurred to that time. No tender of the costs was made or undertaking given to pay them, and the sheriff proceeded with the sale, and sold the land to the plaintiff. The assignee, notwithstanding the sheriff's sale, assumed to sell the land to, and executed a conveyance in favour of, the defendant's son, who allowed the defendant to remain in possession as his agent:—*Held*, that the assignment for the benefit of creditors did not stand in the way of the sheriff proceeding to sell under the writ of execution, and that the sale by the assignee was nugatory and void, and the sheriff's vendee entitled to possession of the land. *Gillard* v. *Milligan*, 28 O. R. 645, followed. *Elliott* v. *Hamilton*, 22 Occ. N. 412, 4 O. L. R. 585, 1 O. W. R. 705, 2 O. W. R. 141.

Mortgage by insolvent — *Purchase of mortgaged land by assignee — Ignorance of existence of mortgage—Subsequent action to set aside — Statutory presumption.*]—Plaintiff was assignee in law of the Vandecar estate, and sued in that character to vacate a mortgage to the defendants for $250 made by the insolvent, a few days before the assignment, upon a farm already mortgaged to the Huron and Erie Loan Co. for $3,600. The defence was that the farm was sold by the assignee and purchased on his behalf for $4,200 in March, 1897, and is now vested in him as owner. The learned Judge ruled that such was his legal position, and declined to regard his status as sufficient to justify the maintenance of this action. No doubt, qua owner, he could not attack the prior registered mortgage—qua assignee for creditors he can impeach the mortgage under the statute then in force, 54 V. c. 20, s. 2, s.-s. 2 (b). The mortgage for $250 was to secure a bill of costs of the mortgagees; it was made on 15th October, 1896, but it was not registered until 10th February, 1897. The assignment for creditors was executed on 21st October, 1896. The assets were all realized and distributed on a dividend of 7 per cent. about 12th July, 1897. The farm was sold, subject to the first mortgage, on 13th March, 1897, and the conveyance taken, through a nominal purchaser, to plaintiff in August, 1897. After providing for the first mortgage, there came out of the purchase money a balance of $600, which was paid by plaintiff and distributed among the creditors. Defendants filed their claim as creditors (but without disclosing the mortgage), in December, 1896, and received their share of the dividend in June, 1897. It was proved the plaintiff had no notice nor knowledge of the $250 mortgage till October, 1897, after the estate had been wound up and distributed. Plaintiff took possession of the farm with knowledge of the creditors of the purchase by him, and so remained until disturbed by notice of the exercise of the power of sale in defendant's mortgage on 10th May, 1903, and then this action was begun to invalidate the instrument or to stay proceedings thereon. At trial before Judge (without jury), the action was dismissed without hearing evidence for the defence, holding that plaintiff could not maintain the action:—*Held*, on appeal (evidence for the defence being heard), that neither Vandecar nor the defendants entered into the transaction with the knowledge or intent which would bring it within the mischief of the statute, 54 V. c. 20, s. 2, s.-s. 2 (b), and that it was extremely doubtful whether Vandecar was at the time insolvent, the appearance of anything extraordinary in the defendants' dealings with their security being accounted for by the proverbial carelessness of lawyers in the conduct of their own affairs. *Craig* v. *McKay*, 4 O. W. R. 274, 6 O. W. R. 160, 25 Occ. N. 10, 8 O. L. R. 651.

Motion for removal of assignee—Interim injunction against acting—Order appointing additional assignee to sell assets of estate—Terms—Reference—Costs. *Brock* v. *Cline*, 8 O. W. R. 144.

Partnership assets only — *Creditors' Trust Deeds Act.*]—An assignment by a firm for the benefit of creditors which is construed by the Court to be an assignment of partnership assets only, may be a good and valid assignment within the meaning of the Creditors' Trust Deeds Act. *Eastman* v. *Pemberton*, 7 B. C. R. 459.

Place of making—*Domicile of assignor —Principal place of business.*]—When an insolvent assigns his property at the record office of the district in which he has his office and his dwelling place, such assignment is valid, even when the factory which was the principal cause of his failure in business is situated in another district. *Henderson* v. *Harbec*, 8 Que. P. R. 73.

Place for making assignment—*Judicial district—Domicile—Business carried on in other districts.*] — A trader who has stopped payment and has been required to make an assignment of his property, must do it in the district in which he has his domicile of origin and the centre of his affairs; it is of no consequence that he has an interest in an industrial enterprise in one or two different districts, as a member of a partnership, and that he has deposited in the registry of the Superior Court of one of them a declaration under Art. 1834*a*, C. C.; such a special enterprise does not give occasion for a particular assignment. *Henderson* v. *Harbec*, Q. R. 18 K. B. 338.

Preferential claim — *Wages — One month — Computation — Statutes.*]—By the Creditors' Trust Deeds Act, 1901, an assignee is required to pay in priority to the claims of ordinary creditors the wages of persons in the employ of the assignor at the time of the assignment, or "within one month before." The assignment was made on the 27th November, 1901:—*Held*, that a workman who was in the employ of the assignor previous to and including the 26th October, 1901, was not entitled to a preference. Interpretation Amendment Act, 1902, applied. *In re Clayoquot Fishing and Trading Co.*, 9 B. C. R. 80.

Preferential claim—*Wages of assignor —Creditors' Trust Deeds Act—Contractor.*]—The plaintiff contracted with cannery proprietors (a) to supply labour and pack salmon at a stated price per case, *i.e.*, by piece work; and (b) to act as foreman of the labourers supplied by him, at a salary of $50 per month. The proprietors having assigned for the benefit of creditors, the plaintiff sought to enforce the preference given by s. 36 of the Creditors' Trust Deeds Act in respect to both the salary and the piece work:—*Held*, that the preference must be restricted to the salary. *Ah Tam* v. *Robertson*, 23 Occ. N. 238, 9 B. C. R. 505.

Property of third person in hands of insolvent—*Recovery—Petition.*] — Property not belonging to the debtor which is in the creditors' possession by virtue of an abandonment, can only be recovered by the person entitled thereto on a petition by himself, and the curators will not be allowed to obtain an order authorizing them to transfer the same to the person who pretends to be the owner thereof, in a matter where such owner is not a party and where the ownership is disputed by other creditors. *In re Simpson and Gagnon*, 6 Que. P. R. 419.

Provisional guardian — *Change of — Creditors.*]—The fact that the provisional guardian named by the prothonotary in the case of an assignment for creditors is a creditor for less sum than that claimed by another creditor is not a sufficient ground for an order of the Court to replace the provisional guardian by the other creditor.—2. The Court will not order a change of provisional guardian except upon proof of incompetence or dishonesty. *In re Bonhomme and Burnett*, 5 Que. P. R. 40.

Refusal to disclose property and transactions — Concealment — Fraudulent disposition — Committal — Assignments Act. *Re McLarty*, 12 O. W. R. 1171.

Removal of assignee—Solicitor for preferred creditors—Appointment — Approval—Injunction—Solicitor for estate—Partner of assignee—Debtor of estate. *Orillia Export Lumber Co.* v. *Burson*, 2 O. W. R. 1110.

Rights of assignee—*Recovery of portions of estate — Garnishment—Creditors.*]—The curator to an assignment of property may recover from the insolvent property which the insolvent has not given up or which he has secreted, but the curator cannot exercise against the debtor rights of action which belong individually to each one of his creditors (Art. 931, C. P.), for the balance of the claims of such creditors against the debtor, by way of garnishment of the party paid out of the proceeds of the property given up by the debtor. *Desmarteau* v. *Viau*, 4 Que. P. R. 282.

Right of creditors of partnership to rank on estate of individual partner—Assignments Act, s. 7—Admissions—Insufficiency—New trial. *Frost and Wood Co.* v. *Stoddart*, 12 O. W. R. 230, 688, 1133.

Right of creditor of partnership to rank on estate of partner with individual creditors—R. S. O. 1897 c. 147, s. 7. *Gordon* v. *Matthews*, 12 O. W. R. 1274.

Right of creditor to rank on estate —Owner or chattel mortgagee of insolvent's business — Evidence—Representations—Conduct—Estoppel. *Barthelmes* v. *Condie*, 8 O. W. R. 806, 10 O. W. R. 717.

Rights of secured creditor after valuation of his security—*Assignments Act, R. S. M. 1902 c. 8, s. 29.*]—When the assignee under an assignment for the benefit of creditors, made pursuant to the Assignments Act, R. S. M. 1902 c. 8, has failed within a reasonable time to exercise his right to take over the securities held by a creditor at 10 per cent. over the amount at which the creditor has, under s. 29 of the Act, valued them, the creditor has the right to collect what he can from the securities and rank for dividends on the estate as a creditor for the full amount of the difference between his total claim and the valuation made, although he may have collected on the securities more than the amount of the valuation, provided he shall not receive in all more than 100 cents in the dollar. Under such circumstances the creditor cannot be required to revalue his securities. *Bank of Ottawa* v. *Newton*, 4 W. L. R. 508, 16 Man. L. R. 242.

Right to rank on estate—*Annuitant —Attachment of debts—Assignments Act.*]—An insolvent made an assignment to the defendant for the benefit of creditors, pursuant to R. S. O. 1897, c. 147. Previous to the assignment the defendant had covenanted with the plaintiffs to pay to J. R. $100 per quarter on the first day of each quarter during her natural life:—*Held*, that the growing payments were in the nature of contingent debts; and that the plaintiffs were not entitled under R. S. O. c. 147 to rank upon the estate of the insolvent for the present value of such payments. *Grant* v. *West*, 23 A. R. 533, and *Mail Printing Co.* v. *Clarkson*, 25 A. R. 1, followed. —*Semble*, that such claims are not subject to attachment under the garnishee provisions of the English Judicature Act and Rules, as accruing debts. *In re Cowan's Trust*, 14 Ch. D. 638, has been disapproved in *Webb* v. *Stenton*, 11 Q. B. D. 518. *Carswell* v. *Langley*, 22 Occ. N. 97, 3 O. L. R. 261, 1 O. W. R. 107.

Right to rank on estate—*Claim for inchoate dower—Competition with creditors—Registration of hypothec—Radiation—Rights of curator.*]—Where by the marriage contract a prefixed or conventional dower payable in one sum, has been stipulated in favour of the wife, she is not entitled to rank for that sum as a conditional obligation, in competition with the creditors of her insolvent husband, before the opening of the dower by the death

of the husband.—2. A prefixed dower, or any other right derived from the husband, does not come under the terms of Art. 2029, C. C. The only way in which such rights can be protected is by special conventional hypothec, which must describe the property affected.—3. The curator in an insolvent estate is entitled to bring action for the radiation of the registration of a hypothec affecting the insolvent's immovable property, where such registration is illegal, without waiting to see whether the estate is sufficient to pay all the creditors in full. *Bilodeau* v. *Benoit*, Q. R. 20 S. C. 241.

Sale by assignee—*Title of purchaser—Fraudulent conveyance—Husband and wife—Ratification.*]—A sale of immovables by a curator under an assignment does not transmit the property in the immovables for any greater interest than the assignor had at the time of the assignment.—A curator who sells to a purchaser an immovable assigned cannot validly pass the title to it, a year later, to another purchaser.—Where the purchaser is insolvent and has proceedings pending against him, and the third person to whom the title is passed is his infant son, and the latter, within three days after judgment obtained against his father, sells the immovable *à rémeré*, as a security, to a creditor for costs incurred in the defence and those to be incurred in carrying the case to appeal, the fraudulent intention to withdraw the immovable from the reach of the plaintiff is established, and the alienations are void as to him, on account of fraud and simulation.—An emphyteutic lease made by a husband, without authority, of an immovable owned by his wife, is void and without substance, and, therefore, incapable of ratification. *Duggan* v. *Grenier*, Q. R. 29 S. C. 232.

Sale of land under execution.]—After an assignment of his property by a debtor for the benefit of his creditors, and the nomination of a curator, a creditor of such debtor cannot cause his lands to be seized and sold, but such lands must be sold by the curator or upon his authority. *Guimond* v. *Gravel*, Q. R. 19 S. C. 568, 4 Que. P. R. 17.

Sheriff of another district—*Validity—Setting aside—Costs of action to set aside deed.*]—An assignment to the sheriff of the Superior Court for the district of Quebec by a merchant who lives and carries on business in the district to Three Rivers is absolutely void; and so are the appointment of a trustee and inspectors and all other proceedings thereunder. Any one concerned can on an application to the Superior Court at Quebec, on producing such assignment, have it declared void; and it is sufficient to give notice to the trustees and inspectors, without giving notice to the insolvent.—Such application was allowed with costs to the applicant without saying against whom. The costs of such application are costs incurred in the common interest, and the applicant can claim them "par privilege" from the proceeds of a sale by the sheriff of the lands of the debtor, although such sale was made by virtue of a writ of *fi. fa.* issued by another creditor after the cancellation of this assignment.—The prothonotary, in preparing his scheme of distribution, ought to consider whether hypothecs reported by the registrar are legal; and if it appears by his certificate that a hypothec mentioned in it cannot be a legal charge on the land sold, he should not take it into account.—The plaintiff in an "action paulienne," who has set aside, as a fraud upon creditors, a deed of sale of land made by the debtor, has a good privilege for his costs on the proceeds of the sale of the land; but the prothonotary can only rank him for it, if he claims it by a protest in order to preserve it. The procedure to be followed in a dispute as to the order or ranking of claims is different from that of a dispute of a claim on the merits. *Rousseau* v. *Rivard*, Q. R. 26 S. C. 176.

Status of assignee to attack bills of sale made by insolvent — Estoppel — Laches and acquiescence—Execution creditors—Interpleader. *Lennox* v. *Alaska Mercantile Co.* (Y.T.), 4 W. L. R. 333.

Voluntary assignment—*Property passing.*]—*Quære*, whether the general rule that property in which a bankrupt has no beneficial interest does not pass to his trustee applies, so far as the legal title is concerned, in the case of a voluntary non-statutory assignment for the benefit of creditors. *MacArthur* v. *MacDowall*, 1 Terr. L. R. 345.

Voluntary assignment for creditors—Action by assignee to set aside mortgage made by assignor—Cause of action. *Dichi* v. *Wallace* (N.W.T.), 2 W. L. R. 24.

See HUSBAND AND WIFE—LIMITATION OF ACTIONS — MARSHALLING SECURITIES — MORTGAGE — PRINCIPAL AND SURETY — REGISTRY LAWS—SALE OF GOODS.

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4. COMPOSITION.

Collateral securities — *Reservation—Effect of.*]—The respondent having assigned to the appellants, as collateral security for advances a sum of $5,000 owing to him by the Merchants Telephone Co. (the "*mise-en-cause*"), became financially embarrassed and compromised with his creditors at 75 cents on the dollar. The appellants executed the deed of composition, but added these words, "special reserve being made as to the securities which we hold." They then accepted from the respondent 6 notes for 75 per cent. of their claim, and returned to him all the negotiable securities they had received from him as security for their claim. The first three notes were paid at maturity, and, as the appellants had received from the "*mise-en-cause*," under the assignment mentioned, an amount equal to the amount of the last three notes, the respondent called upon the appellants to give up these notes and retransfer the debt assigned to them. The appellants refused, contending that the reservation in the composition deed was, according to commercial custom, to be considered as made in respect of their total claim, and that the agreement to accept 75 cents in the dollar did not extend to collateral securities:—*Held*, that the reservation did not imply the obligation on the part of the respondent to pay even out of the collateral security which he had given the 25 cents which the appellants had abandoned by executing the deed of composition; that its effect was only to assure to the appellants,

even as to such security, payment of their original claim, in case the respondent should fail to pay the composition notes at maturity; and that commercial usage, urged by the appellants, could not be admitted, in face of the express terms of the reservation, which was the contract between the parties. *Banque d'Hochelaga* v. *Beauchamp*, Q. R. 15 K. B. 417.

Composition — *Payment to creditors as inducement to consent — Recovery back — Set-off.*]—Under our law deductions voluntarily made by creditors to their debtors do not leave a natural debt existing, and in this regard there is no difference between deductions agreed to between traders and the like between other persons.—2. A payment made by a debtor to his creditor to induce him to sign a composition is contrary to public policy, and therefore is void as the contract itself, and may be recovered back; and such recovery may be by way of set-off.—3. It is too late for the plaintiffs to oppose set-off when the cause has been submitted to the Court on the merits, when the parties have proceeded to trial upon the whole cause, and the Court is in a position to adjudicate at the same time upon the existence of the two debts and to liquidate them by its judgment. There is then nothing in the way of a set-off, and the Judge should order it. *Kirouac* v. *Maltais*, Q. R. 18 S. C. 158.

Composition deed—Acceptance by creditor of dividend under—Subsequent action for balance of claim—Proviso as to acceptance by "all the creditors." *Shepherd* v. *Murray*, 3 O. W. R. 733.

Compromise—*Secret agreement—Bribery—Inspector.*] — A commercial firm having made an abandonment of its property for the benefit of its creditors, a secret arrangement was made whereby a particular creditor, without any legal right to preference or priority, was secured an advantage over the other creditors, through the assistance of one of the inspectors of the insolvent estate, to whom was promised a sum of money for his personal use, upon his advising the acceptance of a proposal for the purchase of the estate upon a composition at a rate on the dollar to be paid to the creditors of the estate generally. The preferred creditor was, under the concealed arrangement, to receive an amount greater than the rate of the composition proposed, such additional sum to be paid by a third person who took no direct interest in the estate purchased:—*Held*, that the agreement was fraudulent and void; that the proposed payment by the third person was as much a fraud upon the general body of the creditors as if it had been promised by the insolvent firm itself; and that the additional sum could not be recovered by the creditor so preferred:—*Held*, also, that the promise of the payment to the inspector was a bribe, and, for that reason alone, the transaction to induce which it was given should be adjudged corrupt, fraudulent, and void. *Brigham* v. *Banque Jacques Cartier*, 20 Occ. N. 371, 30 S. C. R. 429.

Construction of deed — *Novation—Reservation of collateral security—Delivering up evidence of debt.*]—By deed of composition and discharge, the defendants agreed to accept composition notes in discharge of their claim against the plaintiff, at a rate in the dollar, a special reservation being made as to the securities held for the debt due by the plaintiff. The original debt was to revive in full, on default in payment of any of the composition notes. Upon receiving the composition notes, the defendants surrendered the notes representing the full amount of the claim:—*Held*, reversing the judgment appealed from, that the effect of the agreement, coupled with the reservation made, was that the debtor was to be discharged merely from personal liability on payment of the composition notes, but that the securities were to be still held by the defendants for the purpose of reimbursing themselves, if possible, to the extent of the balance of the original debt:—*Held*, also, that the surrender of the original notes by the defendants did not extinguish the debts they represented, and, in the circumstances, there was no novation. *Beauchamp* v. *La Banque d'Hochelaga*, 25 Occ. N. 96; *La Banque d'Hochelaga* v. *Beauchamp*, 36 S. C. R. 19.

Deed of compromise.]—A statement in a deed of compromise, involving the acknowledgment of a fact, cannot be extracted therefrom, as evidence against a party who signed it, without taking into account the whole purport of the deed, and the circumstance that no further effect was given to it. *Lacroix & Nault* v. *Rousseau* (1909), Q. R. 18 K. B. 455.

Setting aside—*Misstatement.*]—A composition arrangement made with a creditor induced by a misstatement by the debtor to the creditor of the amount of assets and liabilities, will be set aside if repudiated on the discovery of the falsity of the statement, and before any benefit has been taken under the arrangement, even though the misstatement is not shewn to have been fraudulently made. *Derry* v. *Peck*, 14 App. Cas. 337, applied. *Indian Head Wine and Liquor Co.* v. *Skinner*, 23 Occ. N. 73; *Plisson* v. *Skinner*, 5 Terr. L. R. 391.

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5. Contestation of Schedule.

Creditors' claims—*Contestation—Filing—Subrogation—Exception to form—Tierce-opposition.*]—The original of a contestation of claim must be filed with the curator, and it is not enough to file a copy.—2. An allegation in such a contestation that the contestant has been subrogated to different creditors of the insolvent cannot be attacked by exception to the form upon the allegation that it is not supported by documents justifying it.—3. The fact that certain grounds of contestation of a claim really amount to a *tierce-opposition*, while the contestant is not in a position to claim as a *tiers-opposant*, is also a ground of substance which cannot be discussed upon an exception to the form. *Beaudoin* v. *Lamothe*, 5 Que. P. R. 356.

Fraud—*Pleading.*]—Where an insolvent's schedule is contested for fraud, and the insolvent in his reply to the contestation explains his acts in order to justify them, the contestant will be allowed to rejoin to this reply alleged facts connected with the allegations of his contestation in order to explain and justify them, and these allegations will

not be struck out on the ground that they should have formed part of the contestation itself. *Bessette* v. *Ball*, 5 Que. P. R. 223.

Summary procedure—*Inscription—Notice—Filing—Service—Time.*] — The rules and times for taking the different steps in the matter of the contestation of a schedule are those applicable to summary procedure.—2. An inscription on the merits in every case must first be filed at the office of the Court, and notice must afterwards be given to the opposite party.—3. In a summary matter an inscription upon the merits filed less than three clear days before that fixed for the hearing is illegal and will be set aside upon motion, even when the notice of inscription has been given to the opposite party three days before that fixed for the hearing, such notice being irregular because the inscription had not been filed at the office of the Court at the time that it was served. *Dufour* v. *Ames-Holden Co.*, 6 Que. P. R. 38.

Time — *Proof — Exception à la forme—Particulars*] — Upon a contestation of the schedule by the curator to an assignment of effects, the insolvent, who awaits the production of exhibits by the curator and the order of the Court before filing his reply to the contestation, and who then files exceptions to the form against vague allegations and motions for particulars, is not delaying the proceedings upon the contestation so as to authorize the Judge, under paragraph 3 of Art. 887, C. P. C., to grant to the curator an extension of time for two months to prove the allegations of his contestation.—In this case the Judge having fixed a period of six days for the filing of the reply, the insolvent had a right, in the first three days of this period, to launch a motion by way of exception to the form, and, before the expiration of this period, a motion for particulars, and no valid objection could be made to his not having made these motions within three days from the filing of the contestation.—The contestation of the schedule of an insolvent having a penal character, every allegation should set out the facts on which it is based so as to identify them and give notice to the insolvent of the acts of which proof will be made against him. Thus, allegations that the insolvent has fraudulently concealed notes to an amount exceeding $10,000, a sum of about $7,000 received by him in divers amounts at his shop, and divers other sums of money, amounting in all to more than $25,000, are too vague, and the Superior Court had good grounds for ordering that the facts should be set out.—Nevertheless, the Superior Court having ordered the curator to set out the facts in support of his allegations of concealment, and having afterwards dismissed the exception to the form of the insolvent with costs against the curator, the insolvent had no ground for complaining of the judgment dismissing his exception to the form, since he had been granted, upon his motion for particulars, all that he could obtain upon his exception to the form. *Sylvestre* v. *Letang*, Q. R. 8 Q. B. 385, 2 Que. P. R. 367.

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6. Curators and Liquidators.

Action against insolvent estate—*Contestation by curator—Opposition by majority of creditors — Costs — Minority.*]—If the majority as to numbers and amount of the creditors of an insolvent estate are opposed to the contestation of an action by the curator, he will be allowed to appear and contest the same, but on condition that the expenses thereof shall only be imposable on the creditors who are in favour of such contestation. *Laurence* v. *Chartrand*, 9 Que. P. R. 393.

Appeal by curator — *Leave—Costs—Creditor—Dividend sheet—Dispute.*] — The trustee of an insolvent estate has no right without the leave of the Court, on notice to the inspectors, to appeal from a judgment against him; the Court of Review may reject an appeal for this reason, although not invoked by the opposite party; the trustee who inscribes such an appeal, without the authority of a Judge, must bear the costs thereof, which he is ordered to pay personally; and a creditor, not of the insolvent, but of the trustee as such, has no right to dispute a dividend sheet prepared by the latter. *Slater Shoe Co.* v. *Marchand*, Q. R. 27 S. C. 123.

Appointment — *Vacant succession—Notice to persons interested — Intervention.*]—The appointment of a curator to a vacant succession may be demanded by any "person interested," and that expression includes, besides creditors of the estate and specific or universal legatees, debtors who may have an interest in discharging their debts, and even persons who wish to bring actions against the estate.—2. It is not necessary, in making such an appointment, to notify any person as opposed in interest, but it is necessary to notify every person interested for any reason, who may have the right to intervene for the purpose of seeing that the curator is regularly appointed and that he gives the necessary security. *In re Watson and Trudeau*, 6 Que. P. R. 247.

Appointment of curator—*Vote to creditors—Wife of insolvent—Claim for dower.*]—A stipulation for a fixed sum for dower does not render the wife a creditor of her husband, but she becomes a conditional creditor of her husband's estate. Therefore, a wife cannot, on the ground of her dower, be allowed to vote as a creditor upon the appointment of a curator, to property assigned by the husband. *In re Couture and Gaudreau*, 6 Que. P. R. 438.

Authorization to defend petition for property of estate.]—The curator of an insolvent estate cannot, without the consent of the creditors or the inspectors, and the authorization of a Judge, reply in writing to a summary petition to recover possession of goods which are in his hands by reason of the assignment. *Rowe* v. *Hyde*, 5 Que. P. R. 64.

Bills and notes — *Partnership—Insolvency.*]—Payments made by the curator of an insolvent estate are virtually payments made by the insolvent himself, and they interrupt prescription. *Hochelaga* v. *Richard*, 5 E. L. R. 575.

Costs and charges—*Allowance by Superior Court or Judge—Collocation—Rights of creditors.*]—No provision of the law permits the Superior Court or one of the Judges

of that Court to order payment of the taxed costs and charges of the curator to an assignment of property by an insolvent; the curator must prepare a schedule of the property to be distributed and in it shew the amount of his costs, thereby giving those interested the opportunity of contesting it. *Beaudry* v. *Henderson*, 9 Que. P. R. 232.

Creditors' claims — *Communication to other creditors.*]—The curator to an abandonment of property is bound to communicate to creditors information concerning the claims filed by other creditors, and documents accompanying these claims. *Williamson* v. *Stevenson*, 5 Que. P. R. 407.

Creditors' claims—*Contestation by curator—Second dividend sheet—Contestation—Petition to set aside judament — Lis pendens.*]—The curator prepared a second dividend sheet collocating the creditors for 17 per cent. In consequence of a judgment of default against a creditor, V., setting aside the collocation which the first dividend sheet had awarded, the curator completely omitted to collocate this creditor in his second sheet. At that time the creditor was not aware of the judgment upon his collocation on the first sheet. He thereupon contested the second sheet, demanding to be collocated upon it. Afterwards he became aware of the judgment upon the first sheet, and he thereupon presented a petition against that judgment: —*Held*, that there was no *lis pendens* by the contestation of the second dividend sheet; that the petition and the contestation of the second sheet were two distinct proceedings. *In re Moisan*, Q. R. 22 S. C. 423.

Creditors' claims—*Contestation by curator—Service — Judgment by default—Void service—Petition to set aside.*]—The curator to an abandonment, having made and issued a first dividend sheet in which a creditor, V., was, with other creditors, collocated for 15 per cent., and having afterwards, with the necessary authorization, contested the collocation and the claim of V., must transmit the contestation to the prothonotary at once, and the contestation must be served on the creditors. 2. Such contestation not having been served, a judgment by default against the creditor maintaining the contestation will be rescinded upon petition. 3. The petition, although intituled "petition for review," if it contains all the material necessary for an ordinary petition, will be considered as such. 4. The enumeration in Art. 1177, C. P., of the cases in which a petition may be presented, is not limitative. 5. If, in place of serving upon the creditor collocated a copy of the contestation, the bailiff, by mistake, serves upon him a copy of the contestation of collocation of another creditor, it is the same as if he had not been served at all. 6. Upon motion for leave to contest the report of service by the bailiff, a Judge will order *preuve avant faire droit*; and upon proof of the falsity of such report, it will be set aside. *In re Moisan*, Q. R. 22 S. C. 423.

Creditors' claims — *Delay in filing — Distribution.*]—A creditor who has not filed a claim with the curator to an abandonment of property, is not on that ground deprived of the right of resorting to the proceeds of the sale of the insolvent's goods for payment, but, if there still remain moneys to be distributed, he may demand payment of his claim in preference to other creditors to an amount in proportion to that which has been paid to them, and to be collocated at so much on the dollar with the other creditors for what remains due. *In re Brais*, Q. R. 22 S. C. 470.

Creditors' claims—*Filing with prothonotary—Fee.*]—By virtue of Art. 44 of the tariff of prothonotaries, a prothonotary has a right to charge a fee upon a claim sworn to and filed with him, for the purpose of authorizing the creditor filing it to vote at a meeting held for the nomination of a curator, etc., pursuant to Art. 867, C. P. *In re Beaudoin*, Q. R. 23 S. C. 179, 5 Que. P. R. 291.

Curator ad hoc — *Conseil judiciaire — Wish of person interested.*]—The Court will not appoint a curator *ad hoc* to a person under *conseil judiciaire*, to permit him to litigate interests opposed to those of the *conseil judiciaire*, when it does not appear that the person has himself expressed a desire to litigate. *Meunier* v. *Meunier*, 6 Que. P. R. 201.

Curator of insolvent estate — *Payments to privileged creditors—Collocation—Formalities.*]—The curator of an insolvent estate ought not to pay money received from the proceeds of the property of the insolvent, even to a privileged creditor, before all the formalities required by Art. 880, C. P., for the preparation of the memorandum of collocation have been observed. 2. The Court or a Judge should not as a general rule order the curator, although he is subject to the Court's summary jurisdiction, to depart from this Art. 880, C. P. *In re Smith and Gagnon*, Q. R. 22 S. C. 372.

Deposit made with curator of insolvent estate—*Specific purpose—Guaranty —Contract—Employment of clerks by curator—Right to payment out of estate.*]—A contract of deposit gives rise to an obligation on the part of the depositary not to divert the chattel or sum of money deposited from the object for which the deposit is made. Therefore, a deposit with the curator of an insolvent estate made as a guaranty that the estate in liquidation will pay a specified dividend, cannot be applied to any other purpose without the consent of the depositor, and especially the curator cannot dispose of it as if it formed part of the property of the insolvent.—Curators to assignments of property and to liquidations of companies may engage, and pay out of the property they are administering, employees to do accountants' work necessary or useful in the interest of the creditors. *Dignard* v. *Chartrand*, Q. R. 33 S. C. 147.

Disputing landlord's lien.]—The curator to an insolvent estate has a right to attack a privileged claim by shewing that part of what is supposed to be rental goes to the repayment of a loan, and therefore does not constitute a privileged claim. *In re Mercier and Pauzé*, 3 Que. P. R. 483.

Execution against lands of insolvent —*Sale—Curator.*]—After an abandonment of property of a debtor for the benefit of his

creditors, one of the creditors cannot, in the execution of a judgment obtained against the debtor, cause to be seized and sold, without the consent of the curator, of the other creditors, or of the Court, the immovable property of the debtor, but the seizure and sale of the immovables must be made at the instance of the curator. *Birks* v. *Lewis*, Q. R. 8 Q. B. 517, discussed. *Demers* v. *Gagnon*, Q. R. 1 K. B. 498.

Goods in hands of curator—*Seizure by creditor—Saisie-gagerie.*]—Goods belonging to an insolvent estate and which are legally in possession of the curator to the estate, cannot be seized by a creditor of the insolvent. 2. Nor can such goods be seized by a creditor of the insolvent, by a writ of *saisie-gagerie*, even after they have been legally sold by the curator. *Forrest* v. *Letellier*, Q. R. 24 S. C. 215.

Insolvent estate — *Action by curator—Authorisation — Inspectors.*]—A curator to an insolvent estate, who has taken the advice of the inspectors upon the advisability of a suit, and obtained the approval of a minority of them, may, with the approval of a Judge, institute suit on behalf of the estate. *Desmarteau* v. *Steel*, 6 Que. P. R. 149.

Insolvent estate—*Appointment of curator—Depositions—Signature by attorneys — Sworn before a J.P.*]—At time of appointment of a curator to an insolvent estate, depositions made and signed by firms represented by attorneys are irregular and void; and so are such depositions when made before a J. P., there being no statute authorising a J. P. to take affidavits. *Brossard* v. *Ouimet* (1906), 7 Que. P. R. 471.

Insolvent estate—*Claim—Contestation—Proof.*]— When a creditor files a sworn claim, which is contested by the curator of the insolvent estate, it is for the creditor to prove his claim at the hearing, and the affidavit which he filed with his claim is not sufficient for that purpose. *In re Tessier dit Lavigne*, 6 Que. P. R. 179.

Insolvent party to action — *Substitution of curator—Application for—Wherein made.*]—An authorisation to litigate an action in the name of a party who has become insolvent since the institution of the action must be obtained upon petition made in the matter of the insolvent estate, and not in the action in which the curator proposes to litigate in the place of the insolvent. *Clark* v. *Wilder*, 5 Que. P. R. 24.

Judgment against—*Res judicata as to creditors—Sale of property—Restaurant business—Liquor license—Assignment—Action to set aside.*]—In the absence of fraud, the creditors of an insolvent who has made an assignment of property are represented by the curator to the judgment rendered against the latter upon a demand for restitution of the property which has been regularly served upon him.—Third parties are not in a position to oppose a demand to set aside a sale and for restoration of the thing sold, for default in payment of the price contracted for by the vendor of a restaurant business, including therein the license to sell alcoholic drinks; the license, being personal, is not assignable, and cannot be returned to the vendor. An agreement touching the license concerns only the parties to the contract, and is as regards third persons *res inter alios acta*.—The publicity given to the license, by registration and inscription on the list of the license commissioners, is a measure of policy prescribed by the law in the public interest. The creditors of a license holder do not derive therefrom a guarantee as an additional item in the assets of their debtor. *Canadian Breweries Co.* v. *Gariepy*, Q. R. 16 K. B. 44.

Liquidator authorised to bring action to set aside the fraudulent sale of real estate by an insolvent—*Execution—Sale of the real estate by the Court—Opposition to protect the liquidator — Resource of other creditors.*]—The liquidator in an assignment of goods authorised to bring suit against the insolvent and the purchaser to set aside a fraudulent transfer of real estate who obtains a decree, conforms to its requirements, may execute it by releasing the real estate and form an opposition to keep it to secure to himself the price. The creditors of the insolvent are not permitted to object to this price, but must file their objections with the liquidator. *Darveau* v. *Gagné* (1909), Q. R. 36 S. C. 289.

Opposition to seizure—*Leave.*] —The curator to an insolvent estate has a right to oppose the seizure and sale of the insolvent's property seized in execution of a judgment obtained against another person, and may do so without leave of the Judge. *Paquette* v. *Dish*, 3 Que. P. R. 480.

Payment of a dividend by assignee in an assignment—*Proof of payment.*] — The payment of a dividend by an assignee in an assignment, on credit having as collateral bills of order, interrupts the prescription. The proof of this payment may be made without writing signed by the debtor, by producing extracts from the assignee's books, the proceedings which are vouched for in them being judicial and authentic. Art. 1207, C. C. *Bank d'Hochelaga* v. *Richard*, Q. R. 18 K. B. 252.

Petition by insolvent for discovery by curator—*Sale of assets of estate—Fraud —Claims of creditors not finally settled — Practice.*] — The petition of an insolvent praying that the curator of his estate may be ordered to bring into Court all the documents in his possession concerning the alienation of the property of the estate and an inventory of the property and of the moneys realised therefrom, will not be granted where the contested claim of a creditor has not yet been finally decided by a judgment of the Court.— (2) The prayer of the petition against the vendor and purchaser of the assets of the estate, that the money realised from the sale shall not be paid to any one other than the curator, will also be refused, for the same reason.—(3) Where the insolvent accuses these persons of fraud and bad faith in the sale of the assets of the estate, he must proceed by direct action to annul the sale, and not by petition, as in this case. *Gagnon* v. *Gervais*, 10 Que. P. R. 180.

Property of third persons—*Revendication—Creditors—Goods sold — Property not passing.*]—An assignment of property does not confer upon the curator any right to the possession of property of third persons; the latter may revendicate the property in the curator's hands upon a summary petition presented to a Judge.—The curator does not represent the creditors except in so far as the property of the insolvent is in question; in exercising the rights of a single creditor, for his sole advantage, in regard to property belonging to third persons, he exceeds his powers.—Immovable effects sold on condition that the property shall not pass to the purchaser until after payment of the whole price, may be revendicated by the vendor against the purchaser or the curator appointed in respect of the assignment, if no part of the price has been paid. *O'Cain* v. *Domina*, 8 Que. P. R. 172.

Proposed liquidators—*Disqualification of one of them—Director of a bank which is a creditor of the insolvent—R. S. C. c. 144, s. 24.*]—It is preferable to name but one person as liquidator, the appointment of joint liquidators frequently causing difficulty and expense in the closing up an insolvent estate. —It is also preferable that the director of a bank which is creditor of the insolvent in a large amount should not be appointed as liquidator to such estate.—When two persons are jointly proposed as liquidators to an insolvent estate, and one becomes unable to act, then the votes given in favour of the other joint liquidator become invalid. *Re Dignard et Angers* (1910), 11 Que. P. R. 389.

Provisional guardian—*Change of.*] — The fact that a provisional guardian, appointed by the prothonotary, is a creditor for a sum less than the claim of another creditor is not a sufficient cause for the Court to substitute the other creditor for him. 2. The Court will not order a change of provisional guardian except upon proof of incompetence or dishonesty. *In re Bonhomme*, Q. R. 22 S. C. 22.

Resignation—*Judgment accepting — Jurisdiction of Court—Books of estate.*]—If the unconditional resignation of a curator to an insolvent estate has been accepted by the Court, he ceases to be subject to the summary jurisdiction of a Judge of the Court from the moment the judgment is rendered accepting such resignation; a petition asking that he be ordered to hand over to the new curator all the books, papers, and documents of the estate will be dismissed. *Lamoureux* v. *Gibson*, 9 Que. P. R. 211.

Revendication—*Authorisation of Judge.*] —No authorisation of a Judge is necessary in order to proceed in an action in revendication against curator of an insolvent estate, and a petition to that effect will be dismissed with costs. *In re Desrochers and Aubertin* (1906), 8 Que. P. R. 125.

Transfer of debt — *Attack by another creditor — Purchase of claims by—Litigious rights.*]—A creditor of an insolvent debtor has no status to maintain that the assignee of another creditor of the same debtor has not given valuable consideration, and that notice of the transfer has not been given to the debtor. 2. Nothing in the law prevents the curator of an insolvent estate from purchasing from creditors of such estate the claims which they have against it. 3. The plea of "litigious rights" can only prevail where the debtor making it offers to reimburse the purchaser the amount he has disbursed. *Johnson* v. *Sharswood*, 3 Que. P. R. 473.

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7. EXAMINATION OF INSOLVENT OR THIRD PARTY.

Advocate — *Cross-examination — Discovery.*]—By virtue of Arts. 882 and 883, C. P. C., a creditor of the insolvent, or the curator, with the authorisation of the inspectors, may subpœna the debtor to appear before the Judge or the prothonotary, and interrogate him on oath with regard to his schedule and the state of his affairs. The insolvent is not entitled to be represented or assisted by an advocate upon such examination, and at any rate the advocate of the insolvent has no right to cross-examine him; the examination authorised by these Articles being only preliminary information to the creditors or to the curator. *In re Riopelle and Kent*, 4 Que. P. R. 180.

Insolvent a party—*Right to be present —Cross-examination.*]—Under Art. 883, C. P. C., the insolvent has the right to be represented by counsel at the examination of persons whom the curator deems capable of furnishing information regarding the insolvency; moreover, such person may be cross-examined on behalf of the insolvent in the manner and form prescribed by Art. 340, C. P., the insolvent being considered a party to the proceedings. *Cohen* v. *Kent*, 7 Que. P. R. 26.

Refusal to answer—*Contempt of Court.*] —An insolvent cannot be imprisoned for contempt of Court because he refuses to answer one question put to him by the curator while under examination. *Saxe* v. *Kent*, 5 Que. P. R. 94.

Service of appointment—*Sufficiency of —Motion to commit—Enlargement—Waiver —R. S. O. 1897, c. 147, ss. 34, 35, 37, s.-s. 1.*]—On the examination of an assignor for creditors under the Act respecting Assignments and Preferences, R. S. O. 1897, c. 147, ss. 34, 35, 37, s.-s. 1, it is sufficient to serve a copy of the appointment of the special examiner upon the assignor, and it is not necessary to shew him the original appointment unless sight of it is demanded.—On a motion to commit for failure to attend such an examination, an adjournment of the motion, at the request of the assignor's solicitor, on an undertaking that the assignor would submit himself for examination at his own expense, and that, on default, the order should go, is a complete waiver of any such objection to the regularity of service of the appointment. *In re Ferguson*, 17 O. L. R. 576, 12 O. W. R. 1143.

Third party—*Examination by creditor—Scope of—Order for by prothonotary — Review.*]—Under Art. 883, C. P., the Judge cannot order a third party to appear before him, or before the prothonotary, to be interrogated under oath in regard to the liquidation of the property of an insolvent, but such third party can be subpœnaed and examined pursuant to Art. 882, C. P., only as to the schedule and the state of affairs of the insolvent. 2. An order to subpœna such a third person, made by the prothonotary in the absence of a Judge, by virtue of Art. 33, C. P., upon a petition which does not follow the terms of Art. 882, C. P., is subject to review. *In re Smith and Larivière*, 4 Que. P. R. 385.

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8. PREFERENCE.

Action to set aside—*Preference of assignee—Delay—Fraud—Account.*]— In an equitable action to set aside a deed of assignment containing a preference in favour of the assignee, as fraudulent and void against creditors under the Statute of Elizabeth, the action was not commenced until nearly eight years after the making of the deed, and was not brought to trial until nearly fifteen years after the date of the assignment, no explanation being given of the cause of delay, and the assignee having died in the meantime:—*Held*, that the Court, in view of the long delay, unexplained, must regard the proceedings with suspicion, and would not lend its aid to the action without some clear and reasonable explanation:— *Held*, also, that, under the circumstances stated, the assignee being dead, the assignor would not be heard to say that the transaction, as between him and the assignee, was a fraud, and a scheme to defeat other creditors: — *Held*, that the plaintiff, not being a party to the deed of assignment, was not entitled to an accounting for what was done under it. *Peppet* v. *McDonald*, 38 N. S. R. 540, 1 E. L. R. 82.

Appeal from insolvent Court—*Undue preference—Pressure.*]— The Commissioner of the Insolvent Court refused an order *nisi* for the insolvent's discharge on the ground that a bill of sale, to secure a debt already due, given to McL., a creditor, shortly before the act of insolvency, was an undue preference. It appeared that McL. demanded the security and threatened arrest if it was not given, and also held out the hope that he would make insolvent further advances of supplies if the security was given:— *Held*, (Peters, J.), that to make out undue preference it must appear that the transaction was voluntary, and as in this case it was given under compulsion, the decision of the commissioner refusing the rule *nisi* was wrong. *Re Bell* (1870), 1 P. E. I. R. 301.

Attachment of debts—Insurance—Loss—Assignment before service of attaching order—Right to attack assignment — Assignments and Preferences Act not limited to traders. *McKinnon* v. *Coffin* (1906), 2 E. L. R. 176.

Bill of sale—*Knowledge of insolvency—Onus—Antecedent agreement — Affidavit — Consideration—Amendment.*]—A. G. made a bill of sale to his brother, W. G., the alleged consideration being a prior agreement that W. G. should "go good" for amounts owing to two of the creditors of A. G., and a present cash advance of $20.—The evidence shewed that at the time the alleged agreement was made, and at the time the bill of sale was given, A. G. was in insolvent circumstances to the knowledge of W. G., and further that W. G. had not carried out the agreement in the terms alleged:— *Held*, that the bill of sale was void as against creditors within the terms of the statute, Acts of 1898, c. 11, s. 2, s.-s. 2, and must be set aside.—*Held*, that the burden was on the defendants of establishing the validity of the bill of sale, and that this could only be done by proving a *bona fide* antecedent agreement for the security which was given, or a present advance of money on the faith of the security. —*Semble*, that where a *bona fide* agreement is established, which has been subsequently carried out in good faith, it will be sustained.— The evidence shewed that the amount set forth as the consideration for the bill of sale was not due and owing when the affidavit was made, but the point that the affidavit was bad on this account was not taken in the pleadings:—*Held*, that it was open to the Court, on terms, to amend the pleadings, and to pronounce the judgment which the law and the facts warranted. *McCurdy* v. *Grant*, 32 N. S. Reps. 520.

Bill of sale—*Levy by sheriff—Action or proceeding—Pressure—Presumption.*] — In an action against a sheriff for the conversion of goods levied upon by him under executions issued on judgments recovered against R., the plaintiff's title to the goods depended upon a bill of sale from R.—The evidence shewing that R. was an insolvent and the effect of the giving of the bill of sale being to give the plaintiffs a preference over the other creditors of R., and the levy made by the defendant having been made within sixty days from the giving of the bill of sale:—*Held*, that the levy was "action for the transfer, within the meaning of R. S. N. S. 1900, c. 145, s. 4, and that, under the provisions of s.-s. (2), the bill of sale must be presumed to have been made with intent to give an unjust preference, and to be such preference, whether made voluntarily or under pressure, and that, as against the creditors represented by the defendant, it was utterly void. *Shediac Boot and Shoe Co.* v. *Buchanan*, 35 N. S. Reps. 511.

Bill of sale — *Pressure—Authority of partner.*]—A firm composed of three members being insolvent and being indebted to the plaintiffs and also to the defendants, one of the members of the firm, under the threat of an action by the defendants, executed a bill of sale of all the firm's assets under which the defendants immediately took possession:—*Held*, that the bill of sale was not a fraudulent preference, but was given *bona fide* under pressure, and that the member of the firm who executed it had implied authority to do so, or his partners had ratified his act or were estopped from denying his authority. *McClary Mfg. Co.* v. *Howland*, 9 B. C. R. 479.

Bill of sale—Presumption of invalidity—Pressure. *Edgett* v. *Steeves* (1906), 2 E. L. R. 131.

Bill of sale — *Renewal—After-acquired property—Evidence of defendants—Examination under Collection Act—New trial.*]— On the trial of an action to set aside a bill of sale, as made by an insolvent with intent to hinder and delay creditors, evidence was given to shew that the bill of sale in question was given in substitution for a bill of sale executed some two years previously, from which a provision as to after-acquired property was alleged to have been omitted, although it was understood and agreed that such provision should be included. Evidence was given on the other hand to shew that the written memorandum of instructions for the original bill of sale contained no reference to after-acquired property; that neither the solicitor by whom it was drawn nor a witness who was present at the time, and knew of the terms of the negotiations, made any mention of it; and that on an occasion when both the defendants in this action gave evidence before a commissioner under the Collection Act touching the affairs of the defendant by whom the bill of sale was made, no such arrangement was suggested.— The trial Judge having given judgment for the defendants, and the Court being of opinion that the precarious character of the evidence given by the defendants at the trial had not been sufficiently considered, a new trial was ordered with costs.—*Semble*, as the Collection Act requires the commissioner to file the evidence taken before him, such evidence must be taken in writing, and is the best evidence as to what was said during the inquiry. *Farlinger* v. *Thompson*, 37 N. S. R. 513.

Bill of sale—*Statutory presumption — Rebuttal—Pressure.*]—Section 2 (3) of the Assignments and Preferences Act, c. 141, C. S. N. B. 1905, provides that in a suit brought within 60 days from the making of a transfer of property, to have it set aside, it shall be presumed that it was made with intent to give the preferred creditor an unjust preference, and to be such, whether made voluntarily or under pressure:— *Held*, that the presumption is rebuttable, but that evidence of pressure is not admissible for the purpose. *Edgett* v. *Steeves*, 2 E. L. R. 131, 3 N. B. Eq. 404.

Chattel mortgage—Actual advance by third person—Money applied on debt due by insolvent—Creditor's knowledge of insolvency —Absence of knowledge by third person. *Allan* v. *McLean*, 8 O. W. R. 223, 761.

Chattel mortgage—Attack on—Time — Presumption—Satisfaction of onus — Good faith—Notice—Knowledge *Keenan* v. *Richardson*, 1 O. W. R. 333.

Chattel mortgage—*Fraudulent scheme.*]—On 10th June, 1908, F. gave defendant S., a chattel mortgage to secure certain advances, the wife of F. thereafter carrying on the business, F. acting as her manager. On date of chattel mortgage plaintiff, to whom F. was indebted, had begun an action, and on the 20th July they placed *fi. fa.'s* in sheriff's hands:— *Held*, that solicitor for mortgagee and mortgagor should have informed mortgagee of the action against F. That F. was insolvent when he gave the chattel mortgage, and that the giving of the chattel mortgage was a scheme to defraud the plaintiff. Issue as to ownership of goods was decided in plaintiff's favour. *Union Bank* v. *Schecter*, 13 O. W. R. 231, 604.

Chattel mortgage given by insolvents to creditor—*Assignments Act.*]—Action by judgment creditor to set aside chattel mortgage made by W. to defendants as preferential, fraudulent, and void. W. knew he was insolvent when chattel mortgage given, so did defendants' agent. Defendants not having rebutted *onus* on them, mortgage set aside in part. The chattel mortgage was given for W.'s indebtedness to defendants and as a guarantee for rent. The affidavit of *bona fides* applied only to rent and was held void as regards the debt. Mortgage valid so far as rent concerned. A fraudulent transferee is not entitled to say that the property mortgaged will not more than pay prior encumbrances. The proceeds can be followed though chattel mortgage had been realised on and discharged before action brought. *Hansinger* v. *Kuntz* (1909), 14 O. W. R. 233.

Chattel mortgage given to bank by insolvent—*Action by creditor to set aside as fraudulent under Assignments Act—Knowledge of bank—Status of simple contract creditor—Creditor to maintain action — Saskatchewan Assignments Act, ss. 39 and 48 (b).*]—The defendant H. was found to have been insolvent at the time he gave the chattel mortgage in question to his co-defendants to the knowledge of the latter's manager. Mortgage set aside so far as it purports to secure $500 past indebtedness, but held to be valid as to $250 actual cash advance, although the latter was not taken out by H. until a few days after mortgage given. The plaintiff as a simple contract creditor had a status to maintain the action. *Douglas* v. *Howie*, 10 W. L. R. 67, 2 Sask. L. R. 67.

Chattel mortgage given by insolvent to creditor—*Absence of knowledge of insolvency—Preference — Validity as against execution creditor.*] — Insolvent's manager made a statutory declaration as to the assets and liabilities, shewing a surplus of the former. He said more goods were wanted and agreed if these supplied by defendant a chattel mortgage would be given on the stock-in-trade to cover past indebtedness and the advance. Defendant knew nothing of plaintiff's claim. Chattel mortgage held valid. *Bell* v. *Robinson*, 13 O. W. R. 676.

Chattel mortgage—*Insolvency—Assignments Acts, s. 41—Interpleader — Subrogation.*]—In an interpleader issue the plaintiff claimed by virtue of a chattel mortgage from C. the goods seized by the sheriff under the defendants' execution against C. The mortgage was dated the 22nd April, 1909, and was filed on the 1st May, 1909. The sheriff seized on the 10th May, 1909; and the sheriff obtained his summons for interpleader on the 10th June, 1909. C. was insolvent at the date of the mortgage; the moneys secured by it were advanced in November, 1908:—*Held*, that the mortgage had the effect of giving the plaintiff a preference over the other creditors of C., within the meaning of s. 41 of the Assignments Act,

and the mortgage was therefore void.—The interpleader proceeding was a proceeding to impeach or set aside the mortgage.—*Cole* v. *Porteous*, 19 A. R. 111, followed.—The plaintiff contended that he was entitled to be subrogated to the rights of R., who held a chattel mortgage upon the same property and whose claim was paid off by C. with the moneys advanced by the plaintiff:—*Held*, that, as R. was not a party to any agreement that the plaintiff should be subrogated, and the payment made by the plaintiff was not made to protect any interest of his own, and was not made by mistake, the doctrine of subrogation had no application.—*The Queen* v. *O'Brien*, 7 Ex. C. R. 19, followed.—*Brown* v. *McLean*, 18 O. R. 533, and *Abell* v. *Morrison*, 19 O. R. 669, distinguished. *Gower* v. *Kolchen* (1910), 14 W. L. R. 1.

Chattel mortgage by insolvent debtor—Registration—Bills of Sale Ordinance—Preferential Assignments Ordinance—Absence of intent to defeat creditors—Pressure—"Which has such effect." *Ross Brothers Limited* v. *Pearson* (N.W.T.), 1 W. L. R. 338, 575, 2 W. L. R. 259.

Claim—*Board of children.*]—A debt for board of the children of an insolvent in a convent during the twelve months preceding the bankruptcy ranks as a preferred claim upon the assets of the insolvent. *Les Sœurs de la Congregation de Notre-Dame* v. *Bilodeau*, Q. R. 18 S. C. R. 152.

Claim for rent and taxes — *Monthly sub-tenancy.*] — Plaintiffs rented premises from K. for 5 years. They appointed H. their agent for sale of their clothes. They wanted H. to take over the lease, but as he could not get the necessary security, never did, but went into possession as a sub-tenant:—*Held*, as rent was payable monthly, H. was a monthly sub-tenant. The contract with H. was cancelled in August, and in December following he made an assignment for benefit of creditors:—*Held*, that plaintiffs, to whom K. has assigned his rights, could not rank as preferential creditor, under the acceleration clause in the lease, but plaintiffs are liable for the taxes. *Semi-Ready* v. *Tew*, 13 O. W. R. 476, 14 O. W. R. 393.

Claim for wages.]—Plaintiff allowed to rank as preferential creditor for wages and ordinary creditor for money advanced and wages earned prior to three months' period. *Regan* v. *Langley*, 12 O. W. R. 1101.

Claim of landlord—*Purchase of rights of insolvent tenant—Collocation by privilege—Goods on premises—Dividend sheet—Contestation—Conditional order.*]—Lessor who purchases rights under lease of his insolvent lessee, without prejudice to claim for rental to which he may be legally entitled, has a right to be collocated by privilege out of proceeds of movable property garnishing the leased premises, for a proportion of rental for current year corresponding to the part elapsed at date of his purchase.—2. When on contestation of a dividend sheet prepared by curator to abandoned property, by creditor who has the right to be collocated by privilege out of special proceeds or a special fund, it does not appear whether curator has in hands an amount sufficient to cover the claim, the Court will maintain the contestation, nevertheless, and make conditional order accordingly. *Re Macphersons and Symonds* (1906), Q. R. 29 S. C. 119.

Claim on insolvent estate— *Preferential claim—Contestation—Reply — Interest.*]—Where the contestation of a claim against an insolvent estate affects only the privileged or preferential character of the contested claim, it is improper to add in the reply that the claimant has no right to the interest which he claims; it is a fact which should be alleged in the contestation itself. *St. Arnaud* v. *Turgeon*, 10 Que. P. R. 147.

Claim to rank on estate.]—Mechanics' lien — Assignment registered in prothonotary's office—Lien registered in office of registrar of deeds—Costs of judgment on mechanics' lien. *Re Archibald Estate, Hogan's Claim* (P. E. I.), 6 E. L. R. 454.

Company insolvent—*Chattel mortgage with assignment of book debts—Undue preference—Intent—R. S. O. (1897), c. 147, s. 2.*]—The Ontario Seed Co. was insolvent to the knowledge of its secretary-treasurer, and was indebted to the Merchants Bank for $8,254.52. The bank held an assignment of the company's book debts. The secretary-treasurer was also liable to the bank as surety to the company on notes to amount of $7,709. The company gave the brother of the secretary-treasurer a chattel mortgage and an assignment of the book debts held by the bank, the money raised being paid to the bank in discharge of the company's obligations and of the liability of the secretary-treasurer as surety. The money raised on the mortgage was supplied to the brother by the secretary-treasurer personally:— *Held*, that the transaction should be set aside in so much as it gave an unjust preference to the bank, and the secretary-treasurer over the other creditors, to the extent that they were not at the time of the mortgage already protected by the assignment of book accounts held by the bank. *Stecher Litho. Co.* v. *Ont. Seed Co.* (1910), 16 O. W. R. 766, 1 O. W. N. 1113.

Composition—*Fraud—Bills and notes—Indorsement.*]—An insolvent made a compromise with his creditors, borrowing from his wife the money to pay the composition. She borrowed the money from one of his creditors, agreeing to pay a bonus of a large amount, and giving to the creditor for his composition payment and the bonus, her promissory notes indorsed by her husband, with a mortgage on her real estate, and a chattel mortgage on his stock, as collateral security. The creditor signed the composition agreement, nothing being said about the bonus to the other creditors, who knew, however, that some arrangement had been made with this creditor for the supply of the necessary funds. The insolvent, after carrying on business for some time and incurring further liabilities, made an assignment for the benefit of his creditors:—*Held*, per Burton, C.J.O., agreeing with the judgment of MacMahon, J., that the transaction with the wife was valid and not a fraud on the composition, and that the creditor was entitled to rank upon the notes

as far as this question was concerned.—But the notes in question having been made by the insolvent's wife, payable to the creditor's order, and having been indorsed by the insolvent before they were handed to the creditor:—*Held, per Curiam*, on objection taken in this Court, that the insolvent was not liable as indorser, and that the creditor could not rank on his estate.—*Semble*, per Burton, C. J.O., that an objection on either ground to such a claim to rank cannot be taken under s. 9 of the Act by a dissentient creditor for his own benefit against the wishes of the assignor and the majority of the creditors, and an order purporting to be made under this section allowing the dissentient creditor to contest the claim in the assignee's name is invalid. *Small* v. *Henderson*, 19 Occ. N. 267, 27 A. R. 492.

Compromise—*Secret agreement—Bribery—Inspector.*]— A commercial firm having made an abandonment of its property for the benefit of its creditors, a secret arrangement was made whereby a particular creditor, without any legal right to preference or priority, was secured an advantage over the other creditors, through the assistance of one of the inspectors of the insolvent estate, to whom was promised a sum of money for his personal use, upon his advising the acceptance of a proposal for the purchase of the estate upon a composition at a rate on the dollar to be paid to the creditors of the estate generally. The preferred creditor was, under the concealed arrangement, to receive an amount greater than the rate of the composition proposed, such additional sum to be paid by a third person who took no direct interest in the estate purchased:—*Held*, that the agreement was fraudulent and void; that the proposed payment by the third person was as much a fraud upon the general body of the creditors as if it had been promised by the insolvent firm itself; and that the additional sum could not be recovered by the creditor so preferred.—*Held*, also, that the promise of the payment to the inspector was a bribe, and, for that reason alone, the transaction to induce which it was given should be adjudged corrupt, fraudulent, and void. *Brigham* v. *Banque Jacques Cartier*, 20 Occ. N. 371.

Confession of judgment—*Pressure — Absence of collusion—Presumption.*]— The defendant in consideration of a promise by a trader to pay to the defendant a sum of money on account of indebtedness within a given time or to give security, and believing the trader to be solvent, gave him on credit a further supply of goods. Subsequently the trader, becoming insolvent, announced the fact to his creditors. The defendant thereupon reminded the trader of his promise to him, and urged and induced him to give a confession of judgment for the amount of his indebtedness to the defendant, and to execute an assignment of his book debts to him:—*Held*, that the confession of judgment, having been obtained by pressure and without collusion, was not within s. 1 of 58 V. c. 6, and that the assignment of book debts, having been obtained by pressure, was not within s. 2. The presumption created by s. 2 (a) of the Act does not arise where the sixty days therein mentioned have expired at the date the writ of summons in the suit is sent to the sheriff for service, though the sixty days had not expired at the date of the *teste* of the writ. *Amherst Boot and Shoe Co.* v. *Sheyn*, 21 Occ. N. 415, 2 N. B. Eq. Reps. 236.

Confession of judgment—*Proof of insolvency—Notice of knowledge—Statute of Elizabeth—Consideration — Presumption — Onus—Costs.*]—In an action to set aside a confession of judgment for the sum of $1,545, given by a father to his son, on the ground that it was a preference within the meaning of the Assignments Act, R. S. N. S. 1900, c. 145, and given to defeat or delay creditors, the evidence shewed that the judgment debtor owned a house and land valued at about $1,300, a piece of land worth about $400, and another piece of land, value not ascertained. He had, besides, personal property, value not proved. His liabilities, in addition to judgment given, were a disputed claim of $200, and a note for $75, not then matured:—*Held*, that these facts were not sufficient to constitute proof of insolvency, and, further, that the Act requires the party taking judgment by confession should have notice of insolvency at the time, and, while in certain cases this might be inferred, there was no evidence in this case from which such an inference could be drawn.—Creditor under Statute of Elizabeth, attacking another's judgment, cannot succeed merely by shewing that the judgment was by confession, and in such case no consideration is presumed, but the burden is upon him to shew that no debt was due.—Assuming judgment by confession must be presumed to be without consideration, the party attacking it must still shew that the debtor was subtracting from his assets so much of his property that there was not enough left to pay claims of other creditors.—Appeal allowed with costs, but, as it appeared that there were facts not in evidence, plaintiff was allowed a new trial, costs to be costs in the cause. *Comeau* v. *White* (1906), 3 N. S. R. 553, 1 E. L. R. 98.

Conveyances of land by insolvent to creditors within 60 days of assignment for creditors — Evidence—Onus—Setting aside—Security valid in part—Costs. *Falls* v. *Gibb*, *Falls* v. *Young*, 8 O. W. R. 397.

Debt not due—*Set-off.*]—The state of insolvency of a debtor fixes the position of his creditors, and on account of such insolvency no one of them can obtain a preference over the others. 2. One of such creditors, who is at the same time a debtor of his debtor, but whose debt is not yet exigible, cannot, by renouncing the benefit of the term by which the debt to him is not yet due, and by asserting a set-off, acquire such a preference. *Ville-Marie Bank* v. *Vannier*, 1 Q. R. 20 S. C. 545.

Equitable mortgage or assignment of insurance moneys—*Suit by creditors of assignor to set aside.*]—On and previous to the 4th August, 1903, C. was indebted to the defendant for money lent; on that date he demanded security and C. handed to the defendant two interim receipts for insurance on the hotel owned by C., and pledged them to the defendant as security, and he was the holder thereof at the time the hotel was burned. Shortly after the fire C. arranged

with one S. to rebuild the hotel, and he authorized S. to collect the insurance moneys. C. then (26th August) agreed with the defendant that if he would hand over the insurance documents he held to S., the latter would pay the defendant out of the insurance $600 and guarantee payment of the balance due the defendant; pursuant to this agreement the defendant handed over the documents. About the 5th September C. decided not to rebuild the hotel, and on that date gave to the defendant an assignment of the insurance moneys in S.'s hands, to the extent of $2,200, to secure the defendant, and, as C. stated, to take the place of the original arrangement. This assignment was attacked by C.'s creditors:—*Held*, that by the dealings that took place between the parties on the 4th August the intention was that C. should pledge to the defendant the insurance on the hotel to secure the claim of the latter. The papers handed over were believed by both parties to represent actual insurance, and the transaction was intended to operate as a security in favour of the defendant. It might be regarded either as an equitable mortgage or an equitable assignment. The three transactions of 4th August, 26th August, and 5th September were all connected together; the transaction of the 4th August could not be successfully attacked, and the plaintiffs could not confine their attack to one detail out of several. S. became a trustee of the proceeds in favour of the defendant; that trusteeship arose when the insurance papers were delivered to S. *Ferguson* v. *Bryans*, 24 Occ. N. 194.

Extension agreement — *Secret advantage — Voluntary payment — Action by assignee—Status.*]—S., a trader, in August, 1899, procured the consent in writing of his creditors to payment of his debts then due and maturing, by notes at different dates extending to the following March. V., one of the creditors, insisted on more prompt payment of part of his claim, and took from S. notes, aggregating in amount $708, all payable in September, which S. agreed in writing to pay at maturity, and did pay. In November, 1899, S. assigned for the benefit of his creditors, when the arrangement between him and V. first became known, and the assignee and other creditors brought an action to recover $708 from V. as part of the insolvent estate:—*Held*, affirming the judgment of the Court of Appeal, 3 O. L. R. 5, 21 Occ. N. 551, and that at the trial, 32 O. R. 216, 20 Occ. N. 437, that S. having paid the notes voluntarily without oppression or coercion, could not himself have recovered back the amount, and his assignee was in no better position. *Langley* v. *Van Allen*, 22 Occ. N. 222, 32 S. C. R. 174.

Fraudulent preference — *Assignments Act — Chattel mortgage — Exemptions — Executions Act, s. 29.*]—A chattel mortgage, although given under circumstances entitling a creditor to have it set aside as a fraudulent preference under s. 41 of the Assignments Act, R. S. M. 1902, c. 8, will, nevertheless, be held valid as to any goods covered by it which would, under s. 29 of the Executions Act, R. S. M. 1902, c. 58, be exempt from seizure under execution. *Field* v. *Hart*, 22 A. R. 449, followed. *Bates* v. *Cannon*, 8 W. L. R. 575, 18 Man. L. R. 7.

Fraudulent preference—*Sale of business by insolvent to wife—Knowledge of wife of husband's intention to prefer certain creditors—Repayment of part of purchase money to wife by way of preference.*]—An insolvent trader sold out his business to his wife, who was one of his creditors, having means of her own, and who actually raised the money to make the purchase:—*Held*, that the sale and transfer were valid, notwithstanding that the wife knew of her husband's insolvency and that he intended to prefer certain of his creditors to others by payments out of the purchase money. The whole of the purchase money of the business was paid over to the husband, on the understanding, however, that the wife would at once be repaid the amount owing to her, which was done:—*Held*, that the transaction must be considered as an advance of the purchase money less the amount owing her, and that as to that amount it was fraudulent and void, and she was a debtor to her husband's estate for the portion of the purchase money thus paid back to her, and must account for the same to her husband's assignee for creditors. *Langley* v. *Beardsley*, 18 O. L. R. 67, 13 O. W. R. 349.

Goods delivered to creditors by insolvent company under arrangement with manager — *Preference — Presumption — Rebuttal.*]—Action by assignee for benefit of creditors for removal and conversion of certain goods dismissed, *prima facie* presumption being rebutted, the manager of insolvent company swearing he did not intend to give a preference, and defendants not knowing the hopeless condition of the insolvent's affairs. *Langley* v. *Palter*, 13 O. W. R. 951.

Hypothecation to bank of securities —*Alberta Assignments Act, 1907 — Preference—Concurrence of intent.*]—Action to set aside several transactions between the defendants and A. as coming under ss. 39, 40, 41 and 42 of the above Act:—*Held*, that as to some of the transactions there was not the required intent on the part of A. to give, and the defendants to accept, a preference over creditors:—*Held*, that others were bad where defendants had induced one partner to endorse a note without any consideration when their insolvent condition must have been known to defendants. *Tudhope* v. *Northern*, 10 W. L. R. 122.

Imprisonment of insolvent.] — A debtor who arranges with one of his creditors, his relative, to make an assignment for the benefit of creditors, after having handed over to his relative goods in payment of part of what he owes him, and moreover does not give the names of all his creditors, will, upon proof of these facts, be committed to gaol as provided by Art. 888, C. P. *In re Thibault and Gardner*, 4 Que. P. R. 259.

Intent to prefer—Transfer of securities to creditor by insolvent — Statutory presumption — Rebuttal — Evidence — No knowledge on part of transferee—Dismissal of action against both transferor and transferee—Costs. *Allen* v. *Bank of Ottawa*, 11 O. W. R. 148.

Knowledge of insolvency—*Pressure.*] —Where there is good consideration a mort-

gage comprising the whole of a debtor's property will not be set aside, notwithstanding that the mortgagor is in insolvent circumstances, to the knowledge of the morigagee, and that the effect of the mortgage is to defeat, delay, and prejudice the creditors, if there is pressure. *Adams* v. *Bank of Montreal*, 8 B. C. R. 314, 32 S. C. R. 719.

Lien on goods for advances—Receipt —Order on consignees—Acceptance—Bills of Sale Act—Payment. *Howe* v. *Reeve* (B.C.), 3 W. L. R. 555.

Mortgage — *Statutory presumption — Rebuttal—Transaction before 1897—Circumstances rebutting intent to prefer—Registry laws—Assignment for creditors—Priorities.*]—At the revision of the Ontario Statutes in 1897, the words "*prima facie*" were inserted after the word "presumed," where it occurs in s.-ss. 3 and 4 of s. 2 of c. 147, and the doubt whether the presumption was rebuttable was thereby set at rest; but even under the language of s.-s. 2 (b) of s. 2 of the Act of 1887, *i.e.*, without the words "*prima facie*," the presumption was rebuttable; and in the case of a mortgage of land to secure a debt, made on the 15th October, 1896, to the defendants, followed on the 21st October, 1896, by an assignment by the mortgagor to the plaintiff for the benefit of creditors, the defendants were entitled to shew that there was no intent to prefer. *Lawson* v. *McGeoch*, 20 A. R. 464, followed:—*Held*, also, upon the evidence, that the presumption of intent to prefer was rebutted.—*Held*, also, that the plaintiff, as assignee for the benefit of creditors, occupied no higher position than his assignor, and could not be regarded as a subsequent purchaser for valuable consideration, within the meaning of the Registry Act, so as to avail himself of its provisions with regard to the registration of the assignment before the mortgage. *Craig* v. *McKay*, 12 O. L. R. 121, 7 O. W. R. 507.

Mortgage by insolvent wife to husband—Preference—Presumption — Rebuttal. *McNeil* v. *Dawson*, 1 O. W. R. 24.

Payment in ordinary course of business—Power of attorney. *Goulet* v. *Greening*, 1 O. W. R. 550.

Payment of salary—*Fraud on creditors — Attachment of salary.*] — A contract by which the wife of an insolvent is to receive from a third person for services to be rendered by her husband a certain salary and a part of the profits of the business of the third person, is void as being made in fraud of creditors. Accordingly, the creditors of the husband can seize in execution or attach the salary due under such contract. *Orsali* v. *Aubry*, Q. R. 24 S. S. 320.

Pressure—*Intent.*]—In giving the chattel mortgage impeached in this action it appeared that the dominant motive of the debtor was to make an arrangement for continuing his business, the defendant having induced him to give it by promises of assistance in carrying him along and in arranging with other creditors, although not in any definite way enforceable in a Court of law:—*Held*, that, under s. 33 of the Assignments Act, R. S. M. c. 7, as amended by 63 & 64 V. c. 3, s. 1, there must still be the intent on the part of the debtor to prefer the particular creditor, in order to set aside the impeached conveyance; and, while the effect of it may be to place that creditor in a more advantageous position than other creditors, and the debtor may recognize at the time that such will be the effect, yet if he gave it for some other purpose or in the hope that he might thus be enabled to avoid insolvency, it cannot be considered that he gave it with intent to give a preference, and the security should stand. *Stephens* v. *McArthur*, 19 S. C. R. 446, *New Prance and Garrard's Trustee* v. *Hunting*, [1897] 2 Q. B. 19, *S. C., sub nom, Sharp* v. *Jackson*, [1899] A. C. 419, *Lawson* v. *McGeoch*, 20 A. R. 464, and *Armstrong* v. *Johnson*, 32 O. R. 15, followed. Although the amending Act declares that a *prima facie* presumption of an intent to prefer is to arise from the effect of such a transaction, this does not justify the Court in looking only to the effect and refusing to attach any weight to the proved facts as to the actual intent. The presumption being only *prima facie* may be rebutted by evidence:—*Held*, also, that the Court need not determine whether the preferred creditor was acting *bona fide* or really anticipated that the other creditors could be arranged with and the business continued, it being only the debtor's mental attitude that should be considered. *Codville* v. *Fraser*, 22 Occ. N. 123, 14 Man. L. R. 12.

Pressure — *Intent—Notice.*]—A debtor mortgaged all his real estate to the defendant, and shortly afterwards made an assignment to the plaintiff for the benefit of his creditors generally. Before the giving of the mortgage he was and knew himself to be insolvent. On the day the mortgage was given the defendant went to the debtor and asked for payment, and the debtor informed him he could make none, and then gave the mortgage. The evidence was contradictory as to whether there was a request for security:—*Held*, that when the debtor gave the mortgage he was in insolvent circumstances; the execution of it had the effect of giving the defendant a preference over the unsecured creditors; it must be presumed that the mortgage was executed with intent to prefer and that it constituted a preference. *Stephens* v. *McArthur*, 19 S. C. R. 446, followed. 2. At and before the execution of the mortgage, the defendant had notice of the insolvency and of the mortgage being made with intent to give him a preference over other creditors and having such effect. *Schwartz* v. *Winkler*, 21 Occ. N. 574, 13 Man. L. R. 493.

Pressure — *Knowledge of insolvency — Yukon Ordinance.*]—The effect of s. 2 of the Yukon Ordinance, c. 28, Consolidated Ordinances, 1902, is to remove the doctrine of pressure in respect to preferential assignments, and, consequently, all assignments made by persons in insolvent circumstances come within the terms of the Ordinance. In order to render such an assignment void, there must be knowledge of the insolvency on the part of both parties and concurrence of intention to obtain an unlawful preference over the other creditors. *Molsons Bank* v. *Halter*, 18 S. C. R. 88; *Stephens* v. *McArthur*, 19 S. C. R. 446, and *Gibbons* v. *McDonald*, 20 S. C. R. 587, referred to. *Benallack* v. *Bank of British North America*, 36 S. C. R. 120.

Promise to give security—*Presumption—Rebuttal—Payment—Transfer of security—Cheque — Promissory notes—Discount by third person.*]—In April, 1898, a mercantile firm obtained from a bank accommodation of about $8,200 for the purpose of buying goods upon promissory notes endorsed for their accommodation by the defendant, a brother of one of the partners, they promising him to retire the notes out of the proceeds of the sales of the goods. The proceeds were not so applied, to the defendant's knowledge, and the notes were from time to time renewed in full, the defendant indorsing them upon each renewal. He was satisfied by a general promise that they would secure him, but no security was ever definitely mentioned, nor did he ever press for it. On the 27th May, 1899, the firm sold out their assets for nearly $11,000, their liabilities being about $19,000. Before the sale was carried out the defendant became aware that the firm was insolvent. The purchase money was paid to the firm, $1,000 in cash, $5,000 by a cheque to their order, and the remainder by promissory notes. The firm handed over the cash to the defendant, and indorsed the cheque and some of the notes to him, and he with the cash and the proceeds of the cheque and notes, the latter being at his request indorsed and discounted by a stranger for him, retired all the notes upon which he was liable, and paid, besides, some rent, taxes, and other debts due by the firm. On the 2nd June, 1899, the firm assigned to the plaintiff for the benefit of their creditors:—*Held*, that the promise to give the defendant security could only mean that the firm, being unable to pay or secure the notes for fear of bringing on immediate insolvency, would pay or secure them in the future in case their affairs should become desperate, and such a promise was not sufficient to rebut the statutory presumption of a preference. The payment of $1,000 in cash to the defendant could not be attacked, and that should be treated as having formed part of the sum of $5,200 paid to retire two of the notes.—The $5,000 cheque transferred to the defendant was not a payment in cash, but was the transfer of a security, and he was liable to repay the proceeds of it, less the portion expended in paying debts, etc., of the firm.—The notes indorsed by the firm, and handed to the defendant for the purpose of procuring the payment of the remaining note which he had indorsed for them, were handed by him to the stranger in pursuance of that purpose, and what the latter did was done for the defendant, and not for the firm, and must be treated as if done by the defendant himself. *Armstrong* v. *Johnston*, 20 Occ. N. 334, 32 O. R. 15.

Promissory notes — *Composition—Costs of action.*]—1. Where a creditor, who was also one of the inspectors of the insolvent estate, exacted promissory notes from the insolvent as a condition of his assent to a compromise, such notes were illegal, null and void, as made in fraud of the other creditors, and against public order, and no action could be maintained on the notes by the creditor, or by a *prête-nom*. *Brigham* v. *Banque Jacques-Cartier*, 30 S. C. R. 429, followed.—2. The Judge at the trial dismissed the action "with costs." The Court of Review declined, under the circumstances, to interfere with the discretion thus exercised. *Cartier* v. *Genser*, Q. R. 21 S. C. 139.

Recel—*Capias.*]—A preferential payment is a "recel" in the sense of the statute, and the alienation of his property, whether real or personal, by an insolvent debtor, with intent to defraud—which intent may be deduced from circumstances—is also a "recel" which is ground for a *capias*. *Quebec Bank* v. *Elliott*, Q. R. 16 S. C. 393.

Sale of assets—*Extinguishment of debt.*]—T. and C., doing business under the name of T. & Co., made an assignment for the benefit of creditors, and T. then induced the plaintiffs, creditors, to pay off a chattel mortgage on the stock and a composition of 25 cents on the dollar of unsecured claims, the plaintiffs to receive their own debt in full with interest. The assignee of T. & Co. then transferred all the assets to the plaintiffs, and the arrangement was carried out, the plaintiffs eventually re-conveying the assets to T., taking his promissory notes and a chattel mortgage as security. In an action against T. & Co. on the original debt:—*Held*, affirming the judgment in 26 A. R. 295, 19 Occ. N. 211, that the original debt was extinguished, and C. was released from all liability thereunder. *Dueber Watch Case Mfg. Co.* v. *Taggart*, 20 Occ. N. 321, 30 S. C. R. 373.

Sale to particular creditor — *Knowledge—Bona fides—Delivery.*]—A debtor may in good faith sell to his creditor, subject to a right of redemption, all his chattels, being all the property that he has, if such creditor does not know that the debtor has at the time of sale another creditor, and the latter cannot attack such a sale made pursuant to an agreement anterior to the debt, unless he proves that the purchaser knew that his vendor had other creditors, and therefore was making himself insolvent by this sale. A sale of chattels, subject to a right of redemption, made by an insolvent debtor to his creditor, in good faith, in payment of the debt due, has the effect, even without delivery, of taking the goods out of the patrimony of the vendor, and his other creditors cannot seize them, although there has been no delivery. *Beaubien* v. *Perrault*, Q. R. 17 S. C. 410.

Secret agreement — *Onus — Voluntary payments—Assignee for creditors—Particular creditors—Privity.*]—In an action by certain creditors of an insolvent and by his assignee for the general benefit of creditors to recover from the defendants, who were also creditors of the insolvent, certain sums of money paid by the insolvent to the defendants before the assignment under the terms of an alleged secret agreement:—*Held*, that the onus of proof was on the plaintiffs. —*Held*, also, that, the payments not being procured by oppression or extortion on the part of the plaintiffs, but being voluntary, the assignee could not recover. Review of English cases on this point. Nor could the other plaintiffs, not being the whole body of creditors, recover, even when using the name of the assignee as plaintiff, by virtue of an order under R. S. O. c. 147, and no privity such as would give a right of action was established between the creditor plaintiffs

and the defendants by an agreement for an extension of time for payment entered into by these plaintiffs and defendants and the insolvent, prior to the alleged secret agreement. *Langley* v. *VanAllen*, 20 Occ. N. 437, 32 O. R. 216.

Security—Previous promise — Confession of judgment—Surety's right to take. *McLeod* v. *Wightman*, 1 E. L. R. 146, 260.

Transfer by insolvent debtor—*Attacking — Time — Division Court proceeding—Collateral inquiry — Pressure—Evidence of.*] —A garnishee summons was issued from a Division Court on the 22nd January, 1900, wherein the primary creditor claimed from the primary debtor $200 upon a due bill, and whereby all debts due from an insurance company to the primary debtor were attached. The primary debtor had recovered a judgment against the insurance company on the 7th December, 1899, and had assigned the judgment on the same day to the claimant. No formal notice of the proceedings in the Division Court or of any contest as to his rights was ever given to the claimant, but he appeared in the proceedings on the 6th July, 1900, and consented to an adjournment of them, and afterwards appeared again before the Judge, when his rights under the assignment were tried, and judgment was given against him setting aside the assignment as an unjust preference:—*Held*, on appeal, that the transfer to the claimant was not attacked when the summons was issued, nor until the claimant appeared in the proceedings, and, therefore, it was not attacked within sixty days, and its validity could be supported by proof of pressure in procuring it:—*Held*, also, Falconbridge, C. J., dissenting, that, as it appeared from the evidence both of the primary debtor and the claimant, that the latter had asked the former for security shortly before the security was given, and that the security given was that which was promised, there was pressure inducing the giving of the security, and it should be upheld, notwithstanding that the claimant was merely liable for a debt of the primary debtor which it was expected he should pay, as he did, and notwithstanding that he was not present at the time the assignment was made to him, it having been drawn by his solicitor. *Molsons Bank* v. *Halter*, 18 S. C. R. 88, and *Stephens* v. *McArthur*, 19 S. C. R. 446, followed. *Murphy* v. *Colwell*, 22 Occ. N. 111, 3 O. L. R. 314, 1 O. W. R. 146.

Transfer of cheque—*Deposit with private banker—Application by banker upon overdue note — Absence of pre-arrangement and of intent to prefer.*]—On the 5th September, 1904, a merchant, being then insolvent, sold his stock-in-trade at 50 cents on the dollar, and received in payment the purchaser's cheque on the defendants' private bank for $1,172.27, payable to his own order, which he took to that bank, where he had an account, and deposited it to his own credit. The defendants knew that the sale was about to be made, and had lent the purchaser the money to make the purchase, and knew that the money was to be deposited in their bank by the insolvent, and, in anticipation of this, had charged up against the insolvent's account (without the latter's knowledge) an overdue note for $1,000 and $40 interest thereon. The deposit of the purchaser's cheque with the defendants was attacked by this action (brought within 60 days thereafter) as a preferential transfer of a bill or security to a creditor, within R. S. O. 1897, c. 147, s. 2:—*Held*, Street, J., dissenting, that, there being no evidence of any pre-arrangement nor of any intent to prefer, the transaction was not within the scope of the Act. Judgment of Falconbridge, C.J.K.B., affirmed. *Robinson* v. *McGillivray*, 12 O. L. R. 91, 7 O. W. R. 438, 8 O. W. R. 602.

Supreme Court of Canada *held*, that the transaction was a payment to a creditor within the meaning of R. S. O. 1897, c. 147, s. 3, s.-s. 1, which was not, under the circumstances, void as against creditors. *Robinson, Little, & Co.* v. *Scott & Son*, 39 S. C. R. 281; *Robinson* v. *McGillivray*, 27 C. L. T. 653.

Transfer of goods by insolvent to creditor — Presumption — Rebuttal — Absence of fraudulent intent—Actual advance of money—Judgment—Defendant not appearing. *Baldocchi* v. *Spada*, 7 O. W. R. 325, 8 O. W. R. 705.

Transfer of goods — *Presumption.*] — The statutory presumption of the invalidity of a preferential transfer of goods is rebutted by shewing that it was entered into by the transferee in good faith and without knowing, or having reason to believe, that the transferor was insolvent. *Dana* v. *McLean*, 21 Occ. N. 555, 2 O. L. R. 466.

Undue preference.] — The debtor who, within the five weeks previous to his assignment, effected a loan from one of his creditors, who was also his father-in-law, in consideration of the transfer of certain immovable property, is bound, to escape the presumption of secretion, to prove that the transaction was legal. It is not sufficient for him to establish that the money borrowed was paid to his creditors; he must also prove that the transfer does not cover an undue preference in favour of the lender and causes no prejudice to his other creditors. *Desmarteau* v. *Guimont*, 19 Que. K. B. 25.

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9. MISCELLANEOUS CASES.

Accord and satisfaction.] — Defendants, being insolvent, made an arrangement with their creditors for sale of their assets and distribution of the proceeds among their creditors ratably. The trustee appointed by the creditors wrote the plaintiffs asking them to send in their claim, which was done, and in due course the trustee sent the plaintiffs a cheque for their share of the amount available, and asked an acknowledgment of the receipt of the same "in full of account," the cheque also being marked "in full claim R. A. Copeland & Co." The plaintiffs struck out the words on the cheque, and notified the trustee that they would not accept the amount in full, but retained the cheque. In an action for the balance of the claim, the defendants pleaded acceptance of the amount paid in full:—*Held*, that, in order to establish accord and satisfaction of a debt by a payment of less than the amount due, it must be shewn that such payment was made

in pursuance of an agreement for that purpose, or was so accepted by the creditor, and that there was no evidence that the payment in question was so made or accepted. 2. Following *Day* v. *McLea*, 22 Q. B. D. 610, that the keeping of a cheque marked "in full" is not conclusive evidence of accord and satisfaction, but it may be shewn that, as a matter of fact, the creditor did not accept the cheque in full. *McPherson* v. *Copeland* (1909), 1 Sask. L. R. 519, 9 W. L. R. 623.

Action by assignee for return of goods transferred by insolvent before assignment—*Title of transferee—Conspiracy to defraud creditors.*]—Action by assignee for benefit of creditors for recovery of furs:—*Held*, that on the evidence defendant's story is a pure fabrication and a scheme. Judgment for plaintiff. *Newton* v. *Rein*, 11 W. L. R. 363.

Action for debt—*Defence—Discharge in bankruptcy in England.*]—A plea that the defendants were adjudged bankrupt, and a certificate of discharge granted, in England, under the Bankruptcy Act, 1883, is a good answer to an action for a debt provable against the defendants in bankruptcy, brought in New Brunswick by the subject of a foreign state who had never resided or been domiciled within British Dominions. *Nicholson* v. *Baird*, N. B. Eq. Cas. 195, considered. *Ford* v. *Stewart*, 35 N. B. Reps. 568.

Agreement in fraud of creditors—*Judgment declaring void — Action by one creditor — Benefit of all — Distribution of assets—Collocation of creditors' claims—Contestation—Status of contestant.*]—Judgment declaring void an agreement (in this case a stipulation for dower and other property in favour of wife in a contract of marriage) made in fraud of his creditors by an insolvent, to profit of a person having knowledge of the insolvency, although rendered in a suit instituted by only one of his creditors, is for benefit of all others, who are regarded as being represented by the creditor suing. A creditor collocated for his *pro rata* share in a report on distribution has an interest in seeing that other creditors are collocated each for his share in moneys to be distributed, and has, therefore, a status to contest the collocation of a third person upon a claim not well founded in law, such collocation having the effect, by retarding payment of other creditors, of reducing the chances of the contestant to have his own claim paid out of the future-acquired property of the debtor. *Chevalier* v. *Martel* (1906), Q. R. 27 S. C. 356.

Alberta Assignments Act — *Retroactivity—Transactions completed before statute came into force—Assignment for benefit of creditors—Right of action of assignee—Fraud — Mortgage — Land Titles Act — Effect of non-registration — Preference — Knowledge of insolvency—Intent.*]—So far as it affects transactions completed before its coming into force, the Assignments Act is not retrospective; but, *semble*, that s. 49, so far as it gives a right of action to the assignee, to the exclusion of creditors, is retrospective, but this only applies to transactions "in fraud of creditors" or "in violation of this Act." Hence, where an assignee under the Act brought an action to set aside certain transactions between the assignor and one of his creditors, completed prior to the Act coming into force, on statutory grounds:—*Held*, that, fraud not having been shewn, the plaintiff's action must fail. A mortgage of land under the Land Titles Act, immediately upon its execution, constitutes an effective security as binding as between the parties as if registered. The success of a creditors' action, attacking a transaction as a preference, would depend on proof of knowledge of the debtor's insolvency on the part of both parties, and the concurrence of intention to create an unlawful preference. *Horne* v. *Galt*, 1 Alta. L. R. 392.

Alberta Assignments Act — *Transfer of property by insolvent to creditor—Substance of transaction—Vendor's lien — Presumption—Waiver.*]—Where a transaction is attacked as void under the Assignments Act, 1907, the substantial effect rather than the mere form of the transaction should be considered. This principle applied to the facts in this case. A vendor's lien comes into existence and continues, by operation of law, unless there is an intention on the part of the vendor to the contrary. The presumption is in favour of the lien—and the fact that part of the purchase money is secured by mortgage, and the balance covered by a promissory note, is not conclusive of intention to waive the lien. *Bond* v. *Kent*, 2 Vern. 281, distinguished. *High River Meat Market* v. *Routledge*, 8 W. L. R. 259, 1 Alta. L. R. 405.

Assignment by insolvent of all personal property to secure future maintenance of wife.]—Knowledge of transferee of insolvency. *Forbes* v. *Dingman*, 1 E. L. R. 435.

Assignment of fire insurance policy to creditor of insolvent — Fraudulent preference — Trust — Evidence. *Desmarteau* v. *Dingman*, 11 O. W. R. 111.

Assignment of goods—*Death of one of the assignees—Motion by the survivor for a new appointment—C. P. 867, C. C. 1709, 1712.*]—When the assignees of an insolvent have not acted conjointly, the decease of one of them does not authorise the survivor to present a petition to be appointed anew. *Re Tougas and Turcotte* (1909), 10 Que. P. R. 317.

Assignment of shares — Assignments Act—Seizure under execution — Assignment void as against execution creditors—Interpleader issue. *Potts* v. *Imperial Bank of Canada* (Man.), 8 W. L. R. 583.

Assignments Act, Manitoba — *Action by assignee—Preference — Novation—Executed contract — Non-rescission.*]—M. & Co. were indebted to the defendant G., amongst other creditors, and were pressed by G. for payment. The defendant L. offered to buy M. & Co.'s stock, and approached G. to find out whether, if he did so buy, G. would accept him as debtor in the place of M. & Co. G. agreed to do so, and L. bought the stock, and bound himself to M. & Co. to pay their

debt to G., and to procure the latter to release them, M. & Co., from that debt. He paid M. & Co. in cash the difference between the purchase price of the stock (82½ cents on the dollar) and the amount of their debt to G.; he also bound himself to G. to pay M. & Co.'s debt to them, and procured from G. and delivered to M. & Co. a release in full of their debt to G. There was thus a complete novation as to the debt due to G. A few days later, and within 60 days after the novation, M. & Co. assigned under the provisions of the Assignments Act, for the benefit of their creditors, to the plaintiff. G. did not know M. & Co. to be insolvent, and entered into the arrangement with L. in good faith:—*Held*, that it was doubtful whether such a novation could be attacked under the Assignments Act. The contract had been partly performed on L.'s part, and wholly on that of G. The latter had released M. & Co. absolutely, and in so doing had also released one B. from his covenant which G. held, to pay the liability to G. of a former firm, which M. & Co. had assumed, and $1,200 of which was still unpaid, at the time of the assumption of M. & Co.'s debt by L., and was included in that debt. G. had lost recourse against M. & Co. and the members of that firm. Even if the plaintiff could by this action consent that G., if the novation were set aside, should be at liberty to rank on the estate and receive dividends, the Court could not restore to G. his rights as against the members of the firm of M. & Co., as those had been released in good faith, and it could not restore the claim against B. *Newton* v. *Lilly*, 24 Occ. N. 250.

Assignments Act, Manitoba—*Action by Creditors—Time — Amendment — Statute of Limitations—Preference — Assignment of insurance moneys.*]—The plaintiffs brought action on the 2nd November, 1903, on "behalf of themselves and all other creditors of C. . . . who are willing to join in and contribute towards the payment of the expenses thereof," to set aside, as a fraudulent preference, an assignment by C. to the defendant, dated the 5th September, 1903, of certain moneys payable under fire insurance policies to secure defendant's claim against C. C. had not assigned under the Assignments Act, R. S. M. 1902, c. 8. On the 4th December, 1903, the plaintiffs amended by adding after the words quoted, "and the same is brought for the benefit of the creditors generally of the said debtor:"—*Held*, that there was no suit brought for the benefit of the creditors generally, or of such as had been injured, delayed, or prejudiced, to impeach the transaction in question, until the amendment of the 4th December was made, which was more than 60 days after the date of the impeached transaction; and that this objection was fatal, notwithstanding the provision in s. 48 (*b*) that "in case any amendment of the statement of claim be made, the same shall relate back to the commencement of the action for the purpose of the time limited by the 40th section hereof." The right to sue and the relief to be given are created by the statute and must be construed strictly. The amendments referred to in that provision must, in strict construction, be confined to allegations of law or fact upon which the relief is to be founded, and that provision presupposes an action to have been commenced in the form provided within 60 days. On the merits, also, the findings of fact were that the impeached assignment was not a fraudulent preference within the meaning of the Act, as it was only the last of a series of transactions all connected together which should be treated as a whole, and so treated, were not open to attack. *Ferguson* v. *Bryans*, 24 Occ. N. 194, 15 Man. L. R. 170.

Assignments Act, Nova Scotia — Necessity for pleading—Amendment—Creditors. *McKenzie* v. *McLennan*, 40 N. S. R. 596.

Assignments Act, Ontario — *Assignee for creditors—Removal—Notice of motion—Grounds — Evidence— Proposed examination of assignee — Judicature Act and Rules.*]—Where a summary motion is made under s. 8 (1) of the Assignments and Preferences Act, R. S. O. 1897, c. 147, to remove an assignee for the benefit of creditors, the notice of motion should state the grounds, or they should at least appear in the material filed in support of the application. The ordinary procedure in an action is not applicable to such a motion; and where an appointment to examine the assignee in support of the application under Con. Rule 491, was taken out and served, it was held that he was not obliged to attend upon it, the officer having no authority to issue it. *In re Wilson*, 24 Occ. N. 20, 6 O. L. R. 564, 2 O. W. R. 1033.

Assignments of moneys to bank — Bona fides—Security — Bank Act, s. 80—Belief of bank manager in solvency of customer—Book debts — Moneys to arise from future contracts — Pledge — Consideration —Assignment for benefit of creditors—Transaction within 60 days—Assignments Act, s. 41—Costs. *Norton* v. *Canadian Bank of Commerce* (Sask.), 8 W. L. R. 910.

Clerical error in balance sheet—*Correction — Change of debtor's name.*]—The curator to the estate of an insolvent trader has no right or status to ask that a clerical error in the balance sheet be corrected; such error may be corrected at the request of the insolvent, but not of the curator. 2. A petition to be allowed to change the name of a debtor of the insolvent in the *bilan* is useless, the books and deeds shewing clearly the name of the debtor whom the curator may sue. *Cleary* v. *Stevenson*, 10 Que. P. R. 176.

Composition deed—*Sureties — Variation of contract—Finding of fact—Appeal.*]—The plaintiffs' creditors, under a composition deed, sought to recover from the sureties of the compounding debtor an instalment based on the debt signed for, which was greater than the debt they were entitled to rank for, according to the schedule of creditors attached to the composition deed:—*Held*, that the plaintiffs were not precluded from recovering on the ground that there had been a variation of the contract. On appeal of a case tried without a jury, the Court will not disturb the decision of the Judge below on the facts unless there has been manifest error. *Sillick* v. *Grosweiner*, 2 E. L. R. 493; *Sellick* v. *Grosweiner*, 38 N. B. R. 73.

Conveyance of land by insolvent to creditor — Preference — Statutory presumption—Circumstances rebutting—Absence

of knowledge of insolvency and of fraudulent intent—Effect of transaction on claims of other creditors. *Thompson* v. *Morrison*, 9 O. W. R. 179.

Costs of proving claim—*Assignee acting unreasonably.*]—Where proving a creditor's claim required the presence of a witness from abroad, and much time was occupied in proving it before a Judge, still as the assignee has not acted unreasonably and put the creditor to any unnecessary expense, no costs allowed for proving claim. *Re Archibald, Woodbury Claimant*, 6 E. L. R. 455.

Creditors of partnership ranking on estate of individual partner.]—Where origin of debt for which plaintiff claimed to rank against the separate estate of a partner is on a contract entered into with the firm, which also failed and has existing assets, the plaintiffs as such firm creditors cannot rank against separate estate of partner. *Frost* v. *Stoddart*, 12 O. W. R. 1133.

Creditor — *Inspector—Promissory notes —Fraud.*]—A creditor of an insolvent estate was appointed one of the inspectors thereof. A compromise was proposed, but this inspector would only agree to the same upon the insolvent giving him promissory notes in return for his assent to the arrangement. An action was subsequently brought on these notes:—*Held*, that the notes were null and void, both because they were made in fraud of the other creditors, and also as being against public order; and that, therefore, no action could be maintained on them, either by the creditor himself or by a *prête-nom*. *Cartier* v. *Genser*, 22 Que. N. 416.

Debtor of insolvent — *Acquisition of claim—Set-off.*]—A debtor of an insolvent (not in bankruptcy) may acquire the claim of a third person against such insolvent, and, after notice of the assignment of the claim, there may be a set-off between the two claims. *Villeneuve* v. *Matte*, Q. R. 11 K. B. 192.

Deficiency of assets—*Presumption of withdrawal — Explanation — Absence of fraudulent intent—Reversal of order for committal of insolvent.*]—A state of insolvency occurring in the year which precedes the filing of his schedule by the insolvent, and for which he does not sufficiently account, does not give rise to a presumption of concealment or withdrawal of assets, when the deficit is explained by the insolvent's ignorance of business, by his want of care, or even by his fault. When the element of fraudulent intention to divert his property is eliminated, there is no ground for applying the provisions of Arts. 885 (3) and 888, C. P. Judgment in Q. R. 33 S. C. 78, reversed. *Guimont* v. *Desmarteau*, Q. R. 340 S. C. 508.

Demand for assignment — *Particulars of creditor's claim.*]—A debtor upon whom a demand has been made for an assignment of property has no right to particulars of the claim of the demanding creditor. *Eveleigh* v. *Boschen*, 9 Que. P. R. 325.

Distribution of assets of insolvent—*—Procedure — Allegations — Proof—Opposition—Acknowledgment—Error of Law.*]—It is not necessary that the allegation of the insolvent should be supported by a deposition under conserver, or in an opposition *en distribution*, should be supported by a deposition under oath, in order to authorize an appeal by creditors; such deposition is required only for the purpose of proving that the sum claimed by the opposant is justly due. 2. An acknowledgment based upon an error of law may not be invoked against the party who made it. *Décary* v. *Brodit Pominville*, Q. R. 19 S. C. 563, 4 Que. P. R. 202.

Distribution of insolvent's estate—*Contestation of claims—Interest of unpaid creditor.*]—An unpaid creditor has an interest in preventing his debtor's assets from being diverted to pay illegitimate or unlawful claims. When therefore in distribution of moneys of a debtor by the prothonotary, a party making unlawful claim is collocated, a creditor to whom an amount is allotted in the same report as if such claim had not been made, has nevertheless the right to contest the latter, inasmuch as a reduction in the dividend allotted to other creditors must have effect of impairing contestant's chances of payment out of other or future assets of debtor. Judgment in Q. R. 27 S. C. 356, affirmed. *Chevalier* v. *Bessette* (1906), Q. R. 15 K. B. 206.

English Statute—*5 and 6 Vict. c. 122, s. 23, granting freedom from arrest until final examination does not extend to colonies—Certificate of bankruptcy would extend—Affidavit made in England must be authenticated here.*]—The defendant was arrested here for a debt contracted on P. E. Island. He applied to be discharged under the 23rd section of the English Statute 5 and 6 Vict, c. 122, on the ground that he had been duly declared a bankrupt in England, and had been granted to 20th August next, to finish his examination, and therefore was not liable to arrest until that time had expired. The plaintiff opposed his application on the grounds:—That the summons in bankruptcy and endorsement thereon are not properly authenticated so as to prove them to be really documents under the hand of an English Commissioner of bankruptcy. — That admitting the summons and endorsement to be properly authenticated, the 23rd section of the English Statute does not apply to the colonies.—Even if it does, the privilege from arrest is excluded by the Small Debt Act of this Island:—*Held* (Peters, J.), that the summons and endorsement were not properly authenticated, not being verified by an affidavit made before an officer of this Court.—That though an English "certificate" of bankruptcy would be a bar to an action in this Court, yet the interim protection afforded by the 23rd section of the English Act does not extend to the colonies.—The Small Debt Act does not apply to this case. ——— v. *Irving* (1851), 1 P. E. I. R. 38.

Extension agreement — *Secret advantage—Voluntary payments.*] — The defendants, while ostensibly entering into an extension agreement, took secretly from the debtor notes at short dates for a large portion of their claim in favour of their nominee. These notes the debtor paid, and shortly afterwards made an assignment for the benefit of his

creditors, the general extension payments not having been met:—*Held*, that the other parties to the extension agreement, suing in their own names, and in the name of the assignee, under an order, could not recover back the amount paid. Judgment of Boyd, C., 32 O. R. 216, 20 Occ. N. 437, affirmed; Armour, C.J.O., dissenting. *Langley* v. *Van Allen*, 21 Occ. N. 551.

Failure to account for assets.]—When an insolvent trader files a statement of his affairs and is contested, the insolvent is bound to account for assets which were in his possession during the year preceding his insolvency. (*Clement* v. *La Banque Nationale*, 14 Que. K. B. 493). It follows that his failure to explain the disappearance of $6,000 from moneys received, over and above his payments, creates a strong presumption, equivalent to the proof of it, of the fraudulent omission mentioned in art. 885, paragraph 1 C. P. *Desmarteau* v. *Guimont*, 19 Que. K. B. 25.

Foreign bankruptcy a bar to action on debt contracted abroad. Proof of foreign law by oral evidence of professional men. *Weatherbie* v. *Green* (1853), 1 P. E. I. R. 97.

Fraudulent conveyance.]—In an action by an execution creditor to have two mortgages set aside as fraudulent and void:—*Held*, that although the debtor was insolvent yet no fraudulent arrangements were established; that the mortgages were given for valuable consideration, and there was no fraudulent scheme. Action dismissed. *Elwell* v. *Crate*, 15 O. W. R. 261.

Fraudulent mortgage — Intent — Pre-existing agreement — Consideration — Insolvency of grantor—Knowledge of grantee—Preference—Action begun within 60 days — Presumption—Costs — Summary remedy. *Brown* v. *Beamish*, 5 O. W. R. 722.

Fraudulent preference—*Bills of sale—Assignment for benefit of creditors—Delay—Suit by creditors—Adding assignee as plaintiff.*]—A trader, when in insolvent circumstances, to the knowledge of himself and the defendants, executed to them a bill of sale of his stock in trade, pursuant to an agreement made with them nearly 4 years previously, to give it whenever required, they advancing to him upon the faith of the agreement a sum of money for use in his business and giving him a line of credit. Shortly after executing the bill of sale, he made an assignment for the benefit of his creditors under c. 141, C. S. N. B. 1903:—*Held*, in a suit by the assignee, that the giving and filing of the bill of sale having been postponed until the debtor's insolvency in order to prevent the destruction of his credit, the agreement was a fraud upon the other creditors, and that the bill of sale should be set aside:—*Held*, also, that the delivery of the stock in trade by the trader to the defendants, subsequently to the execution of the bill of sale, did not assist their title; s. 2 of c. 141, C. S. N. B. 1903, applying. A preferential transaction falling within the provisions of c. 141, may be impeached at the instance of creditors, where the debtor has not made an assignment. Where, after the commencement of a suit by creditors, to set aside a bill of sale, as constituting a fraudulent preference under c. 141, the grantor made an assignment for the benefit of his creditors, the assignee was added as a plaintiff. *Tooke Brothers Limited* v. *Brock & Patterson Limited*, 3 E. L. R. 270, 3 N. B. Eq. 496.

Fraudulent transfer — *Proof of insolvency — Statutory presumption — Rebuttal —Application to adduce fresh evidence after close of trial — Powers of trial Judge.*] — Where it is alleged that a transaction offends against the Assignment Act, R. S. N. S. c. 145, the fact of insolvency must in all cases be proved by the attacking party, but what has to be shewn is not a state of insolvency, in the strict legal or commercial acceptation of the term, but the debtor's inability to pay his way, and meet his creditors. Evidence which rebuts the presumption referred to in s. 4, s.s. 2, of the Assignments Act. After the trial and argument of a question of this kind, an application was made to introduce evidence of insolvency:—*Held*, that to grant such an application would be most objectionable, and, therefore, the application was refused.—*Quære*, whether it is competent for the trial Judge to grant such an application. *Fawcett* v. *Faulkner*, 40 N. S. R. 398.

Fraudulent transfer — *Proof of insolvency—Valuation of assets — Knowledge of transferee — Statutory presumption — Rebuttal.*]—The expressions "insolvent circumstances" and "unable to pay his debts in full," are co-extensive terms, and in order to come within their meaning it is not necessary to shew a state of insolvency, in the strict legal and commercial acceptation of the term, but merely to prove the debtor's inability to pay his way, and meet the demands of his creditors, and his want of means to pay them in full out of his existing assets. As to a valuation of the assets of an alleged insolvent, the inquiry should be whether a man of business capacity would value the assets as being sufficient to pay the creditors in full. A transferee's knowledge of the insolvent condition may be implied, if knowledge is shewn of circumstances from which ordinary men of business would determine that the debtor was unable to meet his liabilities. An assignment of a judgment of a person in insolvent circumstances was set aside under R. S. N. S. c. 145, s. 4, as an unjust preference, the presumption provided for by the statute not having been rebutted. *Hart* v. *Allen*, 40 N. S. R. 352.

Goods in possession of insolvent—*Agreement between insolvent and vendor—Construction—Sale or agency for sale—Bills of Sale Act.*]—Certain goods were supplied by the defendant to a trading company, and it was arranged between the company and the defendant that the company might sell the whole or any part of the goods to whomsoever they chose, and for such price and on such terms as they might see fit; but they were, whenever a sale was made, to pay in cash to the defendant the price of the article sold, according to a price list which was furnished to them by the defendant when the goods were from time to time delivered to the company. The company had also the right, whether they had made a sale or not,

to become the owners of the whole or any part of the goods at the prices named in the list, and they had also the right at any time to return the whole or any of the goods which remained unsold. The company made a statutory assignment to the plaintiff for the benefit of creditors, and the defendant took back the goods:—*Held*, in an action for return of the goods or damages for their conversion, that the goods were not at the time of the assignment the property of the company, but were in their possession either as bailees or agents of the defendant, with the right, of and when they elected to buy, to become the purchasers of the whole or any part of them at the prices mentioned in the price list. *Ex p. White*, L. R. 6 Ch. 397, and S. C. in appeal sub-nom., *Fowle* v. *White*, 21 W. R. 465, 29 L. T. N. S. 78, explained and distinguished:—*Held*, also, that s. 41 of the Bills of Sale and Chattel Mortgage Act, R. S. O. 1897, c. 148, did not apply to this case; it refers to sales or transfers in the nature of sales, by which the possession is to pass presently, but not the property in the merchandise until the agreed price or consideration is paid. *Mason* v. *Lindsay*, 4 O. L. R. 265, applied. *Langley* v. *Kahnert*, 24 Occ. N. 225, 3 O. W. R. 9, 7 O. L. R. 356. Affirmed, 25 Occ. N. 69, 4 O. W. R. 396, 9 O. L. R. 169, 36 S. C. R. 114.

Insolvent — *Imprisonment for fraud — Right to support in prison.*]—Person imprisoned by virtue of Arts. 833 and 834, C. P., has right to maintenance and support during imprisonment; an insolvent (in this case) imprisoned for fraud has no such right, his imprisonment being a penalty, not a means of execution. *Desbiens* v. *Desmarteau* (1906), 8 Q. P. R. 114.

Insolvent Act, 1875—*Fraud—Judgment by default.*]—B brought this action to recover a debt from the defendants and alleged fraud. Defendants appeared but allowed judgment by default for want of a plea to be entered against them. Their counsel then moved to strike the cause off the docket on the ground that as no trial of the suit for the debt could now take place, the criminal charge could not be proceeded with:—*Held*, Peters, J., that in face of s. 137 of the Insolvent Act, 1875, the cause could not be struck off. *Rourke* v. *Robertson* (1879), 2 P. E. I. R. 285.

Insolvent Debtors Acts, 1851 and 1876—*B. N. A. Act—Ultra vires.*]—Under 14 V. (1851), c. 2, of P. E. I. Statutes, a debtor confined in jail and unable to support himself there, could apply for relief and get an order that the detaining creditor should pay him a weekly allowance, and when that had been paid for three months he became entitled to his discharge. By 39 V. (1876), c. 9, it was enacted that if on examination an insolvent applicant should be found entitled to weekly allowance, the Judge should make an order for his immediate discharge. Between the dates of the two Acts (in 1873), P. E. I. became a province of the Dominion of Canada, and by the B. N. A. Act, bankruptcy and insolvency are assigned to the Dominion Parliament alone, and by the same Act it is enacted that all laws in the several provinces should continue in force until altered or repealed by the Parliament of Canada. McCannell, a labourer, applied for relief under both Local Acts. It was contended on argument that the Local Act of 1851 was impliedly repealed by the Dominion Insolvent Act of 1875: — *Held*, (Peters and Hensley, JJ., Palmer, C.J., concurring) that the Local Act of 1876 so far as it gave an applicant an immediate discharge was *ultra vires*. That the Act of 1851 remained in force for the relief of insolvent labourers. *Munn* v. *McCannell* (1877), 2 P. E. I. R. 148.

Insolvent estate—*Claim of inspector—Meeting of creditors.*]—If the inspectors of an insolvent estate are equally divided as to the advisability of contesting a claim of their co-inspector against the estate, the Judge will order the curator to call a meeting of the creditors to decide upon the advisability of contesting the claim at the expense of the estate. *In re Dawes and Walsh*, 6 Que. P. R. 85.

Insolvent estate — *Contestation by creditors—Illegal collocation.*]—Any creditor has a sufficient interest to contest illegal collocations, although it does not at the time appear whether he himself would be collocated in case those claiming to be creditors should be ruled out. By such a contestation the creditor may allege a series of fraudulent acts calculated to defeat the just claims of the contestant, and, in particular, the non-existence of certain claims appearing as discharged by the trustee in the interest of the insolvent, in order to pay him back the amount. *In re Malouf and Beaulieu*, 7 Q. P. R. 152.

Insolvent estate — *Creditor's claim — Contestation—Costs—Fund for payment.*]—A creditor whose claim is contested is not entitled to an order providing that no part of the moneys which will come to him out of the insolvent estate shall be made to contribute to the costs of the contestation. *In re May and Fisk*, 6 Que. P. R. 230.

Insolvent estate—*Goods taken possession of by guardian—Claim by stranger—Replevin action — Summary remedy.*]—The owner of articles of which the provisional guardian of an insolvent estate has taken possession, as being the property of the insolvent, may replevy them by an action, and is not obliged to claim them by a summary petition to a Judge. *Bergeron* v. *Campeau*, Q. R. 25 S. C. 26.

Insolvent estate—*Liquidation—Mandate—Assignment—Fraud on creditors.*]—An insolvent debtor may employ some one to liquidate his property for the benefit of his creditors. That is a mandate and not an assignment. 2. Even if he makes a voluntary assignment of all his property, it will be declared void only if made in fraud of creditors. *Chouinard* v. *Caron*, Q. R. 25 S. C. 254.

Insolvent estate—*Sale of timber by insolvent — Rights of workmen — Woodmen's liens — Rights of claimants — Duty of assignee.*] — The privilege conferred by Art. 1994c, of the Civil Code, on woodchoppers, for securing the payment of their wages, ceases when the timber passes into the hands of a third person, who has purchased it, obtained

delivery of it, and paid for it. But this privilege is not lost by a sale of the timber cut, if, in fact, there has not been delivery, and the wood remains in the possession of the vendor, and the same is the case when the purchaser has made advances to the vendor, exceeding the amount realized by the subsequent sale of this timber by the assignees in insolvency of the vendor. A contract of sale of such timber entered into before and during the time it is being cut, for which the consideration is advances and past due debts, is not in fraud of the rights of unpaid workmen, for their right in respect of the timber is preserved notwithstanding such sale. In this case, the timber in question had been sold by direction of the Court, by the assignees in insolvency of the lumberman, and the proceeds of the sale paid into Court until the final disposition of the matter. By the judgment of the Superior Court, part of this timber had been declared the exclusive property of the claimants, and part to be subject to the workmen's rights:—*Held*, that the assignees were not bound to pay over directly to the claimants the proceeds of the sale of that part of the timber belonging to them; but they ought to make a regular distribution of it by way of an ordinary dividend. *In re Hurtubise and Birks*, Q. R. 26 S. C. 137.

Insolvent relief.]—An assignment to a creditor by an insolvent person after service of process under pressure does not deprive a prisoner of right to weekly allowance under Insolvent Act. *Re McKay* (1868), 1 P. E. I. R. 278.

Judgment of distribution.]—An opposition *afin de conserver* made to the payment of monies in an action between lessor and lessee can be decided by the Court during the long vacation. When insolvency of defendant is alleged in an opposition *afin de conserver*, this opposition cannot summarily be dismissed on a motion to that effect, before the creditors at large are called and a judgment of distribution made, even if the action is between lessor and lessee and the moneys raised are less than the amount of the judgment. *Hull* v. *McFadden*, 11 Que. P. R. 117.

Opposition for payment.]—The Court has no power to summarily dismiss an opposition for payment in which the insolvency of the debtor is alleged and an order is prayed for to call in the creditors, on the ground that the monies levied are insufficient to cover the plaintiff's privileged claims for rent and costs of suit. *McFadden* v. *Hodgson* (1910), 37 Que. S. C. 430.

Purchase of estate by wife of insolvent—*Agreement with creditor.*]—An agreement by the wife, separated as to property, of an insolvent trader, to pay one of his creditors $100, and also to compensate any loss he might sustain by the insolvency, in consideration of his assistance in financing the purchase by her of her husband's bankrupt estate, does not come within the prohibition contained in Art. 1301, C. C., where such purchase was carried out, and the wife continued the business in her own name. *Carter* v. *Walker*, Q. R. 23 S. C. 123.

Refusal to disclose property—*Examination—Committal.*]—Insolvent debtor refusing to answer questions on his examination under the Assignments Act was committed to gaol for nine months. *Re McLarty*, 12 O. W. R. 1171.

Sale of book debts by curator — *Delivery of proofs of debts — Default — Remedy—Costs.*]—Sale of debts imports obligation of delivering to purchaser evidences upon which they rest. Consequently, curator of an assignment of property, who sells debts without guaranty, and at risk of purchaser, is bound to hand over to latter notes of debtors, if there are any, and accounts in detail in case of sales of goods. In default of his doing so, purchaser will have remedy of an action for recovery back or reduction in price paid, as case may be, and curator will be ordered to pay costs incurred up to time of production of these evidences. *Thibaudeau* v. *Paradis* (1906), Q. R. 28 S. C. 475.

Sale of estate by assignee for creditors—Covenant of purchaser to pay creditors —Enforcement—Privity — Trust. *Dominion Radiator Co.* v. *Bull*, 1 O. W. R. 672.

Sale of land by sheriff—*Rights of purchaser—Action against, by insolvent—Costs —Claim against insolvent estate — Preference.*]—If the purchaser at auction of land sold by the sheriff under insolvency proceedings has been made defendant with the curator to the insolvent estate in an action to set aside the sale, brought by the insolvent, which has been dismissed, he has no right to maintain an opposition *afin de conserver* to obtain preferential payment out of the proceeds of the sale of the land of the costs and fees of his solicitors in the action to set aside the sale.—The purchaser at the sale in the above circumstances has no recourse against the *saisi* for the costs due to his advocates in respect of the action to set aside the sale. *Beaudry* v. *Henderson*, 9 Q. P. R. 101.

Secretion.]—The intention to appropriate for oneself the property secreted is not an essential element of the offence of secretion. *Desmarteau* v. *Guimont*, 19 Que. K. B. 25.

Separate liability of partner—*Right of creditor of partnership to rank on estate of partner with individual creditors—R. S. O. 1897, c. 147, s. 7—Election.*]—A member of a partnership joined with the partnership in making a promissory note for the price of goods supplied to the firm by the plaintiff:—*Held*, that the plaintiff was entitled to rank upon the insolvent estate of the partner for the amount of the unpaid note, ratably with the individual creditors of the partner. Construction of s. 7 of the Assignments Act, R. S. O. 1897, c. 147. Decision of MacMahon, J., in *Frost and Wood Co.* v. *Stoddart*, 12 O. W. R. 1133, observed upon. The plaintiff having elected, before accepting a dividend from the insolvent estate of the partnership, to pursue his remedy against the estate of the partner, the question whether, under the statute, it was necessary to elect, did not arise. Judgment of Mulock, C.J.Ex.D., 12 O. W. R. 1274, reversed. *Gordon* v. *Matthews*, 18 O. L. R. 340, 13 O. W. R. 649.

Court of Appeal affirmed the Divisional Court. *Gordon* v. *Matthews* (1909), 14 O. W. R. 873, 1 O. W. N. 103.

Transfer of land and assignment of personal property.]—*Held*, that debtor company was in insolvent circumstances at the time the transfers attached and that such transfers were intended to defeat, hinder and prejudice their creditors, and were void under the Saskatchewan Assignments Act (1906), c. 25, s. 38. Transfers set aside. *Belcher* v. *Hudsons Limited*, 12 W. L. R. 25.

Transfer of property by insolvent to creditor—*Withdrawal of assets—Art. 885, C. P. — Imprisonment — Defeasance — Rights of third parties.*]—A transfer of property by an insolvent debtor to one of his creditors to the prejudice of the others, even if he derives no profit or advantage from it, made in the year immediately preceding the deposit of his schedule, constitutes a withdrawal of assets according to Art. 885, C. P., for which imprisonment may be ordered. 2. A defeasance has no effect or value except between the parties, and is nonexistent as to third persons. It cannot, therefore, be set up as an excuse or justification for acts which affect the rights of third persons. *Guimont* v. *Desmarteau*, Q. R. 33 S. C. 78.

Transfer of goods by insolvent to creditor—*Fraudulent preference—Security to creditor—Knowledge of insolvency—R. S. O. 1897 c. 147, s. 2, s.-ss. 2, 3.*]—G. had assisted S. with loans and also guaranteed his credit at a bank to the extent of $3,000. His own cheque at the bank was refused payment until the indebtedness of S. was settled, and the latter promised to arrange it within a month, which he did by transferring to G. a quantity of goods pledged to another bank, G. paying the amount due thereon. Shortly after, S. sold out his stock in trade and absconded, owing large amounts to foreign creditors and being insolvent. In an action to set aside the transfer of goods to G. as a fraudulent preference under R. S. O. 1897 c. 147, the manager of the bank which refused G.'s cheque testified at the trial that it was not because the solvency of S. was doubted, but only that he had heard that S. was dealing with another bank, and he wanted the account closed:—*Held*, Idington and Duff, JJ., dissenting, that under the evidence produced G. had no reason to suppose that S. was insolvent, and he had satisfied the onus placed on him by the statute of shewing that he had not intended to hinder, delay, or defeat creditors.—Judgment of Court of Appeal, 8 O. W. R. 705, affirmed. *Baldocchi* v. *Spada*, 27 C. L. T. 485, 38 S. C. R. 577.

Unfortunate Debtors Act (P.E.I.).]—The P. E. I. Unfortunate Debtors Act, 14 V. c. 2, was not impliedly repealed by "The Insolvent Act, 1875." *In re Blackburn* (1879), 2 P. E. I. R. 281.

BANKS AND BANKING.

Advances—*Security—Bank Act—Chattel mortgage — Insolvency — Assignment—Conversion.*]—H. held a chattel mortgage (unregistered) on G.'s sawmill, with the machinery and lumber therein, and all lumber which thereafter might be brought upon the premises. G., having an order for a large quantity of lumber from a contractor, applied to the bank for an advance. By agreement with the bank, G. assigned the contractor's order to his bookkeeper, and agreed to cut logs at a price fixed and deliver them to the bookkeeper at the millside. The latter assigned to the bank all moneys to accrue in respect of the contract, which assignment was agreed to by the contractor, and also assigned to the bank four booms of logs, by numbers, purporting to act under s. 74 of the Bank Act. Two or three days later G. made an assignment for the benefit of creditors, previous to which the logs had arrived at the mill and were mixed with other logs of G. The greater part had been converted into lumber when H. seized them under his chattel mortgage:—*Held*, affirming the judgment in 7 B. C. R. 465, that no property in the logs assigned to the bank had passed to G., and H. could not claim them.—Shortly before G.'s assignment, his bookkeeper transferred to the bank a chattel mortgage from G. to secure $800:—*Held*, that the assignee had been guilty of no acts of conversion, and was not liable to pay the bank the balance due on this mortgage. The mortgage was not given to secure advances, and did not give the bank a first lien. The bank were in the same position as if they had received the mortgage directly from G. when he was notoriously insolvent. *Merchants Bank of Halifax* v. *Houston*, 21 Occ. N. 401, 31 S. C. R. 361.

Advances — *Security—Invalidity—Bank Act, s. 76.*]—A bank made advances to a lumber operator upon the security of an agreement between him and a trustee that he should sell and deliver a specified quantity of logs to be cut by him, to the trustee, who should have the property therein as from the stump, and who should upon delivery pay for the same by, *inter alia*, paying the bank the amount of its loans:—*Held*, that the security was void under s. 76 of the Bank Act, c. 29, R. S. C. *Randolph* v. *Randolph*, 4 E. L. R. 17, 3 N. B. Eq. 576.

Advance on securities on call — "*A call" not a precedent to payment—Pleadings —Election.*]—Plaintiff brought action to recover moneys advanced defendant on certain securities. Defendant was not a British subject and was served out of jurisdiction with notice of writ and statement of claim. Defendant did not enter an appearance, and plaintiff moved for judgment:—*Held*, that if "a call" by plaintiffs were a condition precedent to their right to payment, plaintiffs would not be entitled to judgment, but the Court found that "a call" was not a condition and gave plaintiffs judgment, the form of which to be adopted to meet the alternative case, made by the pleadings. Defendant given one month in which to elect. *Imperial Bank* v. *Holman* (1910), 15 O. W. R. 681.

Advance to purchase cattle—*Bill of lading.*]—A bank in Ontario, under an agreement with a customer, domiciled in Ontario, advanced money to him to enable him to buy cattle in the province which, under the agreement, when purchased, were to be forwarded by rail by him to Montreal, and to be shipped

by steamship thence to Liverpool, the bank having no control over the cattle until they reached the vessel, when they were to be received by the steamship for the bank, and the customer's possession and control over them was to end; bills of lading therefor in favour of the bank being then signed. The cattle were purchased and sent to Montreal as agreed on. On arriving at the steamship, and before the bills of lading were made out, a creditor of the customer attached the cattle under a writ of *saisie-arret*, but the steamship owners, disregarding the writ, signed the bills of lading and conveyed the cattle to their destination. The creditor subsequently recovered a judgment for the value of the cattle, in the province of Quebec, against the steamship owners, which the latter having paid sought to prove on the estate of the bank in winding-up proceedings, but the claim was disallowed by the Master. On appeal from him it was *held*, that, apart from the Banking Act, R. S. C. c. 120, by virtue of the agreement between the bank and its customer the possession and a special property in the goods passed to the bank, of which the steamship owners were aware, and having assented thereto upon receipt of the cattle, before any process was served, must be taken to have held the cattle for the bank. The agreement having been made, and the parties to it being domiciled in Ontario, the rights of the parties to it must be determined by the laws of Ontario and not those of Quebec, which, however, were not shewn to be different:—*Held*, also, that the rights of the parties were entirely governed by the provisions of the Banking Act and following, though not altogether approving, *Merchants' Bank* v. *Suter*, 24 Gr. 356, that under s. 53, s.-s. 4 of the Act, the bank had, under the agreement and the facts proved, an equitable lien upon the cattle from the time of the making of the agreement, which prevailed over the attachment:—*Held*, lastly, that the bank "acquired" the bills of lading within the meaning of the Banking Act as soon as the cattle were received by the steamship, although it did not at that time actually "hold" the bills. The appeal was therefore dismissed. *Re Central Bank—Can. Shipping Case* (1891), 30 C. L. T. 281, affirmed 21 O. R. 515.

Agency—*Discounting the notes of a mandatary—Abuse of confidence—Circumstances which constitute notice to the bank—Obligations of the latter—Mandator's remedy.*]—A bank which does business with an agent or mandatary and discounts notes signed by him as such, cannot be held to inquire into or trouble itself respecting the use made by such agent of the moneys so advanced to him. But a bank discounting the personal notes of a customer, which are endorsed by him as agent for a third party, who is also a customer of the bank, and has a current account therein, and who sees by its books that the principal's money, his account being closed, passes by such operation to the credit of the agent, whose account increases proportionately, is sufficiently advised to make further inquiry. If, without receiving satisfactory explanations, such bank continues to discount the notes, it becomes the accomplice of the agent, in his abuse of confidence, and responsible towards the principal, in favour of whom there lies a recourse against the bank to recover the amounts fraudulently converted. Such recourse is, however, subject to the condition contained in the second paragraph of Art. 1048 C. C., and, consequently, it no longer exists when the notes which were negotiated have been cancelled. *Gratton* v. *Hochelaga Bank*, 37 Que. S. C. 324.

Amendment of verdict.]—H. had been manager of the bank, and certain losses were made which the bank claimed he was liable to make good. On reference to arbitration an award for $1,718 was found against him. He then brought this action for three quarters salary, and defendants pleaded the award as a set-off. A verdict for $1,703 was found in plaintiff's favour. The bank moved to amend the verdict by entering it for the bank for $13, and in support of the motion produced affidavits from all the jurors, stating that what they intended was to find the amount plaintiff was entitled to for three quarters salary, leaving him liable for the amount of the award:—*Held*, (Peters, J.), that the verdict must be amended as moved, without sending the case to another jury. *Heard* v. *Union Bank* (1874), 2 P. E. I. R. 237.

Assignments and preferences—*Assignments by insolvent to bank—Advances on security thereof — Bank Act—Bona fides—Knowledge of insolvency—Assignments Act.*]—One Broley made a general assignment of all moneys due him to the defendant as security for an advance, and subsequently made a specific assignment of all moneys due to him by a school district. Later, being still indebted to the bank in large sums, he conveyed to the bank a house and lot. A further specific assignment of a debt due by the town of North Brantford to Broley was given at a later date, and within 60 days of this last assignment Broley made an assignment for the benefit of his creditors. Advances were made on the security of all assignments to the bank except that last mentioned. In an action by the assignee to set aside the various assignments and conveyances as being in fraud of creditors:—*Held*, that the various assignments were valid under the Bank Act, and, even if the advances upon such security were not authorized, Broley could not, having received good consideration, assail the pledge; and his creditors occupied no better position.—2. That, as to all the assignments save the last, the bank acted in perfect good faith and belief in Broley's solvency, and without any intent to defeat, delay, or prejudice any creditor or prefer the bank's claim; and the assignments were, therefore, valid.—3. That, as no advance had been made on the security of the last assignment, which was made within 60 days before the assignment for the benefit of creditors, the assignment was void under the provisions of the Assignments Act. *Blakeley* v. *Gould*, 24 A. R. 153, distinguished. *Norton* v. *Canadian Bank of Commerce*, 1 Sask. L. R. 448, 8 W. L. R. 910, 9 W. L. R. 331.

Assignment of book debts by trader to bank—*Collection of book debts by wholesale creditor of trader—Right of bank to recover—Notice — Representations—Authority —Promissory notes—Equitable assignment—Reduction into possession.*]—T., a trader, being indebted to the plaintiffs, a chartered

bank, in August, 1907, executed to them as security an assignment of his bills receivable and book debts. It was arranged between the plaintiffs and T. that he should continue to carry on business and collect all moneys and deposit them with the plaintiffs in a current account, against which he was permitted to draw cheques and make payments to his various creditors as he saw fit; the plaintiffs, however, to be furnished with a monthly statement shewing the details of his accounts receivable; and these were furnished by T. from time to time. The plaintiffs did not notify any of T.'s debtors, neither did they do anything towards perfecting the assignment other than to receive the monthly statements. At the time of this assignment T. owed the defendants, wholesale dealers, a large sum for goods bought, and, continuing to do business after the assignment, he increased his credit account with the defendants, who were not aware of the assignment. T.'s business did not improve, and in November, 1908, the plaintiffs took a further assignment from T., identical in terms with the first. About that time the defendants pressed T. for payment, and T. agreed to pay them, as they were his largest creditors, all the moneys collected by him from his customers. Pursuant to this arrangement, certain moneys and promissory notes were received by the defendants, which the plaintiffs claimed under their assignment. The defendants said that T. told them, after the existence of the assignment had been made known to the defendants, that the plaintiffs knew that he was making payments to them, and that they were receiving payments out of the accounts. The plaintiffs said that they did not hear about the defendants getting the moneys collected until January, 1909. In February, 1909, T. made a general assignment for the benefit of his creditors. The defendants contended that the plaintiffs, in the circumstances, after allowing T. to continue to trade and purchase additional quantities of goods, and to make the representations usually made by a trader to the wholesaler, and especially the representation that the plaintiffs were permitting him to dispose of his moneys as he saw fit, and knew of the arrangement with the defendants and did not object, ought not to be heard to say that T. had not authority to make the payments or the representations:—*Held*, as to the moneys collected, that the plaintiffs were not estopped; they had the right to take the assignment; and no duty was thrown upon them to notify the general creditors of the fact, so as to create an estoppel.—The defendants also received, before notice, certain promissory notes from T., and, after notice of the plaintiffs' assignment, they collected upon these notes certain sums:—*Held*, that the defendants must be considered as equitable assignees of these sums, and the notes and moneys having been reduced into possession before notice of the plaintiffs' claim, the plaintiffs could not recover as to these items. *Bank of B. N. A.* v. *Wood* (1910), 14 W. L. R. 34.

Assignments to bank by customer—Securities — Choses in action—Book debts, accounts, and moneys to become due under contracts—Transfer of land—Bona fides—Advances by bank—Bank Act—Insolvency of customer—Intent to defeat and delay creditors—Assignments Act. *Norton* v. *Canadian Bank of Commerce*, 9 W. L. R. 331.

Bank Act, s. 46—*Inspection of customer's account—Evidence in action—Company—Manager—Private liabilities—Winding-up—Liquidator—Promissory notes—Consideration.*]—Section 46 of the Bank Act, 1890, 53 V. c. 31 (D.), does not enable a bank to refuse to disclose its transactions with one of its customers, when the propriety of those transactions is in question in a court of law between the bank and another customer who attacks them, and shews good cause for requiring the information he seeks. The company had an account with the bank (claimant), and the manager of the company (who had power to sign notes for the company) had also an account at the same office of the bank. The claim of the bank against the company in winding-up proceedings included a number of promissory notes made by the manager and indorsed by the company. The liquidator shewed that notes so made and indorsed had been charged at maturity to the company's account by the direction of the manager, and that renewals of these notes formed part of the bank's claim:—*Held*, that the liquidator, in examining the agent of the bank for the purpose of shewing that the original consideration for several of the notes included in the bank's claim was an advance to the manager for his own private purposes, and that the agent, knowing these notes to be the private debt of the manager, had, at his request, charged them to the company's account, was entitled to refer to the manager's own account with the bank, though the manager was not a party:—*Held*, also, that there was nothing to prevent the liquidator, who stood in the place of the company, from impeaching the consideration for the notes offered in proof by the bank, just as the company itself might have done, but no further:—*Held*, also, that periodical acknowledgments given by the manager to the bank of the correctness of the company's account could not be set up as a bar to an inquiry into the account, where specific errors in it were charged, to the knowledge of the bank. *In re Chatham Banner Co., Bank of Montreal's Claim*, 22 Occ. N. 22, 2 O. L. R. 672.

Bank Act, s. 74—*Advances made under—Restrictive clause in trust deed—Notice—Effect of—Evidence—Weight of.*]—The trust deed to the plaintiff company, to secure debentures of the A. P. Co., contained a clause charging in favour of the trustees "its other assets whatsoever and wheresoever with the payment" of all moneys for the time being owing on the security of these presents, and providing that "such charge shall rank as a floating charge, and shall in no way hinder the company from selling or otherwise disposing of such assets in the ordinary course of its business, and for the purpose of carrying out the same." The deed contained the following restriction: "But the company shall not be entitled to mortgage or charge the same in priority to or *pari passu* with the security hereby constituted." It becoming necessary for the company to obtain an advance to pay for pulp wood and to carry on their business, the defendant bank were applied to for a loan, and granted the same upon security being given, under the terms of the Bank Act, s. 74, upon the company's wood at different places:—*Held*, *per* Townshend, C.J., and Longley, J., Meagher, J., concurring in the conclusion, that in determining the question whether or not the restrictive

clause in the trust deed was brought to the attention of the bank before the money was advanced, the positive evidence of an officer of the company giving details of what occurred must be preferred to the evidence of the bank manager, who testified that he had no recollection on the subject:—*Held*, also, that, so long as the money remained under the control of the bank, it was open to the bank to cancel the loan and retain the money, upon discovering that the credit was given under a misapprehension as to the nature of the security:—*Held*, also, that the fact that the bank, in making the loan, relied upon the assignment under the Bank Act, s. 74, could not prejudicially affect the plaintiffs, when it was shewn that the advance was made after notice of the restriction contained in the trust deed. *Indian and General Investment Trust Ltd.* v. *Union Bank*, 42 N. S. R. 353.

Bank Act, s. 76—*Mortgage of land made to bank.*]—Held, that as the land mortgaged herein was taken to secure a present advance it is illegal and void under s. 64 of the Bank Act, 1890, 53 V. c. 31. *Canadian Bank of Commerce* v. *Wilson* (1908), 9 W. L. R. 359, affirmed (1909), 11 W. L. R. 539.

Bank Act—*Security in form C—Rancher —"Wholesale dealer in live stock"—Description of property.*]—A rancher whose business is raising cattle is not, no matter how large his transactions may be, "a wholesale purchaser or shipper of or dealer in live stock," within the meaning of s. 88 of the Bank Act, R. S. C. 1906 c. 29.—The description in a security in the form in schedule C of that Act, must be sufficient to identify the property. *Hatfield* v. *Imperial Bank*, 6 Terr. L. R. 296.

Bank Act—Securities under s. 76—Mortgage of land made to bank—Security for present advance—Invalidity—Evidence. *Canadian Bank of Commerce* v. *Wilson*, 9 W. L. R. 359.

Bank Act—*Security under s. 88—Assignment of—Payment of principal debt by guarantor—Subrogation.*] — A security acquired under s. 88 of the Bank Act, R. S. C. 1906 c. 29, whereby a bank may lend money to manufacturers upon the security of goods manufactured by them, is not legally assignable by the bank so as to transfer the special lien or security—conferred by that Act—to a third party. The purpose of the security is satisfied when the debt which it is given to secure, is paid to the bank.—A guarantor to a bank, which also holds such a security for the debt guaranteed, is not subrogated to the rights of the bank in the security, on payment of the debt by him.—Judgment of the Master in Ordinary reversed. *Re Victor Varnish Co., Clare's Claim*, 16 O. L. R. 338, 11 O. W. R. 717.

Bank Act—*Security under s. 88—Substitution of goods—Agent for sale.*]—It is only the owner of the goods who can give security under s. 88 of the Bank Act, R. S. C. 1906 c. 29; and a bank which has taken such security on goods from the owner, cannot, under that section, substitute other goods afterwards coming into the possession of the giver of the security as agent for sale.—Section 87 extends the class of persons who may give or indorse a warehouse receipt or bill of lading under s. 86, but is not incorporated in s. 88, by s.-s. (6) of that section. *Barry* v. *Bank of Ottawa*, 11 O. W. R. 1103, 12 O. W. R. 515, 17 O. L. R. 83.

Banker's lien — *Overdrawn accounts—Partner's separate account — Costs—"Good cause"—Scale of costs.*]—Decision of Martin, J., 21 Occ. N. 576, 8 B. C. R. 143, in favour of the plaintiff in an action for damages against a bank for refusing to pay a cheque, affirmed by the full court:—*Held*, that there was no good cause for depriving the plaintiff of costs, but his costs should be on the scale of the County Courts, the recovery being for $199.97, and interest. *Richards* v. *Bank of British North America*, 21 Occ. N. 567, 8 B. C. R. 143, 209.

Bank purchased its own shares in violation of Bank Act, s. 76—*Shares transferred and promissory notes taken therefor—Action on notes — Defence illegality—Action dismissed.*]—The Sovereign Bank used about $400,000 of its funds in purchasing its own shares and divided them into seven equal blocks, which were held by directors, relatives and friends. Promissory notes were taken for the shares, the bank agreeing to indemnify the makers of the notes against any loss arising from the sale of the stock. Plaintiff, the curator of the bank, brought action against a director for $33,110 on some of these notes:—*Held*, that the Bank Act, R. S. C. c. 29, s. 76, prevented the bank from acquiring any title to the shares so purchased; that the bank in transferring said shares to defendant and taking his notes therefor gave no legal consideration for the notes and the action should be dismissed without costs, seeing the defence was illegality. *Stavert* v. *McMillan* (1910), 16 O. W. R. 125, 21 O. L. R. 245.

Bill of lading—*Draft attached—Examination of goods — Surrender of bill — Conversion—Pleading — Amendment — Costs—Measure of damages.*]—The judgment in 4 Terr. L. R. 498 affirmed on the merits with a variation in form and as to costs:—*Held*, by the majority of the Court, that had the consignees, as in *Shepherd* v. *Harrison*, L.R. 5 H. L. 116, sent the bill of exchange, with the bill of lading attached, directly to the defendant, they might have sued for the price on the basis of the defendant's acceptance of the goods, or for damages on the basis of a conversion. In the former case the defendant could have set up the defective quality of the goods in diminution of the price. In the latter case, the measure of damages would have been the value of the goods to the consignors, which would probably be the same as in the former case. The bank, as the holders of the bill of lading, were in no better position than the consignors. *Imperial Bank* v. *Hull*, 4 Terr. L. R. 498, 5 Terr. L. R. 313.

Cheque — *Acceptance — Suspension of bank before payment—Protest.*]—On the 11th July, 1895, the defendants gave L. & Co., in payment of an account, a cheque drawn upon the Quebec branch of the Banque du Peuple. The next day L. & Co. deposited the cheque to the credit of their account in the plaintiffs' bank at Montreal, and the plaintiffs on the 13th July sent it by mail to their branch at Quebec. The cheque was received at Quebec on the 14th July, a Sunday, and the next day, instead of having it paid by the branch of the

Banque du Peuple, which had sufficient funds on hand, the manager of the plaintiffs at Quebec contented himself with having it accepted, intending the next day to have a general settlement with the Banque du Peuple of the cheques of which the two banks were respectively the holders. But the same evening the Banque du Peuple closed its doors, and the cheque was never paid.—*Held*, that, under these circumstances, the plaintiffs could not recover from the defendants the amount of the cheque. The acceptance of a cheque by the drawee, who has on hand funds belonging to the drawer sufficient to pay the cheque, has the effect of discharging the drawer. It is not necessary to protest a cheque in order to hold the drawer liable for non-payment. *Banque Jacques-Cartier* v. *Corporation de Limoilu*, Q. R. 17 S. C. 211.

Cheque—Endorsement to order of plaintiff—Forgery of plaintiff's name — Payment by bank on forged endorsement — Possession of cheque—Action to recover cheque or amount—Failure because of non-presentation and non-endorsement by plaintiff. *Smith* v. *Traders Bank of Canada* (1906), 7 O. W. R. 791.

Cheque—*Forgery — Endorsement — Liability as between banks for loss of money paid on forged cheque — Bills of Exchange Act, R. S. C. 1906 c. 119, ss. 50, 74, 133 (c).*]—J., having stolen a genuine cheque on the plaintiff bank for $6, erased the name of the payee and the amount, substituted the fictitious name of William Johnson, and raised the amount to $1,000. He then endorsed the name of William Johnson and deposited the cheque to his credit in the defendant bank. The defendants refused to advance more than $25 on the cheque until they should learn that the plaintiffs would pay it. They then stamped the name of their bank on the back of the cheque and put it through the clearing house in the usual way, after which it was paid by the plaintiffs. The defendants then honoured the cheques of the forger for $800 more, shortly after which the forgery was discovered: — *Held*, that, under the rules of the clearing house and the practice among Winnipeg bankers, the stamping of the name of the defendant bank on the back of the cheque had the legal effect of an endorsement in blank by the defendant bank, and that the defendants were liable to repay the amount of the cheque to the plaintiffs, either by the direct effect of the statute, Bills of Exchange Act, 1890, s. 24, as amended, ss. 38, 55 (c) (now R. S. C. 1900 c. 119, ss. 50, 74, 133 (c), or because of the warranty to be implied from their endorsement that the cheque was what it purported to be and that they were the lawful holders. *Bank of Ottawa* v. *Harty*, 12 O. L. R. 218, followed. *Leather* v. *Simpson*, L. R. 11 Eq. 398, and *Smith* v. *Mercer*, 6 Taunt. 76, distinguished. *London and River Plate Bank* v. *Bank of Liverpool*, [1896] 1 Q. B. 7, dissented from.—*Held*, also, that the defendants' refusal to pay out more than $25 until after they knew that the plaintiffs had honoured the cheque made no difference. *Union Bank* v. *Dominion Bank*, 6 W. L. R. 217, 17 Man. L. R. 68.

Cheque countersigned by representative of bank—*Authority of representative—Promise not made in writing—Statute of frauds — Original liability—Bank Act.*] — A firm of dealers in fruit, whose account was overdrawn at their bank, applied for further advances, which the bank refused to make unless one D. was employed to look after the business, act as bookkeeper, receive all produce, and countersign cheques given for the same. D. was so employed, and represented to producers of fruit that it was safe for them to bring their produce to the factory, and that cheques given therefor countersigned by him would be paid by the bank. The plaintiff, relying on these representations, delivered peaches, for which he received the firm's cheque, countersigned by D. The bank, which at the time had liens on the plant and property of the firm, through D. disposed of the whole output of the factory, including the plaintiff's goods, and received the entire profit. On the cheque being presented, the bank refused payment, upon which this action was brought:—*Held* (Meredith, C.J., dissenting), that the bank had such an interest in the goods delivered by the plaintiff as prevented the application of the 4th section of the Statute of Frauds, and were therefore bound by D.'s promise of representation that they would pay the cheque, though not made in writing. The principle of *Sutton* v. *Grey*, [1894] 1 Q. B. 285, discussed and applied. (2) That there was evidence to support the finding of the Court below, that there was an original liability on the part of the bank, on which the plaintiff was entitled to recover, on the authority of *Lakeman* v. *Mountstephen*, L. R. 7 H. L. 17. *Simpson* v. *Dolan*, 16 O. L. R. 459, 11 O. W. R. 590.

Cheque initialed by local manager—*Cashed by another bank—First bank refused payment—Right to recover on cheque from first bank—Custom of bankers.*]—One Huether, a customer of two banks, presented two cheques, drawn by himself, for $7,950 and $2,050, and asked for the cash from the Dominion Bank, promising to deposit a marked cheque for $10,000 on Merchants Bank. Later in the day Huether presented his cheque for $10,000 on Merchants Bank, with letter "D" placed upon it by manager of Merchants Bank. Dominion Bank paid the two cheques, but the Merchants Bank refused to pay the $10,000 cheque when presented. Both banks suspended their managers, plaintiff being called upon to pay the $10,000 to Dominion Bank, which he did, taking an assignment of the Dominion Bank's rights against Merchants Bank and brought action to recover:—*Held*, that the action should be dismissed on the ground that the placing of the letter "D" on the cheque was only authority of the manager to the ledger keeper to certify to the cheque, and this not having been done, the Merchants Bank was not liable. *Scott* v. *Merchants Bank* (1910), 16 O. W. R. 773, 1 O. W. N. 1116.

Cheque of customer — *Presentment to clerk — Direction to present to another—Refusal to pay—Action for damages—Evidence.*]—A clerk from one bank presented at another bank a cheque of the plaintiff, a customer of such last mentioned bank, but at the wrong ledgerkeeper's wicket, and was directed to present it at another wicket. There was no evidence that this was done, and a telegram was sent out by the first mentioned bank that the drawer of the

cheque had no account.—In an action for damages for refusal to cash the cheque:—*Held*, on appeal (Irving, J., dissenting), that the trial Judge was right in taking the case from the jury, and dismissing the action for want of sufficient evidence. *Rear* v. *Imperial Bank of Canada*, 7 W. L. R. 408, 13 B. C. R. 345.

Cheques—Authority of station master to endorse for railway company — Freight moneys—Misappropriation by station master—Embezzlement. *Canadian Pacific Ry. Co.* v. *Hochelaga Bank*, 5 E. L. R. 569.

Cheques—*Authority of station master to endorse for railway company.*]—Plaintiffs' instructions to one of their agents was to receive cheques for freight, and forward same to Bank of Montreal, plaintiffs' agent for collection. A son of the station agent having embezzled moneys belonging to plaintiffs and collected for freight, the agent in order to make up these losses endorsed cheques made payable to the company, and received for freight, signing the company's name, per himself as agent, and received proceeds from the defendants. This he employed to make up his son's defalcations:—*Held*, that defendant should have obtained an authority from the plaintiffs before accepting the agent's endorsations, and therefore was liable to pay plaintiffs the amount of these cheques, which were still plaintiff's property. *Canadian Pacific* v. *Hochelaga*, 5 E. L. R. 567.

Cheques—*Forged endorsements—Fraud of agent—Payment—Bills of Exchange Act—"Fictitious person."*]—N. was the assistant-superintendent of a life insurance company, as well as its local agent at one of its branches, having sole control of the business there. A number of applications were sent in by him to the head office, which, with the exception of five, were fictitious. As to these five the insurances subsequently lapsed, of which the company were kept in ignorance. Afterwards N., representing that the insured were dead, and the claims payable under the policies, sent in to the head office claim papers, filling in the names of the claimants and forging their signatures thereto, whereupon cheques for the respective amounts made by the company in favour of the alleged claimants, and payable at a branch of the defendants' bank, were sent to N., whose duty it was, on the receipt, to see the payees and procure discharges from them. The indorsements of the payees' names were forged by N., the genuineness of the signatures on most of the cheques being certified to by his attestation. The cheques were presented to and paid by the bank in good faith, to whom or how did not appear, the amounts thereof being charged to the company:—*Held*, Maclaren, J.A., dissenting, that there was no evidence that the bank were aware that N. had any connection with the transactions out of which the cheques arose, and that they were not entitled to rely on his identification of the payees or attestation of their signatures:—*Held*, however, that, under the circumstances, the cheques must be regarded as payable to fictitious or non-existent persons, and therefore, under s.-s. 3 of s. 7 of the Bills of Exchange Act, 1890, payable to bearer, and that they had the right to pay and charge the company with the amounts. *Governor and Company of Bank of England* v. *Vagliano*, [1891] A. C. 107, followed. Judgment of Meredith, C.J., 5 O. L. R. 407, 23 Occ. N. 155, 1 O. W. R. 457, 2 O. W. R. 34, affirmed on different grounds. *London Life Insurance Co.* v. *Molsons Bank*, 24 Occ. N. 330, 8 O. L. R. 238, 3 O. W. R. 858.

Cheques countersigned by agent of bank.]—A canning company was extended credit by defendant bank on condition that one Dolan should be employed by said company as bookkeeper, etc. The company's cheques were paid by the bank when countersigned by Dolan. Plaintiffs sold the canning company a quantity of fruit and were given a cheque countersigned by Dolan. Bank refused to pay the cheque:—*Held*, that the bank was not liable under Statute of Frauds, s. 4. *Simpson* v. *Dolan* (1908), 16 O. L. R. 459, 11 O. W. R. 590, distinguished. *McWilliam & Everist* v. *Sovereign Bank* (1909), 14 O. W. R. 561.

Cheques—*Endorsement.*]—Action to compel Imperial Bank to pay into Court the proceeds of a cheque in favour of Ross, McRae & Chandler, which had been placed to the credit of a new firm, McRae, Chandler & McNeill, of which plaintiff was not a member. Chandler endorsed the cheque in the name of both the old and new firm, adding his signature each time, and gave bank instructions to place the proceeds to the credit of the new firm. Plaintiff did not question Chandler's right to endorse the cheque, but urged that he was entitled to succeed on the ground that the bank was not a holder in due course:—*Held*, that all the requirements of s. 56 of the Bills of Exchange Act had been complied with, that the bank received the cheque in good faith and for value, and that, when it was negotiated, the bank had no notice of any defect in the title of the person negotiating it. Judgment of Divisional Court (1909), 13 O. W. R. 247, affirming Riddell, J. (1908), 12 O. W. R. 341, affirmed. *Ross* v. *Chandler* (1909), 14 O. W. R. 898, 1 O. W. N. 104.

Collateral securities—*Account of—Payments on—Evidence—Reversal of finding of fact.*]—A creditor who has received collaterals as security for a debt is bound, after payment of the debt, to return them or account to the debtor for their face value, in the absence of evidence to shew that the respective amounts of them could not be collected. *Driffil* v. *McFall*, 41 U. C. R. 313, followed. The County Court Judge disallowed certain sums of money which the defendants swore the plaintiff bank had received on certain collateral securities held for them, because their evidence shewed that these sums had first been received by defendants, and they were unable to give dates and particulars of the payments to the bank, and had no books or memoranda to support their statements, and he was of opinion that they should have given undoubted evidence of the times of receipt and payment to the bank, or in some other way brought home to the bank conclusively the receipt and non-credit of the money, but his verdict was not based on any finding that the defendants were unworthy of belief as witnesses:—*Held*, that, under the circumstances, it was proper for

the Court above to review the finding of the County Court Judge upon the evidence, and that, taking into consideration the bank's duty to produce or account for the collaterals, which it had failed to do, and the presumption to be drawn from such failure, the defendants had sufficiently proved the receipt of said moneys by the bank, and were entitled to judgment. *Union Bank* v. *Elliott*, 22 Occ. N. 331, 14 Man. L. R. 187.

Collateral security—*Crediting proceeds—Suspense account.*]—A bank gave a customer "a line of credit to $150,000, to be secured by collections deposited;"—*Held*, that the bank was bound to credit the customer with the payments made from time to time to the bank on collateral notes deposited with the bank by the customer in accordance with the terms of the memorandum, and could not hold the payments in a suspense account until the maturity of the customer's own paper given to the bank to cover the line of credit, and take judgment against the customer for the full amount of that paper.—Judgment of the Supreme Court of Canada, 26 S. C. R. 611, affirmed. See also S. C., 23 A. R. 146, 26 O. R. 575. *Molsons Bank* v. *Cooper*, 20 Occ. N. 1, 26 A. R. Appx.

Collateral security deposited with bank to secure payment of promissory notes and advances — Memorandum of hypothecation—Judgment — Settlement—Account—Fiduciary relationship — Trustees—Breach of trust—Failure to exercise due diligence in realising securities—*Bona fides*—Tender of reconveyance—Laches—Interest—Rate of—Overpayment—Illegal rate — Contract — Pass-book — Estoppel — Parties—Costs. *Barrette* v. *Canadian Bank of Commerce and Syndicat Lyonnais du Klondike*, 7 W. L. R. 659, 8 W. L. R. 927.

Contractor—*Sub-contractor — Power of attorney to bank to receive money under contract—Privity.*]—Plaintiffs had a power of attorney to receive from the government, moneys for contractors B. & M. Defendants, sub-contractors, wanted some security and plaintiffs wrote B. & M. that as they received money from the government, with their consent they would forward moneys to defendants:—*Held*, no privity between plaintiffs and defendants. Appeal to Supreme Court allowed. *Bank of Ottawa* v. *Hood*, 6 E. L. R. 122, 42 S. C. R. 231.

Curator of an absentee brought action to recover amount of a deposit standing in name of latter:—*Held*, that defendants could plead that plaintiff's appointment was tainted with serious irregularities and asked for its annulment. *Plourde* v. *Bank of Montreal* (1910), 11 Que. P. R. 429.

Deposit—*Decease of depositor—Promissory note—Right to deduct.*] —A testator, having a deposit to his credit in a bank at the time of his death, was a debtor to the bank on a note under discount, which had not then matured. After its maturity the bank brought this action on the note against his executors. The assets of the testator were insufficient to pay his debts in full. The deposit not having been withdrawn or demanded before the maturity of the note:—*Held*, that the bank was entitled to deduct from the amount of the promissory note the amount at the credit of the deceased, and to rank on the estate for and receive a dividend on the balance. *Ontario Bank* v. *Routhier*, 20 Occ. N. 404, 32 O. R. 67.

Deposit—*Overdue note — Set-off.*]— The defendant was a depositor in a bank, the garnishee, and had there discounted a note which was not paid when due. The bank charged the note to the defendant's account, and the latter drew out the exact amount of the balance remaining to his credit:—*Held*, that a set-off had been thereby effected. *Thomas* v. *Smith*, Q. R. 16 S. C. 354.

Deposit receipts are not negotiable securities—only assignable choses in action. *Re Central Bank Ex p. Morton* (1889), 30 C. L. T. 424.

Directors—*False reports—Right of action—Statutory suspension — Prescription — Demurrer.*] — The recourse of creditors against the president or directors of the Banque du Peuple, for false reports, etc., was suspended by 60 & 61 V. c. 75 and 62 & 63 V. c. 123. 2. The right of action against the directors of the Banque du Peuple, personally, was not taken away by 62 & 63 V. c. 123. 3. A director cannot invoke such Act by way of demurrer, but only by a plea to the merits. 4. *Quære*:—Can short prescriptions be pleaded by way of demurrer, when the time required for the acquisition thereof appears to have elapsed? *Préfontaine* v. *Grenier*, 4 Q. P. R. 21.

Discount—*Assignment of warehouse receipts as security—Present advance—Bank Act, ss. 86, 90—Firm—Subsequent incorporation of company and assignment of business to—Evidence of ownership—Liquidation — Parties—Estoppel.*]—Before the 28th November, 1904, a cream and butter business was being carried on by a married woman under the trading name of the Toronto Cream and Butter Company, her husband being the manager. On that date, with the view of opening an account with the defendants' bank, a letter was written in the trading name stating that a line of credit would be required from $10,000 to $12,000, secured by warehouse receipts on butter, and from $1,000 to $2,000 on the firm's note, to be otherwise secured. In November, 1904, the account was opened and advances made by the bank, and on the 23rd October, 1905, the account was overdrawn to the amount of $10,158.01, and there was an outstanding note of $1,700 due in November. On the 23rd October the manager discounted a promissory note made under the trading name for $6,000 at three months and by the same name assigned to the bank as security therefor warehouse receipts of 401 cases of butter, promising also other warehouse receipts to cover the indebtedness. After placing the $6,000 to the firm's credit, there remained a debt balance of $4,278.01, which was gradually reduced, and, on the 26th December, 1905, when liquidation proceedings were taken, there were outstanding the $6,000 note, a $2,000 note discounted on the 27th October, 1905, and an open debit balance of $200. No attempt was ever made to draw out the $6,000, but the manager of the bank stated that there was no restriction preventing it. The 401 cases had been warehoused on the 21st and

26th September, and the 4th, 10th, and 20th October, while 99 cases had been warehoused on the 20th and 21st October, although no warehouse receipts had been obtained therefor, and there was nothing to shew they had ever been assigned to the bank. The firm had been incorporated as a company by letters patent, dated the 5th April, 1905, one of the objects being to acquire the business as a going concern; and by an agreement dated the 1st June, 1905, made between the wife and the company, and executed by both parties, all the property, assets, and goodwill of the business were sold to and transferred to the company, which agreement was confirmed by a resolution of the shareholders, the husband being appointed manager, and the defendants' bank appointed the company's bank. Notwithstanding the incorporation and sale to the company, the business continued to be carried on as theretofore in the trade name, no by-laws being passed, and no stock was ever allotted to the vendor of the business, the bank not being aware of the incorporation and sale until some days after the transfer to them of the warehouse receipts:— *Held*, that the business was that of the wife and not of the husband and that there was a valid transfer by her to the company of all the firm's assets and business, so as to vest in them the title to the butter, and, though the continuance of the business in the old trade name was objectionable and gave colour to the contention that there was no change in the ownership or control of the business, she was estopped from contesting the company's title thereto:—*Held*, also, that as to the 401 cases, the transaction was supportable, under s. 73 of the Bank Act, 53 V. c. 31 (D.), now s. 86 of R. S. C. 1906, c. 29, as on the evidence there was a present advance and not a mere form to cover a past indebtedness; but that the bank had no claim to the 99 cases.—Meredith, J.A., dissented on the ground that the note was not "negotiated" within the 90th section of the Bank Act, at the time of the acquisition of the warehouse receipts:— *Held*, also, Osler and Garrow, JJ.A., dissenting, that the bank were not entitled to hold the warehouse receipts, under the letter of the 28th November, as not constituting an agreement to furnish security for advances thereafter to be made.—*Ontario Bank* v. *O'Reilly*, 12 O. L. R. 420, applied, and *Halsted* v. *Bank of Hamilton*, 27 O. R. 435, 24 A. R. 152, 28 S. C. R. 235, distinguished:—*Held*, also, that the company, and not the liquidator, were the proper parties to the action. *Toronto Cream and Butter Co. Ltd.* v. *Crown Bank of Canada*, 16 O. L. R. 400, 11 O. W. R. 776.

Discount against sales—*Goods drawn against, not accepted — Company making draft—Winding-up order — Right to proceeds—Equitable lien.*]—The S. Co. had an understanding with a bank that they would draw on their customers as goods sold were being forwarded, and these drafts would be discounted by the bank. Under this arrangement a draft was made on M. for certain goods that had been shipped to him at N. M. refused to accept the goods, and the draft was returned dishonoured. It was then agreed between the bank and the company that the manager of the company should proceed to N., take possession of the goods for the bank, and endeavour to get M. to accept them. It did not appear what the manager did at N., but he did not induce M. to accept the goods, and they remained at the railway station at N. until an order was made for the winding-up of the S. Co. It was then agreed between the bank and the liquidator of the company that the latter should take possession and dispose of the goods and hold the proceeds subject to the order of the Court:—*Held*, that the bank had an equitable lien and were entitled to the proceeds of the sale. *In re Shediac Boot and Shoe Co.*, 2 E. L. R. 166, 38 N. B. R. 8.

Discount of notes—*Excessive rates of interest—Payment by cheques on overdrawn account, afterwards met.*]—The plaintiffs, a banking corporation subject to the provisions of the Bank Act, discounted notes made by the defendant, one of their customers, and also allowed him to overdraw his current account. The notes were payable on demand, and purported to bear interest at 20 per cent. per annum. The defendant also agreed to pay interest at that rate on his overdraft; afterwards the rate was reduced to 18 per cent. The defendant from time to time gave the plaintiffs cheques to pay interest accrued; when the cheques were given, the accounts they were drawn against had already been overdrawn. But each account was at some date after the giving and charging up of such cheques on it changed into a credit balance in the defendant's favour by deposits or by collections made by the plaintiffs for the defendant's account. Those cheques covered such interest up to the 31st January, 1902.—The plaintiffs credited themselves with interest at 24 and 18 per cent. up to 31st January, 1902, and alleged that it was paid them by the above cheques:—*Held*, that judgment should be entered for the plaintiffs, with a reference to the Master to take the accounts. The defendant did not recall the cheques or stop payment of them. They were given to the plaintiffs as creditors of the defendant, and not as his bankers. They were in effect directions to the plaintiffs as the defendant's bankers to pay the amounts to themselves as creditors as soon as there should be available funds at his credit with them, as his bankers, to pay them with, and they were in fact paid out of such funds when available; and the defendant could not recover the excess over seven per cent.— From the 31st January, 1902, the plaintiffs could charge the defendant with interest at the rate of five per cent. only, that being the legal rate. *Bank of British North America* v. *Bossuyt*, 23 Occ. N. 338.

Failure to pay customer's cheque.]—Plaintiff claimed damages from the bank for alleged wrongful refusal to cash plaintiff's cheque upon his deposit account at the office of the bank where the cheque was presented for payment, there being, at the time of presentation, at the credit of his account sufficient funds to meet the amount of the cheque, which was duly drawn and endorsed. The defence was non-presentment. It appeared that a clerk from the bank which held the cheque presented it at the office of the defendant bank upon which it was drawn, but at the wrong ledger-keeper's wicket, and was directed to present it at another wicket to the clerk there who had charge of the ledger containing the drawer's account. There

was no evidence that this was done, but the bank which held the cheque sent out a telegram stating that the drawer had no account. At the close of the plaintiff's evidence the trial Judge withdrew the case from the jury for want of sufficient evidence, and his order was affirmed. *Rear* v. *Imperial Bank* (1909), 7 W. L. R. 408, 13 B. C. R. 345; affirmed, 42 S. C. R. 222.

Forged cheque—*Negligence — Responsibility of drawees — Payment—Mistake—Indorsement—Implied warranty—Principal and agent—Action—Money had and received — Change in position—Laches.*]—A cheque for $6, drawn on the plaintiffs, was fraudulently altered by changing the date and the name of the payee and by raising the amount to $1,000. The drawees refused payment for want of identification of the person who presented it. The defendants, without requiring identification, advanced $25 in cash to the forger on the forged cheque, placed the balance, $975, to his credit in a deposit account, indorsed it, and received the full amount of $1,000 from the drawees. After receipt of this amount, the defendants paid the further sum of $800 to the forger out of the amount so placed to the credit of his deposit account. The fraud was discovered a few days later, and, on the defendants' refusal to refund the money thus received, the action was brought to recover it back from the defendants as indorsers or as having received money paid under mistake of fact; —*Held*, that the drawees of the cheque, although obliged to know the signature of their customer, were not under a similar obligation in regard to the writing in the body of the cheque; that, as the receiving bank had dealt with the drawees as principals and not merely as agents for the collection of the cheque, and had obtained payment thereof as indorsers and holders in due course, they were liable to the drawees, who had, through the negligence of the receiving bank, been deceived in respect to the genuineness of the body of the cheque, and that the drawees were entitled to recover back the money which they had thus paid under a mistake of fact, notwithstanding that, after such payment, the position of the defendants had been changed by paying over part of the money to the forger. *Bank of Montreal* v. *The King*, 38 S. C. R. 258, distinguished. *Newall* v. *Tomlinson*, L. R. 6 C. P. 405, *Durrant* v. *Ecclesiastical Commissioners for England and Wales*, 6 Q. B. D. 234, *Continental Caoutchouc and Gutta Percha Co.* v. *Kleinwort Sons & Co.*, 20 Times L. R. 403, and *Kleinwort Sons & Co.* v. *Dunlop Rubber Co.*, 23 Times L. R. 696, followed. Judgment at trial, 4 W. L. R. 407, reversed.—Judgment appealed from, *Union Bank* v. *Dominion Bank*, 17 Man. L. R. 68, 6 W. L. R. 217, affirmed, Idington, J., dissenting. *Dominion Bank* v. *Union Bank of Canada*, 40 S. C. R. 366.

Guarantee by company signed by president.]—A company sold a branch of their business taking a chattel mortgage for $5,066.74 as security. By mistake the affidavit of *bona fides* stated that the mortgagor was justly indebted to the company in the sum of $5,000:—*Held*, that the mortgage was a valid security for $5,000. *Mader* v. *McKinnon* (1892), 21 S. C. R. at p. 652, followed; *Midland Loan* v. *Cowieson* (1891), 20. In order that the mortgagor might obtain an advance from a bank, the president of the Co. signed a guarantee in this form, "A. E. Thomas, Ltd.," and under that name "A. E. Thomas, Pres."—*Held*, that the guarantee was binding on the company. The mortgage covered the stock in trade, fixtures and all book debts. The company did not notify the debtors of the assignment of the debts as required by the Judicature Act, s. 58 (5). The mortgagor later assigned the book debts to the bank as collateral security for the advance:—*Held*, that the bank had taken their assignment without notice of the company's claim and having collected the debts were entitled to retain the proceeds. The mortgagor also gave the bank a document purporting to be a further security, under s. 88 of the Bank Act, covering 230 cases of matches, and the bank took possession of the matches:—*Held*, that as the matches were covered by the chattel mortgage it was not necessary to consider whether the document claimed by the bank was of any value in view of s. 90 of that Act. Judgment given bank against the company for the amount of the guarantee. Judgment given the company against the bank for conversion of the matches, the bank to have right to retain the matches on payment to the company the amount of their mortgage. Reference to the Master in Ordinary to take accounts. Costs and further direction to be dealt with after the Master's report. *Thomas Ltd.* v. *Standard Bank; Standard Bank* v. *Thomas Ltd.* (1910), 15 O. W. R. 188, 1 O. W. N. 379. Affirmed, 1 O. W. N. 548.

Insolvent bank taken over by another bank—*Agreement as to—Validity of agreement—Power of directors to make agreement—Bank Act, ss. 99-111.*]—The Bank of Montreal at the request of the Ontario Bank undertook to meet the liabilities of the latter as they fell due, and in order to assist the Bank of Montreal to do so the Ontario Bank agreed to hand over its available commercial assets for that purpose, the Bank of Montreal having full authority to realise upon these assets as it might see fit. The Ontario Bank warranted that the assets handed over were worth $16,249,080.46 and that the notes and other liabilities of the bank did not exceed $15,272,271.22. The Ontario Bank agreed to place its office, staff, &c., at the disposal of the Bank of Montreal and to do all in its power to carry out the terms of the agreement. The advances of the Bank of Montreal were to bear interest at the rate of six per cent., and if there were a surplus after payment of the liabilities it was to credit the Ontario Bank on the final adjustment of accounts with $150,000 for the indirect benefit received. The principal objection to the validity of the agreement urged was that it was in reality a transaction of sale by the Ontario Bank, and a purchase by the Bank of Montreal, of the assets of the first named bank; that it fell within the provisions of ss. 99 to 111, inclusive, of the Bank Act, and was not legally made or consummated in accordance with those provisions, and was *ultra vires*. The Official Referee *held*, that the agreement was binding upon the Ontario Bank and its shareholders. Britton, J., affirmed the Referee in order that an appeal might be taken to the Court of Appeal. The Court of Appeal *held*, that the transaction was beneficial and advantageous alike to depositors, holders of

bills and notes in circulation, and to other creditors, and to the shareholders, and that in its actual working out it enabled the property and assets of that bank to be dealt with and realized without the very serious sacrifice which, but for the arrangements made, would have been inevitable. It was entered into in good faith by the directors, and the arrangement was not beyond their powers. The objections to the provisions of the agreement were satisfactorily dealt with and disposed of by the Referee. Appeal dismissed, with costs. *Re Ontario Bank, Bank of Montreal's Claim* (1910), 15 O. W. R. 913, 21 O. L. R. 1.

Insolvency of bank — *Creditor—Set-off.*]—One who had become the holder of a cheque accepted by the bank and of a deposit receipt issued by it, at a time when such bank had suspended payment, but when it was believed by the public and announced by the directors that it would pay in full all moneys received on deposit, can set off the amount of the cheque and deposit receipt against a debt which he himself owes to the bank, and that in spite of the fact that the bank has afterwards been declared insolvent, and that its insolvency dates back to the time of the suspension. *People's Bank* v. *Langlois*, Q. R. 9 Q. B. 13.

Insolvency of bank — Winding-up — Claim on promissory note maturing after order—Set-off—Deposit in bank to credit of indorser—Note made by treasurer and indorsed by reeve of municipality for municipal purposes—Personal liability—Rectification. *Kent* v. *Munroe*, 4 O. W. R. 408.

Insolvency of bank — Winding-up — Dividends paid impairing capital—Directors — Negligence — Breach of trust — Illegal borrowing — Fraud on shareholders — Connivance of directors in wrongdoing of bank's officers—Action against directors by curator —Liability. *Stavert* v. *Lovitt*, 5 E. L. R. 33.

Interest—*Cheques — Payment — Excessive rate.*]—The defendant borrowed large sums of money from the plaintiff bank, by way of overdraft and on promissory notes. Having agreed to pay interest, first at 24 per cent. and afterwards at 18 per cent. per annum, the defendant from time to time gave the bank cheques on his current account to pay the interest at those rates respectively up to the 31st January, 1902. When such cheques were given, the account had already been overdrawn, but it was afterwards changed into a credit balance in the defendant's favour by deposits or by collections made by the bank for the defendant's account:—*Held*, that such cheques should be deemed to have been payment of the interest and that the defendant could not recover back such interest or any part of it, although it was in excess of the 7 per cent. rate which the Bank Act permits a bank to charge; also, that, under ss. 80 and 81 of the Bank Act, the bank was not entitled to sue for and recover interest accruing after the 31st January, 1902, at 7 per cent. per annum, but could only recover interest at the legal rate of 5 per cent. per annum from that date on the principal then due. *Bank of British North America* v. *Bossuyt*, 23 Occ. N. 338, 15 Man. L. R. 266.

Joint deposit account — *Death of one depositor—Right of survivor to the money as against executor of other depositor.*]—A testator during his lifetime signed the following document: "This is to certify that I transfer this money in my name, John Schwent and Magdalena Schwent, in our savings bank account number s. 27 in your bank to the joint credit of myself, the sole survivor, and my daughter, Magdalena Schwent to be drawn by either of us."—*Held*, that the daughter Magdalena became entitled to the money so deposited, absolutely in her own right, on the death of her father. *Hill* v. *Hill*, 8 O. L. R. 71, distinguished. *Schwent* v. *Roetter* (1910), 16 O. W. R. 5, 21 O. L. R. 112.

Liability of director and president of bank — *Overdraft of customers improperly allowed by cashier—Failure to detect errors in audited accounts—Negligence.*] — Where the collapse of a bank was due to overdrafts which the cashier, the principal executive officer of the bank under the directors, whose accounts had been duly audited by a board of auditors duly appointed and entirely independent of the directors, had irregularly and improperly allowed to certain customers:—*Held*, that by the law of Quebec, as by the law of England, a charge of negligence could not be established against the president of the bank simply by reason of his having in good faith failed to detect the cashier's concealment of such drafts. *Dovey* v. *Cory*, [1901] A. C. 477, followed. Judgment in Q. R. 15 K. B. 143, affirmed. *Préfontaine* v. *Grenier*, [1907] A. C. 101, Q. R. 15 K. B. 563.

Lien of bank—*Forest product—Manufactured wood.*]—A bank cannot, under s. 74 of the Bank Act, obtain a lien upon the products of the forest for a pre-existing debt. —2. Manufactured wood, that is to say, wood transformed into joists, planks, plinths, and mouldings, does not constitute a forest product within the terms of s. 74; Hall, J., dissenting on this point; and Wurtele, J., pronouncing only on the first point. *Molsons Bank* v. *Beaudry*, Q. R. 21 S. C. 212.

Lien of bank on customer's money — *Application—Insolvency of customer—Promissory notes.*]—A bank has a lien on all moneys, funds, and securities deposited, for the general balance of a customer's account. Where, therefore, a bank held two promissory notes of a customer, one payable three months after date, and secured by an indorser, and another payable on demand without any indorser, upon which the customer had made a payment, nothing being paid on the indorsed note, and on the customer's death there was a credit balance in his favour in the bank, which the bank applied toward payment of the unindorsed note:—*Held*, that the bank were justified in doing so, notwithstanding that it appeared at such time that the customer was insolvent. *In re Williams*, 24 Occ. N. 91, 7 O. L. R. 156, 1 O. W. R. 534, 2 O. W. R. 47, 3 O. W. R. 251.

Lien on wheat—Following proceeds of sales—Moneys paid to creditor with notice of lien. *Union Bank* v. *Spinney* (1906), 1 E. L. R. 277.

Mistake—*Moneys paid out by mistake on forged express orders—Orders cashed by bank*

—Order cashed by payee—Non-liability of person indorsing for identification.]—Actions to recover moneys paid out by plaintiffs by mistake upon express orders fraudulently issued in their name in favour of A., who had committed forgery to obtain a blank express order book. As soon as plaintiff knew this they repudiated liability. Defendants cashed one order which was repaid them by the local office:— *Held*, that defendants must pay plaintiffs. O. had simply indorsed order for identification:—*Held*, he was not liable. *Canadian Express Co.* v. *O'Neil, Canadian Express Co.* v. *Home Bank* (1909), 14 O. W. R. 287.

Money given to notary — *Failure of bank in which deposited— Loss by whom borne—Negligence.*]—The plaintiff gave the defendant, a notary, $412, with special instructions to use the same in payment of a hypothecary claim. The defendant used all due diligence to find the domicil of the creditor, but was delayed for a considerable period by the fact that he (the defendant) had not received from his principal the power of attorney which was necessary before he could complete the transaction. In the interval he deposited the money in trust at the branch of the Ville Marie Bank at Chambly. By the time the power of attorney reached the defendant the bank had closed its doors. The plaintiff sued the defendant for the money so deposited:—*Held*, that the defendant not having been negligent, the money was properly deposited in the bank, and was there at the risk of the plaintiff. *Tempest* v. *Bertrand*, 21 Occ. N. 131, Q. R. 19 S. C. 365.

Notes and bills for discount—*Collection—Banker's lien on customers' bills and notes.*]—*Held*, when a customer hands over notes and bills to a bank for discount, and part of them only is discounted, the rest being held for collection, the bank acquires no lien on the latter for the customer's indebtedness to it. *Freedman* v. *Dominion Bank* (1909), 37 Que. S. C. 535.

Overdraft—*Proof of—Third party—Bill of exchange—Surrender — Insolvency of acceptor—Collateral security—Credit.*] — A claim by a bank against a customer for an overdraft originally evidenced by cheques, etc., may be proved against third party contesting it, by parol testimony of customer, corroborated by his acknowledgment in writing of the correctness of balance shewn in his bank account, and his receipt for cheques returned to him monthly given at date of such surrender.—A surrender of a draft, by bank holding it, to acceptor, with word *paid* stamped on it, is a complete discharge of drawer, and it cannot afterwards be used by bank in support of claim against latter, because acceptor has since become insolvent.—A bank is not bound to credit a customer who has become insolvent and upon whose estate it has a claim, with cash surrender value of a policy of life insurance on life of third party, which had been transferred to it by customer, as collateral security. *Tessier* v. *La Banque Nationale* (1906), Q. R. 28 S. C. 140.

Overdrawn customer's account—Promissory note—Collateral securities—Transfer to third party—Breach of Bank Act by allowing inspection and sale of customer's account—Rate of interest—Agreement — Compounded interest at 7 per cent.—Illegality — Dismissal of action by transferee of note against maker — Damages in cross-action. *Montgomery* v. *Ryan, Ryan* v. *Bank of Montreal and Montgomery*, 9 O. W. R. 572.

Overdrawn customer's account—*Promissory note — Collateral securities—Transfer to third person — Inspection of customer's account—Bank Act, 1890, s. 46—Interest—Compounding.*]—R., having had an account with a bank for many years previous to the 16th July, 1906, was on that day indebted to the bank in a large sum for moneys advanced, for which the bank held securities pledged to them by R. and a promissory note made by R., payable on demand, for a sum larger than the amount then due. M. had been negotiating with the bank for an assignment of the debt due by R., and had been permitted by the bank to see the entries in their books relating to that debt, and, on the day mentioned, the bank assigned to M. the sum due and all the securities held by them, covenanting that the sum named was due and to produce and exhibit their books of account and other evidence of indebtedness, etc. The pledged securities were handed over to M., and afterwards the demand note, upon which he sued R., who brought a cross-action against the bank and M. for an account and damages and other relief:—*Held*, that the bank were not prohibited by s. 46 of the Bank Act, 1890, from allowing M., for the purposes mentioned, to inspect the account of R. with the bank; that the agreement was not invalid; that M. was entitled to succeed in his action upon the note; and that R.'s action failed.—*Held*, also, Meredith, J.A., dissenting, that the bank were not entitled to charge R. compound interest; but where the bank had made a discount or an advance for a specified time and had reserved the interest in advance, this should be allowed in other cases, where there had been an overdraft, and payments had been made, interest should be reckoned up to the date of each payment, and the sum paid applied to the discharge of the interest in the first place, and any surplus to the discharge of so much of the principal.—Judgment of Clute, J., 9 O. W. R. 572, reversed. *Montgomery* v. *Ryan, Ryan* v. *Bank of Montreal and Montgomery*, 16 O. L. R. 75, 11 O. W. R. 279.

Power of bank to take security—*Bill of sale—Sale of goods—Recovery of price—Bank Act—Liability of purchaser—Consideration—Warranty.*]—Under s. 68 of the Bank Act security may be taken from the owner of horses for an existing debt by a bill of sale of the horses which expressly states that it is taken only by way of additional security for the debt, and s. 64 of the Act does not prevent the bank from recovering on promissory notes made in its favour by a person who purchases the horses from the transferor. Section 12, s.-s. 1, of the Sale of Goods Act, 1896, does not prevent the recovery by the bank of the prices of horses sold under such circumstances; for, under s. 11 (c), a breach of the implied condition that the seller of the goods has a right to sell them could be treated only as a breach of warranty, and not as a ground for repu-

diating the contract:—*Held*, also, under the circumstances, that the contract of sale between the vendors of the horses and the defendant was completed; that the property in the horses had passed to him; and that he was liable for the price agreed on. *Bank of Hamilton* v. *Donaldson*, 21 Occ. N. 317, 13 Man. L. R. 378.

Powers of bank—*Deposit in trust made outside the bank—Liability of bank.*]—Under the provision in the Bank Act (R. S. C. c. 29, s. 76, s.-s. 1, *d*), that "banks may engage in and carry on such business generally as appertains to the business of banking," a bank may lawfully receive money deposited with it in trust, for the purchase of stock to be transferred by it to the depositor.—2. Such a deposit may be lawfully made in the hands of the manager of the bank, outside the bank premises, at the office of the depositor, to whom the bank, on taking possession of the money, becomes liable for it. *Hooper* v. *Eastern Townships Bank*, Q. R. 35, S. C. 221.

President of bank—*Duties of—Returns to government—False statements—Action by shareholder against president.*]—It is not the duty of a bank president to watch the conduct of cashier and inferior officers, nor to verify the exactness of calculations of auditors or of entries in books, nor to interfere with employees who are in a position of trust for express purpose of attending to details of management. He is not liable for loss arising from acts of gross mismanagement on their part, of which he has no knowledge, and his signature of returns or statements required by charter or Bank Act, prepared and submitted by them, when he has no reason to suspect that they are inaccurate or false, does not amount to making or approval of *wilfully false statements, etc.*, mentioned in s. 99 of the Bank Act, 1890. Judgment in Q. R. 27 S. C. 307, affirmed. *Préfontaine* v. *Grenier* (1906), Q. R. 15 K. B. 143.

President of bank signing false return—*Evidence — Knowledge of falsity — Jury — Nondirection.*]—The defendant, as president of the Bank of Yarmouth, was indicted and tried for having wilfully made a false and deceptive return to the government respecting the affairs of the bank. On the trial, other returns, made both before and after that in respect to which the indictment was laid, were received in evidence without the jury having been cautioned that they were not to be influenced by such other returns in coming to a conclusion on the main issue respecting the offence charged:—*Held*, per Townshend, J., and Graham, E.J., that there must be a new trial on this ground.—Per Weatherbe, C.J., and Meagher, J., on the facts, that there was no evidence of guilty knowledge, and that the case should have been withdrawn from the jury.—Per Russell, J. (who concurred that there was no evidence to warrant a conviction), that there were matters as to which it was open to the jury to draw a conclusion, and that the cause, therefore, was one which could not be withdrawn from them. *Rex* v. *Lovitt*, 2 E. L. R. 384, 41 N. S. R. 240.

Promissory note—*Action on—Collateral security—Release of, by manager of bank—Counterclaim by makers of note for face value of released securities—Liability of bank for act of manager—Form of judgment.*]—The plaintiffs, a banking corporation, held the defendants' promissory note for $9,000. As collateral security for the payment of the note, the plaintiffs held two promissory notes of C., aggregating the same amount. By a private arrangement between the plaintiffs' manager and C., the manager returned to C. his promissory notes, undertaking with C. to be liable to the plaintiffs for what C. would have to pay. In an action by the plaintiffs upon the defendants' note, the defendants disputed liability upon the ground that the plaintiffs were not in a position to return to them C.'s notes, which were their property and pledged by them as collateral security for the payment of the note sued on. This was set up both as matter of defence and counterclaim:—*Held*, a good ground for counterclaim. Upon the evidence it must be taken that C.'s notes were, when returned to him, worth their face value, and so the defendants' damages equalled the plaintiffs' claim upon the defendants' note, and judgment should go for the plaintiffs for the amount of their claim, and on the counterclaim for the defendants for theirs, the one being set off against the other. The act of the manager was the act of the plaintiffs so far as regarded the defendants, between whom and the bank there existed the relationship of pledgor and pledgee. In the case of documents creating or evidencing rights, the thing pledged must be taken to be both the instrument and the right—not the bare instrument without the right, nor the mere right without the instrument. Review of the authorities. Judgment of Harvey, J., varied as to form. *Hochelaga Bank* v. *Larue* (1910), 13 W. L. R. 114.

Promissory note given by subscriber for bank shares for the 10 per cent. required by the Bank Act to be paid in money, is not a compliance with the statute, and such a subscriber does not validly acquire any shares and therefore is not liable as a contributory in winding-up proceedings. *Re Central Bank, Ex p. Burk* (1890), 30 C. L. T. 343.

Promissory note—*Indorsement for collection—Subsequent indorsement—Rights of parties—Cheque by indorser for collection—Refusal to honour—Damages.*]— A bank to which a promissory note is indorsed "for collection," becomes, for that purpose, the agent of the indorser, to whom it is bound to account for the amount collected. The signature of another party, under that of the indorser, does not affect the relative rights and obligations growing out of such restrictive indorsement. The bank is bound to pay a cheque drawn for a party only of funds collected by it under the foregoing circumstances, and is liable in damages for refusal to do so. *Perreault* v. *Merchants Bank*, Q. R. 27 S. C. 149.

Rate of interest — *Agreement to pay more than statutory rate—Bank Act, s. 80.*] —Section 80 of the Bank Act does not prevent a bank from entering into a contract to be paid a higher rate of interest than 7 per cent.; and if, under such contract, interest is paid in excess of that rate, it cannot be recovered back. *Williams* v. *Canadian Bank of Commerce*, 13 B. C. R. 70.

Right of bank to carry on business —*Bank Act, R. S. C. 1906, c. 29, ss. 76, 81 —Indemnity — Agreement executed by local manager—Validity of—Lease—Agreement to assign—Obligation to pay rent.*]—In 1905, the defendants, a firm carrying on a milling business, being heavily indebted to a bank, effected a settlement by which, upon payment of $10,000 and a transfer of all their assets, the partners were to be discharged from all liability. An agreement was entered into between the bank and the partners executed by them, and by the local manager of the bank on behalf of the bank, whereby the firm agreed to pay $10,000 to the bank, to surrender to the bank all the assets, and assign the lease of the milling property. The bank, in consideration thereof, assumed payment of certain specified liabilities of the firm, as set out in the memorandum attached, which, however, did not specially refer to the accruing rent of the milling property; and agreed to forthwith release the firm, as well as the individual partners, from all liability. At the same time another agreement was executed between the bank, by the local manager, and one of the partners, by which, for the more convenient liquidation of the assets and the disposal of the business as a going concern, the partner mentioned was to act as manager and continue the business in the firm's name, the bank indemnifying the partnership against all liability incurred while doing so. The release agreed on, containing recitals of the above, was duly executed by the bank under their corporate seal. The mill property was held by the firm under a lease for 10 years, which contained a covenant not to assign without leave. The bank continued the business for a time, and paid the rent for the period of their occupation, but refused to pay the quarter's rent accruing due subsequently. The bank were brought in by the defendants as third parties:—*Held*, that the agreement recited in the release was valid and binding on the bank, who, as equitable assignees of the term, were impliedly bound to indemnify the lessees against the rent subsequently accruing due.—2. That, in view of the powers conferred by s. 81 and other sections of the Bank Act, R. S. C. 1906, c. 29, the carrying on of the business for the purpose of and to the extent provided for by the agreement, was not *ultra vires* of the bank under s. 76 of the Act. *Peterborough Hydraulic Power Co.* v. *McAllister*, 12 O. W. R. 364, 17 O. L. R. 145.

Security—*Pledge of grain—Sale without notice—Customer's receipt — Release—Consideration—Bar to action for account.*]—The plaintiff obtained from the defendants, a banking corporation., at their Winnipeg office, an advance upon a draft drawn upon a Toronto broker, to which draft were attached six bills of lading for 30,000 bushels of oats shipped to the broker. This was accompanied by a memorandum of hypothecation, signed by the plaintiff, which provided that the securities, hypothecated, renewals, substitutions, and the proceeds thereof, were to be held by the defendants as a general and continuing collateral security for the payment of the present and future indebtedness and liability of the plaintiff, and any ultimate unpaid balance thereof, and that the same might be realised by the defendants in such manner as might seem to them advisable, and without notice to the plaintiff, in the event of default. The draft on the Toronto broker not having been paid, and the price of oats having dropped, the defendants, without giving any written notice or otherwise complying with s. 89 of the Bank Act, sold the oats for 36½ cents a bushel. Shortly afterwards the price rose. At the end of the month in which the sale was made, the plaintiff signed the usual customer's receipt, whereby he released the bank from all claims in connection with the charges and credits in the accounts and dealings up to the end of the month:—*Held*, that the release was valid and given for a good consideration, and was sufficient to bar the plaintiff's action for an account in respect of the oats. *Graves* v. *Home Bank* (1910), 14 W. L. R. 291.

Security for debt—*Transfer of business —Operation by bank—Assignment of lease— R. S. C. (1906) c. 29, s. 76, s.-s. 1 (d) and 2 (a), s. 81.*]—A bank entered into an agreement with a company heavily in its debt carrying on a milling business, which agreement provided that the company should pay the bank $10,000 and surrender all its assets including an assignment of the lease of its business premises and that the bank should assume payment of its debts and release it from all further liabilities. By a subsequent agreement it was provided that the business of the company should be carried on as before with a view to reducing the debt due to the bank and disposing of it as a going concern as soon as possible, the bank to indemnify against any liabilities incurred while it was so carried on. No assignment of the lease of the business premises to the bank was executed and the lessors having brought action against the company for rent due thereunder, the bank was brought in as a third party by the company claiming indemnity against payment of such rent under said agreements:—*Held*, affirming the judgment of the Court of Appeal (17 Ont. App. R. 145), Duff and Anglin, JJ., dissenting, that the bank should indemnify the company against such payment, the agreements to take an assignment of the lease and to carry on the business as a going concern not being illegal as a violation of provisions of "The Bank Act."—Appeal dismissed with costs, *Ontario Bank* v. *McAllister* (1910), 30 C. L. T. 688, 43 S. C. R. 338.

Security on goods—*Sale by assignor— Bank's right to proceeds—53 V., c. 31, s. 74 (D.).*]—C., obtaining advances from a bank to enable him to pay for goods to be used in manufacture, assigned such goods to the bank under s. 74 of the Bank Act, 1890. A cargo having arrived, when the bank notified C. that further advances would be refused, he induced the manager, by promise of customers' paper as collateral, to give him the sum necessary to pay for it, and immediately after went to S., who had indorsed for him and was liable on a note for $2,800, and gave him a statement of his affairs and agreed to hand him the notes he would receive on selling the goods, which he did, and S. collected the notes. The bank sued S. for the amount so collected:— *Held*, that S. had knowledge, or it would in law be imputed to him, of the bank's claim, and they could recover. *Union Bank of Halifax* v. *Spinney*, 27 C. L. T. 236, 38 S. C. R. 187.

Subscription for bank shares—*Condition—Oral promise of agent—Bank Act, ss. 37, 38—Powers of directors—Times of payment.*]—Defendant subscribed in writing for stock in plaintiff bank on strength that plaintiff would open a branch at S. This plaintiff did, but discontinued it in a few months from lack of business. Defendant sought to set up verbal promise by the agent who took his subscription that the branch would be maintained at S., but in this was unsuccessful. The stock was to be paid for in monthly instalments of $10 per share, commencing 30 days after allotment, and continuing at intervals of 30 days till paid:—*Held*, such an arrangement not *ultra vires* under above sections. *Farmers Bank* v. *Blow*, 13 O. W. R. 1041, 18 O. L. R. 530.

Taking security for past debt—*Transfer of goods—Agreement—Title—Purchaser—Execution against debtor.*]—B., being indebted to a bank, gave them a document purporting to be a warehouse receipt, and also a general transfer or bill of sale. The bank took possession of a portion of the goods covered by the documents and removed them, and was proceeding with the removal of others of the goods, when the removal was forbidden by one of B.'s clerks. Two actions of replevin, brought by the bank to recover possession of the remainder of the goods, were compromised by B., who agreed that the bank should take the goods and sell them, and credit him with the amount received:—*Held*, that, notwithstanding any irregularities under the Banking Act, the title of the bank was complete under the compromise made between the bank and B., and that the plaintiff, who purchased a portion of the goods from the bank, was entitled to recover against the defendant sheriff, who levied on the goods under an execution against B.:—*Held*, also, assuming it to be correct that the security on the goods held by the bank was void under the provisions of the Act, not being for a present advance, but for a past due debt, and that the bank were not entitled to hold such security against the creditors of B., that the bank were not obliged to rest their title on the document, and that its defects, if any, would not affect the subsequent transaction by which the bank became the actual purchasers of the goods and dealt with them as their property. *Armstrong* v. *Buchanan*, 35 N. S. Reps. 559.

Trust — *Hypothecation of securities — Terms of pledge — Duty of pledgee.*] — B. sold property to the Syndicat Lyonnais du Klondyke, and took, as security for the price, mortgages on real and personal property and a promissory note, and transferred the securities to the bank to secure his present and future indebtedness to the bank. He signed a document authorising the bank to realise on the same in their discretion, to grant extensions and give up securities, accept compositions, grant releases and discharges, and otherwise deal with them as they might see fit without prejudice to B.'s liability. The note not being paid at maturity, the bank sued the Syndicat and B. upon it, and on the covenants in the mortgages, and obtained judgment against both. In the same action, the Syndicat, on counterclaim for damages for deceit, had judgment against B., which was eventually set aside, but, while it existed, the bank made a settlement with the Syndicat and discharged the latter from all liability on the judgment of the bank, on payment of over $20,000 less than the debt. B. was not a party to this settlement, and the bank afterwards refused to give him a statement of his account with the bank. In an action by B. for an account and to have the bank enjoined from further dealings with the securities:—*Held*, that the power given to the bank to deal with securities was to be exercised for the purpose of liquidating B.'s debt, and, as to the surplus, for B.'s benefit; that, the settlement having been made solely of B.'s interests, the bank violated their duty, and had not satisfied the onus of shewing that, had the whole amount of the judgment been recovered from the Syndicat, B. would not have benefited thereby. Judgments in *Barrette* v. *Canadian Bank of Commerce*, 7 W. L. R. 659, 8 W. L. R. 927, affirmed. *Canadian Bank of Commerce* v. *Barrette*, 41 S. C. R. 561.

Warehouse receipts — Assignment to bank—Promissory note — "Negotiation" — Bank Act, ss. 86, 90—Company—Formation of joint stock company—Continuance of business of unincorporated company, under same name—Title to goods warehoused—"Written promise" — Parties—Company in liquidation —Liquidator — Costs. *Toronto Cream and Butter Co.* v. *Crown Bank of Canada*, 10 O. W. R. 363.

Winding-up of bank—*Contributory—Institute.*]—One who holds bank shares as institute may be held liable as a contributory when the bank is put into liquidation. *Ville Marie Bank* v. *Kent*, 4 Q. P. R. 429.

Winding-up of bank—*Liquidator— Action on promissory note—Amendment—Intervention—Costs.*]—The liquidator of a bank in liquidation has no status to sue one of the debtors of the bank upon a promissory note which fell due before the winding-up order, but the action must be brought in the name of the bank. 2. The liquidator cannot, by way of amendment, add the bank as a party in an action which he has begun in his own name. 3. An intervention is not a separate and distinct demand, but is grafted upon the principal action, and must fall with it when that action is void *ab initio*. 4. In this case the intervention having been useless because founded upon grounds already set up by the plaintiff, the Superior Court was right in dismissing it with costs. Judgment in Q. R. 19 S. C. affirmed. *Kent* v. *Bastein*, Q. R. 12 K. B. 120.

Winding-up of banking company — Creditor's claim — Notarial charges on dishonoured cheques. *Re Central Bank of Canada, Grand Trunk R. W. Co.'s Claim*, 6 O. W. R. 372, 373.

See Bankruptcy and Insolvency—Bills and Notes—Company — Contract—Guaranty—Husband and Wife — Insurance—Interest—Landlord and Tenant—Money Lent — Receiver — Revenue — Sale of Goods.

BAR COUNCIL.

See Prohibition.

BAR OF ACTION.

See PEREMPTION.

BAR OF DOWER.

See DOWER.

BARRATRY.

See COSTS.

BARRISTER.

See LAW SOCIETY—LOCAL JUDGES AND MASTERS—SOLICITOR.

BARBERS' ASSOCIATION.

Act of incorporation—*By-law—Annual Dues—Liability for—Penalty — Alternative Remedy.*] — The defendant took a license as barber pursuant to the terms of the Act of incorporation of the plaintiffs (62 V. c. 90), and paid his annual dues until 1903; but, since then, refused to pay them, contending first, that he was no longer a member of the association, and secondly, that if he was a member, he could only be sued for the penalty of $10 imposed by the by-laws for their infraction:—*Held*, that he who takes a license as barber, becomes a member of the association and cannot, at his pleasure, withdraw from the obligations imposed on him by the association by virtue of the Act, and that the adoption of a by-law imposing a penalty is only an additional means of enforcing payment by those in default. In the present case the plaintiff association had the alternative of suing to recover the amount of the fee according to art. 13 of the charter, or of claiming the penalty by virtue of the by-law. *Barbers' Association of the Province of Quebec* v. *Gagné*, Q. R. 27 S. C. 47.

BARGAIN AND SALE.

See DEED.

BASTARD.

Filiation — *Paternity* — "*Preuve Testimoniale*" — "*Faits Constants*"—*Admissions by putative father — Denial of allegation of mother—Preponderance of evidence.*]—In an inquiry as to the paternity of a natural child, "*la preuve testimoniale complémentaire*" will be admitted, if, in his answers, the defendant, when he is examined as to the facts and circumstances or as a witness, admits facts which raise presumptions or point with sufficient force to render probable the allegation that he has had carnal intercourse with the mother of the child and that he is its father; and in case the facts admitted by the defendant constituted a set or continued succession of circumstances, which, taken altogether, give birth to a very strong suspicion that the defendant had carnal relations with the mother of the child at the date of its conception, and continuing until nearly up to the time of its birth. The facts thus admitted become, from that moment, "*faits constants*" satisfying the requirements of art. 232 of the Civil Code, and sufficient for the admission of "*preuve testimoniale complémentaire*" of the paternity of the defendant. Whether the facts admitted are such or not is a question of fact to be decided by the Court (Demolombe, t. 5, No. 235). Articles 241, 232, 233, and 234 of the Civil Code, which change the method of proof in force up to the time the code came into force, in the matter of proof of paternity, have not made any change in what up to that time was considered as raising presumptions or grave suspicions of a nature to make it probable that sexual relations existed between the mother and supposed father of the child, and consequently of the paternity attributed to the defendant. Despite the fact that the only "*preuve complémentaire*" adduced may be that furnished by the evidence of the mother, plaintiff in the case, *équalité de tutrice* to her child, who swears positively that the defendant is the father of her child, notwithstanding that the defendant on his side swears with no less assurance that he has never had sexual intercourse with the plaintiff, yet the undisputed fact of the birth of the child added to the admissions of the defendant when heard as a witness, give to the plaintiff's evidence a sufficiently preponderating force to justify the judgment in favour of the latter. In the absence of evidence contradicting that of the plaintiff, proof of the identity of the child of which she is the mother and whose fatherhood she attributes to the defendant, established by the testimony of the mother alone, is sufficient, and this notwithstanding the fact that in the certificate of baptism, the child is represented as being of unknown parents (*"ne de parents inconnus"*). *Rattigan* v. *Robillard*, Q. R. 26 S. C. 222.

Order of affiliation — *Corroborative evidence of mother of child.*]—An appeal by the reputed father from an order of affiliation made by a magistrate was dismissed. There is no rule of law requiring the evidence of the mother to be corroborated. It is a matter of practical expediency and good sense that one should adopt the mother's evidence guardedly. *Overseers* v. *McGillivray*, 7 E. L. R. 121.

Proof of paternity — *Commencement of proof in writing—Deposition of mother—Admission of father—Presumption.*]—A deposition on oath before a justice of the peace by the mother of an illegitimate child cannot serve as the commencement of proof in writing, according to the terms of art. 233, C. C., in an action for the declaration of paternity subsequently begun by the child's tutor, although such deposition has been made part of the record without objection from the opposite part. 2. However, it matters little whether the existence of "the facts thence appearing," which may, in such an action, authorize proof by witnesses (art. 232, C. C.), be demonstrated before or during the *enquête;* it is enough that such facts be established and proved before the oral evidence is admitted. 3. When, in such an action, the defendant admits carnal relations with the

child's mother, but at a date outside (though very near) the period fixed by art. 227, C. C. as that of the longest gestation, such avowal of the defendant constitutes a presumption and an indication resulting from "facts thence appearing," and weighty enough to determine the admission of proof by witnesses; and then, if it appears that the mother had not had relations with other men about the time of conception, the Court will give credit to her declaration under oath that the defendant is the father of her child, especially if such declaration is supported by circumstances and evidence supporting it. *McAulay* v. *McLennan*, Q. R. 20 S. C. 265.

See INFANT—SEDUCTION.

BAWDY-HOUSE.

See CRIMINAL LAW.

BEER HOUSE—BEER SHOP.

See INTOXICATING LIQUORS.

BEES.

See ANIMALS.

BEHRING SEA AWARD ACT.

See SHIP.

BENEFICE D'INVENTAIRE.

Motion — *Dilatory exception.*]—A defendant cannot by motion obtain time to plead for the purpose of setting up non-liability to debts beyond assets descended, such having to be secured by means of a dilatory exception, subject to certain delays and formalities. *Bell* v. *Garceau*, 2 Q. P. R. 407.

BENEFIT CERTIFICATE.

See INSURANCE.

BENEFIT INSURANCE.

See INSURANCE.

BENEFIT SOCIETY.

LIFE INSURANCE IN—*See* INSURANCE.
SICK BENEFITS OF—*See* INSURANCE.

BEQUEST.

See WILL.

BETTING HOUSE.

See CRIMINAL LAW.

BIAS.

See INTOXICATING LIQUORS—TRIAL.

BICYCLE.

See NEGLIGENCE.

BIGAMY.

See CRIMINAL LAW—MARRIAGE.

BILL OF COMPLAINT.

See PLEADING.

BILL OF COSTS.

See COSTS—SOLICITOR—STATUTES.

BILL OF LADING.

See RAILWAY—SALE OF GOODS.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. BILLS OF EXCHANGE, 446.
2. CHEQUES, 450.
3. PROMISSORY NOTES, 459.
4. DEPOSIT RECEIPT, 515.
5. EXPRESS MONEY ORDERS. (*No cases.*)
6. POST OFFICE ORDERS. (*No cases.*)

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1. BILLS OF EXCHANGE.

Acceptance—*Account stated—Mistake—Opening account—Pleading—Amendment.*]—Acceptance of a bill of exchange is evidence of an account stated to the amount of the bill. In order to open a second account it is necessary to particularize specific errors in the account. In an action by the drawer of bills of exchange against the acceptor, the defendant pleaded generally that he accepted the bills under a mistake as to the state of the account. This defence was struck out, with leave to the defendant to amend on

terms of filing an affidavit verifying the facts to be set out in the proposed amended defence. The proposed amended defence alleged that when the defendant accepted the bills he did so under the mistaken idea that he was indebted to the plaintiff in the amount thereof; that such mistaken belief was occasioned by the plaintiff having represented to him, by statements of account in writing and by drawing the bills, that he justly owed the plaintiff that amount, whereas, in fact, he was not indebted to him in any amount; that the defendant had dealt extensively with the plaintiff for over six years; that in course of such dealings plaintiff had, without defendant's knowledge or consent, made many exorbitant and illegal charges, and that if accounts were taken it would be found that the defendant was not indebted to the plaintiff in any amount. This proposed defence and a counterclaim based on the same allegations, for an account, were held bad; and were not allowed to be filed, and there being, therefore, no defence on file, judgment was given for the plaintiff. *Clark* v. *Hamilton*, 5 Terr. L. R. 178.

Accommodation acceptor — *Release—Payment by drawer.*]—The plaintiff agreed to sell certain cattle to M., on condition that M. would procure some one to accept a draft for the price. The defendant, at the request of M., accepted a draft for the amount, and a second draft given in renewal of the first, and agreed to accept a third draft in renewal of the second, but afterwards refused to do so at the instance of M., who, in the meantime, had become insolvent. The plaintiff furnished all the money used to retire the second draft with the exception of $10 paid by M.:—*Held*, that the defendant was not relieved from his liability on the second acceptance by the payment made by the plaintiff, and that the plaintiff was entitled to judgment for the amount of the acceptance, less the $10 paid by M.:—*Held*, that the case was distinguishable from one where the acceptor accepts for the accommodation of the drawer, who takes up the bill at maturity and negotiates it to someone who sues the acceptor. *Dill* v. *Wheatley*, 34 N. S. Reps. 526.

Acceptance—*Condition—Notice to holder of bill—Equity affecting negotiability.*]—Action on a bill of exchange:—*Held*, that plaintiff cannot recover as he took the bill with notice of an equity attaching, namely, that if 5 cars were not shipped promptly the bill was to be altered to read "30 days from date of shipment." The acceptance was, therefore, conditional. *Goldstein* v. *Gillis*, 10 W. L. R. 109.

Act of commerce — *Joint and several judgment.*]—A person who signs a negotiable instrument, although not a trader, does an act of commerce, and, if he has contracted along with others, may have a judgment given against him jointly and severally with them. *Gauthier* v. *Drouin*, 5 Que. P. R. 63.

Action for money demand—*Plea of bill of exchange—Reply that bill not paid—Necessity for deposit of bill.*]—Where the defendant pleads that the plaintiff has drawn upon him a bill of exchange for the amount of the claim, the plaintiff may rely that the bill is overdue and unpaid, and this without depositing the bill in Court; the neglect to deposit will only affect the costs. *McKee* v. *Falardeau*, 5 Que. P. R. 159.

Action by transferee — *Previous action by drawer — Notice — Stay of proceedings—Offer to suffer judgment.*]—Action by transferee of overdue bill, upon which an action has been already brought by transferor, wherein offer to suffer judgment has been made and accepted, was stayed on application to the equitable jurisdiction of the Court, transferee having knowledge of the pendency of first action.—An application to compel plaintiffs to sign judgment on their acceptance of defendant's offer to suffer judgment in first action was refused. *Kennedy Co.* v. *Vaughan, Standard Bank of Can.* v. *Vaughan* (1906), 37 N. B. R. 112.

Action on—*Accepted for accommodation—Evidence as to—Jurisdiction of Co. C.—Removal of action into H. C. J. by consent of counsel—Costs on Co. C. scale.*]—Plaintiff brought action to recover $525, being the amount paid by plaintiff on a draft drawn on him by defendant and accepted by him and for costs, which plaintiff alleged was for accommodation to defendant and not because of any indebtedness of plaintiff to defendant. At the trial the Co. C. J. for Carleton Co. gave plaintiff judgment for $500 with interest and costs. Defendant appealed to Divisional Court. The Court being of opinion that the Court appealed from had no jurisdiction to entertain the plaintiff's claim, by consent of counsel the action was transferred to the High Court, and the appeal treated as if the County Judge who tried the action had done so at the request of and for a Judge of the High Court:—*Held*, that plaintiff had failed to establish his case. Judgment appealed from vacated and judgment entered for defendant dismissing the action with costs on Co. C. scale. *Farrow* v. *McPherson* (1910), 16 O. W. R. 1009, 2 O. W. N. 70.

Action on bills—Limitation of actions—Remedy barred by King's Bench Act, s. 38 (m)—Goods retaken — Contract—Interest—Application of payments—Statute-barred debt—Claim under lien—Costs—Apportionment—Divided success. *Carswell Co.* v. *Hagel*, 9 W. L. R. 462.

Advance on bill—To whom made—Collateral security. *Davies* v. *Friedman*, 2 O. W. R. 220.

Delay in presenting for acceptance.]—Special jury found it had been the custom in Newfoundland in 1817 to retain bills of exchange for an indefinite period without prejudice to holder's right to have recourse to the endorsers and drawers, in event of their non-acceptance by drawee. *Mecham* v. *Brine* (1817), Wakeham's Nfld. Ca. 6.

Discount by mortgage company—*Ultra vires*—Breach of trust—Dishonour of bill — Action against persons negotiating—Duty to return trust funds:—*Canada Permanent Mortgage Corporation* v. *Briggs* (1906), 7 O. W. R. 443.

Forged indorsement of payee — Deposit with bank by customer for collection—Indorsement by customer — Payment by

drawee bank — Refund when forgery discovered—Liability of customer—Bills of Exchange Act—Evidence—Depositions of co-defendant on examination for discovery. *Bank of Ottawa* v. *Harty*, 6 O. W. R. 925.

Law of France—*Contract—Creditor and debtor—Indemnity.*]—By the laws of France, a bill of exchange operates as a real contract between the drawer and drawee, and this contract is of the nature of *mandate mandatum solvendæ pecuniæ* which takes place, and is contracted, by the acceptance of the bill by the drawee. See Pothier, Contrat de Change, pt. 1, c. 4, act. 3, No. 91, 92, 97. Where, therefore, a party became surety, upon an agreement for securing certain advances, by future consignments of West India produce, and after such advances, but before any consignments, the party having contracted to make the same accepted bills to the amount of the advances:—*Held*, that inasmuch as such acceptances operated as a *pro tempore* payment of the sums advanced under the agreement, the surety was discharged. Where two courts below have concurred on a matter of fact, as on a matter of foreign law, the Privy Council would require a very strong case of mischief to reverse them. Judgments of the Court of Appeals for Lower Canada and of the Court of King's Bench for Quebec affirmed. *Bellingham* v. *Freer* (1837), C. R. 1 A. C. 95.

Limitation of actions—*Loan to railway company through general manager—Payment of interest—Estoppel.*]—In 1893 E. N., one plaintiff, and mother of her co-plaintiff, at request of F., her brother, who was chief executive officer of defendants' railway, and had management of their financial matters, lent the company $4,600, giving him her cheque therefor, payable to his order, which he endorsed over to company, and it was applied to their purposes, but, through some error in bookkeeping, F. was credited with the loan on the company's books. E. N. received as security for the loan a bill of exchange, drawn, according to company's usual custom, by F., payable to himself, and accepted, under F.'s instructions, by company's secretary, which F. endorsed over to E. N. The bill was renewed from time to time, interest being paid by company's cheques, drawn payable to F., and endorsed over to E. N., until 1895, when she, having transferred the bill to her co-plaintiff, the interest thereafter was paid to him. On 31st March, 1899, the amount standing to F.'s credit in company's books, including this loan, was transferred to a firm, of which F. was a member, without the knowledge of plaintiffs. Interest thereafter was paid in same manner as before, but in reality it was paid by F. personally, of which plaintiffs were not aware. Payment of interest continued until 1900. In an action brought in 1905:—*Held*, that plaintiffs were entitled to recover; the debt was from its inception, and continued to be, that of the company, and not of F., and the company were estopped from contending that payments of interest were not made by them, and that such payments prevented Statute of Limitations from running against plaintiffs.—The principle of the decision in *Re Tucker, Tucker* v. *Tucker*, [1894] 3 Ch. 429, applied. *Nickle* v. *Kingston and Pembroke Ry. Co.* (1906), 12 O. L. R. 349, 8 O. W. R. 158.

Lost bill of exchange—*Security to be provided for the payment of—Solvency of the guarantor with regard to his movables—Production of titles—Proof of exemption from charges, liens, etc.—Solvency estimated with regard to movables.*] — The security to be given for the payment of a lost bill of exchange provided for in s. 157, c. 119, R. S. C., 1906, the guarantor who shews his solvency as to his movables is not bound to produce the title nor proof, by the certificate of the registrar that they are free from all charges, liens, etc. This security being in a matter of commerce, the solvency of the guarantor may be judged by his movable goods. *Pittsburg Steel Co.* v. *Leprohon* (1909), 18 Que. K. B. 542, 16 R. de J. 64.

Return of bill to drawer by payee—Indorsement by payee not essential. *N. S. Carriage Co.* v. *Lockhart*, 1 E. L. R. 76.

Signature and delivery of blank bill—*Liability to holder—Amount filled in—Subsequent holder in due course.*]—A party who signs and delivers a blank paper in order that it may be converted into a bill, on a certain condition, is liable for the amount of the bill into which the paper is converted, to the holder, in whose presence the conversion or filling in takes place, and, *a fortiori*, to a subsequent holder in due course. *Bacon* v. *Decarie*, Q. R. 34 S. C. 103, 4 E. L. R. 563.

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2. CHEQUES.

Action on — *Pleading—Presentment and protest.*]—In an action on a cheque payable to order, brought by the indorsee, it is not necessary to allege that the cheque had been presented for payment within a reasonable time at the bank where it was payable, and that payment had been refused, and that the cheque had been protested for non-payment. *DeScenes* v. *Enard*, Q. R. 17 S. C. 199.

Action on dishonoured cheque—Illegal consideration — Agent's commission on sale of land—Real estate agent—Municipal by-law requiring license—Revenue by-law—Recovery of commission notwithstanding want of license — Settlement — Estoppel. *Horner* v. *Stevenson*, 7 W. L. R. 794.

Ambiguity as to amount—*Bearer of cheque—Responsibility — Rights of indorsers—Mistake — Settlement — Remedy.*] — A cheque drawn thus, "Pay V. N. or bearer $2.50, two fifty /100 dollars," signed "E. N." is not an order to pay $250. The bearer of the cheque who accepts $2.50 only is not at fault, and incurs no responsibility to the indorsers. The contention that before presenting it he had accepted it from a debtor for the larger of the two sums, which the debtor had himself received from the indorser, cannot be upheld. An acknowledgment by the debtor that the bearer had made a mistake, followed by a settlement between them, takes away from the indorser the subsidiary recourse which he might have against the bearer in the name of the debtor by virtue of Art. 1031, C. C. *Nadeau* v. *Bank of Toronto*, Q. R. 32 S. C. 178.

Banks—Signature of drawer as agent—Requirements of signature to relieve drawer

of personal liability—Bills of Exchange Act, s. 52. *Royal Bank of Canada* v. *Douglas*, 4 E. L. R. 425.

Cheque payable to order—*Forged endorsement—Collection by third party through his bank—Payment over—Liability to refund—Principal and agent—Banks and banking.*] —Defendant McE., having a cheque on New York payable to his order, of which he claimed to be owner, endorsed and handed it to the defendant H. to collect and pay amount over to him. H., believing McE. to be owner and entitled to receive the money, handed it to plaintiffs to be collected, telling their manager that he saw McE. endorse it and that he knew him; but when the manager offered to cash it at once if H. would endorse it, he declined, stating he knew nothing of it, and it might not be paid. For purpose of collection H. signed his name as witness to the endorsement, writing beneath his signature "without any recourse to me whatever." Plaintiffs collected the money and credited proceeds to H., who accounted for them to McE. The New York bank subsequently demanded the money back, alleging McE.'s endorsement to be a forgery, and plaintiff paid back amount received and brought action against H. and McE.:—*Held*, that H., having acted honestly, was not liable for deceit; but the facts constituted a contract of warranty by him that he was entitled, as agent for the rightful owner of the cheque, to request plaintiffs to collect it and pay proceeds to him as such agent when collected, and if the endorsement was forged, he was liable to repay the amount. *Collen* v. *Wright*, 8 E. & B. 647, followed. *Bank of Ottawa* v. *Harty* (1906), 12 O. L. R. 218, 6 O. W. R. 925, 7 O. W. R. 869.

Consideration — *Part payment under unenforceable contract—Statute of Frauds.*] —A definite oral bargain (good except for the Statute of Frauds) for the sale by the plaintiff to the defendant of an ascertainable and definite parcel of land is a sufficient consideration for a cheque drawn by the defendant upon a bank in favour of the plaintiff for a part of the purchase money; and, the cheque being dishonoured, the plaintiff was held entitled to recover the amount thereof from the defendant, the latter not being in possession, and the plaintiff not having made or tendered a conveyance, but being able and willing to perform his contract. Judgment of the 4th Division Court in the county of Waterloo reversed. *Kinzie* v. *Harper*, 15 O. L. R. 582, 11 O. W. R. 408.

Countermanding payment — *Innocent holder for value without notice—Rights of subsequent holder with notice — Holder in due course.*] — The defendant R., having given his cheque for $491.25 to the defendant D., the latter indorsed it to the defendant DeG., who deposited it to her credit in a savings bank, which in its turn accepted it and paid $450 to her, and credited her deposit with the balance. But payment had been countermanded by the maker the day after signing the cheque; and, as a consequence, when, in the ordinary course of business of the bank, and without unreasonable delay, the cheque was presented at the bank on which it was drawn, payment was refused, plaintiff, the teller who had received this cheque on deposit without its being marked "accepted," contrary to the rules, was held liable for the amount by the savings bank, but the latter handed over the cheque to him, thus subrogating him to its rights with a view to his having recourse against the parties. To this action the makers and the indorsers pleaded that the plaintiff was not a holder in due course, since he became a holder after refusal of payment and after he had notice of it:—*Held*, that the indorsers could not raise the question whether he was a holder in due course or not, the cheque not being tainted with any illegality. (2) That DeG. was a holder in due course, since she had become a holder before the cheque could have been presented for payment; and, as a consequence, the savings bank and the plaintiff taking title through her possessed all the rights of a holder in due course against the maker and indorsers. (3) That the maker and prior indorsers must pay the whole amount of the cheque to have a right to it and to be discharged from it; although the savings bank had retained the balance of DeG.'s deposit, that was a personal matter between them. *Gauthier* v. *Reinhardt*, Q. R. 26 S. C. 134.

Conversion—*Forgery—Findings of trial Judge on conflicting evidence — Joint tort-feasors — Banks.*]—Action to recover $800 for alleged conversion of cheque drawn by H. upon defendants, the Imperial Bank, payable to order of plaintiff by the name of "Mrs. B. Cohen," plaintiff on the date of the cheque being the widow of B. Cohen. She claimed the cheque was stolen from her, and that the endorsement, "B. Cohen," was a forgery. The trial Judge gave judgment for plaintiff. An appeal was dismissed as to defendants the Crown Bank, but allowed as to the Imperial Bank, the latter not being a joint tort-feasor. *Meyers* v. *Crown Bank*, 13 O. W. R. 533.

Crediting customer with amount of cheque — *Negotiation—Holder for value—Dishonour of cheque — Honouring subsequent cheques—Bills of Exchange Act, ss. 22, 54, 56, 58, 70, 74, 165.*]—The account of M. at the plaintiffs' bank was $409.53 overdrawn. On May 23rd he posted to the plaintiffs from Chicago a cheque of W. & Co. for $1,000, dated May 16th, with instructions to place the amount to his credit, which the plaintiffs did on receipt on May 26th, thus leaving a credit balance in M's favour of $590.47. On the same day the plaintiffs sent this cheque for collection to the clearing house, but it was returned dishonoured on May 27th. W. & Co. having stopped payment on May 23rd. On May 28th certain cheques drawn by M. on his account came in, which the plaintiffs paid and charged up. The plaintiffs again twice sent the $1,000 cheque to the clearing house, but it was on each occasion returned unpaid, the plaintiffs on each occasion crediting and debiting M.'s account with the $1,000. The plaintiffs now sued W. & Co. on the $1,000 cheque. It was admitted that M. had not given consideration for it, and that, if he were holder, he could not recover on it:—*Held*, that the plaintiffs, by crediting M.'s account with $1,000 on receipt of the cheque sued on, became holders for value of the latter. The position of the plaintiffs, with reference to the cheque sued on, became fixed when the latter was negotiated to them, and nothing which took place subse-

quently altered the plaintiffs' position, except that by the dishonour of the cheque and notice to M. his liability in respect to it became absolute, having previously been only conditional:—*Held*, also, that the interval between May 16th, the date of the cheque, and May 23rd, the date of its being mailed to the plaintiffs, was not, in the circumstances, sufficient to give the cheque the character of an overdue bill, so as to make it, under s. 70 of the Bills of Exchange Act, R. S. C. 1906, c. 119, subject in the plaintiffs' hands to any defect of title affecting it:—*Held*, also, that s. 22 of the Bills of Exchange Act applies to cheques. Judgment of Mulock, C.J.Ex.D. (1908), 12 O. W. R. 1157, varied. *Bank of British North America* v. *Warren* (1909), 14 O. W. R. 325, 19 O. L. R. 257.

Crown—*Forgeries by clerk in Government department—Payment by bank—Negligence—Liability to customer—Estoppel—Deposit of cheques in other banks—Liability over—Mistake.*]—A clerk in a department of the Government of Canada, whose duty was to examine and check its accounts with the Bank of Montreal, forged departmental cheques and deposited them to his credit in other banks. The forgeries were not discovered until some months after these cheques had been paid by the drawees to the several other banks, on presentation, and charged against the Receiver-General on the account of the department with the Bank of Montreal. None of the cheques were marked with the drawees' acceptance before payment. In the meantime, the accountant of the department, being deceived by false returns of checking by the clerk, acknowledged the correctness of the statements of the account as furnished by the bank where it was kept. In an action by the Crown to recover the amount so paid upon the forged cheques and charged against the Receiver-General:—*Held*, affirming the judgment appealed from, *Rex* v. *Bank of Montreal*, 11 O. L. R. 595, 7 O. W. R. 638, that the Bank of Montreal were liable unless the Crown was estopped from setting up the forgery.—*Per* Davies, Idington, and Duff, JJ., that estoppel could not be invoked against the Crown.—*Per* Girouard and Maclennan, JJ., that apart from the question of the Crown being subject to estoppel, under the circumstances of this case a private person would not have been estopped had his name been forged as drawer of the cheques.—*Per* Davies and Idington, JJ., that the acknowledgment by the accountant of the department of the correctness of the statements furnished by the bank, being made under a mistake as to the facts, was subject to being re-opened to have the mistake rectified.—The defendants made claims against the other banks, as third parties, as indorsers or as having received money paid by mistake, for the reimbursement of the several amounts paid to them, respectively. On these third party issues, it was held *per* Girouard and Maclennan, JJ., that the drawees, having paid the cheques on which the name of their customer was forged, could not recover the amounts thereof from holders in due course. *Price* v. *Neal*, 4 Burr. 1355, followed. *Per* Davies and Idington, JJ., that, as the third party banks relied upon the representation that the cheques were genuine, which was to be implied from their payment on presentation, and subsequently paid out of the funds to their depositor, or on his order, the drawees were estopped and could not recover the amounts so paid from them either as indorsers or as for money paid to them under mistake.—In the result, the judgment appealed from was affirmed. *Bank of Montreal* v. *The King*, 27 C. L. T. 226, 38 S. C. R. 258.

Deposit for collection — Bankers by error collecting less than proper amount. *Nadeau* v. *Bank of Toronto*, 2 E. L. R. 529.

Dishonour — *Holder for value—Banker charging to customer.*]—L., having sent his cheque to D. in payment for a certain quantity of hay, stopped payment of it on account of the bad quality of the hay. D., upon receipt of the cheque, had indorsed and deposited it to his credit with G., and G. in turn had deposited the cheque in his bank, from which he was obliged to withdraw it shortly afterwards, upon the refusal of payment by the bank upon which it was drawn. G. then charged the cheque to the account of D.; but D. had no longer sufficient funds to cover it. G. began this action against L., the drawer of the cheque, claiming the amount of the cheque:—*Held*,, that G., having charged the cheque to the account of D. and having notified him of it, had ceased to be the owner of it, and had no right of action against L., the cheque having become again the property of D.; and the latter only could recover against L. *Garand* v. *Lamarre*, Q. R. 25 S. C. 380.

Dishonour—Holders in due course—Consideration — Banks and banking—Overdue bill—Delay in depositing—Reasonable delay—Bona fides—Security for customer's overdraft—Subsequent overdraft. *Bank of British North America* v. *Warren*, 12 O. W. R. 1157.

Evidence—*Cheque on a bank indorsed by payee—Proof of loan.*]—A cheque on a bank indorsed by the payee is not evidence of a loan to him by the drawer. Of itself and unexplained, it is a proof of a payment by the drawer to the payee. *Allaire* v. *King*, Q. R. 33 S. C. 343.

Forged cheques — *Crown—Forgeries by clerk in Government department—Payment by bank—Negligence—Pass-book—Duty of customer to check accounts—Settlement of accounts—Audit Act—Estoppel—Laches—Deposit of cheques in other banks—Liability over—Duty of knowing customer's signature—Alteration in position—Mistake—Liability as between two innocent parties—R. S. C. 1886 c. 29, s. 30.*]—A clerk of one of the departments of the Dominion Government forged several cheques upon the bank account kept by the department with the defendants, in the manner set out in the judgment, and deposited the forged cheques to his own credit with other banks (third parties). The cheques went through the clearing house, and were paid by the defendants. The forgeries were not discovered for some months; the clerk who executed them was the person intrusted with the duty of checking the bank account and examining the pass-book. In an action on behalf of the Crown to recover the amount of the forged cheques, which had been charged by the defendants against the department's accounts, the defendants contended that the right to recover was barred by the

omission or neglect by officers of the Government of duties which the ordinary customer owes to his bank:—*Held*, that, even if there had been a breach of duty or negligence or omission on the part of the plaintiff, it would not avail the defendant bank, for the Crown is not bound by estoppel nor responsible for the negligence or laches of its servants.—As to the claim against the third party banks, *per* Moss, C.J.O.:—Where in the ordinary course of dealing, there comes through one bank to another a cheque purporting to bear the signature of a customer of the latter, which accepts it, the implication is that it was so dealt with in reliance upon knowledge of the customer's signature, and not upon any supposed representation or warranty of its genuineness by the bank representing it.—*Per* Maclaren, J.A.:—The third party banks were justified in assuming that the defendant bank could best determine whether the signatures were genuine or not, and it was a fair inference that the defendant bank would know from bank usage that the third party banks would rely on such knowledge and take the fact of payment by the defendant bank as equivalent to a representation that the cheques were genuine, and would be likely to act upon it. The defendant bank might, therefore, properly be held liable on the ground of estoppel. The third party banks could not be held to have warranted the genuineness of the forged cheques merely by demanding payment of them without indorsing them; and having placed them to the credit of the forger before presenting them to the defendant bank for payment, they presented them as holders for value.—The effect of receipt from a bank of a pass-book and vouchers, and their retention without comment, by a customer, considered.—Judgment of Anglin, J., 5 O. W. R. 185, 10 O. L. R. 117, affirmed. *Rex* v. *Bank of Montreal*, 11 O. L. R. 595, 7 O. W. R. 638.

Forged indorsements—*Fraud of agent of insurance company—Payment by bank.*]—N. was the assistant superintendent of a life insurance company, as well as its local agent at one of its branches, having sole control of the business there. A number of applications sent in by him to the head office were, with the exception of some five, on the lives of fictitious persons, and, as to these five, the insurances had subsequently lapsed, of which fact the company were kept in ignorance. Afterwards N., representing that the insured were dead and the claims payable under the policies, sent into the head office claim papers, filling in the names of the fictitious claimants and forging their alleged signatures thereto, whereupon cheques for the respective amounts, made by the company in favour of the alleged claimants and payable at a branch of the defendants' bank, were sent to N., whose duty it was, on the receipt thereof, to see the payees and procure discharges from them. On receipt of these cheques the indorsements of the fictitious payees' names were forged, and the cheques presented to the bank and paid in good faith, the amounts thereof being charged to the company's account:—*Held*, that the company were affected by what had been done by N. so as to preclude them from disputing the right of the bank to pay the cheques and charge the plaintiffs with the amounts thereof. *London Life Ins. Co.* v. *Molsons Bank*, 23 Occ. N. 155, 5 O. L. R. 407, 1 O. W. R. 457, 2 O. W. R. 34, 3 O. W. R. 858.

Forgery—Banks and Banking—Deposit account—Fraud—Perjury—Burden of proof. *Futural* v. *Dominion Bank*, 4 E. L. R. 232.

Incorporated club—*Members' cheques payable to club—Authority of secretary to endorse.*] — Action to recover amount of cheques sent to former secretary of plaintiff, received by him as club moneys and cashed or deposited with the various defendants in fraud of the plaintiffs. Cheques received by the secretary were endorsed "The Toronto Club" or "Pay to the order of the Dominion Bank for the Toronto Club. —— Secretary:" —*Held*, that he had power to endorse in this way, and his acts were not between him and the club, conversions. Some of the cheques he cashed or handled so as to have the amounts deposited subject to his control:—*Held*, that the defendants are not liable as unaware of any breach of trust. Defendants are *bona fide* holders for value of properly endorsed cheques. *Toronto Club* v. *Dominion Bank*, *Toronto Club* v. *Imperial Bank*, *Toronto Club* v. *Imperial Trusts* (1909), 14 O. W. R. 261.

Marking by bank—*Fraudulent alteration—Money paid under mistake of fact—Negligence—Notice of dishonour — Reasonable delay.*]—A cheque for $5 certified by the respondent bank's stamp was fraudulently altered to $500 and paid by the respondent bank to the appellant bank, holders for value, under a mistake of fact, which was not discovered until the next day. In an action by the respondents to recover back $495 from the appellants:—*Held*, that the respondents were at liberty to prove, as between themselves and an innocent holder for value, that the cheque had been fraudulently altered after it had been certified. *Schofield* v. *Earl of Londesborough*, [1896] A. C. 514, followed.—2. No negligence was imputable to the respondents in cashing the cheque without examining the drawer's account; and, even if it were, it did not induce the appellants to treat the cheque as good. *Kelly* v. *Solari*, 9 M. & W. 54, approved. 3. Notice of forgery was unnecessary, and the cheque for $5 was not dishonoured; and, accordingly, the stringent rule laid down in *Cocks* v. *Masterman*, 9 B. & C. 902, 33 R. R. 365, to the effect that notice of dishonour of a bill of exchange must be given on the due date, did not apply. The rule will not be extended to other cases where notice of the mistake is given in reasonable time, and no loss has been occasioned by the delay. Judgment in 21 Occ. N. 400, 31 S. C. R. 344, affirmed. *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49.

Order on debtor—*Acceptance—Unincorporated body—Officers—Personal liability—Mechanics' liens—Drawback.*]—The plaintiff brought an action on the following document: "The Board of Managers, Presbyterian Church, Moose Jaw. Please pay H. McDougall the sum of $817.85 on my account and oblige me. James Brass:" which was accepted as follows: "Accepted. D. McLean, Chairman; A. E. Potter, Treasurer." It was found as a fact that McLean and Pot-

ter were members of the board, an unincorporated body:—*Held*, that the document was a bill of exchange; and, following *Owen* v. *Van Ulster*, 10 C. B. 318, that McLean and Potter were personally liable thereon. Brass was the contractor with the board for the erection of a manse. If the contract had been completed, $817.85 would have been owing to him; but the trial Judge found that it had been left uncompleted to the value of $80. This was allowed to be set off against the amount of the plaintiff's claim; and it was contended that the defendants were entitled further to retain 10 per cent. of the contract price for thirty days after the completion of the contract, under the provisions of the Mechanics' Lien Ordinance:—*Held*, that the defendants were not so entitled. *McDougall* v. *McLean*, 1 Terr. L. R. 450.

Payment refused — *Right of holder against drawee.*]—One R. gave the plaintiff in payment of a debt due, a cheque drawn on the defendant bank. Upon presentation payment of the cheque (which was not accepted) was refused, the clerk stating that, as it was for the balance of the sum to R.'s credit, his pass-book must be produced before payment. Within a few days R. became insolvent, and the plaintiff lost payment of his debt. The bank admitted that there were funds of R.'s to meet the cheque when presented, and it was not set up that production of the pass-book when the balance was withdrawn was a custom of the bankers:—*Held*, that the plaintiff had no right of action against the defendant for damages incurred by reason of their refusing to pay the unaccepted cheque. *Silverstone* v. *Bank of Hochelaga*, 21 Occ. N. 309. [But see *Marler* v. *Molsons Bank* (1872), 23 L. C. J. 293.]

Payable to order—*Liability of the bank on which it is drawn—Rights of bearer—Payment on an irregular endorsement—Handing funds back to bearer—Return in ordinary course of business and not specifying as the proceeds of the cheque.*]—A bank on which a cheque to order is drawn and which has accepted it, is bound to pay the amount of it to a legal bearer and is not permitted to set off against him a previous payment which it has made to a third party on an irregular and insufficient endorsement. Vainly it is replied that the latter has returned the funds to the bearer when he has only returned them for so much of a current account which he was owing and not specifically for the proceeds of the cheque. *C. P. R.* v. *Bank d'Hochelaga*, Q. R. 18 K. B. 237.

Procurement by misrepresentation.] —Action by endorsee on cheque. Action dismissed, plaintiff having given no value and knowing the defect in the title of him from whom he had received it. *Campbell* v. *National Construction Co.*, 12 W. L. R. 152.

Stamp Act, 1853, s. 19 (Imp.)—*Application to British Columbia—Bills of Exchange Act—Company — Cheques.*]— Section 19 of the Stamp Act, 1853 (Imperial), which exonerates bankers from liability if they pay on what purports to be an authorised indorsement, is inapplicable to British Columbia, and hence did not come into force by virtue of the English Law Act. Even if it were brought in force, it was annulled by the repugnant legislation of the Bills of Exchange Act, although not mentioned in the repealing schedule to the Act. The Canadian Bills of Exchange Act was intended to modify and alter as well as to codify the law relating to bills of exchange, cheques, and promissory notes. A local manager of an incorporated company, who was authorised only to indorse cheques for deposit with the Bank of British Columbia, indorsed and cashed at the Bank of Montreal cheques payable to the company drawn on the bank:—*Held*, that the Bank of Montreal were liable to the company for the amount of the cheques so cashed. *Hinton Electric Co.* v. *Bank of Montreal*, 23 Occ. N. 292, 9 B. C. R. 545.

Specific purpose — *Payment—Application to other purposes — Notice—Trust.*]— The appellants made a cheque for $400 payable to the order of the respondents, intending that it should be applied as a deposit on account of a purchase of material which they wished to obtain from the respondents through the intervention of A. They handed the cheque to A. for this special purpose, and the word "deposit" appeared on the face of the cheque. The respondents indorsed and used the cheque, and applied the amount on an old claim which they had against A. Another cheque of the appellants, for $100, made payable to the respondents or bearer, was treated in the same manner:—*Held*, that by using the cheque for $400 payable to their order, the respondents became accountable to the appellants for the amount; they became trustees of the makers of the cheque, with the usual liability attaching to such relationship. And the subsequent cheque, although payable to the respondents or bearer, being part of the same transaction, and being used after notice that it had been obtained by false representations, the respondents should also be accountable therefor. *Leipschitz* v. *Montreal Street Ry. Co.*, Q. R. 9 Q. B. 518.

Unauthorized acceptance by clerk in bank — *Liability of bank—Negligence—Estoppel — Payment of cheque stopped by drawer—Liability of drawer and endorser—Holder in due course—Overdue cheque—Unreasonable delay—Cheque cashed by another bank—Bills of Exchange Act.*]—Defendants Y. drew a cheque, dated 9th June, 1906, in favour of J. on defendant bank. On 15th June Y. stopped payment of the cheque. On 30th October following, R., a clerk in defendant bank, by misrepresentations, got possession of the cheque, and without authority of the defendant bank marked it accepted with the acceptance stamp of defendant bank, and on same day got plaintiffs to cash the cheque. On the following day he ceased to be an employee of defendant bank:—*Held*, that plaintiffs cannot succeed. *Northern* v. *Yuen*, 11 W. L. R. 698.

See BANKS AND BANKING—CHOSE IN ACTION, ASSIGNMENT OF — CONTRACT — PARTNERSHIP.

3. Promissory Notes.

Absence of consent of maker—*Mistake as to nature of instrument—Holder for value—Damages.*]—A promissory note being a contract, the consent of the parties to it is of its essence as in other contracts. If a person signs a note wishing to sign and believing that he is signing an order for goods, the note is completely void even in the hands of a holder for value given in good faith. *Quære*, whether, where one who has so signed a note has done so negligently, he can be sued for damages for *quasi-tort* by such holder. *Jacques Cartier Bank* v. *Lalonde*, Q. R. 20 S. C. 43.

Absence of consideration — *Evidence, admissibility of—New trial.*]—In an action upon two promissory notes for $3,000 and $4,000 respectively, the defendants set up want of consideration and that the plaintiff was not a *bona fide* holder for value. At the trial the defendants tendered evidence, which was refused, to shew that the notes were given merely as receipts for stock which had been delivered to defendants for sale as agents, that there was no consideration for the notes, and that the plaintiff, who was a clerk in the office of his solicitors, had given no value therefor; also that a written agreement for the transfer of the stock made between the payee of the note and another, and one of the defendants' firm, had never been acted upon, or had been abandoned:—*Held*, that whether or not evidence was admissible to shew that the notes were given as receipts, the defendants were entitled to give in evidence all the facts which would tend to establish want of consideration, and this having been denied them, a new trial was directed. *Clarke* v. *Union Stock Underwriting Co. of Peterborough*, 8 O. W. R. 757, 13 O. L. R. 102, 9 O. W. R. 486, 14 O. L. R. 198.

Acceleration — *Insolvency — Presentment and notice.*]—Where a promissory note becomes payable before maturity by reason of the insolvency of the maker and indorser, presentment and protest against the indorser are nevertheless necessary, and in the absence of protest he is discharged from his obligation. The provisions of the Bills of Exchange Act, respecting presentment, protest, and notice of protest, are applicable to a note becoming due by reason of the insolvency of the parties. *La Banque Nationale* v. *Martel*, Q. R. 17 S. C. 97.

Accommodation co-maker — *Knowledge of holder—Extension of time without notice—Right to notice of dishonour—Principal and surety—Failure of creditors to proceed promptly against principal debtor—Failure to give surety notice of default of principal debtor—Evidence of prejudice—Release—New trial.*]— In an action by the payee of a promissory note against the two joint makers, it appeared that the defendant D. signed as maker entirely for the accommodation of the defendant K., and without receiving any consideration therefor, and that the plaintiff knew at the time of taking the note that D. was an accommodation maker only. The plaintiff placed the note with his bankers as collateral security for his indebtedness to them, and the bankers indorsed upon it the words "extended for 9 months." D. was not notified of this extension. There was no evidence that the time was extended for K.'s benefit, either by the bankers or the plaintiff, or that K. was ever informed by either of them that he could have 9 months more in which to pay:—*Held*, that D. was not released by the extension of time without notice to him.—*Held*, also, that D., as an accommodation maker to the knowledge of the plaintiff, was not entitled under the law merchant or the Bills of Exchange Act to notice of dishonour.—The note fell due on the 20th October, 1907; the plaintiff took no proceedings against D. or K. until more than 14 months after that date; D. was never notified that the note had not been paid until the 6th October, 1908; at some time—the evidence did not shew when—K. made an assignment for the benefit of his creditors; the evidence did not shew whether the plaintiff proved his claim against the estate or not, or whether D. might not have done so and obtained some benefit if he had known that K. had not paid the note:—*Held*, that there should be a new trial so as to give D. an opportunity of proving that he was in some way prejudiced by the omission to notify him of K.'s default—the position being that the plaintiff, the creditor, had failed to proceed promptly against K., the principal debtor, and failed to give D., the surety, notice of K.'s default, and upon these facts, if damage were shewn, D. would be discharged from his liability.—*Kalmet* v. *Kaiser*, 13 W. L. R. 94, as to granting a new trial, distinguished.—Judgment of Noel, Co. C.J., reversed. *Hough* v. *Kennedy* (1910), 13 W. L. R. 674.

Accommodation endorsement — *Collateral security by mortgage.*]— Plaintiff, as assignee, brought action to recover $900 upon a promissory note made by Hannah Boehmer and A. O. Boehmer and endorsed by defendant, dated May 3rd, 1905, payable three months after date. The action was tried twice, through the evidence at first trial being vague, indefinite and unsatisfactory, and nearly, if not quite, as unsatisfactory on the second trial. At trial judgment was given plaintiff for $900 with interest and costs. The Divisional Court, 14 O. W. R. 549, reversed the trial Judge, holding that the note was an accommodation note, given to partly secure a debt from Boehmers to Erb for $25,000, and that such debt was paid by Erb to King. Plaintiff's appeal to the Court of Appeal allowed, and judgment of MacMahon, J., 13 O. W. R. 708, at trial restored. *Wade* v. *Livingston* (1910), 15 O. W. R. 224.

Accommodation endorsement — *Presumptions and oral testimony.*]— When a promissory note, payable to order and discounted by a bank, is taken up, at its maturity, by the payee without protest as against the endorser, and without demand or payment for a period of close on three years, there is thereby created a strong presumption in the maker's favour that the note was given without consideration and to accommodate the payee and proof by oral testimony of such facts is permissible. *Rousseau* v. *Nadeau*, 19 Que. K. B. 97.

Accommodation endorser—*Action for indemnity against maker—Condition precedent — Notice of dishonour.*]— The obligation of the endorser of a promissory note is a conditional obligation, the condition being that the note shall be protected and that notice of protest shall be given to him. Therefore, he has no right of action against the maker for indemnity in respect of his obligation, even after the note has fallen due, if it has not been protested and notice of protest given to him. *Trottier* v. *Rivard*, Q. R. 23 S. C. 526.

Accommodation endorsers — *Co-sureties—Contribution—Order of indorsements.*] —The plaintiffs and defendant were both accommodation endorsers of a promissory note. The plaintiff was the payee, but, when the instrument was given to him to endorse, the defendant's name was already on the back of it, and the plaintiff endorsed under the defendant's endorsement. Each testified that his liability was to be secondary to that of the other—not that they so agreed with each other, but that the maker so agreed with each of them respectively:— *Held*, that, being sureties for the one debt, the rule of equitable contribution applied, and the plaintiff, having paid the debt, was entitled to recover only half of it from the defendant. *Macdonald* v. *Whitfield*, 8 App. Cas. 733, discussed. *Steacy* v. *Stayner*, 24 Occ. N. 309, 7 O. L. R. 684, 3 O. W. R. 244, 557.

Accommodation endorser—Transfer to bank as collateral security for debt of maker of note — Transactions between bank and maker—Release of note—Payment—Action to recover amount paid—Fraud and misrepresentation—Statute of Limitations—Appeal—Costs. *Evans* v. *Bank of Hamilton*, 12 O. W. R. 791, 13 O. W. R. 374.

Accommodation endorser—*Waiver of notice of protest.*]—Action on a promissory note against the defendant Q. as endorser. The defendant pleaded that he was only a guarantor on the note, and had received none of the proceeds thereof, and that, as he had received no notice of protest, he was discharged from all liability. The evidence shewed that when the note fell due Q. had gone to the plaintiff, offered a renewal note, and had asked for time in which to pay:— *Held*, that this action on the part of Q. was a waiver of protest under the Bills of Exchange Act. *Smith* v. *Lang*, 22 Occ. N. 418.

Accommodation endorser.]— Wife indorsing for benefit of husband—Absence of independent advice—Notice to plaintiffs — Benefit for plaintiffs. *Bank of Montreal* v. *Scott*, 3 O. W. R. 523, 6 O. W. R. 411.

Accommodation maker — *Conditional delivery—Bank—Notice to agent.*]—In an action brought by the plaintiffs against the defendant M., as endorser of a promissory note made by S., and as joint and several maker with S. of two other promissory notes, the defence chiefly relied on was that the notes were signed by M., and delivered to the plaintiffs' agent under a special agreement, of which the plaintiffs had notice, that they were not to be used until they had been endorsed or signed by certain other parties as co-sureties. The evidence shewed that the defendant S. was largely indebted to the plaintiffs for advances made by the plaintiffs' agent, for which the plaintiffs were anxious to obtain collateral security, and that the notes were taken for that purpose, and not as ordinary discounts; also, that the signature of the defendant M. to the notes was obtained by the plaintiffs' agent, under instruction from the cashier of the bank; also, that, at the time the notes were signed, the plaintiffs' agent was told by M. not to take them unless the other signatures were obtained, and replied, "that is all right;" also, that the notes were signed in the defendant's office, and that no part of the transaction took place in the office of the bank:—*Held*, setting aside the findings of the jury, that the signature of M. was obtained in the course of the business of the agency, and within the scope of the agent's authority, and that his knowledge of the condition upon which the signatures were obtained must be held to be the knowledge of the bank.—*Held*, also, that if the agent, acting under the authority of the cashier, applied to the defendant M. to sign the notes, and, in order to induce him to do so, agreed to any condition, or did anything to lead M. to believe that they would not be used by the bank until another person had signed them, the bank would be bound, although the conduct of the agent was unauthorised, and knowledge thereof was concealed from their officers. *Commercial Bank of Windsor* v. *Smith*, 34 N. S. Reps. 426.

Accommodation maker — *Holder for value—Equities—Defects in title — Agreement for renewal—Parol evidence—Agreement—Signature—Amendment — Parties.*] —The trial Judge found that the promissory note sued on was made by the defendant for the accommodation of K., the payee, subject to the conditions that: (1) it was not to be used at all except in a certain stated event; (2) it was to be negotiated, if at all, only at a certain named bank; and (3) it was renewable for the stated period, which had not expired at the commencement of the action. He also found that the second and third of these conditions had been broken; that the plaintiff acquired the note, though for value, after maturity, from one C., the trustee for the benefit of the creditors of K., and not from a certain bank which, at the time of the arrangement whereby he acquired the note, actually held it as a collateral security for an indebtedness of K.:— *Held*, that these conditions were "equities attaching to the note," and their breach "defects in the title of the person who negotiated it;" that the note was affected by them in the hands of both C. and the plaintiff; and that therefore the plaintiff could not recover. The nature and effect of an accommodation note discussed. Where a note is subject to an agreement for renewal, if the renewal is not contemplated, except on the happening of an event not within the knowledge of the holder alone, the obligation of offering to renew is on the party entitled to renew. The necessity for such offer and the time within which it must be made discussed. In this case there was a continuing offer to renew, and a continuing refusal to accept a renewal.

The character of the evidence of notice of defects in title discussed. Where it is made to appear that a note, transfer, or other writing is merely an incident in or part of a larger agreement, and there is no writing in which the parties professed to set down all the terms of their agreement, oral evidence of the agreement is admissible. Signature is a conventional mode of declaring a writing to be the record of an agreement; but it is not essential, except where made so by statute. The fact that such a writing is directed to a third party does not prevent its being taken as the record of such an agreement. On the plaintiff's application an amendment was allowed adding the bank, with its consent, as a co-plaintiff, on the terms that the bank stand on the title of the plaintiff. *MacArthur* v. *MacDowall*, 1 Terr. L. R. 345.

Accommodation maker.]— Holder in due course—Discount — Finding of trial Judge—Credibility of witness—Appeal. *Molsons Bank* v. *Stearns*, 5 O. W. R. 479, 6 O. W. R. 667.

Accommodation maker—*Liability of —Payee pledged note to bank after maturity as collateral security—Right of bank to recover amount due bank by payee—Bank trustee for payee for balance of note—Bills of Exchange Act, ss. 54, 70.*]—Payee pledged a past due note to bank as collateral security to his indebtedness. Bank sued on note. Certain collateral matters arising between payee and maker of the note were pleaded as a defence.—Boyd, C., *held*, that the bank held the note for value so far as payee was indebted to the bank, and could recover to the extent of that amount under Bills of Exchange Act, ss. 54 and 70; that there were no equities attaching to the note; that bank was trustee for payee for balance of note. *Merchants Bank* v. *Thompson* (1910), 16 O. W. R. 770, 1 O. W. N. 1015.

Accommodation maker—*Renewal note obtained by fraud of principal maker — Right to sue on original note — Division Court—Power to amend—Evidence.*]— The defendant joined in making a promissory note, as the payees, the plaintiffs, knew, for the accommodation of his co-maker. When it became due, the latter brought a renewal note, purporting to be signed by the defendant, which the payees accepted, and gave up the original note stamped "paid." The primary debtor becoming insolvent and dying, and the plaintiffs failing to get payment of the renewal note out of his estate, they sued the defendant upon it, in a Divisional Court, where there was a trial by jury. The defendant swore he never signed the renewal note, but, nevertheless, there was a verdict for the plaintiffs. A new trial was then granted, resulting in a verdict for the defendant. A further new trial then being granted, the Judge at the trial allowed the plaintiffs to claim in the alternative upon the original note, as well as claiming upon the renewal note, and to amend their claim accordingly. The jury then returned a verdict for the plaintiffs on the original note. The defendant applied for a new trial, which was refused, and he then appealed to this Court: —*Held*, that the Division Court Judge had jurisdiction to amend the plaintiffs' claim as he had done, under Rule 4 of the Division Courts.—2. That the renewal note being a forgery, so far as the defendant's signature was concerned, and the plaintiffs, therefore, having been induced by the primary debtor's fraud to give him up the original note, the plaintiffs retained a right to recover in equity on the original note.—3. That a witness was entitled to refer to entries in the books of the primary debtor, made by him or under his direction, to refresh his memory. *Matthews* v. *Marsh*, 23 Occ. N. 154, 5 O. L. R. 540, 2 O. W. R. 247.

Accommodation maker — Subsequent endorser with notice paying holder — Summary judgment. *Lownds* v. *Clay*, 2 E. L. R. 287.

Accommodation maker—*Surety for co-maker—Knowledge of holders—Extension of time for payment to principal debtors—Covenant not to sue—Reservation of rights against surety.*]—Action on a promissory note made by defendant A., claiming to be surety for B. Plaintiff gave B. time to pay, but no binding arrangement made, plaintiff's rights against A. being reserved. Judgment against both defendants. *Sovereign Bank* v. *Thompson* (1909), 14 O. W. R. 387.

Accommodation makers — Sureties—Renewal — Consideration — Evidence—Promise of holders as to non-liability—Failure to obtain signature of principal debtor as co-maker. *Murphy* v. *Bryden*, 7 O. W. R. 250.

Accommodation note *by officers of company to secure advances to company*—Consideration — Personal liability — Guaranty. *Bank of Nova Scotia* v. *Dickson*, 10 O. W. R. 742.

Accommodation notes *given for specific purpose* — Extent of liability of makers — Notice to holders — Limited security — Memorandum of hypothecation — Account— Continuing security—Interest—Costs. *Murphy* v. *Murphy*, 9 O. W. R. 36.

Accord and satisfaction—*Agreement to accept land in payment of debt—Solicitor's authority—Agent's authority.*]— One C., a commercial traveller in plaintiffs' employ, called on defendant and pressed for payment of an overdue promissory note. Defendant offered to give a parcel of land in payment, and C. in company with defendant inspected the land. C. wrote plaintiffs submitting the proposition and giving a specific description of certain land. Plaintiffs wrote a solicitor instructing him to prepare a conveyance thereof. The solicitor, finding that there had been a misdescription in the letter to plaintiffs, accepted a conveyance of the land actually shewn by defendant to C.: *Held*, in an action on the note, that plaintiffs were bound as by an accord and satisfaction and could not recover. *Pither* v. *Manly*, 9 B. C. R. 257.

Action by holder — *Fraud—Notice.*]— The holder of a promissory note who, at the time of its transfer, had actual knowledge

that it was originally obtained by false representations and without consideration, has no action to recover the amount from the maker. *Guimond* v. *Batalon*, Q. R. 29 S. C. 8.

Action by payee against endorser—Liability of endorser—Bills of Exchange Act—Authority of decisions—Agreement—Recitals—Estoppel. *McDonough* v. *Cook*, 11 O. W. R. 991.

Action by payee against endorser—*Liability of endorser—Bills of Exchange Act — "Negotiated" agreement — Estoppel.*] — Plaintiff was payee of two notes. The defendant Crawford endorsed the notes before delivery to plaintiff:—*Held*, that this endorsement made Crawford liable:—*Held*, further, that Crawford is estopped as he was a party to an agreement with plaintiff in which he says he was an "endorser" of the original note, those sued on being renewals thereof and similarly endorsed. *Robinson* v. *Mann* (1901), 31 S. C. R. 484, followed; *McDonough* v. *Cook*, 13 O. W. R. 808, 19 O. L. R. 267.

Action for money lent — *Proof that note given—Production of note — Proof of loss—Indemnity—Costs.*]—Where, in an action of a loan the defendant admits the loan, but alleges that he gave a promissory note for the amount, and this admission constitutes the sole proof of the loan, it cannot be divided. 2. A person who, on making a loan of money, receives a promissory note for the amount, cannot maintain an action upon the loan without producing and tendering to the debtor the note so given, or in the event of its being lost, without proving the loss, and obtaining an order that its loss shall not be pleaded by the defendant upon plaintiff giving security to the satisfaction of the Court or Judge against the claim of any other person upon the note. 3. Although the defendant is entitled, in the absence of compliance with the above conditions, to ask for the dismissal of an action brought simply for the recovery of the loan, yet where he has declared his readiness to pay on proof of loss being made, and indemnity given, the Court, in order to avoid further litigation, may treat the case as an action on a lost note, and give judgment for the plaintiff on condition that security be given according to law—the defendant's costs in such case to be paid by plaintiff. *Tessier* v. *Caillé*, Q. R. 25 S. C. 207.

Action on, *brought by assignee of administratrix of holder.*]—Transfer after maturity—Set-off of claims against estate of holder — Services—Account—Evidence. *O. W. Kerr Co.* v. *Burkman* (N.W.T.), 2 W. L. R. 430.

Action on, *by trustee for payee.*]—Endorsement by payee after action—Equitable right of action. *Watson* v. *Coates*, 6 O. W. R. 509.

Action on—Defence—Absence of consideration—Plaintiff not *bona fide* holder for value—Collateral contract—Oral evidence—New trial. *Clark* v. *Union Stock Underwriting Co. of Peterborough* (1906), 8 O. W. R. 757.

Action on — Defence—Accommodation—Absence of consideration—Extension of time for payment—Fraud—Holder for value without notice or knowledge. *Anthes* v. *Stoltz*, 12 O. W. R. 549.

Action on—Defence—Accommodation — Evidence—Set-off. *Ladue Gold Mining and Development Co. of Yukon* v. *Prudhomme* (Y.T.), 2 W. L. R. 482.

Action on — Defence—Accommodation—Withdrawal of election petition—Agreement to waive costs—Illegality. *Johnston* v. *Wood*, 4 E. L. R. 316.

Action on—*Defence — Agreement—Violation—Condition—Parol Evidence of.*]—To the plaintiff's claim against the defendant, as maker of a promissory note for $238.58, the defence was set up that in consideration of the defendant's forbearance to commence proceedings, in the Probate Court, for proof in solemn form of the will of A. C., the plaintiff agreed to advance the defendant, on account of a legacy to which she was entitled, as guardian of her infant children, a sum of money, to be expended in repairs to property of the said children, and that the plaintiff, not having the money required for that purpose, requested the defendant to sign a note for the amount, which note was indorsed by the plaintiff to a firm which had done a portion of the repairs, and that the note was given on the understanding that the plaintiff would pay it when it became due, and would deduct the amount from the amount payable to the defendant, as guardian of her said children; and in answer to the plaintiff's claim on a second note, for the sum of $150, the defendant, on the trial, sought to give evidence to shew that the note, although expressed to be payable on demand, was made subject to a condition that the defendant should not be called upon for payment, unless her children should die before a legacy to which they were entitled under the will of A. C., should become payable:—*Held*, that the defendant, having violated her agreement by commencing proceedings in the Probate Court, and having succeeded in setting the will aside, could not set up the agreement as a defence to the plaintiff's action on the first note; and that the second note being absolute on its face, evidence could not be given to vary its terms, there being no evidence to shew that it was given on a condition, or as an escrow, or only to be treated as a note in a certain event. *McNeil* v. *Cullen*, 37 N. S. Reps. 13.

Action on — *Defence — Composition and discharge—Payment into Court—Costs.*] — The defendant, being in difficulties, procured from all his creditors, among whom were the plaintiffs, a deed of composition and discharge, on the terms that within 60 days he should give them secured promissory notes representing 75 cents on the dollar. Before expiration of the 60 days, the defendant, under pressure from his creditors and by an arrangement with them, sold his entire assets on certain terms, which netted to the creditors 64½ cents on the dollar, payable and paid by the purchaser's promissory notes. All the creditors except the plaintiffs, upon receiving the 64½ cents on the dollar, gave a formal

discharge to the defendant. The plaintiffs sued upon the promissory notes for the balance of their original debt, or, alternatively for the difference between 64½ and 75 cents on the dollar. The defendant pleaded several defences and paid the amount representing this difference into Court together with costs up to defence. The jury found in answer to certain questions: (1) that the plaintiffs did not receive the 64½ cents in full of their claim; (2) that they did receive it on account of the 75 cents; and (3) that the 64½ cents was not paid on account of the original claim:—*Held*, that the plaintiffs' right of action on the promissory notes was defeated by the agreement for composition and discharge, although its terms had not been fulfilled; and the action was dismissed with costs. Effect of payment into Court upon form of judgment and disposition of costs, discussed. *Howland* v. *Grant*, 2 Terr. L. R. 158, 26 S. C. R. 372.

Action on — *Defence — Demand note — Absence of demand—Costs.*]—The neglect to demand payment of a promissory note payable on demand, or default of an allegation, in an action to recover the amount of the note, that such demand for payment was made, cannot be the subject of the defence in law, such an action importing a demand of payment.—2. The neglect to demand payment before the institution of the action may at the most permit the defendant to escape the costs of the action upon depositing the amount claimed or due. *Eastern Townships Bank* v. *Woodward*, 6 Que. P. R. 458.

Actions on — Defences—Evidence—Commission to Manitoba—Judgment for plaintiffs with interest and costs. *Can. Bank of Com.* v. *Rogers* (1910), 16 O. W. R. 968; 2 O. W. N. 45.

Action on—*Defence—Fraud and misrepresentation — Notice—Trustee—Enquiry—Failure of consideration—Allotment of shares —Holder in due course.*]—Action to recover amount due on a promissory note. Judgment for plaintiff. The note being made payable to a trustee does not make it the duty of the transferee to investigate the trust. *Held*, that there was consideration for the note, the shares for which note given having been allotted. *Lerner* v. *Dawson*, 11 W. L. R. 677.

Action on—*Defence—Foreign Companies Ordinance—Note in favour of foreign company doing business in contravention of Ordinance—Notice to endorsee.*]—The Foreign Companies Ordinance, 1903 (c. 14 of 1903, 1st session), provides (s. 3), that no foreign company having gain for its object, or a part of its object, shall carry on any part of its business in the Territories, unless it is duly registered under the Ordinance, and imposes a penalty for breach of this provision; it further provides (s. 10), that any foreign company required by the Ordinance to become registered shall not while unregistered be capable of maintaining an action or other proceeding in any Court in respect of any contract made in whole or in part in the Territories, in the course of or in connection with business carried on without registration, contrary to the provisions of s. 3:—*Held*, that an endorsee with notice of a promissory note made to a foreign company in the course of and in connection with business carried on in contravention of the above provisions, could not recover.—The plaintiff was the endorsee of a promissory note made by the defendants in favour of the Sawyer and Massey Co., Ltd., to secure the price of certain threshing machinery. The defendants, with other defences, set up by the 3rd paragraph of their defence that the note in question was given to an unregistered foreign company engaged in selling machinery for gain within the Territories by resident agents, of which facts the plaintiff had notice when he became the holder of the note, and that they would rely upon the provisions of the Foreign Companies Ordinance. —On argument of the question of law thus raised, the facts above set out were admitted: —*Held*, a good defence in law. *Ireland* v. *Andrews* (19), 6 Terr. L. R. 66.

Action on — *Defence — Misrepresentation.*]—An action on a promissory note made by defendant in favour of plaintiffs, in payment of premium on a policy upon his life, was dismissed upon the ground that plaintiffs' agent misrepresented a material fact to defendant, and thereby induced him to apply for insurance and sign the note. *Prudential Life Ins. Co.* v. *Hardwick* (1910), 15 W. L. R. 143.

Action on—Defence—Non fecit—Consideration — Purchase price of horse—Finding as to signatures — Knowledge of nature of document signed — Agreement admittedly signed—Reference to notes—Holder in due course. *Dart* v. *McQuaid* (1906), 8 O. W. R. 662.

Action on—Defence—Payment—Forgery — Conflicting evidence — Onus — Laches. *Hebert* v. *Harel* (Man.), 2 W. L. R. 18.

Action on—*Holder in due course—Transfer — Indorsement — Pleading — Bills of Exchange Act — Amendment — Costs.*] — The claim of the plaintiff was set out in the statement of claim as follows: "The plaintiff claims against the defendants for the payment of the sum of $249.84, the amount of a promissory note and interest thereon, dated the 2nd December, 1907, and made by the defendants, payable two years after date, to the order of C. H., at ..., which said promissory note was duly transferred by the said C. H. to the plaintiff, for valuable consideration, before maturity." The evidence at the trial shewed an indorsement and delivery, and that the plaintiff was a holder in due course:—*Held*, that the pleading was insufficient to establish a right of action under the Bills of Exchange Act. The plaintiff was allowed to amend and to allege that the note was duly transferred or indorsed to the plaintiff, and the plaintiff thereby became the holder for value in due course; and the plaintiff was allowed to enter judgment for the amount of the note, with costs of a default judgment, less the defendants' costs of defence—as it was admitted that they would not have defended had the pleading been properly framed at first. *Hcon* v. *Bonnet* (1910), 14 W. L. R. 534.

Action on — *Insolvency of defendant — Notes maturing pending action — Amendment.*] — A plaintiff who sued on several notes, some of which would not yet be due

but for debtor's insolvency, may subsequently, by supplementary declaration, plead that some of those notes have matured and have been protested since the action. *Molsons Bank* v. *Steel*, 5 Que. P. R. 237.

Action on—*Liability of maker.—Guarantor.*]—*Held*, that the defendant is the maker of the note in the position of a guarantor. *Setchfield* v. *Evans* (1909), 1 O. W. N. 62.

Action on—Lien notes—Construction and operation between original parties—Not equivalent to promissory notes—Leave to amend—Terms—Costs. *New Hamburg Manufacturing Co.* v. *Weisbrod* (N.W.T.) (1906), 4 W. L. R. 125.

Action on—Plea that time for payment had been extended—Covenant not to sue—Demurrer. *Stevenson* v. *Koughan*, 4 E. L. R. 315.

Action on — *Pleading — Admissions — Presentment — Affidavit.*] — In an action upon a promissory note, the defendant who admits the amount and date thereof, and his signature as endorser, and denies all the other allegations, is prevented from pleading afterwards a special defence.—2. The plea alleging default of presentment of a note payable on demand must be supported by affidavit; if not it will be struck out on exception to the form. *Hawes* v. *Fulton*, 2 Que. P. R. 561.

Action on — *Pleading — Consideration — Administrators — Illegal appointment by foreign Court.*]—A defendant, sued upon a promissory note, may plead that the note was given without consideration and may set this up as a defence against the holder deriving his title from administrators illegally appointed by a foreign Court. *Poirier* v. *Arnault*, 5 Que. P. R. 139.

Action on — *Pleading — Declaration—Necessary averments.*]—In an action on a promissory note, it is not necessary to allege that the payee endorsed the note, nor how the plaintiff came into possession of the note; provided the declaration is in conformity with the special rule contained in Art 123 C. P. *Stern* v. *Knaupe*, 9 Que. P. R. 245.

Action on — *Pleading — Demurrer — Endorsement in blank — Holder — Presumption.*]—In an action on a promissory note, a declaration in accordance with form 6 of Schedule A (Art. 123, C. C. P.), is sufficient, though there be no averment that the plaintiff is the holder of the note, nor by whom it was endorsed to him, nor that the plaintiff gave value therefor.—2. The Court, for the purposes of a demurrer, cannot look at papers filed with the declaration, such as the protest of a promissory note sued on.—3. When a promissory note is endorsed by the payee in blank, a person who brings suit thereon and produces the note, is presumed to be the holder in due course, and it is for the defendant to rebut this presumption by making the proof required by s. 30, s.-s. 2, of the Bills of Exchange Act, *i.e.*, that the issue or subsequent negotiation of the note is affected with fraud, duress, or force and fear, or illegality. *Ridgeway* v. *Dansereau*, Q. R. 17 S. C. 176.

Action on — *Pleading — Irregular protest—Affidavit.*]—A plea to an action against the endorser of a promissory note, alleging that notice of protest was not regularly given, should be set out especially the irregularity complained of; and, further, such plea must be supported by affidavit establishing the facts alleged: Art. 208, C. C. P. *Western Loan and Trust Co.* v. *Ross*, Q. R. 12 K. B. 226.

Action on—*Price of goods—Exorbitancy—Defence.*] — To an action founded on a promissory note the defendant cannot set up a defence going behind the instrument itself; he cannot plead that it was given in payment of goods sold at an exorbitant price. *Renaud* v. *Bougie*, Q. R. 16 S. C. 405.

Action on — *Purchase of shares — Want of consideration — Inference from facts—Onus.*]—Plaintiffs brought action to recover $1,380, being the amount of a demand note given by defendant in connection with 10 shares of stock in plaintiff's bank, said to have been allotted to him. The defendant pleaded want of consideration, claiming that no shares were ever allotted to him:—*Held*, that the evidence shewed that the stock for which the note was given never was and never could have been delivered to defendant, therefore, there was a total failure of consideration for the note. Action dismissed with costs. Judgment of Magee, J., at trial and of Divisional Court (1909), 13 O. W. R. 509, set aside. *Sovereign Bank* v. *McIntyre* (1909), 14 O. W. R. 1204, 1 O. W. N. 254.

Action on—*Stay—Bringing in endorser en garantie.*]—A party becoming holder of note after maturity, is subject to all equities between original parties to note, and defendant sued as maker of note, may, by dilatory exception, have delay to call in warranty the endorser as his *garant*, to take up his *fait et cause*. *Levinoff* v. *Richard* (1906), 8 Que. P. R. 72.

Action on—*Stay—Bringing in prior endorser en garantie.*]—The endorser of promissory note may stay action of holder by dilatory exception in order to bring in in warranty a prior endorser of note. *Leclaire* v. *Auerbach* (1906), 8 Que. P. R. 66.

Agreement not to negotiate—Notice. *Murray* v. *Wurtele*, 1 O. W. R. 298, 353.

Agreement to release endorser.] — Plaintiffs sold a wagon to H., for which they took notes endorsed by defendant, and defendant agreed with plaintiffs to deliver up to them the wagon in question, together with another wagon which H. had purchased from plaintiffs and not paid for, both being in his possession, upon being released from liability upon his endorsements. Plaintiffs assented to this, and left the wagons temporarily in defendant's possession. *Held*, that the change of defendant's position with respect to the wagons was good consideration for plaintiff's agreement to release him, and that whether defendant's agreement was of any benefit to plaintiffs or not was immaterial. Meagher and Laurence, JJ., dissented. *De Wolf* v. *Richards* (1908), 43 N. S. R. 34.

Alteration—Adding provision for payment of interest—Knowledge of alteration. *Hebert* v. *La Banque Nationale*, 2 E. L. R. 559.

Alteration *after signature of maker*—Insertion of interest clause—Material alteration—Avoidance of instrument—Subsequent conduct of maker—Estoppel — Ratification. *Jones* v. *Reid* (1906), 6 O. W. R. 608, 7 O. W. R. 131.

Alteration—*Erasure of word "renewal" — Material alteration — "Approval" — Holder in due course—"Tenor"—Alteration not apparent.*]—By the proviso to s. 145 of the Bills of Exchange Act, R. S. C. 1906, c. 119, "where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill, as if it had not been altered, and may enforce payment according to its original tenor." The defendant gave N. a promissory note intended as a renewal of and to retire a former note for the same amount which N. had discounted at a bank. When the defendant made the note, the word "renewal" was, at his instance, written near the lower left-hand corner. N. erased the word "renewal," the erasure not being apparent without the use of a magnifying glass, and discounted the note with the plaintiffs without taking up the original note which the defendant had to pay. In an action on the renewal note:—*Held*, that the alteration not being apparent, and the plaintiffs having taken a note complete and regular on its face in good faith and for value without actual notice, they were "holders in due course" and entitled to recover the amount according to the original tenor, the word "renewal" not forming part of the contract to pay.—Per Falconbridge, C.J.:—The erasure, although not that of a word forming part of the contract, was material. *Maxon* v. *Irwin*, 10 O. W. R. 537, 15 O. L. R. 81.

Alteration *in date.*]—An alteration in the date of a promissory note by the payee, after signature, without the assent of the maker, does not avoid the instrument if it be made for the purpose of correcting a mistake and making the note as it was intended by all parties to be. *McLaren* v. *Miller*, 20 Occ. N. 392.

Alteration — *Joint and several liability —Principal and surety—Judgment.*]—The insertion by the holder of a promissory note signed by several persons, some of whom are sureties for the others, of the words "jointly and severally," before the words "promise to pay," is a material alteration which avoids the note, and the subsequent cancellation of the words by the holder does not do away with the effect of the alteration, even though the makers of the note do not know of the alteration until after the cancellation. A promissory note given to the holder after the alteration and cancellation, in renewal of the original promissory note and in ignorance thereof, cannot be enforced, there being no consideration to support it. Accepting in renewal of a promissory note some of the makers of which are, to the knowledge of the holder, sureties of a promissory note not signed by one surety, discharges the co-sureties. A judgment recovered against debtors in their firm name for the amount of the debt is not a bar to the recovery of judgment against them individually upon a promissory note given by them as collateral security for the same debt. *Banque Provinciale* v. *Arnoldi*, 21 Occ. N. 582, 2 O. L. R. 624.

Alteration — *Material alteration—Acquiescence—Renewal.*]—The joint maker of a promissory note is considered to acquiesce, within the meaning of 53 V. c. 33, s. 63, in a material alteration which has been made therein, when, knowing of the alteration, he promises to pay the amount of the note and renews such promise in consideration of an extension of time. *Hébert* v. *La Banque Nationale*, Q. R. 16 K. B. 191.

Collateral security—*Bank—Discharge —Evidence—Commercial matter—Oral testimony—Appropriation of payments — Endorsed note—Onerous debt.*]— Promissory note signed in favour of bank as collateral security for payment of cheque accepted by bank is subject to ordinary rules relating to security, and will be held to be paid and discharged by reimbursement to bank of amount of cheque.—The circumstances with regard to signing of note and the subsequent reimbursement being commercial matters, oral evidence thereof is admissible.—The endorsement of note by third persons makes it a "mere onerous" debt of maker, within meaning of Art. 1161, C. C. Accordingly, holder must appropriate to this note, in preference to others signed by maker alone, moneys which he receives for the account of maker. *Banque d'Hochelaga* v. *Macduff* (1906), Q. R. 14 K. B. 390.

Collateral security — *Pledge — Subsequent debt — Tacking.*] — The plaintiff received from the defendants a promissory note at four months, dated the 21st January, 1895, for $450, as collateral security for an advance of $250 to one of the defendants, M. The plaintiff also received from the defendant M. two notes for $125 each, both dated 24th January, 1895, one at three and the other at four months, to cover the $250 advance. On the 8th February, 1895, the plaintiff received from M. another note for $150 at four months, for a new advance. The note at three months became due on the 27th April, 1895, and one of the defendants paid $25 on account and gave a renewal note for $100 at four months:—*Held*, that the sum of $100, represented by the renewal note, only became due after the note for $150, and that the plaintiff was entitled, under the circumstances stated, to the benefit of the second paragraph of Art. 1975, C. C., which says that "if another debt be contracted after the pledging of the thing and become due before that for which the pledge was given, the creditor is not obliged to restore the thing until both debts are paid." (Reversed in K. B.) *Bennet* v. *Cameron*,, Q. R. 19 S. C. 192.

Company—Authority to make notes — Proof against estate of surety—Renewal or substitution of notes. *Baldwin Iron and Steel Works (Limited)* v. *Dominion Carbide Co.*, 2 O. W. R. 6, 170.

Company—*Powers of—Indorser.*] — The indorser of promissory notes signed by an incorporated company, who allege that the amount has been paid to the indorser and bring him in *en garantie* in an action upon such notes, cannot plead that the company was not authorized to sign such notes. *Ball* v. *Atlantic and Lake Superior Rw. Co.*, 3 Que. P. R. 315.

Conditional Endorsement — *Principal and agent—Knowledge of agent—Constructive notice—Deceit.*] — A promissory note endorsed on the express understanding that it should only be available upon the happening of a certain condition is not binding upon the endorser where the condition has not been fulfilled. *Pym* v. *Campbell*, 6 E. & B. 370, followed. The principal is affected by notice to the agent, unless it appears that the agent was actually implicated in a fraud upon the principal, and it is not sufficient for the principal to shew that the agent had an interest in deceiving his principal. *Kettlewell* v. *Watson*, 21 Ch. D. 685, and *Richards* v. *Bank of Nova Scotia*, 26 S. C. R. 381, referred to. *Commercial Bank of Windsor* v. *Morrison*, 22 Occ. N. 196, 32 S. C. R. 98.

Conditional sale—Special lien—Title retained by vendor—Purchaser's agreement to pay balance in case of deficiency on sale — Collateral security—Account stated — Debt payable *in futuro*—Jury—General verdict—Separate issues—Contradictory evidence. *International Harvester Co. of America* v. *Grant*, 4 E. L. R. 1.

Consideration — *Advances by father to son — Gift—Expectation of death.*] — A promissory note, freely signed by a son, who has had advances from his father, by which he engages, at the request of his father, who was on his death bed and in poor circumstances, and wished to provide for his daughter's future, to pay her (his sister) a sum of money or annuity for a certain number of years, is founded on valuable consideration and ought not to be regarded as a gift made by the father to the daughter during a supposed mortal illness, and, therefore, void as yielded to in consequence of the expected death of the father. *Brulé* v. *Brulé*, Q. R. 26 S. C. 77.

Consideration — *Alteration.*] — The maker of a promissory note who leaves the name of the payee in blank, is presumed to have given the bearer a mandate to insert the name of the person to whom the note is to be paid, and such an addition cannot be considered an alteration to or a change in an important part of the note. The maker of a promissory note is presumed in law to have signed it for value received; and if he alleges, with an affidavit, want of consideration, the burden of proof is upon him.—Bills of Exchange Act, ss. 20, 63. *Gardner* v. *Lecker*, 16 R. L., n. s., 14.

Consideration—*Balance due on judgment —Forbearance—Collection Act — Duress—Dominion civil servant—Salary.*]—The plaintiffs recovered judgment against the defendant and obtained an order from a Commissioner of the Court under the Collection Act, after examination, for payment of the debt by instalments. The defendant paid the instalments for a time, as required by the order, and then failing to pay, an order was obtained under the Act for an execution to take the body. The defendant, having been arrested, applied to a Judge of the Court under the Judgment Debtors' Act for his discharge. On the recommendation of the Judge in favour of a settlement the defendant gave the note sued on:—*Held*, that the forbearance by the plaintiffs in respect to their judgment, and in respect to asking for a remand, constituted good consideration for the making of the note.—At the time of the making of the Commissioner's order the defendant was in the employ of the Dominion Government as inspector of weights and measures, and it was contended that the order was illegal, and that the arrest was invalid and constituted duress, and that the giving of the note under the circumstances was illegal:—*Held*, that, in the absence of statutory provisions in the province expressly protecting the salaries of Government officials, it was a question of fact with the Commissioner whether or not the making of the order requiring payment by instalments would impair the usefulness to the Crown of the official, and that, as his order, made under the circumstances, was not a nullity, the note was not illegal for duress or other cause. *Smith* v. *Frame*, 2 E. L. R. 63, 203, 41 N. S. R. 20.

Consideration—*Compromise of claim.*]—A promissory note given to plaintiff in connection with a settlement of family differences was held to be given for good consideration. *Power* v. *Power*, 6 E. L. R. 498.

Consideration—*Condition — Finding of trial Judge—Review by Appellate Court.*]—Defendant gave promissory note to plaintiff for $100, in part payment of a larger sum which he agreed to pay for transfer of the interest of F. in Bedford Electric Co., upon which plaintiff held an option. At time note was given plaintiff signed agreement in which he undertook to transfer the interest bargained for to defendant upon payment of balance of purchase-money as agreed.—An action on note was defended, on the ground that it was made subject to condition, alleged to be contained in agreement signed by plaintiff, which had not been fulfilled.—The trial Judge having found as a fact that the condition relied upon was not contained in the agreement when it was signed by plaintiff, the Court refused to disturb his finding:— *Held*, that, as plaintiff at time he agreed to transfer his interest to F., was entitled to receive a portion of the consideration in cash, and, instead, gave defendant time for payment, taking his note for the amount, this constituted good consideration for the note. *Soulis* v. *McNeil* (1906), 37 N. S. R. 525.

Consideration—*Failure of.*]—The plaintiff and defendant were joint makers of a note for the defendant's accommodation. The defendant gave the plaintiff the note sued on in consideration of the plaintiff undertaking to pay the joint note. When this action was brought the plaintiff had not been called on to pay nor had he paid the joint note, but after he brought this action and before the trial he had paid it:—*Held*, that the plaintiff could recover. *Raffee* v. *Shaw*, 21 Occ. N. 507.

Consideration — *Family arrangement.*] —Defendant secured a deed of a piece of land from his father in consideration of an agreement on his part to provide for the support of his father during the remainder of his life. Defendant failed to carry out his agreement, and plaintiff with other members of the family in the lifetime of the father were about to take proceedings with a view to setting the deed aside, when defendant, in consideration of the proposed proceedings being abandoned, agreed to give plaintiff and other members of the family, each, his promissory note for the sum of $300:—*Held*, that the claim made by plaintiff being a serious one, there was good consideration to support an action on the note, irrespective of whether plaintiff could have succeeded in the proposed proceedings or not.—*Semble*, that consideration for the note was afforded by the fact that it was given as part of a family settlement or arrangement. *Power* v. *Power*, 412.

Consideration—Fraudulent representations—Transfer of notes—Defective title — Notice or knowledge of transferee—Evidence —Notes of similar character taken by defendant—Admissibility — Jury — Misdirection—Intent—Holder in due course—Bills of Exchange Act—Onus — Credibility of witnesses. *Olstadt* v. *Lineham* (Alta), 8 W. L. R. 152.

Consideration — *Illegality—Bankruptcy —Composition — Holder for value without notice.*]—A promissory note exacted by a creditor as a condition of consent to sign a deed of composition between the debtor and his creditors, the note representing the difference between this creditor's claim and the amount of the composition upon it, is void between the parties.—But this validity is only relative, and cannot be set up against one who derives his title to the note from a holder in due course who is ignorant of the fraud committed, even when the holder of the note has not himself given value and is only a *prête-nom* for the regular holder. *Bellemare* v. *Gray*, Q. R. 16 S. C. 581.

Consideration—*Illegality—Buying shares on margin—Knowledge of illegality by payee —Compromise and forbearance to sue—Criminal Code, s. 231.*]—Action on a promissory note, a renewal of a former one which had been given as the result of the compromise of a claim. The money was originally lent to buy shares on margin. Action dismissed as plaintiff knew of application of money for an illegal purpose under the above section when he made the loans. The compromise and taking renewal note will not help him. *Dean* v. *McLean*, 7 E. L. R. 232.

Consideration — *Illegality — Gambling transaction—Criminal Code, s. 231.*]—Action to recover amount of a promissory note given by defendant to plaintiff for money alleged to have been loaned defendant to pay margins on stock transactions:—*Held*, that there was no evidence that plaintiff knew the money was for illegal purposes. Judgment for plaintiff on appeal. *Dean* v. *McLean*, 7 E. L. R. 557.

Consideration — Illegality — Loan for gambling transactions. *Allan* v. *Robert*, 2 E. L. R. 556.

Consideration — *Inadequacy of—Fraud —Pleading.*]—To an action brought to recover the amounts due on three several promissory notes, the defendants pleaded an equitable plea. The Court, being of the opinion that the facts set up thereby disclosed such an inadequacy of consideration, accompanied by other circumstances, as would justify a jury in finding that there was fraud in the transaction, and that it was unconscionable, gave judgment for the defendants on demurrer. *Macpherson* v. *McLean*, 34 N. B. Reps, 361.

Consideration—Note given for balance of previous judgment—Duress—Note given to avoid imprisonment as judgment debtor—Collection Act—Order for payment against Dominion civil servant. *Smith* v. *Frame* (1906), 2 E. L. R. 63, 203.

Consideration — Purchase of seed grain —Warranty, implied or express—Breach—Findings of trial Judge. *Lawton* v. *Reid* (N. W.T.), 2 W. L. R. 240.

Consideration—Release of claim afterwards found to be of no value. *Naugle* v. *Hirtle* (1906), 2 E. L. R. 51.

Consideration—*Sale of animals—Defective title—Affirmance after discovery of defect.*]—The defendant bought cattle from the plaintiff, gave her the promissory note sued on for the price, and took and kept the cattle, all parties believing that the plaintiff had an absolute title to them. It was subsequently ascertained that the plaintiff had only a life interest in the cattle. After learning this fact, the defendants paid a year's interest on the notes, and neither returned nor offered to return the cattle:—*Held*, that the defendants were liable on the notes, as there was no fraud and no total failure of consideration. They were bound to repudiate the transaction at once on learning of the defect in the plaintiff's title, if they wished to object, and must by their conduct be held to have elected, with knowledge of the facts, to affirm their purchase. *Primeau* v. *Mouchelin, Primeau* v. *Pantel*, 15 Man. L. R. 360, 1 W. L. R. 434.

Consideration—Sale of improvements on land and interest in business—Contract—Construction—Homesteader's interest—Fraud and misrepresentation. *Ward* v. *Logan, Logan* v. *Ward* (Alta.), 7 W. L. R. 198.

Consideration — *Settlement of Disputed account — Subsequently discovered error in account.*] — The defendant was agent of the plaintiff to collect rents and profits of a wharf property. On the termination of the defendant's agency, the plaintiff brought an action for an accounting, which was settled by the defendant agreeing to pay the plaintiff the sum of $376, by paying $125 in cash and giving his note for the balance, and by the plaintiff agreeing to assign to the defendant all debts due in respect to the property during the period covered by the agency. The defendant refused payment of the note given by him on the ground that, before it became due, it was discovered that $100 had been paid the plaintiff on account of one of the

debts assigned to the defendant, and that the defendant was entitled to credit for this amount on the note:—*Held*, Graham, E.J., dissenting, that, as the defendant's attorney had knowledge of the error, before the compromise which resulted in the giving of the note was effected, and as by the compromise the plaintiff was prevented from going fully into the accounts, and perhaps establishing a greater liability on the defendant's part, she was entitled to recover the full amount of the note. *Worrall* v. *Peters*, 35 N. S. Reps. 26.

Consideration — Stock dealings — No actual transactions — Knowledge—Acquiescence—Request to pay. *Carpenter* v. *Pearson*, 2 O. W. R. 526, 3 O. W. R. 483.

Contract—*Misrepresentations — Use of trade name—Findings of fact.*]—To an action upon a promissory note the substantial defence was misrepresentations by the plaintiff, inducing the contract in respect of which the note was given, as to the use of a trade name:— *Held*, upon the evidence, that the defendants entered into the negotiations leading up to the contract with their eyes open, and as to the use of the name took chances and proceeded at their peril, and had got or could get under the contract substantially what they bargained for; and, having regard to the dealings between the parties as to the note, before and after maturity, the defendants were precluded from disputing payment. The use of the name was not mentioned in the written contract, and the defendants were not induced to enter into the contract by any misrepresentation of the plaintiff. *Le Page* v. *Le Page Liquid Fish Glue Oil and Fertilizer Co.* (1910), 13 W. L. R. 640.

Credit—*Payment.*]—*Semble*, that where goods are sold and delivered by the maker of a promissory note to the holder thereof, and their value credited by the latter, the transaction amounts in law to a payment *pro tanto*. *Pinder* v. *Cronkhite*, 34 N. B. Reps. 498.

Curators of insolvent estate of payee—Claim of set-off—Payments made by defendant at request of payee—Evidence to establish. *Kent* v. *Spector* (Man.), 6 W. L. R. 14.

Default in payment at 3 o'clock on last day of grace—*Seizure under chattel mortgage later on same day—Premature seizure—Measure of damages.*]—*Held*, following *Kennedy* v. *Thomas*, [1894] 2 Q. B. 759, 63 L. J. Q. B. 761, that a promissory note does not become due when it is presented for payment and dishonoured on the last day of grace, and the holder thereof cannot take action for the recovery of the amount of such note until the expiration of such day of grace; and a seizure under a chattel mortgage given as collateral security to a promissory note effected after dishonour of the note, but before the complete expiration of the last day of grace, is premature and unlawful. — *Held*, also, that the measure of damages in an action for unlawful seizure is the value of the goods seized less the amount due to the party making the seizure by virtue of the security under which the seizure was made. *Westaway* v. *Stewart*, 8 W. L. R. 907, 1 Sask. L. R. 200.

Default of payment on last day of grace — *Seizure under collateral chattel mortgage later on same day — Premature seizure — Eviction — Saskatchewan Rule 233.*]—Plaintiff having purchased a stock of goods from defendant, gave notes in payment, secured by a chattel mortgage. The notes were indorsed to a bank, the chattel mortgage being left as security. A note matured on the 21st August. The mortgagee seized that day, which was the last day of grace:—*Held*, that the seizure was premature, nor could it be upheld under the "deem himself safe" clause in the mortgage, as the seizure had not been made on that ground. Judgment for plaintiff. *Westaway* v. *Stewart*, 10 W. L. R. 623, 2 Sask. L. R. 178.

Delivery—*Consideration—Onus.*] — Motion by the plaintiffs for summary judgment under Rule 616 in an action upon a promissory note. The defendant in his examination for discovery admitted the making of the note, and said that he left it with the officers of the Consolidated Pulp and Paper Company, to be used by them in procuring an advance from the plaintiffs, the payees of the note, for the purposes of the company, and that the note was, instead, deposited with the plaintiffs by the officers of the company as security for past advances. Fraud was not alleged. Notice to the plaintiffs of the terms on which the note was given was not alleged, and the only defence was want of consideration:—*Held*, that the onus of the defence lay on the defendant, and he had failed to sustain it: *Watson* v. *Russell*, 3 B. & S. 34; Bills of Exchange Act, s. 21, s.-s. 3. *Ontario Bank* v. *Young*, 21 Occ. N. 505, 2 O. L. R. 761.

Demand note—*Notice of dishonour.*] — It is necessary before action to give notice of dishonour to an indorser of a promissory note payable on demand. *Royal Bank of Canada* v. *Kirk and Rumball*, 5 W. L. R. 432, 13 B. C. R. 4.

Demand — *Prescription — Payments—Parol evidence—Endorsements on note.*]—A promissory note in these terms, "12 janvier, 1896. A demande je promets de payer à.... la somme de....d'ici an 15 février sans intérêt, et après le 15 avec intérêt à 6 par cent.," is payable on demand from the day of its date. 2. Where a promissory note is payable on demand, prescription runs from the date of the note, and not from the date of demand of payment. 3. Proof by parol is inadmissible of payments alleged to have been made by the maker on account of the note, for the purpose of establishing interruption of prescription. 4. Endorsements on a note of payments on account have no effect against the maker as regards proof of interruption of prescription. *Bachand* v. *Lalumière*, Q. R. 21 S. C. 449.

Deposit receipt—*Action on as note — Payable after notice—Demand for immediate payment.*]—A writing, signed by defendant, admitting receipt of money, and agreeing to be responsible for same with interest at 7% per annum, upon production of receipt and

after 3 months' notice, may be recovered upon a promissory note.—A demand for immediate payment made more than three months before the commencement of the action is sufficient proof of the notice called for by the receipt. *Babineau* v. *LaForest*, 37 N. B. R. 156, 37 S. C. R. 521.

Directors of company—*Personal liability—Descriptive signature.*]— A promissory note signed with the name of an incorporated company, followed by the signature of the various persons, with the description "Dir.," or "Mgr.," to the promissory note of the company, and not of the person so signing. *Lindus* v. *Melrose*, 27 L. J. Ex. 326, referred to in *Fairchild* v. *Ferguson*, 21 S. C. R. 497, followed. *Union Bank* v. *Cross* (1909), 2 Alta. L. R. 3.

Discount by bank — *Holder in due course—Fraud or illegality — Evidence — Company—Power to borrow—Endorsement of note to bank—Bills of Exchange Act, ss. 48, 58—Interest post diem.*]—In an action upon a promissory note made by the defendants:—*Held*, upon the evidence, that the plaintiffs were holders in due course, and entitled to recover, the defendants not having shewn, under s. 58 of the Bills of Exchange Act, such evidence of fraud or illegality in connection with the issue or negotiation of the note as to deprive the plaintiffs, who discounted the notes, of their *prima facie* status as such holders.—The note was endorsed to the plaintiffs by an incorporated insurance company, who had no power by their Act of incorporation to borrow:—*Held*, that they could, nevertheless, by virtue of s. 48 of the Bills of Exchange Act, endorse over to the plaintiffs any note or bill which might be drawn payable to them, and thereby enable the plaintiffs to enforce payment against the maker or acceptor; and that, if the company issued shares, whether for cash or on notes, they would be estopped from denying that the shares were legally issued. —*Per* Irving, J.A., that, as the promissory note provided for payment of interest at 7 per cent., the plaintiffs were entitled to interest at that rate after as well as before maturity. *Merchants Bank* v. *McLeod* (1910), 14 W. L. R. 461.

Discount by payees with bank—Action brought by payees while bank still holders of note—Note taken up by payees pending action—Failure of action—New ground of relief urged in Court of Appeal—Right of payees to compel maker to indemnify them against note—Leave to amend refused. *Pure Colour Co.* v. *O'Sullivan*, 10 O. W. R. 313.

Document in form of note, with memorandum—*Given for goods to remain property of payee — Non-negotiable instrument—Assignment by indorsement.*]—In an action by an indorsee of a document in the form of an ordinary promissory note, but having on the face of it a memorandum "Given for Suffolk stallion (His Grace), same to remain the property of J. H. Truman until this note is paid:"—*Held*, that the document was not a promissory note, and that the rights of the parties under it could consequently not be assigned by simple indorsement. *Bank of Hamilton* v. *Gillies*, 12 Man. L. R. 495, and *Kirkwood* v. *Smith*, [1896] 1 Q. B. 582, applied. *Frank* v. *Gazelle Live Stock Association*, 5 W. L. R. 573, 6 Terr. L. R. 392.

Document purporting to be note, but with addition of memorandum — Property in goods for which note given not to pass until note paid—Non-negotiable instrument—Indorsement — Invalidity as assignment of agreement—Action by indorsee—Dismissal—Costs. *Frank* v. *Gazelle Live Stock Co.* (N. W. P.), 5 W. L. R. 573.

Duress—*Verdict of jury.*]—In an action against the maker of a promissory note, the local manager of the plaintiff bank, the defence was that he had been coerced by the head manager, under threats of dismissal and criminal prosecution, into signing the note to cover up deficits in customers' accounts in which he had no personal interest. His evidence at the trial to the same effect was denied by the head manager:—*Held*, that the jury having believed the defendant's account and given him a verdict, which the evidence justified, such verdict ought to stand. Judgment of Court of Appeal (16th October, 1901, unreported) affirmed. *Western Bank* v. *McGill*, 23 Occ. N. 36, 32 S. C. R. 581.

Effect of endorsement—*Maker—Proof of signature—Presentment — Notice of dishonour.*]—An endorsement of a negotiated promissory note, even though the endorser really be a surety, admits, *prima facie* at all events, the ability and signature of all prior parties. In an action by the holder of a promissory note and chattel mortgage against the makers of the mortgage and makers and endorser of the note, the plaintiff failed to prove the signature of one of the makers of the note, and the action, as far as the note was concerned, was dismissed as to that maker, although a judgment was recovered on the chattel mortgage. At the trial a defendant, an endorser of the note, although represented by counsel, gave no evidence, and judgment was given against her. She appealed to a Divisional Court, and her appeal was dismissed. She now applied for leave to appeal to the Court of Appeal. The plaintiff gave evidence at the trial that, in payment for "the property" sold, he received a mortgage and the note in question and cash for the balance; that the note was not paid at maturity and was protested after presentment and notice sent. It was contended that no one could tell what notice was sent or to whom:—*Held*, that it should be inferred from the evidence, in the absence of any weakening of it by cross-examination that that presentment was made on the day the note became due, that payment was refused, and that due notice of dishonour was given; and leave to appeal was refused. *Wiedeman* v. *Guittard*, 22 Occ. N. 129.

Elections and promissory notes.] — Section 279 Dom. Elec. Act (R. S. C. 1906, c. 6), provides that "every executory contract or promise or undertaking in any way referring to, arising out of or depending upon any election under this Act even for payment of lawful expenses, or doing of some lawful act, shall be void in law."—Sometime before an election for House of Commons

was held in county of L., defendant, a nephew of one of the candidates, was principally concerned in raising a fund on behalf of his uncle for expenditure in connection with the election. It appears that defendant deemed it prudent to borrow money for such fund, possibly so that if any of it went into illegal channels, there would be no prior connection with, or intent, on the part of the candidate. Defendant instructed a solicitor to apply to plaintiff, who was living in another town in the constituency, for a loan of $1,800, offering his promissory note, with name of a third party as endorser, as security for repayment of loan. Plaintiff advanced the money to defendant's solicitor, receiving the promissory note of defendant, so endorsed, as security. Plaintiff knew that the election was to take place within three weeks from the date of the loan, and that defendant was a nephew of one of the candidates; but plaintiff was not an active politician, and denied any knowledge of the purpose for which the loan was to be used at the time it was made. He swore that the only attention he paid to the matter was as to sufficiency of security he was getting for money advanced. When action was brought for non-payment of note, defendant pleaded that the money was advanced by plaintiff to be used illegally in the election:—*Held*, that as there was no proof that plaintiff at time of loan knew that the money was to be used in connection with the election, nor any evidence from which the Court could infer that plaintiff knew that the borrower intended to use it in bribery or corrupt purposes, the provisions of R. S. C. 1906, c. 6, s. 279, did not apply to the transaction, the vote was valid and the defendant liable thereon. *(Guerin* v. *Taylor*, Q. R. 3 Q. B. 86, and *Dean* v. *McLean*, 7 E. L. R. 557, referred to). *Caston* v. *Kaulbach* (1910), 8 E. L. R. 411.

Endorsement *by debtor to creditor* — Question whether as payment or security — Evidence—Presentment — Waiver — Collateral security—Lien notes — Property not passing. *Foster* v. *Woodworth* (Sask.), 8 W. L. R. 688.

Endorsement *by directors of company before delivery to or endorsement by payee —Aval—Liability of directors—Bills of Exchange Act, secs. 2 (a), 56, 131—Holder in due course—Consideration—Powers of company—Estoppel.*]—A promissory note was made by the defendant company and endorsed by some of the directors of that company in their own names, although the note was payable to the plaintiffs, before delivery to or endorsement by them:—*Held*, that the directors so endorsing were liable to the plaintiffs, under sec. 131 of the Bills of Exchange Act.—*Robinson* v. *Mann*, 31 S. C. R. 484, and *McDonough* v. *Cook*, 19 O. L. R. 267, followed.—*Jenkins* v. *Coomber*, [1898] 2 Q. B. 168, not followed.— There was ample consideration for the note, as found by the trial Judge, and the evidence shewed that the plaintiffs took it in good faith and pursuant to a clear and well understood arrangement with the defendants, including these endorsers:—*Held*, that, by the effect of secs. 2 (8) and 56 of the Bills of Exchange Act, the plaintiffs became holders in due course.—The note was made by the defendant company for the purpose of paying a note made by G. in favour of the plaintiffs, to secure a loan made to G.; and the consideration for the defendant company assuming the indebtedness upon the G. note was that the plaintiffs should subscribe and pay for $5,000 in stock of the defendant company, which the plaintiffs did:—*Held*, that, whatever objection might be taken by the defendant company as to their liability, the directors who endorsed the note were estopped from disputing the validity of the transaction, both by their endorsements and by the part they took in entering into the agreement with the plaintiffs and in inducing the plaintiffs to perform it on their part. —Judgment of Macdonald, J., 11 W. L. R., 344, affirmed. *Knechtel Furniture Co.* v. *Ideal House Furnishers* (1910), 14 W. L. R. 175.

Endorsement *by payee to agent for collection.*]—Action by payee — Holder of note—Note payable at particular place—Bills of Exchange Act, s. 86—Necessity for presentment to hold maker—Failure to present —Dismissal of action—Costs. *Jones* v. *England* (N. W. T.), 5 W. L. R. 83.

Endorsement *by third party without endorsement by payee — High Court of Justice—Following precedents.*]—The defendant become the endorser of two promissory notes without the payees having endorsed the same, being so endorsed by the defendant in pursuance of an agreement with the payees for valuable consideration that he should endorse them and become liable thereon:—*Held*, that the defendant was liable.—*Robinson* v. *Mann*, 31 S. C. R. 484, followed.—*Steele* v. *McKinlay*, 5 App. Cas. 754, and *Jenkins* v. *Coomber*, [1898] 2 Q. B. 168, not followed.—It is the duty of the Courts of the province to follow the decision of the highest Courts in Canada, being the latest decision on the subject, without questioning whether or not it is in accordance with previous cases. *Slater* v. *Laboree*, 10 O. L. R. 648, 6 O. W. R. 628.

Endorsement *for limited purpose* — Failure of purpose—Fraudulent use by maker for another purpose—Holders in due course —Notice—Knowledge. *Stirton* v. *Harvey* (Man.), 8 W. L. R. 185.

Endorsement — *Forgery—Notice of dishonour—Laches of endorser alleging forgery —Estoppel.*]— Notice of dishonour of the note sued on was given on 15th July. Summons issued on 7th October. On 26th November, defendant G. repudiated his signature. The maker of the note, who is said to have forged G.'s signature, was ill on the latter date, and died on 12th December. As plaintiffs have not been prejudiced by G.'s silence even if G. should have informed plaintiffs sooner of the forgery, appeal allowed and action dismissed. *Shaw* v. *McConnell*, 7 E. L. R. 165.

Endorsement—*Liability — Evidence to vary contract.*]—Parol evidence will not be received to shew that a person who endorsed a promissory note to another for valuable

consideration, stipulated at the time that he was not to be liable on the endorsement. *Smith* v. *Squires*, 13 Man. L. R. 360, followed. *Emerson* v. *Erwin*, 10 B. C. R. 101.

Endorsement *of payments by payee* —Statute of Limitations—Set-off—Action by administrator of payee—Admissibility of evidence of admissions. *Peck* v. *Robinson*, 3 E. L. R. 381.

Endorsement — *Parol evidence to vary contract—Inadmissibility.*] —Parol evidence will not be received to shew that a person who endorsed a promissory note to another for valuable consideration stipulated at the time that he was not to be liable on the endorsement, that he would be contradicting the contract which such endorsement by s.-s. 2 of s. 55 of the Bills of Exchange Act, 1890, imports. *Abrey* v. *Cruz*, L. R. 5 C. P. 37, *Henry* v. *Smith*, 39 Sol. J. 559, and *New London Credit Syndicate* v. *Neale*, [1898] 2 Q. B. 487, followed. *Pike* v. *Street*, Moo. & M. 226, dissented from. *Smith* v. *Squires*, 21 Occ. N. 216, 13 Man. L. R. 360.

Endorsement—Promissory notes payable to the order of an unincorporated non-trading association such as a trade union must be endorsed by all the members of the association in order that a subsequent holder may sue the maker upon it. *Cooper* v. *McDonald* (1900), 19 Man. L. R. 1.

Endorser adding his signature as maker—*Immaterial alterations—Implied assent of original maker.*]—Defendant F. gave an accommodation note to defendant S., the latter during its currency transferring it to plaintiff. S., at plaintiff's request, instead of endorsing it, placed his name underneath F.'s. F. saw this signature and made no objection:—*Held*, that there was no agreement to give time to S., and that the alteration is not such a material one as will release F. Judgment for plaintiff as claimed. *Lytell* v. *Foell*, 13 O. W. R. 738.

Endorser—*Note payable to another—Absence of endorsement by payee—Liability—Notice of dishonour—Presentment—Waiver — Endorser becoming administrator of maker.*]—The defendant A. M. put his name on the back of a promissory note made by M. M. to the order of the plaintiff, which was then delivered to the plaintiff:—*Held*, that the defendant A. M. was an endorser of the note, liable as such to the payee and entitled to notice of dishonour. M M. died before maturity of the note, and the defendants A. M. and H. were appointed two of his administrators; after their appointment and before maturity, they had a conversation with the plaintiff in respect of the note, and the plaintiff swore that he told them when it would be due, and one of them asked for an extension of time, which was granted. The defendant A. M. swore that the plaintiff told him not to worry, that he would not look to him for payment, but take whatever the estate was able to pay, and he did not ask for an extension, nor did he hear the defendant H. ask for any. The defendant H. could not remember what took place: —*Held*, insufficient to prove that the defendant A. M. waived presentment or notice of dishonour. The plaintiff also, before maturity, pursuant to administrators' advertisement for creditors, filed with their solicitor a copy of the note and a statutory declaration that it was unpaid:—*Held*, that this is not such a presentment as is required by s. 45 of the Bills of Exchange Act, 1890:—*Held*, also, that, notwithstanding that the endorser became one of the deceased maker's administrators before maturity of the note, presentment and notice of dishonour were nevertheless necessary. *Fraser* v. *McLeod*, 2 Terr. L. R. 154.

Endorser — *False signature of maker — Holder in due course.*]— The endorser for accommodation or for value of a bill or note cannot set up against the holder in due course that the signature of the maker is false. *Choquette* v. *Leclaire*, Q. R. 19 S. C. 521.

Endorser—Procurement by fraud—Discount—Notice to agent of holder—Notice to bank—Property in notes not passing—Conflict of evidence. *Merchants Bank* v. *Grimshaw*, 2 O. W. R. 729, 4 O. W. R. 179.

Endorser — *Recourse.*]— Every party to a bill or note has his recourse against every antecedent party. Successive endorsers are liable to each other in the order of the endorsements. The obligation as between the parties is several and successive and not joint, whether the endorsements be made for accommodation or for value received, unless there be an agreement *aliunde* different from that evidenced by the endorsements. *McRae* v. *Lionais*, Q. R. 16 S. C. 262.

Endorser—*Recourse.*]—The first endorser has no recourse against the subsequent endorsers, even when they have endorsed for accommodation, unless it appears by legal evidence that the last endorsers have assumed a different liability from that which arises according to the ordinary course of law. *Poisson* v. *Bourgeois*, Q. R. 17 S. C. 94.

Endorser—Surety—Discharge — Intimation by holder that note paid by maker—Absence of prejudice. *Bank of British North America* v. *Auston*, 9 O. W. R. 669.

Estoppel—*Forgery—Discount — Duty to notify holder.*]— E. & Co., merchants at Montreal, received from the Dominion Bank, Toronto, notice in the usual form that their note in favour of the Thomas Phosphate Co. for $2,000 would fall due at that bank on a date named, and asking them to provide for it. The name of E. & Co. had been forged to the note, which the bank had discounted. Two days after the notice was mailed at Toronto the proceeds of the note had been drawn out of the bank by the payees:—*Held*, affirming the judgment of the Court of Appeal, *Dominion Bank* v. *Ewing*, 7 O. L. R. 90, 24 Occ. N. 89, 1 O. W. R. 654, 3 O. W. R. 127, Sedgewick and Nesbitt, JJ., dissenting, that on receipt of the notice E. & Co. were under a legal duty to inform the bank by telegraph or telephone, that they had not made the note, and not doing so they were

afterwards estopped from denying their signature thereto. *Ewing* v. *Dominion Bank*, 24 Occ. N. 285, 35 S. C. R. 133.

Extension of time for payment—*Release of co-maker—Surety—Notice—Binding agreement.*]—D., on being sued on certain promissory notes to which he was a party, defended the action, setting up an arrangement between himself and the fuel company that he was to be a surety merely for them to the plaintiff; and that, as the plaintiff was aware of this at the time he accepted the notes, he, D., was relieved by the plaintiff giving the fuel company an extension of time:—*Held*, that, in order for D. to escape his liability on this ground, he must shew that there was a binding agreement arrived at between his creditor and himself for valuable consideration, and that, in the circumstances, there was here no such agreement. *Stone* v. *Rossland Ice and Fuel Co.*, 12 B. C. R. 66, 3 W. L. R. 55.

Failure of consideration — *Price of horses of lunatic sold to defendant—Guardian subsequently appointed—Necessity for ratification and notice—Action by guardian.*]—Plaintiff, as guardian of a lunatic, sought to recover the amount of a promissory note given by defendant to plaintiff for the price of horses belonging to the lunatic, and sold by plaintiff to defendant. Plaintiff first brought an action in his own name, to recover the amount, but was unsuccessful. Then he was appointed guardian of the lunatic's estate and brought this action. No notice was given to defendant of plaintiff's appointment as guardian, nor any notice that plaintiff, as guardian, had ratified the dealings between plaintiff, individually, and the defendant, with respect to the horses:—*Held*, that plaintiff cannot succeed, owing to want of notice to defendant, and action dismissed. Plaintiff had mistaken the remedy in this action, but will not be precluded from recovering value of horses in an action properly framed. *Davis* v. *Reynolds*, 11 W. L. R. 288.

Failure of consideration—Purchase of shares in mining company—Failure to allot shares—Abandonment of enterprise — Recovery back of moneys paid — Promissory notes—Effect of renewals. *Bullion Mining Co.* v. *Cartwright*, 5 O. W. R. 522, 6 O. W. R. 505.

Failure of consideration — Purchase price of horse—Division into shares—Necessary number of subscribers not obtained—Non-fulfilment of agreement — Transfer of note—Holder in due course—Interest overdue at time of transfer—Notice of defects in transferor's title — Suspicious circumstances. *Peters* v. *Perras* (Alta.), 7 W. L. R. 193.

Failure of consideration—*Transferee of note—Holder in due course—Fraud—Interest overdue at time of transfer—Notice of defects in transferor's title—Bona fides—Suspicious circumstances—Inquiry.*]—Where it is admitted or shewn that the maker of a promissory note has been induced to sign it by fraud, the effect of s. 58 of the Bills of Exchange Act is to throw upon an endorsee for value from the payee the burden of proving affirmatively his honesty and good faith in becoming the holder of the note.—It is not sufficient for such a holder to give evidence that he had no knowledge or information of the fraud, if there is evidence of suspicious circumstances which tend to the belief that he suspected something wrong, but refrained from inquiry, and which throws doubt upon the holder's honesty and good faith. The burden is on the holder to remove such doubt, and to prove that he had no such suspicion. The mere fact that interest is overdue and unpaid on a promissory note is not of itself sufficient to give to the note the character of an overdue note, so long as the principal has not yet matured, but, nevertheless, this fact should put a party negotiating for such note upon inquiry.—*Union Investment Co.* v. *Wells*, 39 S. C. R. 625, followed.— Carelessness, negligence, or foolishness in not suspecting something wrong with a bill of exchange or promissory note, and consequent absence of inquiry, are not necessarily inconsistent with good faith, but they do constitute some evidence of bad faith. —Nature of circumstances apparent on the face of the note, and from the relations between the parties, which were deemed suspicious circumstances in this case, discussed. —*Jones* v. *Gordon*, 2 App. Cas. 616, commented on and followed.—Judgment of Scott, J., 7 W. L. R. 193, 1 Alta. L. R. 1, affirmed. *Peters* v. *Perras*, 8 W. L. R. 162, 1 Alta. L. R. 201.

Forged endorsement — *Estoppel—Previous action on like endorsement undefended.*]—A person whose endorsement on a promissory note has been forged is not estopped from denying his signature by the fact that he had allowed judgment to go against him by default in a previous action by the same plaintiff on an endorsement of his name on a prior promissory note forged by the same person, although the forger negotiated the second note after such judgment.—*Morris* v. *Bethell*, L. R. 5 C. P. 47, followed.—*Mackenzie* v. *British Linen Co.*, 6 App. Cas. 82, distinguished. *Simon* v. *Sinclair*, 6 W. L. R. 638, 7 W. L. R. 710, 17 Man. L. R. 389.

Forged endorsements — Partnership—Holding out—Estoppel—Authority of partner to pledge credit of firm—Ratification—Waiver of notice of dishonour. *Royal Bank of Canada* v. *Maughan*, 12 O. W. R. 899.

Forged endorsement of note—Action against ostensible endorser — Proof of forgery—Estoppel by conduct—Previous action on forged endorsement undefended — Representation of genuineness of endorsement. *Simon* v. *Sinclair* (Man.), 6 W. L. R. 638.

Forgery of. *See* CRIMINAL LAW.

Forgery—Conflicting evidence—Collateral circumstances—Comparison of handwriting. *Burton* v. *Lockeridge*, 5 O. W. R. 51.

Forgery—*Denial of signature—Onus — Evidence—Expert opinion—Estoppel by conduct—Adoption of forgery.*]—The denial of his signature to a promissory note, made on oath by a defendant under Art. 208 C. P., casts upon the plaintiff the onus of proving it, which he must do by positive evidence, as any other matter of fact. The unsupported opinion of experts will not avail against the testimony of the party himself, especially

when circumstances lend probability to his denial.—2. A defendant who is not clearly proved to have known of the existence of his forged signature to a note, is not estopped on the ground of neglectful standing by, from setting up the forgery against the holder. *Ethier* v. *Labelle*, Q. R. 33 S. C. 39.

Forgery *of makers' names* — Endorsement in name of firm—Liability of non-authorising partner—Discount by bank — Notice or knowledge of manager—Circumstances giving rise to suspicion—Findings of jury—Disregard of one—Rule 615 — Judgment of Court. *Crown Bank* v. *Brash*, 8 O. W. R. 400, 483.

Forgery — *Renewal—Endorser—Liability—Bank.*]—A promissory note given in payment, or renewal, of notes of the maker bearing endorsements forged by him, to the bank which discounted and holds the latter paper and is aware of the forgery on it, is valid, and, as a consequence, the endorser of such a note is liable to the bank for the amount, more particularly if, at the time he endorsed it, he was not aware of the forgery and fraud in question. *La Banque Nationale* v. *Drolet*, Q. R. 28 S. C. 146.

Fraud — *Duress.*]—Bills of Exchange Act, s. 29—Holder in due course—Value—Good faith—Notice of defect—Note payable to bearer—Restrictive endorsement. *Gibson* v. *Coates* (Man.), 1 W. L. R. 556.

Fraud—*Holder in good faith.*]—According to findings of fact at the trial, the evidence did not clearly shew that the promissory notes sued on had been signed by the defendants, and it was proved that, if they had signed them, they did so without knowing that they were promissory notes and in the belief, induced by the false representations of the agent of the payee, that the documents they signed were petitions to the Government for a road: — *Held*, following *Foster* v. *McKinnon*, L. R. 4 C. P. 704, and *Lewis* v. *Clay*, 77 L. T. 633, that, notwithstanding the language of ss. 29 and 38 (b) of the Bills of Exchange Act, 1890, the defendants were not liable to the plaintiffs although they were holders in good faith, for value and without notice of any defect or fraud, and had acquired the notes during their currency. *Alloway* v. *Hrabi*, 24 Occ. N. 253, 14 Man. L. R. 627.

Fraud *in procuring—Discount — Good faith—Evidence.*]—L. and others signed promissory notes each for the amount of 10 shares in a company formed to manufacture rotary engines, under an invention of the payee, who fraudulently misrepresented to them the prospects and intentions of such company. At the same time each maker signed an application for 10 shares. The payee and T., the assignee of his patent of invention, induced W. to discount these notes, and received a portion of the proceeds, part being retained by W. in payment of debts due him from these two persons. On the trial of actions by W. on the notes the evidence of T., who had absconded, was taken under commission, and he swore that the form of application signed by the respective defendants had been shewn to W. before the notes were discounted. W. denied this and swore that he had been told that the notes were given in payment of stock held by the payee:—*Held*, that the evidence of W., on whom the onus of proof rested, could not be accepted; that the whole testimony and attendant circumstances shewed that W. suspected that the proceeds of the notes belonged to the company; and, having discounted them without enquiry as to the right of the payee and T. to receive these proceeds, he was not in good faith and could not recover. Judgment of Court of Appeal in *Wilson* v. *Lockhart*, 10 O. reversed. *Lockhart* v. *Wilson*, 39 S. C. R. 541.

Fraud *in procuring signatures of makers*—Holder for value—Suspicious circumstances—Failure to make enquiry—Findings of jury—Judge's charge. *Gillard* v. *McKinnon*, 8 O. W. R. 311.

Fraud, *misrepresentation, and concealment of payees* — Endorsement by payees to bank as collateral security for debt—Absence of consideration—Notice of defective title—Agreement—Pre-existing debt not payable at time of transfer of notes—Company — Subscription of shares obtained by fraud—Repudiation—Action on notes given for price of shares, commenced before winding-up—Third party proceeding—Notice after commencement of winding-up. *Canadian Bank of Commerce* v. *Wait* (Alta.), 7 W. L. R. 255.

Fraud—*Note delivered conditionally — Endorsement—Liability of partner of payee—Indemnity—Costs.*]—The plaintiff purchased from C., a member of the firm of R. & C., a quantity of hay, and gave in payment therefor his promissory note, which C. undertook should not be used until the hay was delivered. The hay was never delivered, and C., in violation of his agreement, endorsed the note to T. for value. An action brought by T. against the plaintiff to recover the amount of the note was defended by the plaintiff, at the instance of R., who practically joined in the defence and acted as if the cause were his own:—*Held*, that the plaintiff was entitled to recover against R., not only the amount of the note for which judgment was recovered against him, but the amount of the costs taxed as well. *Ross* v. *Reid*, 42 N. S. R. 232, 4 E. L. R. 259.

Fraud *of payees—Endorsement to bank as collateral security—Absence of consideration—Notice—Holder in due course—Pre-existing debt not payable—Company—Subscription for shares obtained by fraud—Action on notes given for price of shares, commenced before winding-up—Third party proceeding—Notice.*]—A bank or person to whom the promissory note of a third person is endorsed by way merely of collateral security, by a debtor whose indebtedness has not yet matured (i.e., is only *debitum in præsenti solvendum in futuro*), takes such promissory note without giving consideration therefor (at any rate in the absence of a new agreement, and provided there is no right in the principal debtor to anticipate the date of payment), and such an endorsee is not a holder in due course.—W. was induced by fraudulent misrepresentation and concealment on the part of the company to subscribe for shares in a limited company. In payment he made promissory notes pay-

able to the company, and the notes were endorsed to a bank as collateral security for advances made by the bank to the company not yet due or matured. After such endorsement, but prior to the maturity of the indebtedness of the company to the bank, A. notified the bank of the fraud.—*Held*, that under these facts as stated the bank gave no consideration, was not a holder in due course, and that the maker could successfully plead fraud, as a defence in an action by the bank on the notes.—*Currie* v. *Misa*, L. R. 10 Ex. 153, 1 App. Cas. 554, and *Stott* v. *Fairlamb*, 53 L. J. Q. B. 47, discussed.—A defendant is, in such circumstances, entitled to rely on the defence of fraud, and to bring in the company as third parties, notwithstanding that the company are in liquidation, and the defendant has not taken steps to have his name removed from the list of shareholders, if the defendant has repudiated his contract to take shares with reasonable promptitude, and the action is begun before the commencement of winding-up proceedings, notwithstanding that the third party notice is not issued until after commencement of winding-up proceedings. *In re General Railway Syndicate, Whitely's case*, [1900] 1 Ch. 365, considered and applied. *Canadian Bank of Commerce* v. *Wait*, 7 W. L. R. 255, 1 Alta. L. R. 68.

Fraud—Want of consideration—Transfer—Bona fide holder—Action to recover amount of note paid and costs. *Ross* v. *Reid*, 4 E. L. R. 259.

"Given for a patent right"—*Subsequent addition.*]—Every bill or note signed in consideration of the transfer of rights under a patent of invention must bear upon its face the words "given for a patent right" at the time the instrument is signed and issued by the promissor, and it will not suffice to write these words in afterwards, the note, without them, being absolutely void from the beginning. *Lefebvre* v. *Titemore*, Q. R. 16 S. C. 248.

Given for life insurance premium—Obtained by fraud of agent—No intention of signing note—Action dismissed—No costs. *Home Life Ins. Co.* v. *Matthews* (1910), 17 O. W. R. 328.

Holder—*Action—Ratification.*]—Where a promissory note was delivered by McG., the holder, to P., whose name McG. wished to use in the collection of the note, and, subsequently and before the note was due, McG. got it from P., telling him that he was going to place it with a banker, and he had better direct him to collect it. P. never gave any direction to collect it, and did not, before commencement, authorise the action, but he subsequently ratified it, stating he would have authorised it in the first instance if he had been asked to do so:—*Held*, in an action on the note in the name of P., that he was entitled to recover as holder. *Potter* v. *Morrisey, Potter* v. *Creaghan*, 35 N. B. Reps. 465.

Holder—*Equitable set-off against drawee—Preferential assignment—Pressure—R. O. 1888, c. 49.*]—M., to secure a claim of $867 endorsed to the administrators of the estate of E., a promissory note made in M.'s favour by the defendant. At the same time it was arranged that the administrators should hold the balance of the proceeds in trust, first to pay certain other claims against M. and the residue to pay over to him. Subsequently, but before the note became due, M. executed an assignment to the plaintiff of all his interest in the moneys secured by the note, in trust to pay the claims previously arranged for any certain additional claims, amounting to more than sufficient to exhaust the proceeds. The administrators before action endorsed the note to the plaintiff, taking from him an agreement to protect their interest. The defendant claimed to be entitled to deduct from the amount payable by him certain indebtedness of M. to him incurred in some collateral transaction, and on the ground that the assignment was void under R. O. 1888, c. 49, or that it was no more than an assignment of a chose in action, and that the plaintiff took subject to the equities between the maker and the payee:—*Held*, that the assignment, having been procured by pressure, was not void; that the administrators at all events were holders in due course, and the plaintiff could rest upon their title; and that there could, therefore, be no set-off against the plaintiff. *O'Brien* v. *Johnston*, 3 Terr. L. R. 50.

Holder for value—*Holder for collection—Pleading.*] — In an action based upon a promissory note, where the defendant pleads that plaintiff is not a regular holder for value, the latter may reply that he holds the note for collection on behalf of the last endorser, and such answer will not be rejected on motion, as changing the basis of the action. *Legal and Financial Exchange* v. *Cameron*, 5 Que. P. R. 98.

Holder for value — Notice—Executor. *Evans* v. *Rolls*, 4 O. W. R. 125.

Holder for value without notice — *Delivery on condition of signature by another joint maker—Contract—Rescission—Election to affirm contract.*]—The defendants, thirteen in number, and one Lee, formed a syndicate for the purchase of a stallion. The vendor's agent afterwards induced the defendants to sign an agreement for the purchase, and promissory notes for the price, on the representation that he would get Lee to put his name also on the notes. The defendants then took possession of the horse and used him for one season and part of another, when he died. Shortly after signing the notes, the defendants became aware that Lee had refused to sign the notes. They did not ask then for a return of the notes or do anything to indicate that they did not intend to be bound by them. On the contrary, they acted from that time as though the syndicate was composed of themselves alone, ignored Lee in the matter, and collected and retained the earnings of the horse for themselves until he died. The vendor discounted the notes with the plaintiffs, who proved that they had no notice or knowledge of any fraud or irregularity in obtaining them:—*Held*, that the defendants, by their course of conduct, had elected to affirm the purchase, and could not now repudiate their liability on account of any fraud or misrepresentation in obtaining their signatures.—Per Dubuc, C.J.:—The plaintiffs, being holders for value, without notice of any fraud or irregularity, were entitled to recover against the defendants notwithstanding the

defence set up that they were only to be liable on condition that Lee joined with them. *Merchants Bank* v. *Good*, 6 Man. L. R. 339, followed. *Awde* v. *Dixon*, 6 Ex. 869, *Hogarth* v. *Latham*, 47 L. J. Q. B. 339, and *Ontario Bank* v. *Gibson*, 3 Man. L. R. 406, 4 Man. L. R. 440, distinguished. *First National Bank of Minneapolis* v. *McLean*, 3 W. L. R. 227, 16 Man. L. R. 32.

Holder in due course—Acquisition of note by endorsee after default in payment of interest—Dishonour—Notice — Fraud and misrepresentation in procuring signatures to note—Purchase of horse—Pretended formation of company or syndicate. *Union Investment Co.* v. *Wells* (Man.), 5 W. L. R. 409.

Holder in due course — *Bills of Exchange Act, s. 58—Onus of proof—Suspicious circumstances—Notice—Absence of enquiry—Admissibility of evidence of previous similar transactions.*]—It being shewn that a maker of a promissory note has been induced to sign it by fraud, if there is evidence sufficient to raise a doubt in the jury's mind as to the good faith of an endorsee, though the evidence may not conclusively establish bad faith on his part, the Court will not interfere with the finding of the jury that the endorsee had not satisfied the burden cast on him by s. 58 of the Bills of Exchange Act, of establishing good faith.—Evidence that the indorsee had on previous occasions bought promissory notes from the same payee under similar suspicious circumstances, and had heard rumours of their fraudulent nature, is admissible to prove notice or suspicion in the mind of the endorsee, and that he deliberately refrained from enquiry. *Oldstadt* v. *Lincham*, 1 Alta. L. R. 416, 8 W. L. R. 152.

Holder in due course — *Bills of Exchange Act, 1890, s. 29—Rescission of contract—Plea of fraud—Amendment asking for rescission—Restitutio in integrum.*]—1. The endorsee of a promissory note made payable with interest, payable annually, who acquired the note after default in payment of one of the annual interest instalments and with knowledge of the default, is not a holder of the note in due course as defined by s. 29 of the Bills of Exchange Act, 1890, and defences of fraud and misrepresentation set up by the makers of the note against the payees are available as against such endorsee. *Jennings* v. *Napanee Brush Co.*, 4 C. L. T. 595, followed.—The defendants, who had given their promissory notes for the price of a horse purchased by them, had been defrauded in the transaction, but did not acquire certain knowledge of the fraud until after the death of the horse:—*Held*, that they were not too late in exercising their right to rescind the contract, although they took no steps to do so until they set up the plea of fraud in this action. *Doyle* v. *Diamond, etc., Co.*, 10 O. L. R. 567, followed.—2. The defendants had a right to rescind without restitution in this case, as the horse had died without any default or neglect on their part. *Head* v. *Tattersall*, L. R. 7 Ex. 7, followed. *Moore* v. *Scott*, 5 W. L. R. 8, 281, 16 Man. L. R. 492.

Holder in due course—Defect in title—Onus—Endorsement after maturity—Equities—Payment on account. *Smith* v. *Galbraith* (Man.), 1 W. L. R. 227.

Holder in due course — Effect of endorsement—Evidence. *Weideman* v. *Guittard*, 1 O. W. R. 110.

Holder in due course — *Endorsement in blank — Special endorsement by transferee—Attempted cancellation and delivery to further transferee — Title — Right of Action — Undertaking — Amendment—Bills of Exchange Act.*]—Payee of a note endorsed it in blank. The Standard Bank of Canada became holders as collateral security. The bank stamped on the back over the endorsement the words, "Pay Standard Bank of Canada or order," thus converting it into a special endorsement to that bank. The plaintiffs took over the account, depositing the note, receiving the note and other securities, paying therefor $13,800. The note was again stamped "Pay to the order of the Sovereign Bank of Canada," over the words already there, "Pay Standard Bank of Canada or order," so as to partly obliterate them, but not so that both endorsements could not be plainly made out. On these facts it was held that the intention of the two bank managers was to transfer to plaintiffs all the title of the Standard Bank to the note, and that the effect was that plaintiffs became the holders of the note and entitled to maintain the action. *Sovereign Bank* v. *Gordon*, 4 O. W. R. 152, 9 O. L. R. 146.

Holder in due course—Findings of trial Judge—Signatures of defendants — Knowledge of nature of document signed — Evidence—Examination of parties not put in at trial—Agreement put in after close of evidence—Admission of written argument of counsel—Motion for new trial—Result not affected by irregularities—Appeal. *Dart* v. *Quaid*, 9 O. W. R. 714.

Holder in due course—*Instalment of interest—Transfer after default to pay interest—"Overdue" bill—Notice — Holder in good faith—Bills of Exchange Act—Common law rule.*]—Where interest is made payable periodically during the currency of a promissory note, payable at a certain time after date, the note does not become overdue, within the meaning of ss. 56 and 70 of the Bills of Exchange Act, merely by default in the payment of an instalment of such interest.—The doctrine of constructive notice is not applicable to bills and notes transferred for value.—Judgment appealed from, 5 W. L. R. 409, reversed; Idington and Maclennan, JJ., dissenting. *Union Investment Co.* v. *Wells*, 39 S. C. R. 625.

Illegal consideration—*Onus—Findings—Appeal.*]—In an action by the endorsee of a promissory note against the defendants as makers, the defences relied on were that the note was made for the accommodation of the plaintiff, and that it was given in connection with a smuggling transaction, and for other illegal purposes. The plaintiff's evidence was unsatisfactory to the trial Judge and there was a failure on his part to produce the books of account shewing how the consideration for the note was made up. There was evidence to support the plea of illegality, and the Judge, holding that, under these circumstances the burden of proving consideration was upon the plaintiff, dismissed the action with costs.— On appeal

there was an equal division of opinion, and the appeal was dismissed without costs. *Ross* v. *Gannon*, 39 N. S. R. 65, 1 E. L. R. 239.

Illegal consideration—*Smuggling transaction—Burden of proof—Findings of trial Judge—Appeal.*]—Judgment of the Supreme Court of Nova Scotia, 39 N. S. R. 65, 1 E. L. R. 239, affirmed. *Ross* v. *Gannon*, 39 S. C. R. 675.

Illegal consideration — *Unreasonable restraint on marriage — Public policy.*]—Appeal by plaintiff from judgment of Street, J. (2 O. W. R. 1129, 24 Occ. N. 17, 6 O. L. R. 708), dismissing action by an unmarried woman against administrator of the estate of Albert Rose, whose housekeeper plaintiff was, upon a promissory note for $1,500 made by the intestate. The consideration was an agreement by plaintiff not to marry while the intestate lived:—*Held*, that the contract was not one in restraint of marriage for such an unreasonable period as to be contrary to the policy of the law. Judgment for plaintiff for the promissory note sued on and interest. *Crowder* v. *Sullivan*, 4 O. W. R. 397, 25 Occ. N. 31, 9 O. L. R. 27.

Illegality — *Consideration — Election fund.*]—There can be no recovery upon a promissory note given for the purpose of raising funds to be used at an election, or upon a renewal of such a note. *St. Pierre* v. *L'Ecuyer*, Q. R. 23 S. C. 495.

Instrument in form of note with additional provisions—Interest — Acceleration clause—Waiver of presentment, etc. —Holder in due course. *Davis* v. *Butler* (Man.), 7 W. L. R. 85.

Invalidity—Illegal transaction—Stifling prosecution—Cancellation of notes—Costs — Misrepresentations—Amendment of pleadings. *Bowins* v. *Home Bank of Canada*, 9 O. W. R. 938.

Irregular indorsement — *Liability by signature—Bills of Exchange Act.*]—On the back of a certain promissory note given by S. to the order of H. appeared the signature of K. and B., underneath the words, "We guarantee payments of the within note":—*Held*, that K. and B. were liable as indorsers. *Lock* v. *Reid* (1842), 6 O. S. 295, not followed, as no longer representing existing law, having regard to the course of decision, and the effect of s. 131 of the Bills of Exchange Act. *Lehigh Cobalt Silver Mines Co.* v. *Heckler* (1908), 18 O. L. R. 615, 12 O. W. R. 854.

Joint and several note—*Release of co-maker—Reservation of rights — Knowledge and consent — Subsequent deed — Ratification.*]—One of the five makers of a joint and several promissory note was absolutely released by the holder, by an instrument under seal, from liability upon the note, and there was no reservation of rights against the other makers, but the holder sought to recover upon the construction of the release, and a subsequent instrument under seal, to which the maker who had been released was not a party, that the rights of the holder against the defendant had been effectively preserved. —Decision of a Divisional Court, 8 O. L. R. 261, 3 O. W. R. 758, reversed.—Per Moss, C.J.O.:—The whole arrangement of which the release formed part was come to and carried out with the knowledge and consent of the defendant, and that knowledge and consent were sufficient to prevent the release of his co-maker operating as a discharge of his liability.—Per Osler, J.A.:—Even if the release did in law operate from the moment of its execution as a discharge of the defendant, there was nothing to prevent the latter, after its execution, from acknowledging and ratifying, by a proper instrument, his continuing liability to pay, just as a surety may do who has been discharged by time given to his principal or by release of a co-surety. Co-contractors and co-debtors stand in these respects in same position as co-sureties. Release of one operates in general as a release of all, but the legal operation of such a release may be restrained by express terms of the instrument, or co-debtors may reaffirm and ratify their liability notwithstanding the release. *Rogers* v. *Robertson* (1906), 11 O. L. R. 295, 6 O. W. R. 896.

Joint makers — *Action against both — Judgment against one — Subsequent action against other — Former action—Amendment —Lapse of time.*]—The defendants G. and N. were sued jointly as makers of a promissory note for $25. The writ of summons, which was issued in January, 1885, was served on the defendant N., and the defendant G. accepted service. N. appeared and pleaded, but, by arrangement, nothing was done in relation to the claim against the defendant G. In November, 1885, N. withdrew his defence, and confessed the action, and final judgment was entered against him, on which some payments were made. In 1899 the plaintiff commenced proceedings against the defendant G., who, under an agreement reserving his rights, appeared and pleaded:—*Held*, that the judgment entered on confession against the defendant N. was an answer to the claim subsequently made against the defendant G. *McLeod* v. *Power*, [1898] 2 Ch. 295, followed:—*Held*, further, that the action having been brought against defendants as joint debtors only, the position of G. in the suit was not affected by the fact that the note in question was a joint and several one, and that the plaintiff, in another suit, might have some claim against G. alone. *Per* Townshend, J.—The plaintiff could not succeed without an amendment, and no amendment should be permitted after the lapse of fifteen years. *Per* Meagher, J., dissenting:— As the reception of the note was not objected to on the trial, or the existence of the judgment against N. urged as an answer, a stage had been reached when the form of action was not material; also, that, as either objection, if raised upon the trial, could have been cured by amendment, the fact should be looked at rather than the form, and the defendant G. should not be permitted to succeed on a mere technicality. *McDonald* v. *Gillis*, 33 N. S. Reps. 244.

Joint makers—*Endorsement.*] — When two persons sign a promissory note together, their obligation is joint, not joint and several. The bearer of a note which is indorsed cannot claim thereunder. *Dagneau* v. *Decaire*, 8 Q. P. R. 141.

Joint makers — *Liability.*]—The joint makers of a promissory note drawn up in the form "I promise," etc., are jointly and severally bound under s. 84 of the Bills of Exchange Act. *Seth David Congregation of Roumanian Jews* v. *Backman*, Q. R. 31 S. C. 23.

Joint makers—*Surety for debt — Collateral security.*]—Defendant was the maker of a note, but claimed to be a joint surety for debt of another. The note had been renewed several times, and the defendant had to pay it. Judgment for plaintiff. A further defence was that plaintiff had promoted an Act of the Legislature by which some collateral stock had become worthless:—*Held*, that plaintiff is not responsible for Acts of Parliament. *Hobrecker* v. *Sanders*, 6 E. L. R. 567.

Joint obligation — Statute of Limitations—Payments by one maker—Agency—Evidence of—Costs. *Harris* v. *Greenwood*, 4 O. W. R. 140.

Joint or several liability.]—The obligation of the makers of a promissory note which is not expressed to be the several note of each, is joint only. *Noble* v. *Forgrave*, Q. R. 17 S. C. 234.

Judgment against one endorser — *Insolvency of another endorser—Acceptance of part of claim and transfer of same—Release from transferee.*]—A bank, by their *prête-nom* H., had recovered judgment against L., the first endorser, and A., the second endorser, of a promissory note. A. having failed, H. filed with the curator of A.'s estate a claim based on this judgment. Shortly afterwards the bank accepted a certain sum from A.'s daughter, by way of composition, and transferred their claim to her, retaining, however, possession of the note. Afterwards, by an agreement between them, she released L. from all claims which she might have against him by virtue of the transfer mentioned:—*Held*, that the transfer by the bank was of their entire claim under the judgment, that is, its right of recovery against all parties to the note, and not a release by the bank of their rights against the insolvent only; and that the discharge to L. was valid as against the bank and all claiming under them. *Langlois* v. *Harel*, Q. R. 13 K. B. 475.

Liability of endorser — Agreement to become liable — Absence of endorsement by payee—Action by payee—Authority of decided cases. *Slater* v. *Laberee*, 5 O. W. R. 420, 539, 6 O. W. R. 628, 10 O. L. R. 648.

Liability of endorser — *Release of security—Discharge of endorser—Evidence.*]—The defendant had endorsed a note made by A. and H. to E., who subsequently made an assignment to the plaintiff for the benefit of creditors. E. having a mortgage to secure past indebtedness of and future advances to A. and H., released this mortgage, which was really valueless, for some stock which turned out to be no good:—*Held*, that releasing the mortgage did not release defendant. There had been no renewal of the note, nor any giving of time. *Wade* v. *Livingstone*, 13 O. W. R. 708.

Lien notes are not promissory notes. *Imperial Bank* v. *Georges; Georges* v. *Kidd*, 12 W. L. R. 398.

Lost note—*Action on—Security.*]—The payee of a lost promissory note cannot sue upon the note, simply offering to reimburse the maker if the note is found, but he must offer to give security that the maker shall not be troubled on account of the note.—2. This rule applies as well to the case of a non-negotiable note which is probably destroyed, as to that of a negotiable note which is simply lost. *Pillow and Hersey Co.* v. *L'Espérance*, Q. R. 22 S. C. 213.

Lost note—*Action on—Security—Pleading—Striking out—Costs.*]—In an action on a promissory note alleged to have been destroyed by error, where the plaintiff declares that he has offered to the defendant and is still ready to give him security against any liability thereon, and the defendant, after denying all the allegations of the action, further pleads want of security, and sets up facts tending to establish that he is not liable, a motion to set aside such defence will be dismissed, but without costs. *Rowan* v. *Ross*, 3 Que. P. R. 391.

Lost note—Action on—Striking out plea of loss — Indemnity — Costs. *Palmer* v. *Reilly*, 2 E. L. R. 308.

Lost note — *Division Court—Ascertainment of amount — Limitation of actions — Absence beyond seas—Interest.*]—Action in a Division Court upon a promissory note made in 1882, to recover $167 and interest. The instrument was lost; secondary evidence of its contents was received, and it was shewn that it had been signed by the defendant:—*Held*, that the amount was ascertained by the signature of the defendant so as to give the Division Court jurisdiction up to $200:—*Held*, also, that the Statute of Limitations was not a bar to recovery, the defendant shortly after the making of the note having removed to the United States, and having never returned; and the action lay, notwithstanding that he was still abroad:—*Held*, also, that the plaintiff was entitled to interest from the maturity of the note. *Murphy* v. *Sweeney*, 20 Occ. N. 338.

Material alterations — *Forgery—Partnership — Mandate — Assent of parties — Liability of endorser — Bills of Exchange Act.*]—R. induced H. to become a party to and endorser of a demand note for the purpose of raising funds, and agreed to give warehouse receipts as security to the bank on discounting the note. It was arranged that the goods covered by the warehouse receipts were to be held and sold on joint account, each sharing equally in the profits or losses on the transaction. Subsequently R. altered the note, without the knowledge or consent of H., by adding thereto the words "*avec intérêt à sept par cent. par an.*" and falsely represented to the bank that H. held the warehouse receipts as collateral security for his endorsement. A couple of months later H., for the first time, became aware that the goods had never been purchased or placed in warehouse, that no warehouse receipt had been assigned to the bank; and did not, until some months later, know

that the alteration had been made in the note. There was some evidence that H. had asked for time to make a settlement of the amount due to the bank upon the note after he had become aware of the fraud and the alteration so made: — *Held*, by Idington, Maclennan, and Duff, JJ., that the instrument was a forgery and could not be ratified by an *ex post facto* assent. *Merchants Bank* v. *Lucas*, 18 S. C. R. 704, Cam. Cas. 275, and *Brook* v. *Hook*, L. R. 6 Ex. 89, followed. *Per* Idington, J., the circumstances of the case did not shew that there had been any assent to the alteration, within the meaning of s. 145 of the Bills of Exchange Act. *Per* Maclennan, J., the assent required to bring an altered bill within the exception provided by s. 145 of the Bills of Exchange Act, R. S. C. 1906, c. 119, must be given by the party sought to be bound at the time of or before the making of the alteration.—*Held, also*, Fitzpatrick, C.J.C., and Davies, J., *contra*, that, in the special circumstances of the case, there was no partnership relation between the parties to the note for the purpose of the transaction in question, and there could be no implied authorisation for the making of the alteration in the note. *Per* Fitzpatrick, C.J.C., the transaction in question was a joint venture or particular partnership for the enterprise in contemplation of the parties, and, consequently, R. had a mandate to make whatever agreement was necessary with the bank to obtain the funds, and to provide for the payment of interest on the advances required to carry out the business. Judgment appealed from, Q. R. 16 K. B. 191, reversed, Fitzpatrick, C.J.C., and Davies, J., dissenting. *Hébert* v. *Banque Nationale*, 40 S. C. R. 458, 5 E. L. R. 271.

Material alteration — *Renewal—Conflict of evidence—Appeal.*]—To an action on a promissory note the defendants pleaded that the note sued on was given in renewal of a prior note for a larger amount, and that the original note was rendered void by being materially altered by the addition thereto of a charge for interest, of which alteration the defendants had no knowledge at the time of making the renewal note. There was a conflict of evidence as to the alteration referred to, but the plaintiff's version was supported by the appearance of the note itself, which appeared, on the face of it, to have been all written at the one time, with the one ink, and in the one handwriting, and bore no evidence of having been altered. The appearance of the note being consistent with the plaintiff's evidence, and hardly reconcilable with that of the defendants, and the trial Judge, after seeing and hearing the witnesses, having accepted the plaintiff's version:—*Held*, that there was no reason for interfering with his decision. *Brennan* v. *Sutherland*, 37 N. S. Reps. 370.

Misrepresentation — *Counterclaim for damages — Interest on note and counterclaim.*]—A promissory note was given for stock. Defendant counterclaimed for damages for the amount he paid for the stock. The only question was as to interest:—*Held*, if plaintiff is allowed interest on the note, interest must also run on the counterclaim as on the claim. Counterclaim sustained. *Gould* v. *Gillies*, 7 E. L. R. 11.

Motion for judgment against indorser of two promissory notes.]—*Held*, that the defendant must be allowed to defend where he denied his signature to the larger note and where the smaller one had been made five years before, payable one year after date, as defendant might be able to set up a defence thereto, that time had been given to the maker of the smaller note. *Imperial Bank* v. *Tuckett* (1905), 6 O. W. R. 121, 161, followed. *Edwards* v. *Stone* (1909), 14 O. W. R. 644.

Motion for summary judgment on—*Defendant denied signature—Giving time to maker—Correspondence.*]—Motion for judgment on two promissory notes dismissed. As to one note defendant denied his signature, and as to the other he claimed to be an accommodation endorser, and possibly time was given the principal debtor. Even if defendant is disposing of his property that is no ground for giving judgment. *Edwards* v. *Stone*, 14 O. W. R. 644.

Negotiable instruments — Additional memorandum — Sale of goods—Surplusage. *Canadian Bank of Commerce* v. *Livingston* (P. E. I.), 6 E. L. R. 459.

Non-payment at maturity—*Endorser —Notice of dishonour—Waiver—Independent promise to pay.*]—The defendant was sued as endorser of a promissory note. The offer by defendant to pay it by monthly instalments would amount to dispensation of proof of notice of dishonour, but not as to presentment. New trial ordered to enable plaintiff to prove presentment. *Murray* v. *Ayer*, 6 E. L. R. 509.

Notice of dishonour—*Imperial Bills of Exchange Act — Time — Mails — Surety — Endorser — Discharge — Compromise — Extending time for payment.*]—Under the Imperial Bills of Exchange Act, 1882, which provides (s. 49, s.-s. 12), that "notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter," and further provides that, "in the absence of special circumstances, notice is not deemed to have been given within a reasonable time, unless, where the person giving and the person to receive notice reside in different places, the notice is sent off the day after the dishonour of the bill, if there be a post at a convenient hour on that day; and, if there be no such post on that day, then by the next post thereafter;" notice of dishonour of a note payable in London, England, by a person in this province sent the third day after protest, by the first Canadian mail from London, is not sufficient where there are mails leaving London for the United States between the date of protest and the leaving of the Canadian mail by which the notice would have sooner reached its destination. An agreement by the holder of past due promissory notes made with the maker, without the knowledge or consent of the endorser, to extend the time for payment to a fixed date, and accept in full satisfaction a compromise if paid at the date fixed, will discharge the endorser, although the compromise was not paid, and it was expressly agreed that in that event the holder's rights against all parties should be preserved. *Fleming* v. *McLeod*, 2 E. L. R. 180, 37 N. B. R. 630.

Notice of dishonour — Presentment — Demand prior to action—Power of attorney. *Patriache* v. *Krammerer*, 1 O. W. R. 425.

Notice of dishonour—*Sufficiency—Husband and wife—Agency.*]—Notice is merely knowledge, and notice to an endorser, who is also agent for another endorser, at once becomes in law the knowledge of the principal, with all its consequences. In an action against husband and wife, endorsers on a promissory note given as one of a series of renewals during some years, under an agreement, of which the husband had knowledge, in which the notice of dishonour given was a letter in the words: "I beg to advise you that Mr. T. C. L.'s note for $3,500 in your favour, endorsed by yourself and wife, and held by our estate, was due yesterday. As I have not received renewal, will you kindly see that the same is forwarded with cheque for discount, as there is no surplus on hand;" addressed and sent to the husband only:—*Held*, on the evidence, that the husband was agent for the wife, and that such letter was a sufficient notice of dishonour to both the husband and wife. *Paul* v. *Joel*, 3 H. & N. 455, followed. Judgment of Falconbridge, C. J., 2 O. L. R. 582, 21 Occ. N. 563, affirmed. *Counsell* v. *Livingston*, 22 Occ. N. 360, 4 O. L. R. 340, 1 O. W. R. 444.

Notice of protest—*Attack on—Inscription de faux.*]—A notice of protest of a bill or note made by a notary can be attacked only by an inscription *en faux*. *Choquette* v. *McDonald*, Q. R. 19 S. C. 408.

Notice of specific purpose—Collateral security—Bank—Consideration — Holder in due course—"Negotiate." *Ontario Bank* v. *Poole*, 1 O. W. R. 20, 832.

Note wanting in material particular.] — Plaintiff made application for a policy of life insurance and signed a bank note (partly filled in), on condition that nothing was to be done with it until plaintiff passed required medical examination, when if successful he would give cheque to take up note. The insurance agent fraudulently filled up note and disposed of it to United Empire Bank for value. United Empire Bank handed note to Dominion Bank for collection, and they presented it to Home Bank (where plaintiff had a deposit account), and Home Bank paid note and charged it against plaintiff's account:—*Held*, that a document in the form of a promissory note, but wanting in any material particular, is not "delivered into" a note, and payment cannot be enforced against maker, even by a holder in due course, under s. 32 of the Bills of Exchange Act. *Smith* v. *Prosser*, [1907] 2 K. B. 735, followed. *Hubbert* v. *Home Bank* (1910), 15 O. W. R. 277, affirmed 15 O. W. R. 533, 20 O. L. R. 651, 1 O. W. N. 542.

Notes signed in blank—*Payee—Party to whom negotiated—Holder in due course—Bills of Exchange Act.*]—The payee of a promissory note made in the manner set forth in s. 31 of c. 119, R. S. C. 1906, may, in the same manner as an endorsee, be the party to whom it is negotiated, as well as issued, and a holder in due course, within the meaning of s. 32, and of s. 56. *Lilly* v. *Farrar*, Q. R. 17 K. B. 554.

Obtained by fraud — *Discounted with bank — Holder in due course within s. 56 Bills of Exchange Act — Criminal action against payee — Note taken over by third party—Right to stand in position of bank—Notice of fraud.*] — One Fawcett through fraud induced defendants to sign a promissory note for $1,500. He immediately discounted same with Traders Bank. Next day some of the defendants learned of this and had Fawcett arrested on a charge of obtaining the note by fraud. Fawcett arranged to pay the bank and take up the note and criminal proceedings were adjourned from time to time and finally dismissed. Fawcett paid the bank $799.25 and later induced plaintiffs to take up the note by paying the balance to the bank, and Fawcett the amount paid the bank less discount charges. Plaintiffs brought action on the note.—Teetzel, J., *held* (16 O. W. R. 25, 1 O. W. N. 767), that the note was obtained by fraud and was void in the hands of Fawcett; that the Traders Bank was a holder in due course within the meaning of s. 56 of the Bills of Exchange Act; that plaintiffs were holders in due course to the extent of amount paid the bank but not as to the money paid Fawcett, as they had knowledge of the facts.—Divisional Court reversed above judgment, holding that the paper sued on never became a note, the signatures thereto having been obtained by fraud. Action dismissed.—*Foster* v. *McKinnon*, L. R. 4 C. P. 704, followed. *Graham* v. *Driver* (1910), 17 O. W. R. 60, 2 O. W. N. 131.

Oral agreement contemporaneous with note—Evidence of—Consideration — Contradictory written documents—New trial—Objection to evidence not taken at trial—Discretion of Court. *Conley* v. *Ashley*, 1 O. W. R. 704.

Part failure of consideration—*Construction of contract—Implied condition—Event happening after maturity of note.*]—The plaintiff agreed with the defendant to sell him 14 timber limits which he (plaintiff) had staked, at $1 an acre, the defendant to advance the license fees and to pay the plaintiff in cash and notes for the balance. After the plaintiff had obtained from the Government 12 of the licenses, a question arose as to the meaning of the contract, the defendant in good faith (but wrongfully) believing that the plaintiff was liable to repay him the amount paid the Government for the licenses. On the 27th November, 1907, a new agreement was made, a complete settlement, to the effect that the defendant should forego his claim to be repaid the amount he had paid for the licenses, and that the plaintiff should throw in the two other limits, the licenses for which had not yet been obtained, for the price of the 12 limits. The 12 issued licenses were assigned, and the defendant gave the plaintiff an order for an assignment of the unissued licenses, and the defendant gave the plaintiff cash and promissory notes for the sum agreed upon. On the 28th April, 1908, the Government refused to issue the two additional licenses. In an action upon

one of the notes, which fell due in March, 1908:—*Held*, that the absolute terms of the settlement of the 27th November must be construed as subject to the condition that the Government would issue the necessary licenses; the effect was to leave the parties in the position in which they were on the date of refusal; the right which the plaintiff had to have his note paid in full remained; and the defendant was not entitled to a reduction of two-fourteenths as claimed on the footing of a part failure of consideration.—*Taylor* v. *Caldwell*, 3 B. & S. 833, and *Chandler* v. *Webster*, [1904] 1 K. B. 493, followed.—Judgment of Martin, J., affirmed. *Topping* v. *Marling* (1910), 13 W. L. R. 319.

Part payment—*Action for balance due — Defence of illegality of consideration — Sale of shares on margin—Criminal law—Code, s. 231.*]—Action to recover amount due on a promissory note. As plaintiff knew when he lent the money to defendant that it was to be used to pay deposits for stock bought on margin, the consideration was illegal, and plaintiff cannot recover. *Dean* v. *McLean*, 7 E. L. R. 288.

Partnership — *Liability — Evidence—Authority of manager.*]—Action against the members of a partnership carrying on business under the name of the O. T. L. Co., on a promissory note reading as follows:—"Sixty days after date we promise to pay D. & B. or order $407.29 at the Imperial Bank here; value received:" and signed "W. D. R., Manager, O. T. L. Co.:"—*Held*, Wetmore, J., dissenting, that evidence of the circumstances surrounding the making and the accepting of the note was admissible for the purpose of shewing who was intended to be liable on the note. That, on the terms of the note and the evidence of the surrounding circumstances in this case, the defendants were liable. The defendants carried on a lumbering business in partnership. R. was their manager at the place of operations. The partnership kept in the vicinity of their mill a boarding-house, at which their workmen boarded, and a store for the sale to them of supplies. R. ordered goods which were used in the boarding-house, the store or the mill:—*Held*, that the ordering of the goods was within the scope of R.'s authority, and that the defendants were therefore liable. *Ferguson* v. *Fairchild*, 1 Terr. L. R. 329.

Payable at particular place — *Presentation — Bills of Exchange Act, s. 183 — Absent Debtor Act (P.E.I.), 1873 — Non-resident debtors — Jurisdiction.*]—Full interpretation given of above section:—*Held*, that above Absent Debtor Act does not give jurisdiction where debtor is absent only by reason of residence abroad. *Sinclair* v. *Deacon*, 7 E. L. R. 222.

Payable on demand—*Action to recover on—Defence no consideration—Overdue when transferred—Judgment for amount of note—Interest—Costs.*]— Plaintiffs brought action to recover on a promissory note $3,500 and interest. The defence was that the note was made without consideration, negotiated by payee in fraud of defendants, and, being plaintiffs' on demand, was overdue when plaintiffs became holders of it.—Meredith, C.J.C.P., *held*, that the defence failed, and plaintiffs were entitled to judgment for the amount of note, with interest at five per cent. per annum from its date, and costs. *Northern Crown Bank* v. *International Electric Co. Ltd.* (1910), 17 O. W. R. 561, 2 O. W. N. 286, O. L. R.

Payable to order — *Rights of an endorser, bearer of the note by having paid it.*]—The endorser of a note payable to order, who has become the bearer of it by having paid it, has a right to recover payment thereof only as against prior endorsers, guarantors, if any there are, and the maker. *Lachance* v. *Duval* (1910), 37 Que. S. C. 475.

Payable to order of unincorporated association—*Endorsement by officers—Insufficiency to pass title.*]—A trade union lent to the defendant a portion of its funds, taking therefor a promissory note made payable to the union. The president and financial secretary of that organization endorsed it to the plaintiff:—*Held*, that there was no valid endorsement so as to enable the plaintiff to sue. *Cooper* v. *McDonald*, 10 W. L. R. 173.

Payment—*Accord and satisfaction—Mistake — Principal and agent.*]—On being pressed for payment of the amount of a promissory note, the defendant offered to convey a lot of land (which he then shewed to the plaintiffs' agent) to the plaintiffs in satisfaction of the debt. The agent, after inspecting the land, made a report to the plaintiffs, but gave an erroneous description of the property to be conveyed. On being instructed by the plaintiffs to obtain the conveyance, the plaintiffs' solicitor observed the mistake in the description and took the conveyance of the lot which had actually been inspected at the time the offer was made. More than a year afterwards the plaintiffs sued the defendant on the note, and he pleaded accord and satisfaction by conveyance of the land. In their reply the plaintiffs alleged that the property conveyed was not that which had been accepted by them, and at the trial the plaintiffs recovered judgment. On appeal to the full Court the judgment at the trial was reversed and the action dismissed:— *Held*, affirming the judgment in 9 B. C. R. 257, that the plaintiffs were bound to accept the lot which had been offered to and inspected by their agent in satisfaction of the debt, and could not recover on the promissory note. *Pither* v. *Manley*, 23 Occ. N. 64, 32 S. C. R. 651.

Payment by plaintiff—Liability of defendant as joint maker—Contribution — Defence—Counterclaim—Accounts—Costs. *Duncan* v. *Tobin* (B.C.), 2 W. L. R. 396.

Payment—Collateral security — Mortgage of lease—Receipt of rents by creditor—Charging creditor with rents not collected. *Barron* v. *Gilbert*, 4 O. W. R. 406.

Payment—*Evidence—Oral testimony — Payments applicable to earlier note.*]—In an action upon a promissory note, payable to order, the plaintiff may prove by witnesses, the matter being commercial, that payments set up by the defendant, and established by

cheques and receipts of a date subsequent to that of the note, have been made in reality to discharge a prior note. *Renaud* v. *Beauchemin*, Q. R. 35 S. C. 193.

Payment for mining shares—*Shares assigned to bank as collateral security—Bank transferred shares into name of stranger by mistake — Liability of maker of note.*]—Plaintiff bank brought action to recover $17,300 upon two promissory notes given in payment of certain mining shares which were transferred to bank as collateral security for payment of note. Defendant contended that by the bank transferring said shares into name of a stranger by mistake, released him from his obligation to pay the notes and take the stock.—Riddell, J., *held*, that the dealings with the shares by the bank by mistake did not effect defendant's liability, as plaintiffs were at all times ready, willing and capable of handing over the shares to defendant at any time if he had paid the notes. Judgment for amount of notes with interest and costs. *Conmee* v. *Securities Holding Co.* (1907), 38 S. S. R. 601, distinguished. *Northern Crown Bank* v. *Yearsley* (1910), 16 O. W. R. 401, 1 O. W. N. 924.

Payment of note—*Evidence—Presumption—Production by maker.*]—The production, by the promissor or maker, of a promissory note payable on a given date, without any indication upon its face or proof *aliunde* that it remained due after maturity, is *prima facie* evidence that it was paid and redeemed at or before that time. *James Coristine Co.* v. *Accident Guarantee Co.*, Q. R. 32 S. C. 359.

Payment—Price of goods—Destruction by fire—Application of insurance moneys—Interest of vendees—Insurable interest—Trust—Notice—Indemnity. *Imperial Bank of Canada* v. *Hinnegan*, 5 O. W. R. 247.

Payment—*Re-issue under new arrangement.*]—Action to recover balance due on a promissory note. Plaintiff held a note of defendant's, and also had an open account against him. Plaintiff calling for payment, defendant's wife paid the amount of the note which plaintiff handed in to her. Plaintiff made reductions in open accounts if paid in 30 days. Half an hour after plaintiff called, saying he wanted to change the appropriations, and endorsed a payment on the note, which was handed back to him by the defendant's wife. What is the result of handing back the note by the wife? This question was not answered, but amendments allowed under Yukon Ordinance, s. 117, and judgment given for amount claimed. *Vachon* v. *Lefebvre*, 12 W. L. R. 203.

Payment to agent—*Authority to collect—Estoppel.*]— Actions on promissory notes made by the defendants respectively for the price of certain waggons, endorsed by the payee, before maturity and for valuable consideration, to the plaintiffs.—The only defence pleaded was payment to O., the payee, who was, as the defendants alleged, the agent of the plaintiffs to collect the amounts of the notes.—It was admitted that O. was the agent to sell and had sold the waggons, and it was proved that many persons had previously paid O. money, and that the plaintiffs had received money from O. from time to time as it had come into his hands, but it was not shewn that the defendants knew of this last circumstance so as to be led by it to make payments to O. It was proved that O. had not remitted to the plaintiffs the money paid to him by the defendants. In the first case one of the payments relied on consisted in the taking by O. of a lease at the valuation of $20, to be credited on the notes:—*Held*, that the plaintiffs being the legal holders and having the notes in their possession, in the absence of direct authority to the agent to collect, or of estoppel, the defendants were liable.—*Held*, also, that, even if the defendant P. was justified in thinking that O. was authorised to collect money for the plaintiffs, the horse transaction could not be regarded as equivalent to a payment. *McLaughlin Carriage Co.* v. *Pettipas*, *McLaughlin Carriage Co.* v. *Haverstock*, 20 Occ. N. 137.

Payment to agent—Authority to receive—Notice to maker to pay to principal. *Murphy* v. *Canning* (N.W.T.), 2 W. L. R. 103.

Place of payment—*Place of making—Jurisdiction of Courts of another province—Election of domicil—Statutes.*]— Action on promissory notes dated and payable at Montreal in the province of Quebec. Plea to the jurisdiction, the defendant alleging that he was domiciled in Ontario and served there, and that the cause of action did not arise in Quebec because the notes were made and signed in Ontario, although dated at Montreal: — *Held*, that 63 V. c. 38, does not affect prior elections of domicil made tacitly in a note by virtue of 52 V. c. 48, in force when the notes were made. 2. That the election of domicil was one of the terms of the contract, and a right could not be affected by a subsequent statute. *Merchants Bank of Halifax* v. *Graham*, 3 Que. P. R. 415.

Place of payment — *Presentment — Indorsement in blank — Right of action of payee.*]—*Held*, that when a note is not made payable at any stated place, it is not necessary to allege or prove presentation. 2. That the fact that a promissory note is endorsed in blank by the payee does not preclude such payee from suing thereon if the note is produced from the custody of the payee or his solicitor. *Canadian Co-operative Co.* v. *Trauniczek*, 8 W. L. R. 559, 1 Sask. L. R. 143.

Pledgee of promissory note—*Holder—Exchange.*]—1. A pledgee of a promissory note given as collateral security, is a holder in good faith. 2. A promissory note given in exchange for another note which has been handed over by the owner for collection, is the property of the person who owned the note for which it was given in exchange. *Bélanger* v. *Robert*, Q. R. 21 S. C. 518.

Power of agent for collection to compromise—Striking out claim for wages. *Guenot* v. *Girardot*, 1 O. W. R. 638.

Power of attorney—*Renewal of accommodation note—Endorsement by agent—Authority of agent—Extension of time for pay-*

ment.]—A power of attorney given by one person to another authorizing the latter to attend to the affairs of the former, does not empower the attorney to endorse a promissory note for the accommodation of the maker thereof, although such note may be a renewal of an accommodation not endorsed by his principal. The holder of promissory note who consents to a renewal thereof is deemed to extend the time, so far as the maker is concerned, for payment, to the time the renewal falls due. An endorser of a promissory note has a right to avail himself of an extension of time given to the maker. *Molsons Bank* v. *Cooke*, Q. R. 27 S. C. 130.

Prescription—*Notarial note en brevet—Term.*]—A promissory note made before a notary *en brevet*, signed by a farmer, in favour of a person who is not a trader, for money lent, is subject to a prescription of 30 years. *Robert* v. *Charbonneau*, Q. R. 22 S. C. 466.

Prescription—*Part payment—Proof of—Payment by curator of insolvent.*]—In a commercial matter part payments, amounting to a tacit acknowledgment, having the effect of interrupting prescription, may be proved by witnesses. 2. Article 1235, C. C., line 1, does not apply to a promissory note, the proof of promissory notes and bills of exchange being, by the terms of Art. 2341, subject to the law existing in England in 1849. 3. The payment of dividends by the curator of a person who has made an assignment of his property, has the same effect as to interrupting prescription as a payment made by the debtor himself. *Boulet* v. *Metayer*, Q. R. 23 S. C. 289.

Prescription — *Statute of limitations—Acknowledgment — Executor de son tort — Payments by—Bills of Exchange Act—Dominion and Provincial legislation.*] — A payment or acknowledgment by an executor *de son tort* cannot be relied upon to prevent the Statute of Limitations from operating as a bar, where the action in which it is set up is brought against the lawful personal representative of the deceased. But where the executor *de son tort* has made payments of interest in respect to a promissory note, within six months before the action commenced, and the holder of the note brings action against him to make him answerable to the extent of the goods of the deceased come to his hands, it is not open to the defendant, for the purpose of preventing a payment giving a new start to the Statute of Limitations (which effect it would have if made by the lawful personal representative), to rely on his having been a wrongdoer and not the true representative. As between himself and the plaintiff, as respects payments made by the executor *de son tort* and their effect, the latter is to be treated as the true representative of the deceased. The Bills of Exchange Act does not deal with the consequences which are to flow from the character which, according to its provisions, is attached to the promise which a bill or note contains, and therefore these consequences fall to be determined according to the law of the province in which the liability is sought to be enforced. *Cook* v. *Dodds*, 23 Occ. N. 325, 6 O. L. R. 608, 2 O. W. R. 936.

Presentment — *Pleading — Waiver — Amendment—Jurisdiction of County Court.*] —The plaintiffs inserted the defendant's advertisement in two of their publications for the sums of $10 and $15 respectively. Separate agreements were made in respect to each publication, but the agreements were made at the same time, and the defendant, at the same time that the agreements were made and signed, gave the plaintiffs his promissory note for the sum of $25 payable four months after date at the defendant's office. The plaintiffs' statement of claim contained claims based upon the note and upon the original consideration.—*Held*, that the claim based upon the original consideration was within the jurisdiction of a County Court. The defence that the note was not presented for payment, and that while it was current, the remedy upon the consideration was suspended, must be pleaded. If the defendant were allowed to amend by pleading such defence, the plaintiffs should also be allowed to amend by alleging that presentment was waived by subsequent promises in writing to pay. Something was to be inferred from the duty of a clerk whose duty it was to make presentments, and who testified that he had done so in the case in question. *Sharp* v. *Power*, 33 N. S. Reps. 371.

Presentment, waiver of — *Knowledge of default.*]—An offer made after its maturity by an endorser of a promissory note to pay the amount of the same will not operate as a waiver of presentment in the absence of evidence that at the time of the offer he knew there had been default in presentment. *Ayer* v. *Murray* (1909), 39 N. B. R. 170.

Price of goods sold—*Failure of consideration — Contract — Privity — Evidence — Estoppel.*] — One K. having previously bought a threshing outfit from the plaintiffs, upon which he still owed them a large amount, made a sale of it to the defendant. As a matter of convenience this sale was carried out by the defendant signing an order for the purchaser and making a note for the price in favour of the plaintiffs. The defendant resisted payment of the note, on the ground that the consideration for it had wholly or partly failed, and, that he had not got all the goods ordered or an engine of the quality ordered, and contended that the documents relied on were conclusive evidence that the sale had been made by the plaintiffs and that they were estopped from denying it:—*Held*, that the plaintiffs were not estopped from shewing that it was K. who had made the sale, and that, as the evidence established this, the defendant had no remedy against the plaintiffs for any defects in the threshing outfit, and must pay the amount of the note. *Case Threshing Machine Co.* v. *Wermiger*, 5 W. L. R. 339, 17 Man. L. R. 52.

Price of machine—*Failure of consideration—Evidence — Corroboration — Infant—Sale of machine to—Retention after majority —Ratification—Amendment—Costs.*]—In an action upon three promissory notes made by the defendant, given for the price of a machine purchased by him from the plaintiffs: —*Held*, upon the evidence, that the defendant had failed to shew absence of consideration, his uncorroborated statement not being

accepted. — *Held*, also, following *Louden Manufacturing Co.* v. *Milmine*, 10 O. W. R. 474, 15 O. L. R. 53, that where an infant, having purchased goods, retains them after attaining his majority, without disaffirming within a reasonable time, it will be deemed a ratification.—If a plaintiff only applies at trial to set up ratification, he will be allowed to amend, but, though he recover judgment, no costs will be allowed, following the same case. *Great Western Implement Co.* v. *Grams*, 7 W. L. R. 190, 1 Alta. L. R. 11. (*Reversed*, 8 W. L. R. 160.)

Price of machinery—*Failure to prove signature of one maker—Lien on unpatented land—Transfer to stranger — Payments in arrear—Issue of patent to transferee—Effect on lien.*]—In an action against a father and two sons upon promissory notes and liens on land given for the price of machinery said to have been ordered from the plaintiffs by a written order signed by the three, it was *held*, upon the evidence, that the signature of the father to the documents (being denied) was not proved; and the action was dismissed as against him.—The plaintiffs also sought to have the defendant Le S. declared a trustee for one of the sons, A. B., who had after signing a document creating a lien upon land in favour of the plaintiffs, transferred his interest in the land to Le S., or to have the transfer and the patent issued to Le S. declared void. A. B. had made a payment of $64 to the Government for the land at the time the lien was registered, and that was all the interest he had in it; when he made the transfer to Le S. he had improved the land to the extent of $100. A. B. made only the first payment on the land; and, when he transferred it to Le S., two other payments were in arrear, and the Government were pressing A. B. for payment. Le S. paid what was due, and the patent was issued in his name:—*Held*, that the Government must be taken to have dealt with the lien with the intention and result of setting it aside, on the ground that A. B. had, by defaulting, forfeited his interest; and there was no ground upon which the patent could be set aside. *Northwest Thresher Co.* v. *Bourdin* (1910), 15 W. L. R. 181.

Procurement by false representations — Conspiracy—Transfer of notes to plaintiff for value—*Bona fides*—Absence of notice—Circumstances of suspicion—Copy of promissory note — Actual signature of maker — Destruction of part of document shewing it to be a copy—Uttering of copy as note—Forgery — Defence to action by holder for value — Negligence—Estoppel. *Lockhart* v. *Wilson*, 39 S. C. R. 541.

Proof of consideration — *Liability of makers—Liability of endorsers—Signature on back of note before that of payee.*]—Action on a promissory note made by the defendant company and endorsed by the defendant directors:—*Held*, there was good and valuable consideration for the note sued on. The defendants are liable, although the plaintiff endorsed after the signature of the endorsing defendants. *Knechtel* v. *Ideal*, 11 W. L. R. 344.

Proof of making — *Renewal—Payment —Holders in due course—Presentment—Evidence—Insufficiency to shew presentment before action—Necessity for—Bills of Exchange Act, s. 183—Powers of company—By-laws—Preliminaries to be observed.*]—In an action upon a promissory note it was objected that the evidence did not establish that the note was made by the defendants. The evidence shewed that at the maturity of the note the secretary-treasurer of the defendants went to the office of the payees of the note and gave them a renewal note. Prior to this the payees had negotiated the note to the plaintiffs. The payees took the renewal note, not disclosing the fact that the original had been negotiated, and the defendants gave up the renewal without getting back the original note. The renewal note was subsequently paid:—*Held*, that the action of the defendants in giving a renewal of the note at its maturity, and in subsequently paying that note, sufficiently established that the note now sued on was made under the defendants' authority, and that they were liable upon it. —*Held*, also, that the evidence established that the plaintiffs were the holders in due course; they took the note during its currency as security for an advance of money made by them to the payees; and the subsequent action of the payees in fraudulently procuring a renewal note from the defendants could not affect the plaintiffs.—The note was made payable at a bank. At the trial the plaintiffs' agent proved that he presented the note for payment at that bank; but he did not expressly state that it was presented before action:—*Held*, *per* Perdue, J.A., that it might reasonably be inferred from the evidence, as the trial Judge did, that the presentment was before action.—*Per* Cameron, J.A., adopting the dictum of Armour, C.J., in *Merchants Bank* v. *Henderson*, 28 O. R. 360, the opinion of Riddell, J., in *Freeman* v. *Canadian Guardian Life Insurance Co.*, 17 O. L. R. 296, and the opinion of Fitzgerald, J., in *Sinclair* v. *Deacon*, 7 E. L. R. 222, that, as against the makers, presentment was not necessary under the Bills of Exchange Act, s. 183.—*Per* Richards, J.A., dissenting, that the evidence was insufficient to shew presentment before action; and, following the opinion of Regbie, C.J., in *Croft* v. *Hamlin*, 2 B. C. R. 333, of Graham, J., in *Warner* v. *Simon-Kaye*, 27 N. S. R. 40, and of Newlands, J., in *Jones* v. *England*, 5 W. L. R. 83, that the omission to present before action was fatal to the right to recover.—*Per* Perdue, J.A., that, although the plaintiffs were shareholders in the payee company, they were not personally bound by the wrongful action of that company in taking a renewal note after negotiating the note in question.—*Per* Cameron, J.A., that the note was binding upon the defendants, an incorporated company, though not duly made under the by-laws; innocent holders of negotiable securities are not bound to inquire whether certain preliminaries which ought to have been gone through have actually been gone through. *Robertson* v. *North-Western Register Co.* (1910), 13 W. L. R. 613.

Protest—*In London, England — Notice of dishonour to indorser in Canada—Knowledge of address—First mail leaving for Canada—Notice through agent—Agreement for time—Discharge of surety—Appropriation of payments—Evidence.*]—Notes made in St.

John, N. B., were protested in London, England, where they were payable. The indorser lived at Richibucto, N.B. Notice of dishonour of the first note was mailed to the endorser at Richibucto, and, at the same time, the protest was sent by the holders to an agent at Halifax, N.S., instructing them to take the necessary steps to obtain payment. The agent, on the same day that he received the protest and instructions, sent, by post, notice of the dishonour to the endorser at Richibucto. As the other notes fell due the holders sent them and the protests, by the first packet, from London to Canada, to the same agent at Halifax, by whom the notices of dishonour were forwarded to the endorser at Richibucto:—*Held*, Idington and Duff, JJ., dissenting, that the sending of the notice of dishonour of the first note direct from London to Richibucto, with the precaution of also sending it through the agent, was an indication that the holders were not aware of the correct address of the endorser, and the fact that they used the proper address was not conclusive of their knowledge, or sufficient to compel an inference imputing such knowledge to them. Therefore, the notices in respect to the other notes sent through the agent were sufficient.—Per Idington and Duff, JJ., dissenting, that the holders had failed to shew that they had adopted the most expeditious mode of having the notices or dishonour given to the endorser.—The maker of the note gave evidence or an offer to the holders to settle his indebtedness, on certain terms and at a time some two or three years later than the maturity of the last note; and that the same was agreed to by the holders. The latter, in their evidence, denied such agreement, and testified that, in all the negotiations, they had informed the maker that they would do nothing whatever in any way to release the endorser:—*Held*, that the evidence did not shew that there was any agreement by the holders to give time to the maker, and the endorser was not discharged. If the existence of an agreement could be gathered from the evidence, it was without consideration, and the creditor's rights against the sureties were reserved.—Per Idington and Duff, JJ., that a demand note, given in renewal of a time note and accepted by the holders is not a giving of time to the maker by which the endorser is discharged.— Judgment of the Supreme Court of New Brunswick, 37 N. B. R. 630, 2 E. L. R. 180 (*ante* 35), reversed. *Fleming* v. *McLeod*, 27 C. L. T. 660, 39 S. C. R. 290.

Protest—*Waiver—Curator of insolvent.*]—The curator appointed upon an abandonment of property under the Code of Procedure has no authority, more particularly, as in the present case, without leave of a Judge of the Superior Court or the advice of the creditors or inspectors, to waive on behalf of the insolvent protest of a promissory note endorsed by the latter, and a waiver under such circumstances does not bind the endorser. Judgment in Q. R. 22 S. C. 474 affirmed. *Denenberg* v. *Mendelshon*, Q. R. 23 S. C. 128.

Protest—*Waiver—Curator of insolvent.*]—The curator to an abandonment of property has no right to waive protest of a promissory note of which the insolvent is the endorser. *Molsons Bank* v. *Steel*, Q. R. 23 S. C. 316, 5 Que. P. R. 84.

Protest — *Waiver—Form of pleading.*]—The words "I hold myself responsible for the note," written and signed by the endorser upon the face of the note, amount to a waiver of protest; and a declaration alleging this fact is sufficient law. *Ranger* v. *Aumais*, 5 Que. P. R. 184.

Purchase of shares—*Failure of consideration—Onus.*]—On appeal it was held that the promissory note sued on was given for 10 shares of stock in plaintiff's bank at 140. He received six dividend cheques which he endorsed. The inference, therefore, is that defendant knew when giving note, that it was to pay for stock at 140. *Sovereign* v. *McIntyre*, 13 O. W. R. 509.

Purchase price of horse — Warranty —False statement — Repudiation of sale — Negotiation of note—Knowledge by endorsee of facts—Holders in due course — Onus — Fraud. *Willoughby* v. *Conover* (Man.), 7 W. L. R. 87.

Purchase price of shares — Misrepresentations as to value—Confidential adviser—Agency—Evidence. *Atlas Loan Co.* v. *Davis*, 5 O. W. R. 31.

Purchase price of timber licences—*Contract—Payment of license fees—Defence to action on note.*]—Action upon promissory note given under a contract for purchase of timber licenses:—*Held*, there was no meritorious defence. *Topping* v. *Marling*, 10 W. L. R. 455.

Recovery of money paid—*Failure of consideration—Pleading.*]— Where a plaintiff, seeking to get back a payment as having been made without consideration, bases his demand upon a promissory note, and his declaration makes it appear that such note is paid, the demand cannot be allowed, because the fact of his being the holder of this note does not give him the right to bring an action for recovery of the money paid. *Demers* v. *Bank of Ottawa*, 9 Q. P. R. 107.

Release — *Proof by entries in books—Transfer without endorsement — Notice of transfer.*]—Where the payee and the maker of a promissory note agree that it should be released, but the note is afterwards transferred by the payee, with other assets, to a company incorporated to take over the business of the payee, the maker may prove the release of the note by entries made in the company's books, with the knowledge and under the direction of the payee, and by corroborative verbal evidence of other officers of the company. 2. When a promissory note is transferred after maturity, not by endorsement, but by being included in a general transfer of the assets of a business, the person acquiring the note must have notice of the transfer served on the maker before a right of action exists in favour of such transferee. *In re Prowse and Nicholson*, M. L. R. 5 Q. B. 151, followed. *Clonbrock Steam Boiler Co.* v. *Browne*, Q. R. 18 S. C. 375.

Renewal — *Consideration—Acknowledgment of value—Connection.*]—The company

respondents sued on a promissory note signed by the appellant and payable to the order of the respondents, for value received. The respondents admitted that they paid no cash consideration to the appellant for this note, but stated that it was given in part renewal of a previous note for a similar amount, which appellant executed in favour of one S., and which was endorsed and transferred to respondents, with another of like amount, in settlement of the overdrawn account of S., who was their general manager:—*Held*, that where the connection between the first note, for which valid consideration was received, and the notes given in renewal thereof, is clearly established, want of consideration is not a valid defence to an action by the payee against the maker on a renewal note in which the latter acknowledges to have received value. 2. Such connection may be proved, as in this case, by a consecutive and uninterrupted series of dates in the payee's books in regard to the transaction, together with the probability that the payee would not have surrendered a valid note without receiving a valid renewal. 3. Even in the absence of positive proof that the first note was endorsed by S. to the company, the Court may reasonably presume that such was the case from the fact that it was delivered to the company and was in custody of the company's cashier, together with the fact that the note now sued upon was given by appellant for value received and was payable directly to the company. *Ross* v. *Western Loan and Trust Co.*, Q. R. 11 K. B. 292.

Revendication—*Summary procedure.*]—An action by which the plaintiff demands that a certain promissory note shall be given up to him or declared void and of no effect, is of a summary nature. *Ekenberg* v. *Mousseau*, 3 Que. P. R. 348.

Security for debt—*Husband and wife—Parent and child — Undue influence — Lack of independent advice — Conspiracy.*]—C., a man without means, and W., a rich money lender, were engaged together in stock speculations, W. advancing money to C. at a high rate of interest in the course of such business. C. being eventually heavily in the other's debt, it was agreed between them that if C. could procure the signatures of his wife and daughter, each of whom had property of her own, as security, W would give him a further advance of $1,000. Though unwilling at first, the wife and daughter finally signed promissory notes in favour of C. for sums aggregating over $7,000, which were delivered to W. Neither of the makers had independent advice: — *Held*, reversing the judgment of the Court of Appeal, *Adams* v. *Cox*, 2 O. W. R. 93, 3 O. W. R. 32, 4 O. W. R. 15, 5 O. W. R. 419, Taschereau, C.J.C., dissenting, that, though the daughter was 23 years old, she was still subject to the dominion and influence of her father, and the contract made by her without independent advice was not binding:—*Held*, also, Taschereau, C.J.C., and Killam, J., dissenting, that his wife was not subjected to influence by C. and entitled to independent advice, and she was, therefore, not liable on the note she signed. *Per* Sedgewick, J., that the evidence produced disclosed that the transaction was a conspiracy between C. and W. to procure the signatures to the notes, and that the wife of C. was deceived as to his financial position and the purpose for which the notes were required. Therefore the plaintiff could not recover. *Cox* v. *Adams*, 25 Occ. N. 25, 35 S. C. R. 393.

Shares—Purchase induced by misrepresentation—Right to rescind—Counterclaim for damages—Measure of damages. *Gould* v. *Gillies* (1906), 1 E. L. R. 440.

Signature *by third party after maturity—Agreement not to sue—Release of original makers — Insufficient consideration — Bills of Exchange Act — Alteration.*] — Where a promissory note made by two persons in favour of the plaintiff was, after maturity, signed by the defendant at the plaintiff's request, without any agreement or understanding for extension of time or for forbearance:—*Held*, following *Ryan* v. *McKerral*, 15 O. R. 460, that the procurement by the plaintiff of the signature of the defendant was not equivalent to an agreement not to sue, and that no change has been made in the law in this respect by the Bills of Exchange Act.—*Held*, also, that, even if the original makers were released by the execution of the note by the defendant, such release would not be a sufficient consideration to support the promise of the defendant, inasmuch as there was no evidence of a desire or request or consent on her part that the other parties to the note should be released. *Stack* v. *Dowd*, 10 O. W. R. 633, 15 O. L. R. 331.

Signature *of company, followed by signatures of directors—Personal liability of directors—Intention—Intrinsic and extrinsic evidence.*]—Action on a promissory note, signed by a joint stock company and then by the president and two directors. After the name of the president was the abbreviation "Dir." while after the name of one of the directors was the abbreviation "Mgr.":—*Held*, on appeal, that the company and the three individuals are liable. *Union Bank* v. *Cross*, 12 W. L. R. 539.

Signatures *procured by representation that another would be obtained*—Failure to obtain—Absence of repudiation—Adoption—Waiver—Consideration — Endorsee—Holder in due course for value without notice. *First National Bank of Minneapolis* v. *McLean* (Man.), (1906), 1 W. L. R. 538, 3 W. L. R. 227.

Signed in blank—*To be completed on condition — Conditions never happened—Fraudulently filled in—Pledged as collateral security to bank.*]—Defendant signed a note in blank and handed it to his agent to be filled in and discounted should it become necessary for defendant to raise money to make repairs on certain property. The agent fraudulently filled in the note for $1,000 and pledged it with a bank as collateral security for agent's personal account. This was done long after the note had been left with the agent. Defendant never required to use the note for said repairs and received no consideration:—*Held*, that defendant was not liable; that he never intended or authorized the paper sued on to be filled up as a promissory note; that the circumstances never arose upon which only the agent was authorized to

fill the same up; and that what was done by agent was without authority and in fraud of the defendant; and that the paper sued on never in fact by the defendant's authority became a promissory note. *Smith* v. *Prosser*, [1907] 2 K. B. 735, followed. *Lloyd's Bank* v. *Cooke*, [1907] 1 K. B. 794, distinguished. *Ray* v. *Wilson* (1910), 16 O. W. R. 578, 1 O. W. N. 1005.

Subscription for share in company—*Fraud—Note of subscriber transferred to bank—Holders in due course—Hypothecation of securities—Powers of company—By-law—Resolution—Indorsement by secretary—Sufficiency—Negotiation of note.*]— The defendant was induced to subscribe for one share of the stock of an incorporated manufacturing company and to give a promissory note for the amount of the par value thereof, by a false and fraudulent representation made by an agent of the company. The note shewed on its face that it was given for a share in the company, and it was indorsed to the order of the plaintiffs, a chartered bank, by an indorsement in the name of the company, with the name of the secretary thereof signed thereto. A by-law was passed by the directors of the company, and confirmed by the shareholders at an annual meeting, authorising the borrowing of money, following the words of s. 49 of R. S. O. 1897, c. 191. It was also resolved by the directors, and confirmed by the shareholders, that an account be opened with the plaintiffs; that all moneys, orders, and other securities belonging to the company and usually deposited in the ordinary course of banking, be deposited in said bank account; that the same might be withdrawn therefrom by cheque, bill, or acceptance in the name of the company, over the names of any two or four specified officers (one being the secretary); and that for all purposes connected with the making of deposits in the bank account, the signature of any one of the four should be sufficient. By a memorandum over the seal of the company and the hands of three of the officers, it was agreed that the plaintiffs should hold all the company's securities at any time in the plaintiffs' possession as collateral security for present and future indebtedness; and it appeared that the note above referred to, upon which this action was brought, with a large number of others, was delivered to the plaintiffs as a collateral security, accordingly. The secretary was also a director of the company, and indorsed notes, as he indorsed that in question, almost daily, with the knowledge of his co-directors, for a year and a half:—*Held*, that the by-law was sufficient to authorise the hypothecation of the company's securities to secure the present and future indebtedness of the company to the plaintiffs; that the indorsement over the signature of the secretary was sufficient to pass the property in the note to the plaintiffs; that the plaintiffs were entitled to assume that a share had been properly allotted to the defendant, and that the note represented the debt due by him to the company for such share, and that the company had the right to negotiate it; and (upon the evidence) that the plaintiffs were holders in due course, for value, without notice of the fraud, and were entitled to recover.—Judgment of Macbeth, Co.C.J., affirmed. *Standard Bank of Canada* v. *Stephens*, 16 O. L. R. 115, 11 O. W. R. 582.

Substituted note—*Principal and surety—Discharge by giving time—Misdirection—New trial.*]—In an action on a joint and several promissory note made by the defendants W. and P., the defences chiefly relied on were that W. was surety for P. and was discharged by the giving of time to the principal, and that the note sued on was discharged by the acceptance in substitution thereof of another note made by P. and one D. R. The evidence shewed that W. paid one-half of an original note made by himself and P., and signed the note sued on, on the understanding that payment was to be enforced from P. at maturity. When the note became due P. was not in a position to pay in full, and offered a renewal note for the balance due, which the plaintiff agreed to accept, provided P. would furnish another name approved of by the plaintiff. Before the note was made, the plaintiff expressed his willingness to accept the name of C. R., but P. failed to get that name, and sent to the plaintiff, instead, a note signed by himself and D. R. The plaintiff did not return this note, but told P. verbally that he would not accept it:—*Held*, per Graham, E.J., Townshend, J., concurring, that the retention of the note by the plaintiff was not, under the circumstances, an acceptance; also, assuming that W. was only a surety for P., it was his duty to see that the obligation of his principal was satisfied; also, that, in the absence of evidence that ought reasonably to satisfy a jury that the note was made by P. and D. R. was accepted by the plaintiff in lieu of the note upon which W. was liable, there was no necessity for sending the case back for a new trial.—Per Russell, J., assuming that the directions of the trial Judge to the jury were erroneous, there need not be a new trial if a verdict for the defendant would be set aside as unreasonable.—Weatherbe, C.J., dissented. *Rockwell* v. *Wood*, 1 E. L. R. 247, 39 N. S. R. 423.

Surety — Agreement to accept another surety—Conflict of evidence—Drawing inferences — Misdirection. *Rockwell* v. *Wood* (1906), 1 E. L. R. 247.

Surety—Endorser—Notice of dishonour—Giving time to maker—Consideration. *Fleming* v. *McLeod* (1906), 2 E. L. R. 180.

Transfer as collateral security—*Recovery by transferee—Extent of.*]—Whenever persons assume the character of duly authorised mandatories of another, they must prove their mandate or indemnify third parties against the consequence of its absence.—2. When a promissory note is transferred as collateral security for the payment of a principal debt, the transferee of said note has not a recourse against the maker for any amount above what is due on said principal debt. *Letellier* v. *Boivin*, Q. R. 16 S. C. 428.

Usurious transactions—*Commission of 5 per cent. besides interest—Customary allowance for transacting business.*] — Where a merchant supplied goods, money, promissory notes and other commercial instruments to country customers and where accounts, re-

turns and settlements were made from time to time at their convenience with produce from the upper country, transferred by vessels and barges, the Privy Council *held*, that a commission of 5 per cent. on all advances besides interest, under the circumstances, was not an usurious transaction, but a customary allowance for the trouble and inconvenience of transacting the business. *Pollock* v. *Bradbury* (1853), C. R. 2 A. C. 46.

Void consideration—*Fraudulent preference—Bankruptcy and insolvency.*]— Promissory note in favour of creditor and inspector of an abandoned estate, to procure assent to sale of the assets to maker, is fraudulent, null, and void, and no action will lie to recover on it. *Evans & Sons Limited* v. *Tracey* (1906), Q. R. 29 S. C. 97.

4. Deposit Receipt.

Foreign bank — *Refusal of payment—Holder in due course—Liability of endorser—Presentment—Reasonable time—Law of foreign state—Notice of dishonour—Bills of Exchange Act, ss. 71 (f), 85.*]—A deposit receipt of a bank in the State of Minnesota, dated the 9th February, 1903, in favour of the defendant, acknowledging the deposit of a sum of money, payable to his order "on return of this certificate properly endorsed," was endorsed to the plaintiffs for valuable consideration on the 30th October, 1903, and was sent on the same day to another bank in Minnesota for collection. On the 31st October the latter bank returned the certificate to the plaintiffs, with the notation that the debtor bank had suspended payment. This communication did not reach the plaintiffs till the 2nd November, and on that day they notified the defendant by letter that the certificate had been returned to them unpaid, and asked for reimbursement. There was no evidence that this letter ever reached the defendant. After waiting 5 days and receiving no answer, the plaintiffs sent the certificate to an agent in Minnesota, who on the 10th November presented it to the debtor bank for payment; payment was refused; the certificate was on that day protested by a notary, and notice of non-payment sent by him to the defendant. This protest, with the certificate attached, was put in evidence at the trial of an action against the defendant upon the receipt. Expert evidence was given to the effect that by the laws of Minnesota the certificate was negotiable and of the same effect as a promissory note payable on demand. There was no evidence as to what would be a reasonable time for presentment: — *Held*, that, in the absence of evidence, the Court must be governed by the provisions of the law in force in Saskatchewan; that, by s. 71 *(f)* of the Bills of Exchange Act, was *prima facie* evidence of the protest and notice of dishonour; and that the presentment was within a reasonable time, having regard to the circumstances: Bills of Exchange Act, s. 85. The plaintiffs were, therefore, entitled to recover. *Security National Bank* v. *Pritt* (1910), 14 W. L. R. 216.

BILLS OF LADING.

See Pleading—Ship—Sale of Goods—Carriers—Railway—Ship.

BILLS OF SALE.

See Chattel Mortgages and Bills of Sale.

BIRD.

See Animals.

BIRTH.

Evidence of. *See* Evidence—Wills.

BISHOP.

See Church—Will.

BLASPHEMY.

See Public Morals.

BOARD OF DELEGATES.

See Appeal—Municipal Corporations.

BOARD OF EDUCATION.

See Schools.

BOARD OF EXAMINERS.

See Prohibition—Schools.

BOARD OF HEALTH.

See Municipal Corporations — Penalty—Public Health.

BOARD OF LICENSE COMMISSIONERS.

See Intoxicating Liquors.

BOARD OF POLICE COMMISSIONERS.

See Municipal Corporations.

BOARD OF RAILWAY COMMISSIONERS.

See Injunction—Railway.

BOARD OF TRUSTEES.

See Schools.

BOND.

Bottomry bond.] — See *Wallace* v. *Fielding* (1851), C. R. 2 A. C. 33. Digested under Ships.

Breach—*Agreement to exchange land—Infant—Indemnity.*] — The plaintiff and an infant owner of land entered into an agreement for the exchange of land, the land of the plaintiff being subject to a mortgage, the interest upon which to a certain date he agreed to pay, nothing being said in the agreement as to payment of the interest after that date. The defendant gave a bond to the plaintiff conditioned to be void if the infant owner, after arriving at the age of twenty-one years, should convey his land to the plaintiff, and should "do and perform all acts, covenants, and agreements to be done and performed by him as in the said agreement mentioned." The infant went into possession of the plaintiffs' land, but, the interest after the named date not having been paid, the land was sold by the mortgagee before the infant attained the age of twenty-one years, and the infant upon attaining that age did not convey his land to the plaintiff:—*Held*, though the infant was impliedly bound to indemnify the plaintiff against payment of interest after the named date, yet that right of indemnity was not to be enforced until the infant attained his majority, the plaintiff in the meantime being primarily liable to pay the interest; and that, not having done so, he was in default and not in a position to complain of the infant's refusal to convey or to enforce the bond:—*Held*, also, that the implied obligation to indemnify was not an act, covenant, or agreement within the agreement, and, therefore, not within the bond. *Learn* v. *Bagnall*, 21 Occ. N. 223, 1 O. L. R. 472.

Breach—*Penalty—Damages — Commencement of action — Subsequent breaches.*] — *Held*, *per* Tuck, C.J., McLeod and Gregory, JJ., that in an action on a bond conditioned for maintenance, where the breach assigned is refusal to maintain, the plaintiff may recover the whole penalty as damages. In assessing the damages the jury are not limited to those suffered up to the time of the issue of the writ, but they may take into consideration the damages up to the time of the trial, and that there has been a complete breach of the condition. *Per* Hannington, Landry and Barker, JJ., that judgment may be entered for the penalty upon which subsequent breaches may be assigned under 8 & 9 Wm. IV. c. 11, but damages can only be assessed on the breaches assigned up to the commencement of the action. *Barthelotte* v. *Melanson*, 35 N. B. Reps. 652.

Condition — *Construction—Payment of purchase money — Inability of vendors to make title — Obligors absolved from performance of condition.*] — The plaintiffs acquired a right to purchase a tract of 20,000 acres of land for the purpose of establishing a colony, and then entered into an agreement with a number of prospective colonists to sell the lands to them upon certain terms. After this, the defendants, who were some but not all of those who had signed the agreement to purchase from the plaintiffs, executed a bond in the penal sum of $2,500 in favour of the plaintiffs, reciting and incorporating the agreement, the condition being that the obligors should duly and faithfully carry out the terms of the agreement by paying to the plaintiffs a certain sum on a certain date, "on account of the purchase-price of the lands . . . it being hereby stipulated and agreed that the" plaintiffs "are to use every possible endeavour to have the said lands surveyed and located as early as possible, and that such shall be a sufficient performance of the said agreement upon their part, and that the payment of the said sum of $2,500 provided to be made hereunder shall be made to them as liquidated damages for the services rendered and to be renewed by them in connection with the said agreement, as set out in said agreement and this bond, to and for their own use and benefit:" — *Held*, notwithstanding the last clause of the condition, that the bond should be construed as one merely given to secure an instalment of purchase-money; that, upon the evidence, the plaintiffs had never acquired any legal or enforceable right to purchase, and therefore had no title; by their default no sum had become payable; and that they had become payable; and that they had thus absolved the defendants from performing the condition, and could not recover upon the bond.—Judgment of Macdonald, J., 11 W. L. R. 583, reversed. *Colwell* v. *Neufeld* (1910), 14 W. L. R. 83.

Condition for payment *of instalments to obligee for life and after his decease as he might direct*—No direction by obligee. *Kennedy* v. *McDonald*, 2 E. L. R. 83.

Judicial surety — *Declaration — Real property — Valuation — Affidavits.*] — A surety upon a judicial bond is bound to give a declaration of his real property with his title thereto, when required to do so; but not if a registrar's certificate shewing what real property the surety possesses is filed in the case.—The valuation of real property as made by municipal valuators being not always to be relied upon, the real value may be established by affidavits. *Sherwood* v. *Shepard*, 8 Que. P. R. 420.

Limit bond—Action on — Defence—Extension of time after breach. See *Kelly* v. *Thompson*, 35 N. B. Reps. 718.

Mining company, 1st June, 1905, issued bonds secured by mortgage, and plaintiff became holder of $10,000 thereof. In May, 1907, defendant company advertised for offers of such bonds for redemption. Plaintiff offered his at 82. Defendants redeemed other bonds, but not plaintiff's. Plaintiff brought action claiming breach of trust by defendants as trustees, then amended and asked for specific performance of contract to redeem, or for damages in lieu thereof:—*Held*, that the defendants had acted honestly and reasonably and ought to be excused for breach of trust if there were one, that the plaintiff could not recover as *cestui que trust* nor on contract, and that, if an appellate Court should find that plaintiff was entitled to recover on contract, that the market price was 75 at the time of the alleged breach, therefore his damage would be $700. *Whicher* v. *National Trust Co.* (1909), 14 O. W. R. 888, 1 O. W. N. 130.

See COMPANY—MUNICIPAL CORPORATIONS —RAILWAYS.

BONUS.

See ASSESSMENT AND TAXES—COMPANY—MUNICIPAL CORPORATIONS — RAILWAYS AND RAILWAY COMPANIES.

BOOK DEBTS.

See BANKRUPTCY AND INSOLVENCY.

BOOKS.

Agreement between author and publisher. *See* CONTRACT—COPYRIGHT.

BORNAGE.

See BOUNDARIES.

BOTTOMRY BOND.

See *Wallace* v. *Fielding* (1851), C. R. 2 A. C. 33. Digested under SHIPS.

BOUNDARIES.

Action to settle—*Formalities of—Dispensing with—Appointment of surveyor by consent.*]—In an action for the settlement of a boundary the parties may consent that a surveyor be appointed to fix the boundary without proceeding with the formalities of measurement and preparation of a plan. *Lacroix* v. *Lanctot*, 7 Que. P. R. 24.

Action to settle—*Original survey.*]—In an action to settle the dividing line between the north and south halves of a lot on a broken front, it was held that the words "The centre of the concession" meant the centre of the particular lot and not the centre of the concession where the lots were not broken. *Scriver* v. *Young* (1909), 14 O. W. R. 530, affirmed 15 O. W. R. 27.

Bornage—*Extent of—Wall of building.*]—1. The right that every land owner has to compel his neighbour to make *bornage* does not the less exist when this neighbour has built a house the wall of which forms a fixed and certain limit in the line of division of their lands. It is enough that this wall has been built without the consent of the plaintiff, to give him the right to an action *en bornage*, which the act of another cannot take away. The boundary in such a case ought to be placed on the land of the plaintiff, at the distance from the wall required by law, the right to the *bornage* not extending beyond the limit of his own land, and the neighbour being brought in as a party only to make the proceeding a contentious one. 2. In an action *en bornage* in which the plaintiff asserts that a building on the adjoining property encroaches upon his own, the defendant can validly set up against claims based upon this assertion, the acquisitive prescription of ten years founded on a conveyance of the property. *Brown* v. *McIntosh and Roy*, Q. R. 34, S. C. 464.

Corporate body created by statute to own in trust, improve and manage a harbour bounded by its high-water mark, with a proviso that "it shall be incumbent on it to erect land-marks," and vested with general powers to alienate its property, has both implied and express power to contract with owners of land contiguous to the harbour and bounded by the same high-water mark, involving the alienation of land on the harbour side and acquisition of land on the other.—When a statutory enactment declares that land-marks set by a corporate body, to which a harbour is committed for management, shall determine its boundaries, and such land-marks are set, no evidence is admissible to establish a different boundary from that so determined.—A description by boundaries of the property vested for management in a corporate body, in the statute passed for that purpose, does not render every portion of it inalienable without the intervention of the legislature. *Montreal Harbour Commissioners* v. *Record Foundry* (1909), 38 Que. S. C. 161.

Description of lands according to plan—*Area and extent—Fixing of division line—Title and possession.*]—The plaintiff in an action *en bornage* who describes the lands to be subjected to *bornage* by the numbers which they bear on the cadastral plan made for the registration of real rights, does not thereby recognize the accuracy of such plan nor the area of the lands as given by it. The rights of the parties as to the extent of their lands and the fixing of the division line between their portions are dependent upon their title and possession. *Forcier* v. *Bélanger*, Q. R. 16 K. B. 289.

Error—*Good faith — Trespass—Cutting timber—Wilful acts.*]—The rule that an action will not lie to recover the value of timber cut in trespass, where the boundary has not been settled between contiguous lands, applies to cases of presumed error and good faith, but not to cases of undoubted and inexcusable trespass. *Papineau* v. *Jasmin*, 1 Que. R. 30 S. C. 193.

Establishment of boundaries—*Order for bornage—Oral evidence—Surveyor's field notes—Possession—Costs in action en bornage — Injunction — Expertise — Reference to surveyors.*]—Judgment of the Court of King's Bench, Q. R. 15 K. B. 432, affirmed with costs, for the reasons given by the Court below. *Laurentide Mica Co.* v. *Fortin*, 39 S. C. R. 680.

Establishment of—*Oral evidence—Surveyor's field notes—Possession — Costs.*] — Oral evidence of the setting of a boundary (*bornage*) by a surveyor, with the production of his field notes, of the existence of posts at either end thereof, and of blazings along the line from one to the other, and of 18 years' legal possession by one of the contiguous owners in conformity therewith, is admissible and sufficient to establish a settlement of boundaries (*bornage*), in the absence of an official statement or authentic *procès-verbal* thereof: Trenholme and Lavergne, JJ.,

dissentientibus. The costs of suit in an action of boundary are subject to the rule which applies to litigation in other matters, and should be awarded to the party whose pretensions, as set forth in the pleadings, are upheld by the judgment. *Laurentides Mica Co.* v. *Fortin*, Q. R. 15 K. B. 432.

Land — *Title — Trespass — Conventional boundary—Absence of fences—Survey—Possessio pedis.*]—Action for trespass. Really a dispute as to a boundary line:—*Held*, that plaintiff had agreed to the running of this conventional boundary line, and is bound by it. Plaintiff had no documentary title, only a *possessio pedis*. Action dismissed. *Carrigan* v. *Lawrie*, 7 E. L. R. 108.

Line between farm lots—Evidence as to position of former fence—Statute of Limitations—Proceedings of fence-viewers—Line laid by surveyor—Appeal to County Court Judge from award of fence-viewers—Order on—Effect of — Jurisdiction — Determination of true boundary—R. S. O. 1897, c. 284 — History of legislation — Injunction — Counterclaim—Declaration of title — Costs. *Delamatter* v. *Brown*, 13 O. W. R. 58, 862.

Line fence—*Reference under—Duties of fence-viewers—R. S. O. (1897), c. 284, ss. 6, 7.*]—Three fence-viewers were notified to view a line fence. One did not view the fence and the other two made an award without the concurrence of the third:—*Held*, that the award should be set aside, there being no evidence that the third fence-viewer had refused to act. *Miller* v. *McKenzie* (1909), 14 O. W. R. 542.

Line fence.]—Where persons have agreed to a divisional line between lands and have lived up to it for 10 years, even without a fence, such division would be conclusive evidence of ownership. *Forrest* v. *Turnbull* (1909), 14 O. W. R. 478, affirmed, 14 O. W. R. 930, 1 O. W. N. 150.

Mistake in survey — *Line between quarter sections—Dominion Lands Act, 1879 —Construction — Trespass — Damages — Costs.*]—There was a dispute between the plaintiff and the defendant as to the boundary between the north-west and south-west quarter sections of a section of land in township 12, range 20 west. The difficulty arose out of a mistake in the original survey made by F., a Dominion Land Surveyor, in 1882. Corner monuments or mounds were placed at the north-west and south-west corners of the section as surveyed, but the distance between these mounds was not 81 chains, as it should have been, but only 72 chains. The survey was made, as was proper under the Dominion Lands Act, 1879, s. 13 (2), the Act then in force, on the west limit of the road allowance on the west side of the section:—*Held*, that the parties were entitled to have their rights adjusted and established by that survey, as interpreted by the Act of 1879; that was what both parties obtained from the Crown by their patents; and, having regard to ss. 3, 104, 105, 106, and 107 of that Act, that the section corner mounds placed by F. for the north-west and south-west corners established those points as the section corners; and that the place fixed, in the circumstances of this case, for the quarter section mound, is a point equi-distant between the two section corner mounds; and, under s. 105 of the Act, that point is to be connected with the opposite original quarter section corner, and such line will be the dividing line between the two western quarters of the section. Section 106 of the Act is intended to have general application as a rule, but, when exceptional circumstances arise of the character existing in this case, the mode prescribed by s. 105 is to be followed.—The plaintiff and defendant each alleged that the other had trespassed, and certain trespasses were found against each, and judgment given for the plaintiff for $20 and for the defendant for $12, with a special direction as to costs. *Rohrke* v. *Marshall* (1910), 13 W. L. R. 198, 3 Sask. L. R. 82.

Original survey.] — In an action to settle the dividing line between the north and south halves of a lot on a broken front, it was *held*, that the words "the centre of the concession" meant the centre of the particular lot and not the centre of the concession where the lots were not broken. *Scriver* v. *Young* (1909), 14 O. W. R. 530, affirmed, 15 O. W. R. 27.

Surveys — *Fences — Improvements — —Removal of.*]—Action to recover certain lands of which defendant held possession. There had been two surveys made, plaintiff had followed the one and the defendant the other. Plaintiff held entitled to possession, defendant to remove his improvements without damaging plaintiff's freehold. *Nikoden* v. *Salicgycki*, 11 W. L. R. 148.

Survey—*Wall built on strip of land in dispute—Honest belief of ownership—R. S. O. (1897), c. 119, s. 30—Plan—Registration of—Agreement — Declaration of true line— Building not to be disturbed.*]—The dispute between the parties was over a strip of land eight feet wide, more or less, along the easterly side of land granted by conveyance registered as V. 6864, and plaintiff brought action for a declaration that a certain agreement in relation thereto was void as against plaintiff, and to have it set aside and the registration cancelled on the alleged ground of misrepresentation.—Boyd, C., *held*, that judgment should be entered for plaintiff, with a declaration that the true line of division between the lots was that laid down on the plan of Newman, filed, part of house that projected for a few inches not to be disturbed by plaintiff. — Divisional Court dismissed an appeal from above judgment with costs. *Parent* v. *Latimer* (1910), 17 O. W. R. 368, 2 O. W. N. 210.

Trespass — *Line fence — New trial — Onus.*]—The plaintiff and defendant were owners of adjoining lots of land, the title to which was derived from the same original grantor. The plaintiff's lot was described as being bounded on the north by the south line of the defendant's lot. In an action for trespass the plaintiff complained that the defendant, in erecting a new fence, had placed it on a line different from the line of the fence which existed previously, and which was admitted to have been on the true line between the two lots. The question whether the defendant had, as a matter of fact, departed from the old line or not, having been left undetermined:—*Held*, that there must be a new trial. *Per* Weatherbe, J. (dissenting), that the burden was upon the plaintiff to prove the south line of the defendant's lot,

and that, as she had failed to do so, she could not recover. *Dixon* v. *Dauphinee*, 34 N. S. Reps. 239.

See DEED—EASEMENT—FENCES—MUNICIPAL CORPORATIONS — NUISANCE—TRESPASS TO LAND—VENDOR AND PURCHASER—WARRANTY—WATER AND WATERCOURSES—WAY.

BOUNDARY LINE ROAD.

See WAY.

BOUNTY.

See FISHERIES.

BOWLING ALLEY.

See MUNICIPAL CORPORATIONS.

BREACH OF CONTRACT.

See CONTRACT.

BREACH OF PROMISE OF MARRIAGE.

See HUSBAND AND WIFE—SEDUCTION.

BREAD.

See BAKER.

BREWER.

See INTOXICATING LIQUORS.

BREWERIES.

See CONSTITUTIONAL LAW.

BRIBERY.

See CRIMINAL LAW—ELECTIONS.

BRIDGE.

Maintenance of. *See* MUNICIPAL CORPORATIONS.

On highway. *See* WAY.

"Property and assets." *See* MUNICIPAL CORPORATIONS.

BRITISH COLUMBIA ARBITRATION ACT.

See ARBITRATION AND AWARD.

BRITISH COLUMBIA CROWN PROCEDURE ACT.

See CONSTITUTIONAL LAW.

BRITISH COLUMBIA HEALTH ACT.

See CONSTITUTIONAL LAW.

BRITISH COLUMBIA IMMIGRATION ACT.

See ALIENS—CONSTITUTIONAL LAW.

BRITISH COLUMBIA LAND REGISTRY ACT.

See HOMESTEAD AND PRE-EMPTION—REGISTRY LAWS.

BRITISH COLUMBIA PROVINCIAL ELECTION ACT.

See CONSTITUTIONAL LAW—ELECTIONS.

BRITISH NORTH AMERICA ACT.

See CONSTITUTIONAL LAW.

BROKER.

See PRINCIPAL AND AGENT.

Action by stock-broker—*Gaming transaction—Contract void.*] — The plaintiff, a stock-broker, brought an action against the defendant for a balance alleged to be due on account of certain transactions. The defendant pleaded that the alleged contract was illegal, and therefore null and void. The evidence shewed that the corn and cotton which were the subjects of the alleged contract were never delivered, and that there was no intention that they should be delivered:—*Held*, that the contract sued on was a gaming one, and was therefore prohibited by law. *Forget* v. *Ostigny*, [1895] A. C. 318, distinguished. 2. That the broker having knowledge of the nature of such contract, had no recourse against his client for moneys advanced in furtherance of such contract. 3. That, even if the defendant had recognized his debt and offered his property to cover the same, as alleged by the plaintiff, such acknowledgment was of no effect, as the debt claimed resulted from an illegal contract. 4. That, in any event, the responsibility of a person speculating in stocks to his broker is limited to his margin, unless he has given contrary instructions. *Morris* v. *Brault*, 23 Occ. N. 120, Q. R. 23 S. C. 190.

Agreement to carry stocks on margin—Wrongful sale—Measure of damages. *Vanbuskirk* v. *Smith*, 1 E. L. R. 383.

Buying grain on margin for customer—Gambling transaction—Gaming Act—Illegal contract—Recovery of money deposited with broker—Costs. *Donald* v. *Edwards-Woods Co.* (N.W.T.), 4 W. L. R. 128.

Carrying stock on margin—*Advances by broker—Sale of shares without notice—Measure of damages.*]—*Held*, on the evidence, that the plaintiffs, having admittedly paid money for the defendant at his request, had the usual right of action at law on the common counts for money paid.—The defendant, not having sought to redeem his shares nor made any tender, of the amount due by him, could not say that the plaintiffs would not have restored his shares, which might have been bought in the market for a lower price than they were sold for and credited to him.—Even if the plaintiffs were wrongdoers or had committed a breach of their contract, the defendant was not entitled in the circumstances of this case to damages greater in amount than the price which the shares realized.—Judgment of a Divisional Court, 9 O. L. R. 631, affirmed. *Ames* v. *Sutherland*, 11 O. L. R. 417, 7 O. W. R. 116. Affirmed in *Sutherland* v. *Securities Holding Co.*, 37 S. C. R. 694.

Contract with customer—*Broker selling on grain exchange—Contract in broker's name—Liability of principal—"Futures"—"Options"—"Margins"—Board rules—Indemnity.*]—On the 14th August, 1907, the defendant, who resided in the state of Nebraska, wrote the following letter to the plaintiffs, grain dealers at Winnipeg, Man.: "Yours of recent date enclosing market report rec'd. I shall be north in about four weeks to look after the new crop., and, if you can sell No. 2 oats for 37c. or better, in store Fort William, you had better sell 4,000 bus. for me, and I will be up at Snowflake then so I can look after the loading of them, and I will send the old oats then." The plaintiffs, who were also brokers on the Winnipeg Grain Exchange, sold the oats at 38½ cents on the "Board," without disclosing the name of their principal, for October delivery, becoming personally liable for the performance of the contract according to the rules of the Exchange. Upon the defendant refusing to deliver the oats, the plaintiffs purchased the quantity of oats so sold at an advance in price in order to make the delivery and brought the action to recover the amount of their loss thus sustained:—*Held*, reversing the judgment of the Court of Appeal in *Murphy* v. *Butler*, 18 Man. L. R. 111, 9 W. L. R. 82, that the authority so given did not authorise the plaintiffs to make a sale under the Grain Exchange rules binding upon their principal; but no contract binding on the principal outside of these rules had been entered into; and, consequently, that he was not liable to indemnify them for any loss sustained by reason of their contract. *Butler* v. *Murphy & Co.*, 41 S. C. R. 618.

Contract with customer—*Purchase of stock on margin—Implied proviso for resale on default—Rules of Stock Exchange.*]—A party who orders a purchase of stock through a broker under the rules of the Stock Exchange, implicitly consents to its resale without notice in case of his failure to maintain the margin agreed upon. Any agreement at variance with the rule must be expressly proved and will not be inferred from conduct in previous transactions. *Lagueux* v. *Belleau*, Q. R. 14 K. B. 219.

Contract with customer—*Sale of grain for future delivery — Personal liability of broker—Custom of exchange—Principal and agent.*]—The custom on the Winnipeg Grain Exchange, by which brokers trading there, and acting on instructions from customers to sell grain for future delivery, enter into contracts for such sales in their own names without disclosing the names of their customers, thus make themselves personally liable, is reasonable and necessary for the prompt dispatch of business, and, if a customer makes default in carrying out any such contract, and the broker suffers loss in consequence of having to carry it out himself, he is entitled to recover the amount of such loss from his principal.—*Robinson* v. *Mallett*, L. R. 7 H. L. 802, distinguished.—*Thacker* v. *Hardy*, 4 Q. B. D. 687, *Bayley* v. *Wilkins*, 7 C. B. 886, and *Scott* v. *Godfrey*, [1901] 2 K. B. 726, followed. *Murphy* v. *Butler*, 9 W. L. R. 82, 1 Man. L. R. 111.

Custom of trade — *Joint liability of principal and agent—Performance by agent for principal — Recourse of agent against principal — Evidence — Parol testimony.*]—When, by the custom of trade, in a sale made through an agent, the latter is held jointly liable with his principal, for its performance, an action will lie in his favour to recover from his principal whatever he may have expended for that purpose. Hence, a broker, in Montreal, has an action to recover from a customer, together with his commission and charges, an amount expended to fill an order for the sale of stock, in consequence of repudiation by the customer and of his joint liability, as a broker, to the purchaser, by the custom of trade governing stock exchange operations in Montreal. Parol testimony is admissible to prove such custom of trade, as well as the price for which the broker was authorised to sell the stock. *Pitblado* v. *Rosenthal* (1910), 37 Que. S. C. 433.

Gambling in wheat—*No real business transactions—Loss in gambling—Action for loss—Operation in Chicago—Dealings in Ontario — Criminal Code, s. 231 — Refusal of Court to aid recovery.*]—Plaintiff brought action to recover from defendant $229.37 alleged to be due him, pursuant to an agreement between them for purchase and sale of wheat on the Chicago wheat market:—*Held*, that there were no real business transactions between the parties; that any *indicia* of reality, such as payment of storage of the grain or payment of interest upon bank loans or brokers' advances, were lacking; that their dealings were merely gambling on the Chicago wheat market and prohibited by Criminal Code, s. 231, and the contract could not be enforced. Action dismissed. *Kaufman* v. *Gibson*, [1904] 1 K. B. 598, followed. *Trench* v. *Brink* (1910), 16 O. W. R. 161.

Gaming contract—*Principal and agent—Mandate—Speculation—Delivery of goods.*]—*Held*, reversing the judgment in 23 Que. S. C. 120, Q. R. 23 S. C. 190, that where a broker enters into a transaction on the Stock Exchange for the purchase or sale of goods in behalf of a customer, and the transaction

takes place in the ordinary course of business, the broker's sole interest being his commission, he is entitled to recover from the customer the amount of the loss resulting from the operation. 2. The broker's claim is not restricted to the amount of margin in his hands, but, in the absence of any contract to the contrary, includes the entire loss. 3. A contract does not fall under the head of gaming contract merely because it is entered into in furtherance of a speculation. It is a legitimate commercial transaction to buy a commodity, in the expectation that it will rise in value, and with the intention of realising a profit by its resale. 4. Where a real contract of purchase has been made and carried out by a broker on behalf of a principal, delivery of the goods to the broker by transfer of warehouse receipts is delivery to the principal, just as much as if it had been made directly to himself. *Morris* v. *Brault*, Q. R. 24 S. C. 167.

Order to purchase shares—Contract — Payment—Principal and agent. *Deslauriers* v. *Forget*, 4 E. L. R. 363.

Partnership — *Contract—Denial of by one partner—Counterclaim—Costs.*]—Plaintiff, a broker, brought action to recover $12,187.50 and for a declaration of his rights against defendants, brokers, under an alleged agreement. Defendant Singlehurst denied all knowledge of said agreement and counterclaimed for one-third of $12,188 and for $950.—Falconbridge, C.J.K.B., *held*, that Singlehurst had established his defence and counterclaim. Action dismissed as against Singlehurst. As defendant Wilis had joined hands with plaintiff, plaintiff given judgment against Wills without costs. *Kemerer* v. *Wills & Singlehurst* (1910), 16 O. W. R. 999, 2 O. W. N. 76.

Purchase of shares for customer — *Contract—Repudiation — Delivery — Sufficient number of shares not kept on hand—Principal and agent.*]—On appeal, *held*, that defendant had ordered the shares; that it is not necessary to keep the identical shares purchased separate from other shares held by the broker plaintiffs; that if not put in a common fund defendant may claim particular shares if he can identify them. Even if plaintiff has disposed of some of these shares it would be merely ground for counterclaim. It is not a question of damages between vendor and purchaser, it is the right of the agent to be indemnified by his principal for his outlay. A letter written "without prejudice" admitted, where written not with a view to settlement but in repudiation of the purchase. *Ussher* v. *Simpson*, 13 O. W. R. 285.

Purchase of shares for customer — Contract—Repudiation—Tender — Evidence —Letter written "without prejudice." *Ussher* v. *Simpson*, 12 O. W. R. 396.

Purchase of shares for customer — —*Margins—Stop order—Deficiency.*]— Action by plaintiffs to recover an amount due them for shares bought for defendant on margin after crediting the price for which the shares were sold by plaintiffs who were brokers:—*Held*, that as the questions involved are entirely questions of fact, the Court had no difficulty in coming to the same conclusions as arrived at by the trial Judge. Appeal dismissed. Judgment for plaintiffs confirmed. *Heintz* v. *Collier*, 13 O. W. R. 824.

Purchase of shares on margin—*Hypothecation by broker—Conversion — Bought note — Account — Interest—Commission.*] —Judgment of the majority of a Divisional Court, 10 O. L. R. 159, affirmed on appeal. *Ames & Co.* v. *Conmee* (1906), 12 O. L. R. 435, 8 O. W. R. 337.

Sale and purchase of shares for customer—Margins—Stop order—Deficiency — Liability—New trial—Terms. *Heintz* v. *Collier*, 12 O. W. R. 681

Sale of mining stock—*Commission of 10 per cent.—Agreement as to payment.*]—Plaintiff claimed 10 per cent. commission on $25,000, being the sale price of certain mining stock; $12,000 of which was paid in cash, the balance being paid-up shares:—*Held*, that plaintiff was only entitled to the 10 per cent. commission on the amount paid in cash. Plaintiff also claimed $5,000 in cash and $5,000 in shares additional on the share part of the purchase money.—*Held*, that plaintiff was entitled. Judgment of Mulock, C.J.Ex.D., 21st January, 1909, varied. *Van Every* v. *Fortier* (1909), 14 O. W. R. 1047, 1 O. W. N. 209.

Selling fee of 5% on shares not wholly paid up—*Sale made for amount of calls paid—Commission charged on par value of shares.*]—A broker who agrees to sell for a customer shares paid for in part and subject to further calls, and to pay him proceeds of sale, "less 5% selling fee," and who sells the shares for a sum equal to amount paid on them, has the right to charge his "selling fee" on par value of shares, particularly when the company that issued them paid that commission to the agents who procured original subscription to them. Evidence is admissible to establish the last mentioned fact, as a means of ascertaining the true meaning of agreement as to "selling fee." *Haycock* v. *Findlay* (1910), 38 Que. S. C. 265.

Shares—*Advance by brokers—Margins—Speculative shares—Fall in price—Sale without notice to customer—Damages—Measure of—Intention of customer to retain shares—Price at time of trial—Unreasonable delay in objecting to sale.*]—Action for moneys advanced by plaintiffs as defendant's brokers to protect shares bought by plaintiff for defendant on margin. The bought note delivered by plaintiffs to defendants at the time of purchase contained the following stipulation: "When carrying stocks for clients we reserve the right of pledging the same or raising money upon them in any way convenient to us." The price of stocks purchased at first advanced, and plaintiffs returned defendants' deposit and advanced him an additional $4,000 upon the stock. Afterwards the price fell and stock was sold (without notice to defendant) at a loss. Then plaintiffs notified defendant of the loss, and at the same time rendering a bill for balance due them on the transaction. Then this action was brought:—*Held* (5 O. W. R. 328, 9 O. L. R. 631), plaintiff entitled to recover the amount of

their advances, with interest on them at the rates shewn in the account rendered, deducting the dividends received and the proceeds of the sale of stock. There was no evidence to shew that the defendant would not have held the stock until the trial. The Court presumed that he would have done so, therefore, *held*:—That the defendant was not entitled to recover any damages for the wrongful sale of the stock by the plaintiffs, as the stock at the time of the trial could have been bought very much below the prices at which it was sold by plaintiffs. Judgment appealed, but dismissed with costs. *Ames* v. *Sutherland*, 6 O. W. R. 20.

Shares — *Conversion by broker.*]—Defendant stock brokers purchased 10 shares on a margin for plaintiff. He paid down $263.75, which left a balance of $1,501.25 due defendants, on shares. The next day defendants pledged said shares with other shares to Bank of Hamilton for $14,400. In an action for damages for conversion of said shares, or for the return of moneys paid defendants as margins upon them, Magee, J., *held*, at the trial, that when plaintiff entered into the transaction he supposed that he was pledging his money and credit as against the stock, not as against a liability of defendants to make good the stock. *Commee* v. *Securities Holding Co.*, 38 S. C. R. 601, followed: That defendants having $63.75 of plaintiff's money in their hands, and plaintiff being liable for $1,501.25 more, plaintiff was entitled to expect that the shares did exist in such a shape that he could get them by paying the $1,501.25; That defendants by pledging plaintiff's shares for $14,400 had converted said shares to their own use and plaintiff was entitled to judgment for all moneys paid after the conversion, plaintiff having paid those moneys under a misapprehension, a mistake of fact arising from defendants' non-disclosure of the conversion of the shares. Divisional Court reversed above judgment, following *Clark* v. *Bailie*, 15 O. W. R. 691. Action dismissed with costs. Judgment of Magee, J., 15 O. W. R. 417, 1 O. W. N. 481, reversed. *Hutchinson* v. *Jaffray & Cassels* (1910), 51 O. W. R. 858.

Shares—*Purchase for customer.*]—Plaintiffs brought action against defendants, stock brokers, for $8,153.46, and interest, alleged to have been paid by plaintiff to them for certain stocks she had instructed them to buy for her and for their commission thereon, but which she alleged they had not done, or if they had bought the stock that they had converted them to their own use, and she further claimed damages for misrepresentation, deception and conversion of her said shares. Defendants denied all charges of wrongdoing. At the trial MacMahon, J., *held*, that the plaintiff's stocks were not at any time hypothecated for as much as plaintiff was owing defendants thereon plaintiff has suffered no damage, and dismissed action. *Clark* v. *Baillie*, 14 O. W. R. 104; affirmed by Divisional Court (1909), 14 O. W. R. 848, 1 O. W. N. 125, 19 O. L. R. 545.

Shares—*Purchase for customer on margin—Moneys advanced to keep up margins—Recovery—Instructions — Usual course of dealing—Practice of brokers—Discharge of customer—Obligation of broker to sell—Several orders included in one contract—Interest—Hypothecation of shares by broker.*]—Action by brokers against a customer to recover moneys paid to keep up margins on shares bought by plaintiffs for defendant, and interest thereon. The contract established by the evidence is that plaintiffs would purchase and carry for defendant 300 shares of Lake Superior Consolidated stock. The defence raised two questions of fact. 1st, That when he paid $3,000 on 28th April, 1902, he did so for the purpose of investing that amount in the stock mentioned, and if the stock should appreciate he would get the benefit of it, and if the price went down he would lose his money, and the plaintiffs could protect themselves from loss by selling before the drop was sufficient to use up the $3,000, put in as a ten point margin; and 2nd, that when defendant subsequently paid $1,800 he did so upon the express agreement that this should be in full satisfaction of any claim plaintiffs had in reference to this transaction. Evidence went against defendant upon each contention. The questions of law were (1) As to the right of plaintiffs to hypothecate the stock for advances made to them:—*Held*, there was the right of hypothecation. (2) Were the shares sold by Chandler & Co. to the plaintiffs in December defendant's shares so that he was entitled to call that a conversion and to compel plaintiffs to account as of that date? [Reference to *Clarkson* v. *Snider*, 10 O. R. 568]:—*Held*, plaintiffs never parted with the stock so as to prejudice defendant, and ways had such control of a sufficient amount of the stock as would enable them to deliver it to the defendant upon demand and upon payment of balance due by him. Stock was sold without instructions from defendant, as the memorandum of the bought note permitted them to do. *Held*, plaintiffs entitled to what they paid Chandler & Co., but to no profit on that sale (a sale for their own benefit). Plaintiffs apparently paid 1-16, equivalent to $18.75. Credit to defendant of $56.25. A greater rate of interest than the statutory 5 per cent., and that not compounded was not allowed. Otherwise judgment for plaintiff for principal, interest and costs. *Ames* v. *Conmee*, 4 O. W. R. 460, 6 O. W. R. 89, 10 O. L. R. 159.

Shares purchased by one broker for another — *Delivery at 90 days — Price dropped — Failure of purchaser to accept shares—Sale at a loss—Action for loss—Counterclaim for conversion.*]—Plaintiffs alleged that defendants purchased from them, subject to the rules, customs and regulations of the stock exchange of the city of Toronto, 10,000 shares of the Temiskaming Mining Co. at $1.00 per share, total price $10,900, which was to be payable, and which they said defendants agreed to pay in 90 days or sooner, if defendants sooner called for delivery of the shares, and that defendants refused delivery, and plaintiffs, after notice, sold the shares for $8,818.—Defendants alleged that they called upon plaintiffs to deliver the stock, but that they were unable to do so, and counterclaimed for $10,000 damages for conversion of said shares.—Sutherland, J., *held*, that plaintiffs should be given judgment for $2,082, with interest and costs, being the difference between the contract price for the shares and the price actually

obtained for them by plaintiffs. Counterclaim dismissed with costs. *Warren, Grzowski & Co.* v. *Forst & Co.* (1910), 17 O. W. R. 339, 2 O. W. N. 222.

Shares—*Purchase for customer on margin — Hypothecation of shares by broker — Fraud and misrepresentation—Damages.*]—Plaintiff brought action against defendants, stock brokers, for $8,153.46, alleged to have been paid by plaintiff to them for certain stocks she had instructed them to buy for her and for their commission thereon, but which she alleged they had not done, or if they had bought the stocks, that they had converted them to their own use, and she further claimed damages for misrepresentation, deception and conversion of her said shares. At trial MacMahon, J., dismissed the action with costs. Divisional Court dismissed plaintiff's appeal with costs. Court of Appeal *held*, that plaintiff received from defendants all she bargained for, at the time and in the manner in which she was to receive it under her contract, and, having sold and converted to her own use that which she so received, it was obvious that she could not have any good cause of action. Appeal dismissed with costs. *Conmee* v. *Securities Holding Co.*, 38 S. C. R. 601, distinguished. Judgments at trial, 14 O. W. R. 104, and of Divisional Court, 14 O. W. R. 848, affirmed. *Clark* v. *Baillie* (1910), 15 O. W. R. 691, 20 O. L. R. 611.

Shares—*Purchase on margin—Depreciation—Sale by broker — Notice—Acquiescence.*]—The defendant instructed the plaintiffs' manager at Winnipeg to purchase for him, on a margin of 3 per cent., 100 shares of Erie Railway stock. The plaintiffs, through their agents, bought the shares on the New York Stock Exchange, and the agents thereafter held them subject to the control and order of the plaintiffs. The defendant was informed within an hour of the purchase and the price paid. The next day he received the usual advice note of the transaction, in which it was stated that on all marginal business the plaintiffs reserved the right to close transactions when margins are running out, without further notice. Two weeks afterwards the price of the shares began to fall, and the margin became so small that the manager telegraphed the defendant at Gladstone to send $500 additional margin; and later in the same day, the margin being entirely lost, he telegraphed the defendant to put up $1,000 further margin. Defendant replied to these telegrams: "Will attend message, down to-morrow." The manager gave no express notice that he would sell the shares unless the margins demanded were put up, but waited until the delivery of the mail from Gladstone the next morning. Then, not having heard from the defendant, he telegraphed to have the shares sold, which was done at a loss of $1,150:—*Held*, that there was an actual purchase of the shares for the defendant, and it was not necessary that the shares should have been actually transferred on the books of the railway company, either to the defendant or to the plaintiffs. 2. There was an actual sale of the shares regularly made on the defendant's account, according to the usages of the stock-broking business. 3. The plaintiffs were entitled, under the terms of the notice sent to the defendant, to sell the shares, without notice to him, when the margin was exhausted, as the defendant, not having objected to these terms, must be taken, after a reasonable time, to have assented to them. *VanDusen Harrington Co.* v. *Morton*, 24 Occ. N. 29, 15 Man. L. R. 222.

Stock—*Purchase on margin — Pledge of stock by broker—Possession for delivery to purchaser.*]—C. instructed A. & Co., brokers, to purchase for him on margin 300 shares of a certain stock, paying them $3,000, leaving a balance of $6,225 according to the market price at the time. A. & Co. instructed brokers in Philadelphia to purchase for them 600 shares of stock, paying $9,000, nearly half the price, and pledged the whole 600 for the balance. The Philadelphia brokers pledged these shares with other securities to a bank as securities for indebtedness, and later drew on A. & Co. for the balance due thereon, attaching the script to the draft, which was returned unpaid, and 475 of the 600 shares were then sold, and the remaining 125 returned to A. & Co. In an action by the latter to recover from C. the balance due on the advance to purchase the shares, with interest and commission:— *Held*, reversing the judgment of the Court of Appeal, *A. E. Ames & Co.* v. *Conmee*, 12 O. L. R. 435, which affirmed the judgment in 10 O. L. R. 159, Fitzpatrick, C.J.C., dissenting, that A. & Co. never had the shares for delivery to C. on payment of the amount due by him, and therefore could not recover.—*Held*, also, that the brokers had no right to hypothecate the shares with others for a greater sum than was due from C. unless they had an agreement with the pledgee whereby they could be released on payment of that sum; that there never was a time when they could appropriate 300 of the shares pledged for delivery to C. on paying what the latter owed; and that, therefore, they were not entitled to recover.—The bought note of the transaction contained this memorandum: "When carrying stocks for clients we reserve the right of pledging the same or raising money upon them in any way convenient to us."—*Held*, per Davies and Idington, JJ., that this did not justify the brokers in pledging the shares for a sum greater than that due from the customer.—Per Duff, J., that the shares were purchased before this note was delivered, and it could not alter the character of the authority conferred on the brokers; and that no custom was proved which would modify the common law rights and duties of the brokers and their customer in the transaction. *Conmee* v. *Securities Holding Co.*, 27 C. L. T. 484, 38 S. C. R. 601.

Stock dealings on margin—*Obligation on broker to sell.*]—There is no obligation on a broker, in the absence of the customer's orders, to sell shares during a falling market after he has demanded further margins and received no reply from his customer; and therefore if he does not sell the stock under such circumstances he has no responsibility for any loss that may arise to the customer. *Kerr* v. *Murton*, 24 Occ. N. 293, 7 O. L. R. 751, 3 O. W. R. 801.

Stock transactions—*Contract with customers—Purchase of shares on margin—Sale—Default—Notice.*]—Operations on the stock

market consisting in the purchase of shares upon margin are operations permitted by law and cannot be compared to gaming or betting. 2. Stock brokers are not obliged to give notice to their customers that they are about to sell their stocks if they do not furnish margin to cover sudden fluctuations of the market. 3. A demand for margin by telegram does not create, as regards the brokers, the obligation not to sell the stock of the customer where the latter has consented to furnish the margin demanded, and has informed the broker of his consent. *Belleau* v. *Lagueux*, Q. R. 25 S. C. 91.

Stockbroking transactions — "*Commercial matters*"—*Commencement of proof in writing—Notice to produce—Authority to brokers—Stock exchange terms.*]—In an action by stockbrokers against their principal to recover the balance of their account in respect of sales and purchases of shares for private speculation on his account:—*Held*, that these transactions were "commercial matters" within Art. 1233, C. C., which the plaintiffs might prove by oral evidence; and that a plaintiff was a competent witness under s. 2 of 54 V. c. 45.—2. An admission by the defendant in his deposition that he employed the plaintiffs as his stockbrokers, and that they bought and sold something for him, is a sufficient commencement of proof in writing under Art. 1233 (7) to let in oral evidence of the particulars.— 3. Art. 1233 (6) authorises reception of secondary evidence of bought and sold notes in possession of the adverse party without a notice to produce; and an objection thereto not taken at the trial cannot be taken in appeal. —4. The defendant in giving authority to the plaintiffs to do business on the stock exchange must be taken, in the absence of evidence to the contrary, to have employed them on the terms of the stock exchange, and therefore to have authorised the sale of his shares on failure to supply them with the requisite funds. *Forget* v. *Baxter*, [1900] A. C. 467.

See CONTRACT—CRIMINAL LAW—JUDGMENT—PLEADING—PRINCIPAL AND AGENT.

BUILDERS' AND WORKMEN'S ACT.

See MECHANICS' LIENS.

BUILDER'S PRIVILEGE.

See MECHANICS' LIENS.

BUILDING CONTRACT.

See CONTRACT—MECHANICS' LIENS.

BUILDING SOCIETY.

See COMPANY.

BUILDINGS.

Contractor for building — *Faults of construction—Warranty for ten years—Acceptance by owner—Commencement of period — Superintendence of work by owner — Churchwardens—Defective work—Repair — Deduction of cost from drawback.*]—The contractor for the construction of a building from plans and specifications warrants the construction free from fault for a period of 10 years, notwithstanding the acceptance of the work by the owner. The acceptance has the effect only of fixing the date from which the 10-year period begins to run.—2. Such obligation of warranty exists notwithstanding superintendence of the work by the owner. Therefore, superintendence by the *curé* of work done for the churchwardens for the construction of a church, cannot be set up by the contractor against the claim of the churchwardens founded upon the warranty.—3. Churchwardens who have stipulated for the retention of a percentage upon the contract price, as a guarantee for the execution of the contract, have a remedy by way of compelling the contractor to repair defective work, and are authorised upon his default to conform to the judgment, to repair the work themselves at his expense, deducting it from the amount retained in their hands. *Churchwardens of the Parish of St. Pie de Guire* v. *Shawinigan Construction Co.*, Q. R. 32 S. C. 212.

Encroachment on land of neighbour —*Remedy—Damages.*]—When a building is erected in good faith upon the land of another, with the knowledge of the owner, the latter cannot revendicate it as belonging to him nor force the person erecting it to take it down. He can, at most, claim damages, if any have been sustained, by virtue of Art. 1053, C. C. *Dansereau* v. *Dansereau*, Q. R. 29 S. C. 411.

Encroachment on neighbouring land — Evidence — Boundaries — Description — Survey — Mistake — Failure of plaintiff to establish boundary. *Barry* v. *Desrosiers*, 9 W. L. R. 633.

Encroachment on neighbouring land — *Evidence — Boundaries — Proof of location—Authority of surveyor to determine.*]—The posts planted at the time of the survey of a city lot having been destroyed by a general fire which swept over the block of land in which the lot was included:—*Held*, in an action to recover possession of a portion of a city lot encroached upon by the defendant's building, and to compel the removal of the building, that a surveyor could not determine the location of the lot by apportioning the apparent shortage among all the lots in the block. *Barry* v. *Desrosiers*, 14 B. C. R. 126, 9 W. L. R. 633.

Encroachment on neighbouring land — *Remedy — Indemnity — Value of land.*] — A slight encroachment on neighbouring land by a person who builds a house, made in good faith and with the knowledge of the owner of such land, and without objection on his part, will not give the latter the right to revendicate the strip taken, nor to sue for the demolition of the building. His recourse, in such a case, is for an indemnity, of which the measure is the value of the land taken. *Lidstone* v. *Simpson*, Q. R. 16 K. B. 557.

Erection of stable or outhouse — *Danger to neighbouring wall—Party wall—*

Art. 532, cl. 4, C. C.]—The contramure provided for by cl. 4 of Art. 532, C. C., is only required where the stable is built near a party wall or the wall of the neighbour. Therefore, there is no obligation to make a contramure for a stable built the length of an inside court or at a distance of several feet from a wooden shed or kitchen without a cellar or stone foundation.—This obligation is imposed for the preservation of the wall against which the stable leans and to prevent injury to it. It is not effective when the stable is properly placed and does not threaten danger to the neighbouring wall. *Defoy* v. *Saint-Jean*, Q. R. 31 S. C. 97.

Erection of stable or outhouse — *Danger to neighbouring wall—Party wall—Art. 532 (4), C. C.—Servitudes—Counter-wall.*]—An action lies in favour of the owner of a servient tenement against the owner of the dominant one to have it declared that the condition of the former has been aggravated by the latter in the use of the servitude, and for an order upon him to desist from the acts of aggravation complained of. 2. He who builds a stable near a common wall or a wall belonging to his neighbour, is obliged to make a counter-wall or other works as provided in Art. 532 (4), C. C. 3. The rule of the Article is a fixed one to provide against a cause of probable damage and to preclude the greater number of disputes which would otherwise arise. Relief from the obligation cannot, therefore, be obtained through care, cleanliness, or the avoidance of injury to the neighbour. 4. It is imposed as a protection, not merely to the wall from deterioration, but also to the neighbour from nuisance or injury. 5. Nor does it matter how the neighbouring wall is constructed, whether of masonry or of wooden planks. 6. The obligation also arises in the case of the enlargement of a stable which has existed for many years, during which it has not been enforced. Judgment in Q. R. 31 S. C. 97, reversed. *Defoy* v. *Saint-Jean*, Q. R. 16 K. B. 432.

Faults of construction—*Neglect to repair—Injury from — Liability—Usufructuary — Remainderman — Joint and several liability.*]—When injuries are caused by a fault in construction of a building or by neglect to keep the building in repair, the building being subject to a right of usufruct, the usufructuary and the remainderman are jointly responsible, the former because he has the structure, the cause of the trouble, under his care (Art. 1054, C. C.), and the latter as proprietor (1055 C. C.) If the ownership in remainder is vested in several persons, they are jointly and severally responsible according to the terms of Art. 1106, C. C. *Laplante* v. *Saint-Germain*, Q. R. 34 S. C. 497.

Grant of usufruct of land while building thereon endures—*Gradual replacing of parts.*]—Usufruct of land for the period of time that a house built upon it shall "subsist and last," comes to an end when, by works of repair and construction, the house is virtually replaced by another. This substitution may be said to have taken place when several parts of the building, without which it would not exist, have been replaced by new ones. *Beaudry* v. *Chouinière* (1906), Q. R. 28 S. C. 1.

Negligence — *Sale of ruined building—Personal responsibility of vendor.*]—Where a ruined building is sold by A. to B., B. engaging himself to remove the materials from the ground, there is no responsibility imposed upon A., under the provisions of Art. 1054 of the Civil Code of Lower Canada, in respect of injuries sustained in consequence of the negligence of B. in the removal of the materials, as A. had no control over the operations of demolition and removal by B. and his workmen. Judgment in *Eastern Townships Bank* v. *De Kérangat*, Q. R. 17 K. B. 232, affirmed. *De Kérangat* v. *Eastern Townships Bank*, 41 S. C. R. 259.

Obligations of architects and contractors—*Ten years' warranty—Addition to building—Acceptance of work—Payment for—Inspection—Rights of subsequent owners of building.*]—The ten years' warranty due by architects and contractors under Arts 1688 and 1696, C. C., applies to additions made to a building after its erection, and extends to the fit and sufficient state of the latter to receive the additions and to the safe and proper adapting of the ones to the other. Hence, a contractor who installs a fire-extinguishing apparatus, or automatic sprinkler, in a store, is liable for damage caused to the stock therein by the bursting of a pipe with which the sprinkler was unskilfully connected, and which becomes disjointed through not having been properly braced. 2. The acceptance of the work and payment for the same does not extinguish the obligation of warranty, nor does a clause in the contract that the work shall be inspected and approved and accepted by a third party, which is complied with, nor a further one that no obligation, "other than herein set forth," shall be binding upon the parties. 3. The right to enforce the warranty is not personal to the owner with whom the contract is made. It attaches to the work and passes with the same to subsequent owners of the building during the decennial period. *McGuire* v. *Fraser*, Q. R. 17 K. B. 449. Affirmed, Davies, J., *dubitante*, 40 S. C. R. 577.

Removal — *Rights of owner of land — Remedy — Possessory action — Revendication.*]—The remedy by way of possessory action is not open for the purpose of removing or demolishing a building, as against one who has been in possession of it for several years. A person claiming to be the owner of the soil upon which the building is erected must proceed to assert his claim of right to the property by revendication. *Dansereau* v. *Dansereau*, Q. R. 16 K. B. 426.

Taking down and removing—*Employment of contractor — Injury to person in course of work — Liability of owner—Art. 1054, C. C.*]—The owner of a building who lets a contract for its demolition, or who sells it on the condition that it be removed by the purchaser, has not, within the meaning of Art. 1054, C. C., the "control" of the contractor or purchaser, and is not in any sense his employer or principal, nor his warrantor as regards his servants or the public, in respect of accidents which may occur in the course of the work. *Eastern Townships Bank* v. *De Kérangat*, Q. R. 17 K. B. 232.

See COVENANT — EASEMENT — INTERPLEADER — LANDLORD AND TENANT—LIMITATION OF ACTIONS—MECHANICS' LIENS—MUNICIPAL CORPORATIONS — NEGLIGENCE—PARTICULARS — TRESPASS — TRUST AND TRUSTEES.

BURGLARY.

See CRIMINAL LAW.

BURIAL.

Corpse—*Property in—Right of custody, control, and disposition—Exercise by executor or relative—Remedy for invasion—Delay of railway company in delivering corpse — Damages—Expenses caused by delay—Mental anguish—Tort—Negligence.*]—The plaintiff, the mother and executrix of a deceased man, shipped his body by the defendants' railway from Revelstoke to Bawlf, and accompanied the body. By a mistake of the defendants' servants, the body was put off the train at Banff, and did not arrive at Bawlf until a day later than it should have arrived, occasioning expense by postponement of the funeral, etc. The plaintiff's luggage was also treated in the same way, and she was put to expense in consequence:—*Held*, that the proposition, accepted in English law, that there can be no property in a corpse, does not rest upon a sound foundation, and is not sustainable at least as a general proposition. The English decisions rest to a large extent upon ecclesiastical law, which has no application or effect in Alberta.—Review of the decisions.—The true rule is, that, inasmuch as there is a legal right of custody, control, and disposition, the law recognises property in a corpse, but property subject to a trust, and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise.—*Pettigrew* v. *Pettigrew* (1904), 207 Pa. 313, 64 L. R. A. 179, approved.—The property in a corpse is subject, on the one hand, to the obligations of proper care and decent burial, and the restraints upon its voluntary or involuntary disposal and use provided by law, or arising out of the fact that the thing in question is a corpse; and, on the other hand, the nature and extent of the right or obligation of the person for the time being claiming property; and the Courts will give appropriate remedies against interference with the right of custody, possession, and control of a corpse awaiting burial, pre-supposing a right of property therein, subject to the obligations and restrictions indicated:—*Held*, also, that the action was one of tort, for damages occasioned by the defendants' negligence; and the plaintiff was entitled to recover as damages not only the money loss occasioned by the mistake, but compensation for her mental anguish occasioned by the delay and the decomposition of the corpse.—Review of the authorities. *Miner* v. *Can. Pac. Rw. Co.* (1910), 15 W. L. R. 161.

BUSH FIRE ACT.

See STATUTES.

BUSINESS ASSESSMENT.

See ASSESSMENT AND TAXES.

BUSINESS TAX.

See ASSESSMENT AND TAXES.

BUYING OFFICES.

See CRIMINAL LAW.

BY-LAWS.

Of companies. *See* COMPANY.

Local option. *See* ELECTIONS.

Municipal. *See* MUNICIPAL CORPORATIONS.

CABS.

See MUNICIPAL CORPORATIONS.

CADASTRE.

See REGISTRY LAWS.

CALLS.

See COMPANY.

CANADA EVIDENCE ACT.

See CRIMINAL LAW—EVIDENCE.

CANADA SHIPPING ACT.

See CRIMINAL LAW—SHIP.

CANADA TEMPERANCE ACT.

See INTOXICATING LIQUORS.

CANADIAN PACIFIC RAILWAY COMPANY.

See ASSESSMENT AND TAXES—CROWN.

CANAL.

See CROWN — SHIP — WATER AND WATERCOURSES.

CANCELLATION OF CONTRACT.

See VENDOR AND PURCHASER.

CANCELLATION OF INSTRUMENTS.

Actio pauliana — *Debtor and creditor—Fraud—Title to land—Amount below jurisdiction of Court—Motion to quash.*]—Appeal to Supreme Court of Canada from Court of King's Bench, Quebec, quashed, the actio being to set aside a sale of land in fraud of creditors; the plaintiff's claim being only $53.50, and the debtor's total indebtedness not exceeding $500. *Actio pauliana* is a personal action. In dealing with jurisdiction only the matter actually in dispute will be considered, not the collateral effect of the judgment. *Lamothe* v. *Daveluy*, 6 E. L. R. 153.

Action by assignee *for creditors to set aside conveyance by insolvent*—Fraudulent conveyance — Statutory presumption — Rebuttal — Onus — Knowledge of grantee — Parties—Fraudulent grantor. *Crawford* v. *Magee*, 6 O. W. R. 44.

Action by assignee *for return of goods transferred by insolvent before assignment—Title of transferee—Pledge for advances—Conspiring to defraud creditors.*] — Appeal from judgment 11 W. L. R. 363, dismissed. *Newton* v. *Rein*, 12 W. L. R. 490.

Action by assignee *to set aside chattel mortgage and land mortgage made by insolvent*—Previous agreement—Absence of knowledge of insolvency by mortgagee—Imputed knowledge — Presumption — Rebuttal — Costs—Discretion—Appeal. *Wade* v. *Elliott*, 10 O. W. R. 206, 11 O. W. R. 38.

Action by assignee *to set aside assignment of interest in land made by debtor within 60 days of assignment—Assignments Act, s. 42—Application to subsequent conveyances —Right of assignee for creditors—Trust—Statute of Frauds—Pleading.*]—A few days before making a general assignment for the benefit of his creditors to the plaintiff, W. assigned to his wife, one of the defendants, his interest under an agreement for sale of land, on which he had paid $200, and had erected on the land a building, the money for which was supplied by his wife, on the understanding that she was to have the property. Three months earlier she had entered into an agreement with the knowledge and consent of W., to transfer this property to S., the other defendant, in consideration of a promissory note for $1,200 made by W. and endorsed by her, the property to be retransferred on payment of the note with interest. At this time all the parties considered that the property was hers. Just before the general assignment, when the vendors under the agreement for sale were pressing for payment, W. made the assignment to his wife, who then assigned to the defendant S., who subsequently paid the balance due to the vendors, and obtained title. In an action to set aside the transactions and make the property available for W.'s debts, it was *held* by the trial Judge that the transactions were *bona fide*, but should be set aside under s. 42 of the Assignments Act, because the transfer by W. was made within 60 days before the general assignment:—*Held*, that the provisions of s. 42 are not wide enough to authorize this result; the section is limited to conveyances made by the debtor, and does not apply to any subsequent conveyance; and an assignee's rights are only such as conferred by the statute. The most that could be done, therefore, would be to set aside the assignment by W. to his wife, which would be of no effect:—*Held*, also, that, as W. was in effect a trustee for his wife, who had the beneficial interest under the agreement for sale, he was not assigning his own interest, but hers; and, the Statute of Frauds not being pleaded and no amendment having been asked, it was not necessary to consider whether it applied. Judgment of Beck, J., 12 W. L. R. 585, reversed. *Smith* v. *Sugarman* (1910), 13 W. L. R. 671.

Action by assignee *to set aside conveyances to insolvent trader's wife*—Misstatement of consideration—Conveyances for value — Absence of intent to defraud — Action brought after expiry of statutory period—Evidence—Costs. *Attwood* v. *Pett*, 9 O. W. R. 173, 748.

Action by assignee *to set aside transaction with creditor as a preference* — Creditor's want of knowledge of insolvency —Imputed notice—Absence of fraudulent intent—Novation—Acceptance by creditor of third person as debtor in lieu of insolvent—Sale of assets by insolvent to same person—Manitoba Assignments Act — Payment — Covenant — Release — Surety. *Newton* v. *Lilly* (Man.), 3 W. L. R. 537.

Action by assignee *to set aside transfer of moneys by insolvent as preferential and void—Evidence—Intent—Knowledge of insolvency — Correspondence — Recovery of moneys transferred.*]—Action by official assignee to set aside a transfer of moneys as fraudulent and void. Transfer set aside as there was intent to prefer as to both creditor and debtor. *Jagger* v. *Turner*, 12 W. L. R. 588.

Action by creditors to declare void *—Prescription—Registration—Notice.*] — A conveyance of property which is simulated and produces neither change of possession nor any other effect between the parties, whose sole object is to preserve the property from the attacks of the creditors of its owners is non-existent as to them, and their action to have it so declared is not subject to the prescription for a year of Art. 1040, C. C.—2. The registration of a deed is not a public act, and is inadmissible as proof that creditors of the parties had knowledge of it in the sense of Art. 1040, C. C. *Lemay* v. *Dufresne*, Q. R. 18 K. B. 132.

Action by execution creditor to set aside — *Representation that land liable to execution—Subsequent claim of same being exempted as a homestead—Estoppel.*]—The defendant husband who in a written statement to plaintiff stated that certain land was liable to execution, is estopped from subsequently claiming same to be exempt as a homestead. *Codville* v. *Haygarth*, 10 W. L. R. 35.

Action by purchaser *to set aside sale of land for damages*—Misrepresentations of vendor. Judgment of Riddell, J., 14 O. W. R. 338, affirmed by Divisional Court. *Heatherly* v. *Knight* (1910), 1 O. W. N. 396.

Action by judgment creditor of grantor to set aside—Security for debt—Intent to defeat other creditors—Fraud—Preference — Assignments Act — Consideration. *Christie* v. *Shroeder* (Man.), 8 W. L. R. 757.

Action to annul — *Simulated sale — Pleading—Judgment on municipal election petition.*]—A plaintiff has a right to allege facts tending to prove that his action is well founded. If he asserts that a deed of sale of a property has been made with the sole object of putting the name of the purchaser on the list of municipal electors, he may, in an action to annul the deed, allege a judgment rendered in the matter of a contested municipal election, finding that the purchaser was not qualified to vote, seeing that he had not been in possession of the property which he pretended to have bought. *Auclair* v. *Ledoux*, 9 Que. P. R. 149.

Action to set aside—Absence of collusion and fraud—Sale at fair value—Chattel mortgage — Estoppel — Change of position. *Greer* v. *Fitzgerald*, 5 O. W. R. 339.

Action to set aside—Absence of fraudulent intent—Creditors lying by—Agreement —Consideration. *Bowman* v. *Winn*, 3 O. W. R. 60.

Action to set aside—Absence of knowledge of fraudulent intent on part of grantee. *Webb* v. *Hamilton*, 10 O. W. R. 192.

Action to set aside—Absence of knowledge of fraudulent intent on part of grantee —Evidence—Testimony in corroboration adduced before Court of Appeal—Costs. *Webb* v. *Hamilton*, 12 O. W. R. 380.

Action to set aside deed—*Contract for maintenance of plaintiff—Pleading—Pleas—Irrelevancy—Poverty of defendant—Hostility of plaintiff.*]—Where the plaintiff asks for the annulment of a deed whereby the defendant undertook to care for the plaintiff and his wife, the defendant cannot allege: (a) that he feeds and cares for the plaintiff better than the latter did for his children; (b) that the plaintiff has a considerable income and is a persistent litigant; but *preuve avant faire droit* will be ordered on the allegations that he is poor and has a large family; that the plaintiff is capricious, and has often displayed hostility towards the defendant, and wishes to ruin him; these allegations may assist the Court in adjudicating upon the merits of the demand. *Benoit* v. *Dubord*, 10 Que. P. R. 148.

Action to set aside deed to defendant.]—*Held*, that plaintiff had been guilty of laches and acquiescence. Action dismissed without costs. *Lamb* v. *Franklin* (1910), 1 O. W. N. 395.

Action to set aside—Evidence—Depositions on discovery — Written statement of mortgagee—Right of action—Creditors—Subsequent incumbrancer—Insufficient security—Conveyance from parent to child—Valuable consideration—Onus—Corroboration. *Bank of Montreal* v. *Scott*, 3 O. W. R. 523.

Action to set aside — *Evidence—New trial — Conspiracy — Costs — Parties — Damages.*]—In an action by creditors to set aside as fraudulent and void a conveyance of land and a bill of sale made by an insolvent debtor to his sister-in-law, there was judgment for the plaintiffs at the trial, but on appeal by the defendants, the Court of Appeal, deeming the evidence unsatisfactory, ordered a new trial, upon payment by the defendant grantee of the costs of the former trial and of the appeal, notwithstanding the danger which attends the opening up of a case after the attention of the parties has been directed to the defects in their proofs.—A brother of the debtor was made a defendant, as well as the debtor and his grantee, it being alleged by the plaintiffs, who sued on behalf of themselves and other creditors, that all the defendants entered into a conspiracy to defeat and defraud the creditors:—*Held*, that the plaintiffs could not succeed upon the conspiracy claim, for they could shew no special damage accruing to them, and could not recover damages on behalf of a class.—And that claim failing, there was no ground for making the debtor's brother a party, and he could not be ordered to pay costs, but the plaintiffs should pay his costs.—Judgment of Teetzel, J., reversed. *Canada Carriage Co.* v. *Lea*, 11 O. L. R. 171, 6 O. W. R. 633.

Action to set aside—Execution creditors—Amendment—Action on behalf of all creditors — Family arrangement—Change of trustees — Formation of company—Assignment of interest in estate—Invalidity against creditors — Equitable execution — Form of judgment. *Union Bank of Canada* v. *Brigham*, 5 O. W. R. 142.

Action to set aside—*Gift to son—Absence of evidence of insolvency.*]—A donation of property can only be avoided in an action *pauliana*, upon clear evidence that the donor became thereby insolvent. When therefore the latter retains in his hands immovable property purchased for a price of $7,000 on which he has paid $2,000, the vendor to whom the balance of $5,000 is due has no action to annul a donation made by his debtor to his son of his other homestead property. *Laport* v. *Bernard*, Q. R. 15 K. B. 243.

Action to set aside — Improvidence—Absence of advice—Consideration — Costs. *Frank* v. *Hohl*, 2 O. W. R. 489.

Action to set aside — Improvidence—Lack of independent advice — Lease executed on Sunday—Part performance—Parol agreement. *Duprat* v. *Daniel*, 1 O. W. R. 561, 2 O. W. R. 940.

Action to set aside — Insolvency of grantor—Intent to defeat creditors—Failure to prove—Husband and wife—Husband going into business—Absence of hazard. *Farquharson* v. *Dowd*, 6 O. W. R. 760.

Action to set aside—*Intent to defraud —Presumption from insolvency—Rebuttal—Evidence.*]—A conveyance of land may be set aside at the suit of a creditor of the grantor only where it was made by him with intent to defraud, and the presumption of such in-

tent arising from his insolvency may be rebutted by proof of circumstances which establish that the intent never existed. *Forest* v. *Girouard*, Q. R. 33 S. C. 193.

Action to set aside sale — *Indefinite and uncertain conclusions—Exception to the form—C. C. P. 174.*]—In an action to set aside a deed of sale for fraud, the plaintiff will be permitted to conclude generally that the defendant be ordered to return to him moneys received and the land still in his possession, if he is ignorant of what sums of money were received or what parts of the land have been sold.—Plaintiff cannot be held to allege facts of which he is ignorant and which occurred during the transactions whereby it was intended that he should be defrauded. *Garand* v. *Chaput*, 11 Que. P. R. 114.

Action to set aside—*Judgment creditor —Lapse of execution—Homestead entry — Trustee—Evidence—Costs.*]—In an action to set aside a conveyance of lands as a fraud upon creditors, if the action is not brought on behalf of all the creditors of the debtor, the plaintiffs must shew that they have obtained both judgment and execution, and if their executions have elapsed for want of renewal before the commencement of the action, the action will fail. A. D. made a homestead entry on certain lands, but by mistake his homestead duties were performed on adjoining lands. The Government cancelled his entry but agreed to sell the lands to the nominee of A. D. at $1 an acre. In pursuance of this agreement the lands were sold by the Government to one Alloway, as A. D.'s nominee, and Alloway received a patent for the same: —*Held*, that Alloway held the lands as trustee for A. D., and that a transfer of the lands from Alloway to the defendant, the wife of A. D., for which the defendant gave no consideration, and which was made at a time when A. D. was, to the knowledge of the defendant, in insolvent circumstances, should be set aside as fraudulent and void. A letter written by A. D. to one of the plaintiffs subsequently to the date of the transfer attacked was *held* to be inadmissible as evidence against the defendant. Costs in case of partial success of the plaintiff. *McDonald* v. *Dunlop* (No. 2), 2 Terr. L. R. 238.

Action to set aside — *Limitation of time—Parties.*] — An action to annul acts done by a debtor in fraud of his creditors' rights, must, as regards third persons, be brought within a year from the date when the creditor had knowledge thereof; and all parties to the deed sought to be annulled, must be made parties to the suit. *Smith* v. *Bouffard*, Q. R. 25 S. C. 448.

Action to set aside—*Parties—Grantor.*] —The execution debtor is not a necessary nor a proper party to an action by execution creditors to set aside a conveyance made by him as fraudulent and void as against them, no relief being claimed against him except costs. Participation in fraud is not a sufficient ground for adding a party for purpose of rendering him liable for costs. *McDonald* v. *Dunlop* (No. 1), 2 Terr. L. R. 177.

Action to set aside—Previous action—Different creditors—Res judicata—Intent to defraud—Evidence—Subsequent conveyance—Purchaser for value — Notice — Purchase money — Equitable relief. *Burns* v. *McCarthy*, 4 O. W. R. 29.

Action to set aside—*Sale of land à réméré—Equity of redemption only left—Contract prejudicing creditors.*] — A sale of land *à réméré*, which leaves the vendor without other means of paying his debts than that of his right to redeem, is a contract which is calculated to prejudice his creditors, the right to redeem being less valuable than the ownership of the land, and therefore may be set aside as a fraud on creditors. The fact that the purchaser furnished the vendor with money to pay some of his creditors, is evidence of the fact that he knew that the vendor had creditors, and acted in fraud of their rights. When it is a question of the credibility of a witness who gave evidence before the trial Judge an appellate Court ought only to set a different value on the evidence of such witness when the manner of the witness furnishes strong reasons for so doing, and in doubtful cases ought to follow the trial Judge. *Laflamme* v. *Fortier*, Q. R. 27 S. C. 96.

Action to set aside—*Status of creditor's creditor — Prescription.*] — *Held*, reversing the judgment in Q. R. 15 S. C. 577, that the creditor of a person who is himself creditor of a third, who has made a deed in fraud of creditors, may, in his name, as exercising the rights of his debtor, attack the deed and have it set aside; and the prescription against his action runs from the time he knew of the fraudulent conveyance, and not from the date of the judgment in his favour in garnishing proceedings against the fraudulent debtor as garnishee. *Charron* v. *Tourangeau*, Q. R. 16 S. C. 489.

Action to set aside—Status of plaintiff as creditor of grantor—Judgment establishing liability of grantor—Amount not ascertained — Reference — Receiver — Impeached conveyance made before amount ascertained — Voluntary conveyance — Express intent to defeat plaintiff's claim — Assignee for creditors of grantee—Costs out of estate. *Webb* v. *Scott*, 11 O. W. R. 251.

Action to set aside — *Time — Knowledge—Burden of proof.*]—On the trial of a contested action *pauliana*, brought more than a year after the contract impeached was made, but in which the plaintiff alleges that he only obtained knowledge of it within the preceding year, the burden of proof is not on the plaintiff to establish the negative proposition that he did not know of it sooner, but on the contesting defendant to shew affirmatively that he did. *Boulais* v. *Monast*, Q. R. 29 S. C. 509.

Action to set aside *transfer of land —Valuable consideration—13 Eliz., c. 5 — Preference—Saskatchewan Assignments Act.*] —Action for price of goods sold, and to set aside transfer of land as a fraudulent conveyance:—*Held*, that evidence did not shew an actual express intent to defraud or delay creditors. The transfer in this case was for

valuable consideration, and under the circumstances there was no preference. *Manitoba* v. *McDonald*, 11 W. L. R. 313.

Action to set aside—Voluntary conveyance—Insolvency—Absence of fraudulent intent by grantee—Submission to pay purchase money into Court—Rights of creditors—Equitable relief. *Urquhart* v. *Aird*, 4 O. W. R. 501, 6 O. W. R. 155, 506.

Action to set aside—Undue influence—Mental incapacity—Improvidence — Delay in bringing action—Costs. *Kellens* v. *Waffle*, O. W. R. 892.

Agreement to pay grantor's debts—*Grantor a creditor—13 Elizabeth—R. S. N. S. c. 145, s. 4.*]—*Held*, that transfer of certain lands by father to son did not come within either of above statutes. *Langley* v. *Marshall*, 7 E. L. R. 401.

Bill of sale—Action to set aside and for an accounting — Partnership — Insolvency—Subsequent bill of sale—Execution creditor—Seizure of stock for rent—Sale by bailiff—Fraud—Pleading. *Pitts* v. *Campbell* (N.S. 1910), 9 E. L. R. 10.

Bill to set aside—*Injunction—Affidavit — Administration — Parties — Pleading — Judgment — Probate Court — Jurisdiction — Delay—Limitation of actions — Demurrer —Costs.*]—Under 53 V. c. 4, ss. 23, 24, a bill in an injunction suit need not be sworn to or supported by affidavit. It is only where an injunction is sought before the hearing that the bill must be supported by affidavit. In a suit by simple contract creditors of an intestate to set aside as fraudulent, under 13 Eliz. c. 5, a conveyance testate. On failure to make the administration by the Court of the estate, an administrator of the intestate's estate appointed by the Probate Court is a necessary party to the suit, though there are no personal assets of the intestate. The failure to make the administrator a party to such a suit is not a ground of demurrer but may be taken advantage of under Act 53 V. c. 4, s. 54. In such a suit it is not necessary for the plaintiff to allege that he has obtained or is in course of obtaining a judgment upon his debt. The Court will not in such a suit appoint a person under 54 V. c. 4, s. 89, to represent the estate of the intestate, instead of requiring an administrator of the intestate's estate to be made a party to the suit. The Probate Court has jurisdiction to grant letters of administration where an intestate dies indebted possessed of real, but of no personal, estate. Delay cannot be set up against a creditor seeking to set aside a conveyance of lands as fraudulent under 13 Eliz. c. 5, where the creditor's debt is not barred under the Statute of Limitations at the commencement of the suit. In a suit commenced in 1899 by a creditor to set aside as fraudulent, under 13 Eliz. c. 5, a conveyance of land, the bill stated that the debt arose upon two promissory notes dated respectively in March and April, 1885, payable with interest three and twelve months after date; that the rates "were renewed and carried along from time to time by new or renewal or other notes, but have never been paid, but with interest thereon are still due to the plaintiff."—*Held*, that the allegations were too vague, general, and uncertain to shew a valid and subsisting debt, not barred by the Statute of Limitations at the time of the commencement of the suit, and that the bill was therefore demurrable. Where some of several grounds of demurrer were overruled, costs were not allowed to either side. *Trites* v. *Humphries*, 19 Occ. N. 407, 2 N. B. Eq. Reps. 1.

Bona fides of grantee.]—In an action to set aside a conveyance as fraudulent against creditors, the evidence shewing that there was an actual sale from the debtor to the claimant, and that, even if there was any fraudulent intent on the part of the former, the latter bought *bona fide*, the conveyance was held valid. *Steele* v. *Ramsay*, 1 Terr. L. R. 1.

Cancellation of lease for breach of covenants, when involving over $100 rent is within the jurisdiction of the Superior Court even if plaintiff does not ask damages, and such action brought in the Circuit Court may be moved into the Superior Court, even if plaintiff does not sue for $100. Provisions of Art. 1152 C. P. do not apply, subject to rules laid down in Art 49 C. P. *Poire* v. *Lavigne* (1909), 38 Que. S. C. 19.

Collusion—*Immoral consideration—Pleading—Amendment.*]—V., a miner and prospector, in 1896 engaged B. as a servant in an hotel kept by him in Revelstoke, on the understanding that the rate of wages would be fixed when he found out what she was worth. And some weeks afterwards he fixed the rate at $50 per month. A few months afterwards V. built a house, and he and B. lived there as man and wife. In November, 1898, V. made an assignment for the benefit of his creditors, having seven days previously conveyed to B. the house property for an alleged consideration of $1,200, as representing her wages for two years. She had never asked for wages before October, 1898, and then V. was hopelessly in debt:—*Held*, in an action to set aside the conveyance, on the ground of its being fraudulent under 13 Eliz. c. 5, that there was collusion between V. and B. to defeat V.'s creditors:—*Held*, also, that the conveyance was void on the ground that it was based on an immoral consideration; also, that, if necessary, the statement of claim could be amended to conform to the evidence. *Holten* v. *Vandall*, 20 Occ. N. 427, 7 Brit. Col. L. R. 331.

Consideration—*13 Eliz. c. 5.*]—In 1891 E. S., a farmer, since deceased, agreed with two of his sons, in consideration of their remaining on the farm and supporting him and their mother, and paying to their two sisters $1,000 each, that the farm and his personal property should be theirs. The farm consisted of adjoining pieces of land, each worth about $3,200. Subsequently the sons paid more than $3,000 in paying off balance of purchase money due on the farm, paid $2,000 to the sisters, and supported the father and mother. On the 19th July, 1899, the father conveyed the farm to the sons for an expressed consideration of $1. At that time he

was not in debt, but he was surety with others for loans amounting to $14,000 to a company, of which he and they were directors, the last loan being for $3,000, made on the 7th June, 1899. On the 3rd May, 1901, the company went into liquidation, and the amount for which the directors were sureties was paid by them, except E. S. A suit by them to set aside the conveyance as fraudulent and void under 13 Eliz. c. 5, was dismissed. *Baird* v. *Slipp*, 26 C. L. T. 467, 3 N. B. Eq. 258.

Conveyance made by husband to wife was set aside as fraudulent and void as against creditors. Judgment of Anglin, J., at trial (1908), 4th December, affirmed. *Canada Carriage Co.* v. *Lea* (1909), 14 O. W. R. 725, 1 O. W. N. 71.

Creditor—Right of, to attack—Mortgagee—Simple contract creditor. *Thomas* v. *Calder*, 1 O. W. R. 26.

Crown patent obtained by fraud.]—Action to have it declared that the patent for north half of lot 19 in con. B. of tp. of Widdifield, issued to defendant, was procured by fraud, and to have it repealed, cancelled, voided, and declared to be null and void, that defendant has no legal right, title or interest in, and to the said lands, and for a judgment for possession granted to plaintiff. At trial action was dismissed with costs. Court of Appeal *held*, that as the settlement duties had not been performed to knowledge of defendant the patent should be set aside, but it did not follow that defendant should lose the land. The revocation simply put the matter where it stood before patent was issued, and the Crown could be trusted to act with justice toward defendant upon a fresh application. *Atty.-Gen. for Ont.* v. *Devlin* (1910), 15 O. W. R. 584.

Declaration—*Sale — Exemption—Homestead.*]—The defendant Mrs. R. conveyed land to her son without consideration because she thought she might thereby prevent the sale of the land to realize the plaintiff's claim, and both she and her son admitted that fact in this action, and that the property was the mother's and that the son had no interest in it. The plaintiff sought a declaration that the land belonged to the mother and that the son held it only as trustee for her and asked a sale of the land to satisfy the lien of his registered judgment: — *Held*, that the plaintiff was entitled to the declaration asked for, but not to a sale, as the property was exempt under s. 9 of the Judgments Act, R. S. M. 1902, c. 91, it being the actual residence and home of the judgment debtor, and not worth more than $1,500. *Roberts* v. *Hartley*, 14 Man. L. R. 284, 23 Occ. N. 53, and *Merchants Bank* v. *McKenzie*, 13 Man. L. R. 19, distinguished. *Logan* v. *Rea*, 24 Occ. N. 30, 14 Man. L. R. 543.

Deed—Will—*Administrators—Action by, to set aside deed of 50 acres of land as fraudulent and void.*]—Plaintiffs, administrators of the estate of Malloy, brought action with will annexed, to set aside a deed of 50 acres of land made by said Malloy to one Cook, as being fraudulent and void. The evidence shewed that the deed was prepared at the instance of defendant and executed by Malloy without independent advice, and without the same being fully and properly explained to him, and that Malloy was over 80 years of age and could neither read nor write:—*Held*, that the transaction was in substance a gift from Malloy to defendant, and having regard to the position of the parties, the age, condition and helplessness of Malloy, the onus was clearly upon defendant to establish the perfect fairness of the transaction, that the donor clearly and perfectly understood what he was doing and realised that by signing the deed he was in effect signing away all his property. That this was not done and plaintiffs are entitled to have the conveyance set aside and the registration thereof cancelled. *Trusts & Guarantee Co.* v. *Cook* (1909), 14 O. W. R. 1185, 1 O. W. N. 265.

Exchange of lands—*Creditors' action to set aside—Judgment against debtor defendant—Subsequent registration of conveyance to him — Vacating registration.*]—The defendants A. and B. exchanged lands by contemporaneous conveyances, and the plaintiff, suing on behalf of himself and all other creditors of A., brought action to set aside the conveyance of A.'s lands to B. The trial Judge found that the conveyance of A.'s lands to B. was fraudulent and void as against A.'s creditors, and ordered that it should be set aside and the lands revested in A. for the benefit of his creditors, but refused to make any direction as to the lands conveyed by B. to A. The conveyance of the last-mentioned lands was subsequently registered by the plaintiff's solicitor, and it was contended that the plaintiff was also entitled to claim the proceeds of the property thereby conveyed:—*Held*, that the registration of the deed of B.'s lands to A. should be vacated and the lands revested in B. free and clear of any cloud thereon caused by the registration of the deed. *Pringle* v. *Olshinetsky*, 17 O. L. R. 38, 11 O. W. R. 871.

Exemptions — *Lien of registered judgment — Taking proceedings under, while debtor in occupation—County Courts Act—Judgments Act.*]—The registration of a certificate of judgment, under ss. 196 and 197 of the County Courts Act, R. S. M. c. 33, as amended by 55 V. c. 7, s. 5, binds and charges the land of the judgment debtor, though it may be his actual residence or home, and the creditor may take proceedings to realize whenever the defendant ceases to be entitled to claim the property as his exemption. *Frost* v. *Driver*, 10 Man. L. R. 319, 15 Occ. N. 169, followed. 2. When a debtor has absolutely conveyed all his interest in the land on which he resides by a conveyance valid and binding on him, even when set aside by the Court as against creditors, the claim that the land is an exemption of his under s. 12 of the Judgments Act, R. S. M. c. 80, can no longer be maintained. *Brimstone* v. *Smith*, 1 Man. L. R. 302, and *Massey-Harris Co.* v. *Warrener*, not reported, followed. 3. Under such circumstances, when the debtor has made a conveyance of his home, which is fraudulent against creditors under 13 Eliz. c. 5, the creditor is entitled to an immediate order for sale of the property to realize the amount of the judgment and costs. *Taylor* v. *Cummings*.

27 S. C. R. 592, distinguished. *Roberts* v. *Hartley*. 22 Occ. N. 185, 23 Occ. N. 53, 14 Man. L. R. 284.

Exemptions—*Real Property Act—Burden of proof—Concealed fraud — Laches—Limitation of actions.*]—The plaintiffs were judgment creditors of the defendant McL., who at the time judgment was recovered was, and had since remained, in insolvent circumstances; and this action was brought to have it declared that two quarter sections of land which were bought after the recovery of the judgment in the name of the defendant McK. were held by her as a bare trustee for McL., or had been fraudulently transferred to her in order to hinder and defeat the creditors of McL. Both parcels of land had formerly belonged to McL., but they had been sold for arrears of taxes in 1886; and subsequently the purchasers, after negotiations carried on by McL. or his solicitor, assigned the tax sale certificates to the defendant McK., a poor girl who lived with McL., her uncle. Tax deeds were issued to her by the municipality, and certificates of title under the Real Property Act were obtained for both parcels in her name. She claimed that she had furnished the money, $125, required to acquire the tax sale certificates, but the evidence in support of this was not satisfactory to the Court, which held that the onus was upon her to establish this fact by clear and convincing proof, and the additional sum, about $125 more, required to complete the purchases and procure the certificates of title, was not provided by her. After the purchase, the charge and management of the lands were left wholly in McL.'s hands, and McL. had never received any rents or exercised any rights of ownership except that she agreed to a suggestion that her cousin, McL.'s son, made to her seven or eight years ago, that she should rent them to him. But no terms were discussed and he had paid her no rent. The evidence also shewed that the defendant McL. had himself cultivated and managed the farms for his own benefit, and had in fact always dealt with the lands as if they were his own, but in his evidence at the trial he stated that he had been working for his son in cultivating the land:—*Held*, that the plaintiffs were entitled to the relief asked for, and that s. 57 of the Real Property Act, R. S. M. c. 133, as amended by 55 V. c. 38, s. 4, does not prevent the granting of the relief, as it provides that a certificate of title is "subject to the right of any person to shew fraud wherein the registered owner has participated or colluded," and the law declares that such a transaction as was held to have been proved is fraudulent under 13 Eliz. c. 5, and McK. participated in it. *Barrack* v. *McCulloch*, 3 K. & J. 117; *Merchants Bank* v. *Clark*, 18 Gr. 594; *Harris* v. *Rankin*, 4 Man. L. R. 126; and *Re Massey and Gibson*, 7 Man. L. R. 172, followed. 2. The Statute of Limitations could not be set up as a defence, as the fraud was a concealed one, and the plaintiffs, without any want of reasonable diligence, became aware of the facts only about eighteen months before the commencement of the action. 3. That the defendant McL., in view of the evidence given by himself at the trial, was not entitled to claim any part of the lands as exempt from seizure and sale. *Merchants' Bank* v. *McKenzie*, 18 Occ. N. 367, 20 Occ. N. 90, 13 Man. L. R. 19.

Foreign assignment of personal property—*Conflict of laws—Onus of proof — Garnishment — Equitable execution.*] — A share in the annual income of an estate in Ireland payable under will, through the hands of the executors living in New Brunswick, to the beneficiary living and domiciled in Massachusetts, was assigned by the beneficiary by assignment executed in Massachusetts to a trustee in trust, first to maintain the assignor and his family, and, second, to pay his creditors a limited sum. In a suit in New Brunswick to set aside the assignment as fraudulent and void against a judgment creditor of the assignor, under 13 Eliz. c. 5:—*Held*, that the validity of the assignment should not be determined by the *lex domicilii* of the assignor; (2) that, assuming that the validity of the assignment should be determined by the law of Massachusetts, the onus of proving that the assignment was invalid by that law was upon the defendant, and that, in the absence of such proof, it must be assumed that the law of Massachusetts was the same as that of New Brunswick; (3) that, as the money coming into the hands of the executor was liable to attachment under 45 V. c. 17, s. 21, or to equitable execution, the plaintiff was prejudiced by the assignment within 13 Eliz. c. 5. *Black* v. *Moore*, 20 Occ. N. 463, 2 N. B. Eq. Reps. 98.

Fraudulent conveyance — *Insolvency of grantor.*]—Plaintiff having endorsed the note of the defendant J., received as security a deed of certain property of which the defendant F. now claims to be the owner, alleging his co-defendant was merely a trustee: —*Held*, that plaintiff's equity must prevail, notwithstanding J. was not in possession when note endorsed. *Lovitt* v. *Sweeney*, 7 E. R. 391.

Fraudulent conveyance of real estate.]—R. on the eve of absconding, had conveyed two valuable farms to McV. who was his brother-in-law. Attachment was issued by plaintiff against R., and McV. was summoned as agent or trustee for R. McV. claimed the lands as his own. Plaintiff sought to have deeds declared fraudulent and void as against creditors and moved that McV. be declared garnishee. The Court was satisfied that there was fraud:—*Held*, (Palmer, C.J., Hensley, J., concurring, Peters, J., dissenting), that this Court could not under the present enquiry declare the deeds void. *Davies* v. *Rogerson* (1877), 2 P. E. I. R. 161.

Fraudulent transfer of personal property—Action to set aside—Following proceeds — Equity of redemption in land—Status of judgment creditor as plaintiff—Expiry of execution—Laches in bringing action—Absence of fraudulent intent. *Scott* v. *Griffin*, 7 O. W. R. 441.

Fraudulent transfer of property.]—On February 10th, 1908, plaintiff commenced an action against defendant, and judgment was signed for $764.58 on June 5th, 1908.

On May 20th, 1908, defendant conveyed certain real estate to his son in consideration of $400 for work performed by son for defendant father and a mortgage for $500. Defendant was not insolvent at time he made the conveyance. The only creditors he had besides his son were the plaintiff and a solicitor, to whom he owed a small amount for professional services rendered in connection with D.'s suit against him:—*Held*, that the conveyance would not be set aside and the bill must be dismissed, as the evidence shewed that the sale was made *bona fide* for a valuable consideration with the intent to pass the property, and in such a case it was immaterial whether or not there was an intention to defeat or defraud a creditor. *Dyer* v. *McGuire* (1909), 4 N. B. Eq. 203, 7 E. L. R. 260.

Fraudulent transfer of property.]—Where a debtor fraudulently transferred property the Court enjoined further transfers until a creditor could obtain judgment and attack the conveyance. *Fairchild* v. *Elmslie* (1909), 2 Alta. L. R. 115.

Husband and wife — Defeating creditors of husband—Declaration of trust. *Merilees* v. *Cox* (Man.), 5 W. L. R. 38.

Husband and wife—*Income—Gift.*] — Judgment in 31 O. R. 59, 19 Occ. N. 271, affirmed. *Rice* v. *Rice*, 20 Occ. N. 55, 27 A. R. 121.

Husband and wife—Intent—Consideration. *McDonald* v. *Hennessy*, 1 O. W. R. 559.

Husband and wife—Judgment against husband—Enforcement against lands standing in name of wife—Trust—Registration of certificate of County Court judgment—Voluntary conveyance—13 Eliz. c. 5—Statute of Limitations—Claim arising after conveyance—Costs. *Keddy* v. *Morden* (Man.), 2 W. L. R. 373.

Husband and wife—Parent and child—Gift—Absence of insolvency and fraudulent intent—Business carried on by wife—Attempt to have stock in trade declared available for husband's creditors — Remedy — Sheriff—Interpleader. *White* v. *Campbell*, 7 O. W. R. 146, 612.

Injunction—Receiver—Money in *custodia legis*. *Bank of Ottawa* v. *McLeod*, 1 O. W. R. 565.

Insolvency—*Knowledge — Action to set aside—Parties—Consideration.*]—The notorious insolvency of a debtor is not sufficient ground upon which to set aside his deed, if he was not aware of the insolvency, and if the one to whom he conveyed was not aware of it. 2. A deed cannot be set aside as made in fraud of creditors of the grantor unless all the parties to the deed are before the Court. 3. Want of consideration in a sale of lands is evidence of simulation and nullity of the sale. *Connolly* v. *Baie des Chaleurs Rw. Co.*, 5 Que. P. R. 383.

Insolvency — *Right of repurchase — Pledge.*]—A pretended sale by an insolvent, who keeps possession of the articles sold and reserves the right of repurchasing them within a certain time, is void as constituting a pledge without dispossession; and in any event such sale is void as being fraudulent. *Edgerton* v. *Lapierre*, 5 Que. P. R. 389.

Intent of grantor — *Consideration.*]—A deed will not be set aside as fraudulent where the purchaser paid full value in cash, and knew nothing of any fraudulent intent on the part of vendor in converting his property into cash. *McDonald* v. *Horan*, 12 O. W. R. 1151.

Intent of grantor—Fraud—Knowledge—Consideration—R. S. O. 1897, c. 115—13 Eliz. c. 5. *McDonald* v. *Horan*, 12 O. W. R. 1151.

Intent to defeat creditors—Marriage settlement—Evidence of fraud—Inferences—Conveyance by husband to wife—Pretended consideration—Dower in other properties—Value of land—Charges thereon—Will—Precatory trust—Gift of cattle—Crops grown on land conveyed—Seizure under execution—Interpleader issues — Evidence — Admissibility—Depositions of parties in other actions. *McKinnon* v. *Gillard* (No. 1); *McKinnon* v. *Gillard* (No. 2); *Gillard* v. *McKinnon; Gillard* v. *Cuthbert*, 9 O. W. R. 77.

Intent to enter hazardous business.]—Where a voluntary settlement was made by husband to wife of half his available assets just before he entered into a speculation of considerable magnitude in connection with supposed oil lands, it was held that the property so held by the wife was available for creditors. *Mackay* v. *Douglas* (1872), L. R. 14 Eq. 106, and *Ex p. Russell* (1882), L. R. 19 Ch. D. 588, followed. *Alexandra Oil Co.* v. *Cook* (1909), 13 O. W. R. 405, affirmed, 14 O. W. R. 604, 1 O. W. N. 22.

Intent — Fraud on creditors.] — *13 Eliz. c. 5, s. 1—Re-transfer to administrator of wife's estate—Setting aside conveyances—R. S. O. 1897, c. 334, s. 1.*]—Action against R. upon promissory notes and to set aside conveyance of his interest in his wife's estate to defendant C. and by latter to defendant M.:—*Held*, that intent to defeat creditors was in minds of R. and C. and under above section conveyance must be set aside. M. cannot stand in any better position than C., but money advanced must be returned to him. *Dorland* v. *Charsey* (1909), 14 O. W. R. 129.

Interest in land under agreement for purchase—Assignment by purchaser to daughter—Action to declare daughter trustee for father—Evidence — Honest transaction. *Payne* v. *Tew*, 10 O. W. R. 776, 11 O. W. R. 320.

Interim injunction—*Deposit in bank—Judgment creditor—13 Eliz. c. 5.*]—A conveyance by an insolvent debtor in good faith and for valuable consideration, though made with intent to defeat creditors, to the knowledge of the purchaser, is not void under 13 Eliz. c. 5. An interim injunction granted restraining the transfer of property by the grantee in a suit by a judgment creditor of the grantor impeaching the conveyance as

fraudulent under the statute 13 Eliz. c. 5. Application refused of a judgment creditor for an injunction order restraining the wife of a debtor from withdrawing money on deposit in her name in the Government savings bank alleged to belong to the husband. *White* v. *Ham*, 24 Occ. N. 244, 2 N. B. Eq. Reps. 575.

Issue—Determination in favour of validity—Appeal—Evidence that conveyance made as security only — Refusal to give relief. *Schuel* v. *Hamilton*, 8 O. W. R. 563.

Judgment creditor—13 Eliz. c. 5. *Gray* v. *Ayles*, 3 E. L. R. 487.

Judgment—*Motion to set aside—Signed against defendant for default of delivery of statement of claim — Plaintiff resides in Alberta.*] — Motion referred to trial Judge as the action was going down to trial at once against the other defendants and the defences were the same. *George* v. *Strong* (1909), 14 O. W. R. 1017, 1 O. W. N. 208, See 15 O. W. R. 99.

Judgment obtained by default for liquor drunk in an ale-house is null and void, an execution sale of lands to satisfy said judgment is void, and the deed and mortgage is of no effect and the registration of them should be vacated and annulled *Drew* v. *Rexford* (1909), 14 O. W. R. 505.

Land—Conveyance — *Fraud—Stat. 13 Eliz. c. 5—Valuable consideration — Bona fides.*]—Action by execution creditor to set aside certain conveyances as having been made to delay, hinder and defeat the plaintiff:— *Held*, that the transfer from the father, the debtor, to the son, the defendant, A., was made *bona fide* and for valuable consideration and not intended to defeat or delay plaintiff, though that is immaterial. *Dyer* v. *McGuire*, 7 E. L. R. 260.

Marriage settlement — *Action to set aside—Letter accepting proposal of marriage on condition of property being settled—Bona fides — Suspicious circumstances.*]—On the 31st October, 1906, the plaintiff obtained a verdict for $1,000 damages against the defendant G. H. W. in an action for breach of promise of marriage; there was an appeal, which was dismissed by consent on the 25th January, 1907; judgment was entered for the plaintiff on the 26th January, and execution placed in the sheriff's hands on the 6th February. Early in October, 1906, G. H. W. had proposed marriage to Miss C.; she took time to consider, and on the 16th January, 1907 (never having seen him in the meantime), wrote him a letter in which she alluded to the "trouble" he was in (meaning the action), and accepted his proposal on condition that he should settle upon her and her children (if any) $2,500 in money or property. On the 28th January he instructed a solicitor to prepare a marriage settlement, which he did, and this was executed at the solicitor's office, where G. H. W., Miss C., and the trustees named in the instrument, his brother and sister-in-law (whom Miss C. had never seen before and whose home was in a distant province) met, on the following day. The property of G. H. W. included in the settlement was $1,000 in money and an equity in land of the value of $800, being practically the whole of his property. The marriage took place on the same day. In an action against G. H. W., his wife, and the trustees, to declare the settlement fraudulent and void: — *Held*, that there were circumstances of grave suspicion surrounding the transaction; if the letter were part of a scheme, the fact that G. H. W. was in difficulty, and that the action was pending against him, and that the effect of making the transfer of the property would be to prevent recovery by the plaintiff upon her judgment, would make the transaction void under the Statute of Elizabeth; but, the trial Judge having found that there was an honest offer of marriage, that the letter was genuine, and the wife (then Miss C.) honest in her statement of the condition upon which she would accept the offer, the plaintiff could not succeed. *Bulmer* v. *Hunter*, L. R. 8 Eq. 46, distinguished. *Fallis* v. *Wilson*, 10 O. W. R. 121, 695, 15 O. L. R. 55.

Mortgage—*Action to annul registration of exhibits—Motion for filing thereof—C. P. 155, 157.*]—In an action for the annulment of the registration of a mortgage, the defendant has the right to move that the plaintiff be ordered to produce a document referred to in the declaration as having been exhibited to the defendant and to which the latter was requested to affix his signature or an authentic copy thereof, in order that he may plead to said action. *Auger* v. *Auger* (1909), 10 Que. P. R. 396.

Mortgage by company to bank to secure existing debt.]—Plaintiff, liquidator of the New Ontario Brewing Co., brought action to set aside a mortgage by the company to defendants, on the ground: (1) that it was made within three months preceding the commencement of winding-up proceedings; (2) that no by-law of the company was passed authorising the mortgage. Sutherland, J., *held* (15 O. W. R. 536, 1 O. W. N. 519), that the consideration mentioned in the mortgage was proved to have consisted of an existing debt from the company to the bank, and that the bank was endeavouring to get security therefor. Plaintiff was entitled to succeed under s. 94 of the Winding-up Act, the by-law was not properly ratified, and was without effect for the purpose of making the mortgage valid. Judgment for plaintiff as liquidator of the New Ontario Brewing Co., setting aside the mortgage, and the defendants to execute a discharge of it. Costs to plaintiff. Court of Appeal *held*, that the attack upon the mortgage failed and the appeal should be allowed and the action dismissed, but the circumstances were such as to invite enquiry, and costs should not be allowed either party. *Hammond* v. *Band of Ottawa* (1910), 17 O. W. R. 121, 2 O. W. N. 99, 22 O. L. R. 73.

Mortgage—*Trust — Execution creditor.*] —Plaintiff, an execution creditor, brought action to have it declared that defendant was a trustee of certain lands and to have two mortgages set aside as fraudulent and void: —*Held*, that the execution debtor was insolvent when he transferred the property to defendant; that the alleged fraudulent ar-

rangements were not established; and that the mortgages were given for valuable consideration, and no fraudulent or collusive scheme to defeat, delay or hinder the execution creditor had been proved. *Elwell* v. *Crate* (1910), 15 O. W. R. 261.

Notes in favour of wife.]—In an action to have it declared that certain notes made to wife were fraudulent and void as against plaintiff, the notes in question having been given wife to bar her supposed dower and for money she had advanced to her husband:—*Held*, that if a debtor makes a payment, believing in good faith and on reasonable grounds that he is, although in fact he is not, legally bound to make it, such payment is not a fraudulent preference. *In re Vaulin* (1909), 7 Mans. Bank 291, followed. See (1908), 12 O. W. R. 1115, and (1909), 13 O. W. R. 272, where the facts of this case were twice before the Courts. *McDonald* v. *Curran* (1909), 14 O. W. R. 838, 1 O. W. N. 121. Affirmed (1910), 15 O. W. R. 218.

Parties.]—Plaintiff was trustee for the benefit of creditors of the M. Co., and as such sued H. Co. and H. to set aside as fraudulent and void certain conveyances made by H. Co. to H. Plaintiff had judgment against H. Co. and claimed H. Co. was otherwise indebted to him as such assignee. H. Co. moved to have its name struck out as a defendant:—*Held*, that company was a necessary party. *Belcher* v. *Hudson*, 9 W. L. R. 265.

Prescription—*Fraud on creditors—Simulated deeds.*]—The prescription enacted by Art. 1040, C. C., applies only to deeds made in fraud of creditors, and not to deeds attacked by creditors assimulated. *In re Simpson and Gagnon*, 6 Que. P. R. 436.

Properties purchased by trader and conveyances made to wife—Embarking in hazardous business — Intent to defeat creditors—Declaration—Evidence. *Revillion Brothers Limited* v. *Derome* (Alta.), 7 W. L. R. 53.

Purchase of land by judgment debtor—Transfer by vendor to wife of judgment debtor—Action by judgment creditors to set aside—Evidence—Separate property of wife—Absence of corroboration — Suspicious circumstances—Intent to defraud creditors — Declaratory judgment — Wife trustee for husband—Other property of husband—Costs. *Merchants Bank of Canada* v. *Hoover* (N.W.P.), 5 W. L. R. 516.

Status of judgment creditor attacking—Execution — Husband and wife—Evidence—New trial. *Burnett* v. *Bock*, 2 O. W. R. 182.

Statute of limitations — *Amendment after cause of action barred — Promissory note—Negotiable instrument—13 Eliz. c. 5—County Court judgment—Registration of certificate.*]—1. An instrument in the form usually called a lien note is not a negotiable promissory note (*Bank of Hamilton* v. *Gillies*, 12 Man. L. R. 495), and the right of action upon it is barred by the Statute of Limitations in 6 years from the due date of it, without adding any days of grace.—2. A voluntary conveyance of land cannot be successfully attacked under 13 Eliz. c. 5, on the basis of a debt due at the time of the conveyance, but barred by lapse of time before the commencement of the action to attack. *Struthers* v. *Glennie*, 14 O. R. 726, followed.—3. A voluntary conveyance of land, if meant to be absolute as between the parties, so that the grantee holds it free of trust for the grantor, leaves no interest to him which can be affected by the registration of a certificate of a subsequently recovered County Court judgment against the grantor. —A debt of the grantor, though owing at the time of the making of such voluntary conveyance, became afterwards barred by the Statute of Limitations before the creditor sued the grantor upon it. The grantor neglected to plead that statute, and judgment was recovered against him:—*Held*, that, as against the grantee, such judgment did not relate back to the original debt so as to form the basis for an action under 13 Eliz. c. 5. The grantee, having once gained the right to plead the Statute of Limitations in such last named action, can not be deprived of that right by the act or omission of the grantor. *Keddy* v. *Morden*, 15 Man. L. R. 629, 2 W. L. R. 373.

Summary application to set aside—Rule 1015 *et seq.* — Evidence — Burden of proof—Local Judge—Jurisdiction—Residence of solicitors. *Wendover* v. *Nicholson*, 2 O. W. R. 1108, 4 O. W. R. 475, 5 O. W. R. 645, 6 O. W. R. 529.

Summary application to set aside—Liability to execution—Evidence — Partnership—Company—Fraud—Suspicious circumstances — Issue. *Carbonneau* v. *Letourneau* (Y.T.), 1 W. L. R. 273, 2 W. L. R. 113, 493.

Valuable consideration — *Judgment creditor—Tort—Cause of action.*]—In 1895 the defendant and his son entered into a parol agreement that the defendant should convey his farm to the son, and that the son should labour upon the farm and support his parents. The farm was not conveyed to the son until the 2nd October, 1895. On the 24th September and on the 10th October, 1895, the defendant spoke words alleged to be defamatory of the plaintiff. Before the date of the conveyance the plaintiff warned the defendant of her intention to bring an action against him for slander. An action was brought for the words spoken on both occasions, and the plaintiff obtained a verdict for $123, which on motion for new trial was reduced to $63, being the amount of damages awarded by the verdict in respect to the defamatory words uttered on the 10th October. At the date of the conveyance the defendant was not in debt. In a suit to set the conveyance aside as fraudulent and void against the plaintiff under 13 Eliz. c. 5:—*Held*, that the conveyance was not within the statute. *Gorman* v. *Urquhart*, 2 N. B. Eq. Reps. 42.

Voluntary deed—*Creditors—Absence of fraudulent intent.*]—The defendant's father, believing himself solvent, in January, 1905, conveyed land voluntary to the defendant. At that time he owned shares in the plaintiff

company, and had borrowed money from the company upon them, but these shares up to the time of the failure of the company in June, 1903, were saleable above par, and considered then and at the time of the loan ample security for the amount of it. On the evidence, no fraudulent intent on the part of the grantor could be inferred:—*Held*, that, although, at the time of action brought to set aside the conveyance, the plaintiff company were, by reason of it, hindered in recovering their claim, this was not the necessary consequence of the conveyance, within the meaning of R. S. O. 1897, c. 147, and therefore the conveyance could not be set aside. *Spirett* v. *Willows*, 3 DeG & Sm. 293, and *Freeman* v. *Pope*, L. R. 5 Ch. 538, specially considered. *Elgin Loan and Savings Co.* v. *Orchard*, 24 Occ. N. 292, 7 O. L. R. 695, 3 O. W. R. 781.

Voluntary mortgage — *Subsequent transfer to creditor — Pressure—Consideration—Priorities—Future support of grantor —Statute of Elizabeth.*]—In 1877 C. made a conveyance, by way of mortgage, to H. The conveyance was made without consideration, and in fraud of creditors, and was voidable as against creditors and subsequent purchasers for valuable consideration. In 1896 H., at the request of C., assigned the mortgage so made to W., who was a creditor of C., and pressing for payment. — *Held*, that the mortgage, although fraudulently made in the first instance, was validated by the assignment to W. for valuable consideration; that the giving of time by W. to C. in connection with the antecedent indebtedness, was sufficient consideration to support the assignment. But the validating of the mortgage would not affect the right to priority of the party claiming under a second mortgage mode by C. previously to the assignment of W.:—*Held*, also, following *McNeil* v. *McPhee*, 31 N. S. Reps. 140, that a deed made by C., the sole consideration for which was the future support of the maker and his wife by the grantee, was not founded upon valid consideration, within the Statute of Elizabeth. *Conrad* v. *Corkum, Whitford* v. *Corkum*, 35 N. S. Reps. 288.

13 Eliz. c. 3, s. 1—Voluntary conveyances to wife—Intent to defeat claims for damages—Fraud—Judgment declaring conveyances void. *Watson* v. *Gordanier*, 11 O. W. R. 62.

CANDIDATE.

See Elections.

CAPIAS.

See Arrest—Bankruptcy and Insolvency —Husband and Wife.

CARGO.

See Carriers—Shipping.

CARNAL KNOWLEDGE.

See Criminal Law.

CARRIERS.

Carriage of Goods—*See* Railway—Street Railway—Shipping.

Carriage of Liquor — *See* Intoxicating Liquors.

Carriage of Passengers — *See* Railway —Street Railway—Ship.

Negligence in—*See* Negligence.

Theft by—*See* Criminal Law.

Agreement for carriage of goods—*Costs of transport — Bills of lading — Non-delivery of goods—Damages.*] — The appellant had made an agreement with the agent of the respondent company, at a fixed price and under penalty, for the delivery of goods which were to be forwarded from Paris, France. The respondent, having brought a package to Montreal, addressed to the appellant, refused to deliver it unless the appellant paid $11.84 for disbursements and expenses of conveyance, but did not produce the bills of lading and way bills, which had been sent to him at New York:—*Held*, that the respondent company could not, arbitrarily and before the delivery, impose on the appellant the payment of this sum, without verification and right of subsequent reimbursement for any overcharge, if there was any, and that the respondent should make to the appellant an indemnity, for damages which the non-delivery had caused him. *Poindron* v. *American Express Co.*, Q. R. 12 K. B. 311.

Breach of contract to carry safely—Negligence — Injury to passenger — Hotel keeper — Conveyance of guest to and from station—Duty to guests—Hire of omnibus—Contract—Independent contractor—Damages —Costs. *Barker* v. *Pollock* (N.W.T.) (1906), 4 W. L. R. 327.

Carriage by express — *Liability for safety of goods—Onus of proof in case of loss —Limitation of liability—Value of goods not declared.*]—An express company that formally undertakes to forward goods is not a mere agent or intermediary between the shipper and the actual carriers. It is itself a common carrier, and, as such, liable for the safe carriage and delivery of the goods, and the onus of proof is on it to shew that loss of them is due to irresistible force or the act of God. A clause in a bill of lading for goods forwarded by express, that the company will not be bound in case of loss beyond a stated amount unless their value be declared in it, is valid and binding. *Dominion Express Co.* v. *Rutenberg*, Q. R. 18 K. B. 50.

Carriage by water—*Contract — Bill of lading—Weights and measures — Bushel—Canadian standard or American standard—Applicability of — Compulsory payment — Freight—Action for excess—Contract by telegram.*]—An agreement was completed in Canada with an American steamship company to carry oats from a port in Ontario to one in the United States, "at the rate of 2½ cents per bushel," and the master of the vessel, as agent of the steamship company, accepted the cargo as measured by weight on the Canadian standard of 34 pounds to the bushel, and so indicated on the bills of lad-

ing signed by him at the port, which stated "rate of freight as per agreement:"—*Held*, Magee, J., dissenting, that the Canadian standard and not the American standard of 32 pounds to the bushel was to be applied to the contract. Where, on delivery by vessel of cargo, freight in excess of the amount due was paid as demanded, without protest.—*Held*, that, nevertheless, such payment was not voluntary, since, if it had not been made, expenses for storage, with possibly demurrage and loss by reason of non-delivery to purchasers, would have been incurred; and the excess paid was recoverable by action. A contract by telegram is made at the place where the telegram of acceptance is sent from. *Melady* v. *Jenkins Steamship Co.*, 18 O. L. R. 251, 13 O. W. R. 439.

Carriage by water—*Liability for loss of goods of passengers—Jewels—Declaration of nature and value — Statutes.*] — The liability of carriers by water in the province of Quebec is governed by the rules laid down in ss. 962 *et seq.* of c. 113, R. S. C. 1906, which are the reproduction of those in c. 82, R. S. C. 1886, embodied in the Civil Code by s. 6254, R. S. Q. 2. Carriers by water are not liable for the loss of jewels of passengers, the nature and value of which have not been declared to them. Hence, when a passenger by boat from Toronto to Montreal, avails herself of a stop-over at Kingston to go ashore, and on her return finds that her cabin had been broken into, and three rings and a bracelet stolen out of a satchel she had left in it, her action to recover the value of the same will be dismissed. *Ivers* v. *Richelieu and Ontario Navigation Co.*, Q. R. 35 S. C. 344.

Carriers—*Lost luggage—Contract of carriage — Receipt—Condition limiting liability —Notice—Agents of owner — Alteration of oral contract — Negligence — Damages.*] — The defendants were an incorporated company, a main part of whose business was to carry and deliver baggage or luggage for customers to and from railways, steamboats, and other public conveyances. The plaintiff, who was a passenger on a steamer, on his arrival at the wharf in Toronto, handed the steamer check for his trunk to his father-in-law, R., to have the trunk sent up to R.'s house. R., who was an employee in the customs, handed the check to H., also a customs officer, and asked him to pass the trunk and have it sent up to the house. H. gave D., the defendants' agent on the wharf, the check and twenty-five cents which R. had given him, told him to have the trunk sent up to R.'s house, and walked away. D. then gave the money to S., a soliciting agent of the defendants, and proceeded to take the steamer check off the trunk. H. returned about fifteen minutes after he had left the check and money with D., and asked him for a receipt for the trunk. S. then wrote out the receipt and handed it to H., who looked at but did not read it, nor was his attention called to any terms upon it—he knew, however, that the defendants were in the habit of giving receipts upon taking over baggage for transfer. About an hour and a half thereafter H. handed the check to R., who passed it on to the plaintiff, who did not read it till about ten days afterwards. The receipt was a document which had legibly printed on its face a notice by which the defendants agreed to receive and forward the articles for which the receipt was given, subject to a condition that they should "not be liable for any loss or damage of any trunk . . . for over $50." The receipt was in a form generally used by the defendants in the course of their business, and no proof was given that their agents who did the work of receiving and receipting for baggage had authority to receive it on any other footing. The trunk was lost or stolen; but without negligence on the part of the defendants. The defendants tendered to the plaintiff $50 as in full discharge of their liability under their contract, which the plaintiff refused, and brought this action:—*Held*, Meredith, J.A., dissenting, that the plaintiff was entitled to recover the full value of the trunk and its contents, inasmuch as the defendants, who as common carriers were liable to their customer for the full value of the property entrusted to their care, in the absence of notice, brought home to the customer, that their liability was limited to a certain sum, had failed to discharge the onus which lay upon them to shew that the plaintiff at the time when he made his contract with the defendants, had received notice that their liability was limited, or that the stipulation limiting their liability had been at any time accepted by him as a term of his contract. *Harris* v. *Great Western Rw. Co.* (1876), 1 Q. B. D. 515; *Henderson* v. *Stevenson* (1875), L. R. 2 H. L. Sc. 470, and other cases bearing on the liability of carriers for loss or damage to luggage, discussed. Per Meredith, J.A., that the question whether the plaintiff had accepted the condition limiting the defendants' liability was one of fact, and the finding of the trial Judge in favour of the defendants should not be reversed unless plainly shewn to be wrong on the evidence. Judgment of a Divisional Court, reversing the judgment of Boyd, C., at the trial, affirmed. *Lamont* v. *Canadian Transfer Co.* (1909), 13 O. W. R. 1181, 19 O. L. R. 291.

Contract for carriage of goods—Action for damages for breach by failure to deliver in time—Lien for freight—Evidence. *Ludwig* v. *Beede* (Y.T.), 8 W. L. R. 973.

Contract to carry passenger to U. S.—*Act of Congress requiring payment of poll tax—Liability of carrier—Right to collect from passenger—Unlawful detention—Breach of contract.*]—The defendants sold the plaintiff a ticket from Toronto to Buffalo, U.S., and return, by the terms of which he was entitled to travel by the defendants' line of steamers from Toronto to Lewiston, U.S., and thence to Buffalo by rail, and to return within five days over the same route. The plaintiff embarked on one of the defendants' steamers, but before reaching Lewiston he was told by an officer of the United States government that he was liable on entering the United States to pay a head tax of $2, and was directed to pay it to the purser of the boat, and at the same time told that he would be entitled to a refund if he returned to Canada within 48 hours. He offered $2 to the purser, asking for a receipt; the purser refused to give a receipt; the plaintiff did not pay the $2, and on attempting to leave the boat at Lewiston he was stopped by the purser, who asked to see his ticket, and upon getting it retained it, and he was taken back to Toronto. The purser was acting under

instructions from the defendants. An Act of the United States Congress provides that a duty of $2 shall be levied on every passenger not a citizen of the United States or of the Dominion of Canada, etc., who shall come by vessel from any foreign port to any port within the United States, and that the duty shall be paid by the owner of the vessel:—*Held*, that if the plaintiff were within the class of persons covered by the Act, the defendants, and not he, were liable to pay the $2, and the purser had no right to demand it from the plaintiff, and make its payment a condition of his being allowed to land, nor had he any right to retain possession of the plaintiff's ticket, and by so doing broke the defendants' contract to carry the plaintiff to Lewiston. The defendants might, by a few words printed upon their ticket, have made their contract with the plaintiff subject to this payment, if the plaintiff fell within the Act, but, in the absence of such a provision, the defendants were alone liable. *Jones* v. *Niagara Navigation Co.*, 12 O. L. R. 481, 8 O. W. R. 342.

Damage to goods — Contract limiting liability — Negligence—Fraud—Goods deposited in customs warehouse. *Normandin* v. *National Express Co.*, 4 E. L. R. 558.

Damage to goods—*Successive carriers—Presumption—Company—Admissions of servants.*] — The consignee of goods (in this case 200 cases of oranges) transported by two successive carriers, has no remedy against the latter one for the damaged state in which they are delivered unless he establishes neglect or default on his part. The proof that 50 cases out of 200 were damaged at the time they were handed over by the first carrier to the second carrier creates a strong presumption that they were all damaged, and frees the second carrier from responsibility.—Carrier companies are not bound by the admissions and promises of their employees, unless it is proved that the latter had authority to make them. *Coté* v. *Grand Trunk Rw. Co.*, Q. R. 28 S. C. 529.

Dangers of navigation—Seaworthiness of vessel—Loss of cargo—Right of freight. *Scott* v. *Orillia Export Lumber Co.*, 7 O. W. R. 857.

—**Delivery** — *Withholding—Abandonment.*] —Where a consignor withholds, by error and negligence, the delivery of the goods consigned during one month, the consignee, who has been in the necessity to replace the consignment with other merchandises before the delivery, had the right to abandon the goods to the consignor, and to have the latter condemned to pay him their value and express charges, C. C. Art. 1053. *Greenberg* v. *Am. Ex. Co.*, 16 R. L. 41.

Demurrage—*Fraction of a day.*]—In a case of demurrage, a fraction of a day counts for a whole day. Hence, when a vessel is delayed to 10 a.m., on the day following the expiration of the lay days allowed by the charter-party, the owners have a right to claim demurrage for the whole of that day. *Trechmann S.S. Co.* v. *Hirsch*, 37 Que. S. C. 143.

Express company—*Contract to forward perishable goods — Delay in transmission—Gross negligence—Railway company—Agent or servant—Notice of claim for damage to goods—"At this office."*] — The defendants undertook to forward a consignment of fish from Selkirk, Manitoba, to Toronto, Ontario, subject to certain conditions expressed in the contract:—*Held*, that the defendants' engagement implied that a safe and rapid transit would be furnished for the whole distance, and that contract was broken when the perishable goods were transferred to a freight train at Winnipeg, by which delivery was delayed; and this was negligence for which the defendants were liable as common carriers.—A special condition that the defendants should not be liable for loss or damage, unless it should be proved to have occurred from the gross negligence of the defendants or their servants, did not avail the defendants, because the railway companies employed by the defendants for the transaction of their business were to be regarded as the defendants' servants, and the negligence was to be accounted gross negligence.—Another condition was that a claim for loss or damage should be presented to the defendants in writing "at this office:"—*Held*, that presentation at the head office of the defendants satisfied this requirement. — Judgment of Clute, J., affirmed. *James* (*F. T.*) *Co.* v. *Dominion Express Co.*, 9 O. W. R. 93, 13 O. L. R. 211.

Express company — *Liability for damaged goods — Connecting lines—Bill of lading—Clause limiting liability.*]—An express company is not responsible for damages to goods intrusted for carriage, when the accident happened on another and connecting line of transfer, and the bill of lading contained a clause by which the company was relieved from any liability if the loss or injury happened at a place beyond its lines or control. *Neil* v. *American Express Co.*, Q. R. 20 S. C. 253.

Expressman — *License — Liability for goods destroyed by fire.*]—An expressman, duly licensed under a by-law of the police commissioners of a city, and carrying goods for hire, is a common carrier, and as such liable for the loss of the goods by fire not caused by the act of God, or by the King's enemies, or by the inherent quality of the goods. *Culver* v. *Lester*, 21 Occ. N. 295.

Ferryman — *Transportation of animals —Liability.*]—1. To render a person liable as a common carrier he must exercise the business of carrying as a public employment, and must undertake to carry goods for all persons indiscriminately, and hold himself out, either expressly or by course of conduct as ready to engage in the transportation of goods for hire as a business, not merely as a casual occupation. Therefore, the owner of a boat propelled by oars and rowed for hire across a river, from time to time, by employees usually occupied in other ways, does not fall within the definition of a common carrier.—2. Where a traveller put his horses upon a ferry boat of the above description, with side-rails only 15 inches high, saw the risk to which his animals were exposed, and kept them under his own charge during the crossing, he is not entitled to re-

cover from the owner of the ferry boat the value of a horse which became frightened, jumped overboard, and was drowned, where the accident occurred through no fault or omission or commission on the part of the carrier or his employees, but from the restless disposition of the horse and the inability of the owner to keep him quiet. *Roussel* v. *Aumais*, Q. R. 18 S. C. 474.

Injury to goods — *Liability — Negligence — Contract — Owner — Consignor.*]—A carrier cannot stipulate that, by reason of the tariff of charges for the transport of goods being reduced, he shall not be responsible for damages which may be caused to the goods carried by the fault of negligence of his servants, but when such a stipulation has been made, the owner of the goods damaged in conveyance has to prove that the damage was caused by such fault or negligence. 2. The owner of goods is bound by the contract of carriage signed by the person forwarding them. *Drainville* v. *Canadian Pacific Ry. Co.*, Q. R. 22 S. C. 480.

Lost luggage — Contract of carriage—Condition limiting liability—Notice — Agent of owner—Negligence—Inevitable accident—Damages limited to amount specified in notice—Tender before action—Costs. *Lamont* v. *Canadian Transfer Co.*, 11 O. W. R. 953, 12 O. W. R. 882.

Negligence — Liability—Bill of lading—Contract — Protective conditions—Value of goods not stated—Force majeure. *Dominion Express Co.* v. *Rutenberg*, 5 E. L. R. 314.

Negligence in delivery of goods — *Loss of sale as advertised — Damages.*]—Plaintiff had advertised a sale. Defendants notified plaintiffs of arrival of goods intended to be sold, but by mistake the goods were shipped back:—*Held*, that as goods had reached point of destination defendants are liable for delay. The terms of bill of lading do not empower delivery at pleasure nor shield them from their own negligence. The damages could have been foreseen. Judgment for plaintiff. *Courian* v. *Richelieu and Ontario Navigation Co.* (Que.), 6 E. L. R. 229.

Non-delivery and conversion of goods——*Termination of transitus—Conditional refusal of consignee to accept—Place of refusal—Setting aside findings of jury—Dispensing with new trial—Con. Rule 615—Judgment.*]—Trees consigned by the plaintiffs to one C. at Aylmer, Quebec, were delivered by a railway company, by mistake, at Aylmer, Ontario. The defendants, pursuant to a message received from the railway company, "Ship by express C.'s trees to Aylmer, Quebec," carried the trees as far as Ottawa, and were about to send them on by wagon to Aylmer, Quebec, when C., who was the only person known in the transaction by the defendants, appeared at Ottawa and said to the defendants' agent that he would not accept the trees until he saw one F. There were no further communications between the defendants and C. The defendants held the goods and sought out the consignors and notified them of C.'s refusal:—*Held*, in an action by the consignors for damages for non-delivery and conversion of the trees, that the defendants' contract was not one to deliver the goods to C. at Aylmer and not elsewhere, and his refusal to accept, even if not absolute, was such as dispensed with any further action on the part of the defendants till they had a message from C. that he was ready and willing to receive; and this never having come, the defendants acted reasonably in holding the goods and notifying the consignors, and were not liable for the loss.—The findings of the jury not having supplied material for a final disposition of the case, the Court, acting under Con. Rule 615, instead of directing a new trial, set aside the findings and gave judgment on the whole case for the defendants, deeming that if the proper questions had been put to the jury they could have been answered in only one way.—Judgment of the County Court of Wentworth reversed. *Smith* v. *Canadian Express Co.*, 12 O. L. R. 84, 7 O. W. R. 403.

Not liable for profits.]—The carrier is responsible for the value of the goods carried, at their point of destination, but it is not liable for the profits which their owner might have made by their re-sale, if nothing transpired at the time the contract was entered into to lead the carrier to believe that this would be a consequence of its failure to perform it: Art. 1074 C. C. *Black* v. *Can. Ex Co.*, 36 Que. S. C. 499.

Perishable goods—*Delay in forwarding —Reasonable care — Liability for loss of goods.*]—Action for damages for loss incurred in forwarding fresh fish:—*Held*, that there should be a new trial. The trial Judge had refused to ask the jury if defendants were to do the best they could and wherein they had failed. A bald finding of negligence without specifying any act of negligence is unsatisfactory. *Matthews* v. *Can. Ex. Co.*, 8 E. L. R. 28.

Privilege and right to retain possession — *Indivisibility of the right to retain possession—Obligation to deliver — Condition precedent to the payment of the charges for carriage.*]—The right to retain possession of movables is indivisible and attaches, not only to all of several objects, but to each and every one of such objects, and this for the whole amount due. Consequently, the carrier who moves household furniture has the right to retain possession of each of the objects moved for the whole of his charges, and, even after delivery of a part of such effects, he cannot be forced to deliver the balance until payment in advance is made to him of whatever is due him. *De Senneville* v. *Baillargeon*, 37 Que. S. C. 215.

Railway goods in bond — *Notice to consignee—Negligence of customs officer in mislaying warrant—Destruction by fire while in customs warehouse.*]—A bundle of skins shipped from Buffalo to plaintiff were in customs house at Montreal when they were destroyed by fire. The shipping customs collector's warrant had been lost and the goods had never been released. Defendants held not liable and action dismissed. *De Tonnancourt* v. *Grand Trunk*, 6 E. L. R. 367.

Reason for its issue—*Erroneous appreciation of evidence by the inferior tribunal—*

C. P. 1293.]—The Court, upon a petition for *certiorari*, has but to consider whether the inferior tribunal acted within the limits of its jurisdiction, and if, in the proceedings had before it, it followed the rules laid down by law. The writ will not be granted if the petitioner simply complains that he has not received justice and that the decision of the inferior tribunal is erroneous. *Wightman* v. *Montreal & Lanctot* (1910), 11 Que. P. R. 318.

Ship—*Bills of lading—Stipulation against liability for thefts.*]—The owner may lawfully stipulate for immunity from liability for thefts committed on board his ship, even by the captain of the crew. When the damage of which the shipper or consignor complains falls apparently within the scope of a stipulation against liability in the bill of lading, the plaintiff must prove some default on the part of the carrier personally to entitle him to recover. *Mathys* v. *Manchester Liners*, Q. R. 25 S. C. 426.

Ship — *Contract—Breach—Damages.*]—In December, 1899, the defendants contracted with the plaintiffs to carry a cargo of hard coal from New Jersey to Halifax in the schooner of the defendants. The schooner sailed with her cargo on the 30th December, 1899, but did not reach Halifax until the 15th March, 1900:—*Held*, that there was a breach of the contract to carry and deliver the cargo within a reasonable time:—*Held*, further, that the carrier had notice from the description of the goods that delay in the voyage would diminish their value, and, as there were circumstances which it was reasonable to assume were known to the carrier, from which the object of the plaintiffs in ordering the coal ought to be inferred by the carrier, damages were recoverable for the natural consequences of the failure of that object; that the natural consequence of the breach of this contract was a loss to the plaintiffs through an inevitable fall in the market value of the coal; that therefore the difference in such market value between the time when the coal should have arrived and the time when it actually arrived, was the proper measure of damages.—*The Parana*, 1 P. D. 452, 2 P. D. 118; *The Notting Hill*, 9 P. D. 105, and *Smeed* v. *Ford*, 1 E. & E. 602, distinguished. *Bauld* v. *Smith*, 40 N. S. R. 294.

Ship — *Contract limiting liability — "Wearing apparel," meaning of — Question first raised on appeal.*]—The plaintiff was a passenger for Dawson on the defendants' line of steamboats, and his ticket contained the proviso: "Baggage liability limited to wearing apparel only. Each ticket is allowed 150 lbs. of baggage free, and not exceeding $100 in valuation, and half tickets in like proportion. All exceeding this rate and valuation will be charged for. This company shall not be held accountable for merchandise, notes, bonds, documents, specie, bullion, jewellery or similar valuables, nor stores to be landed under designation of baggage, unless bills of lading are regularly signed, and freight charges paid thereon, and under no circumstances shall this company be held responsible in case of loss of baggage for over $100, unless extra charge has been paid on excess of valuation." He paid $10 excess baggage. Part of the baggage, including a sealskin jacket, a lady's dress, men's suits, and wolf robes, to the value of $655, was lost. The plaintiff sued for the full amount, and the defendants pleaded that their liability under the contract was limited to $100:—*Held*, by Craig, J., and by the full Court (Irving, J., dissenting), that the defendants were liable for more than $100, but under the Carriers' Act for not more than $500.—*Held*, also, on appeal, that the contention that the defendants were not liable for certain articles, nor the wearing apparel of the plaintiff himself, was not open to the defendants, as that point was not raised in the pleadings nor taken at the trial. Remarks of Drake and Martin, JJ., as to what is included in the term "wearing apparel," which must differ according to different circumstances and climates. *Wensky* v. *Canadian Development Co.*, 21 Occ. N. 601, 8 B. C. R. 190.

Ship—*Contract with owners — Master's powers.*]—The master of a ship has no express or implied authority to alter or vary a contract made directly with the owners of his vessel. *Perry* v. *P. E. I. Steam Navigation Co.* (1874), 1 P. E. I. R. 476.

Ship—Detention of goods carried—Replevin — Damages — Freight — Demurrage—Costs—Set-off. *Osborne* v. *Dean*, 9 O. W. R. 889.

Ship—*Failure to notify consignee—Liability for damages—Action in name of consignor.*]—Cheese was consigned to the Hochelaga Bank at Montreal, and at the foot of the bills of lading were written the words "Notify James Irvine, Gould Cold Storage, Montreal." Irving was the selling agent for the factory from which the cheese came, and the usual course was (as evidenced by previous transactions) that the cheese was only to be delivered to him by the bank upon payment of the draft attached thereto, and usually drawn upon Irvine payable to the Hochelaga Bank. As the bank thus had very little to do with the matter, the carriers commenced to regard Irvine as the only person with whom they had to deal. On the occasion in question the carriers did not give any notice to the bank, but stored the cheese according to the instructions of Irvine, who subsequently sold it and absconded with the proceeds of the sale:—*Held*, that the receipt of the bank or its order for delivery was the only discharge which could terminate the liability of the appellants as carriers, and that the fact that the latter were directed on the bills of lading to "notify James Irvine" should have warned them, in any event, against dealing with him as the consignee:—*Held*, further, that, while a right of action probably did exist in the bank as consignees, it was concurrent with the right of the consignor, since the bank only acted as agents of the shipper to collect his drafts for the price of the cheese, and had neither purchased nor made advances on them. And this common law doctrine is not impaired by 52 V. c. 30, s. 1. *Montreal and Cornwall Navigation Co.* v. *L'Ecuyer*, 21 Occ. N. 249.

Special contract—*Variation—Authority of agent—Limiting liability—Sale of goods—Conversion — Damages.*] — Conditions in a

shipping receipt relieving the carrier from liability for loss or damage arising out of the "safe keeping and carriage of goods," even though caused by the negligence of the carriers' servants, without the actual fault or privity of the carriers, and restricting claims to the cash value of the goods at the port of shipment, do not apply to cases where the goods have been wrongfully sold or converted by the carriers. A shipping receipt, with terms as above, was for carriage by the defendants' line and other connecting lines, and made the freight payable on delivery of the goods at the point of destination. The defendants had previously made a special contract with the plaintiff, but delivered the receipt to his agent at the point of shipment with a variation of the special terms made with him in respect to all shipments to him as consignee during the shipping season of 1899, the variation being shewn by a clause stamped across the receipt, of which the plaintiff had no knowledge. One of the shipments was sold, at an intermediate point on a connecting line, by the company in control, on account of non-payment of freight: — *Held*, that the plaintiff's agent at the shipping point had no authority to consent to a variation of the special contract, nor could the carriers vary it without the concurrence of the plaintiff; that the sale amounted to a wrongful conversion of the goods by the defendants; and that they were not exempted by the terms of the shipping receipt from liability for their full value. Damages reduced by Supreme Court of Canada, instead of a new trial being ordered. Judgment in 22 Occ. N. 271, 9 B. C. R. 82, reversed. *Wilson* v. *Canadian Development Co.*, 33 S. C. R. 432.

Trover — *Carrier — Liability for loss of article in custody of passenger.*] — Ramsay had been employed by the promoters of a political demonstration to drive Bell and others to a reception meeting, but had not been hired by his passengers. He drove them to the meeting, left them there and his engagement being at an end went away. Bell had a plaid with him in the carriage and left it there. The plaid was not marked, and next day Ramsay not knowing to whom it belonged took it to the person who had employed him to be delivered to the owner, but it never was delivered and was lost. Bell subsequently applied to Ramsay for it, but was received with abusive language. Bell brought an action of trover in the Small Debt Court and recovered judgment, from which Ramsay appealed. For appellant it was contended (1) that he was not a carrier chargeable with the custody of the plaid, having received no hire from Bell, and the plaid not having been placed in his charge. (2) That if an action would lie against him it was not trover:—*Held* (Hensley, J.), that Ramsay was not chargeable as a common carrier, and, even if he was, the plaid being an article of personal wear, and not given into his custody, and did not come within the description of articles for which he would have been responsible.—That if he was a carrier *quoad* the plaid, the remedy, no conversion being shewn, was case not trover.—That appellant was at most a bailee by finding, and as such was not guilty of any culpable negligence. *Ramsay* v. *Bell* (1872), 1 P. E. I. R. 417.

Trunk lost by negligence of licensed baggage transfer agent—*No contributory negligence by plaintiff—Damages assessed at $188 allowed.*]—Plaintiff brought action to recover $180 damages, for loss of a trunk and contents, which she gave defendant to deliver at Ottawa Union Station. The trunk was taken to the station about 20 minutes before the train left. The trunk was left on a truck, near the door of the baggage room, without checking it. Plaintiff was taken ill and did not take that train. The next morning her brother-in-law enquired about the trunk but could find no trace of it.—McTavish, Co.C.J., *held*, that defendant was not liable, inasmuch as the trunk was at the station after the departure of the train, which plaintiff had intended taking, and that plaintiff was negligent in either not notifying defendant that she was not able to take the train or not sending for it.—Divisional Court *held*, that the trunk was lost solely through the negligence of the defendant. Judgment entered for plaintiff for $180 and costs. *Murphy* v. *Dunlop* (1910), 17 O. W. R. 244, 2 O. W. N. 178.

CAT.

See ANIMALS.

CATTLE.

See ANIMALS — MUNICIPAL CORPORATIONS—RAILWAY—TRESPASS TO LAND.

CAUTION.

See DEVOLUTION OF ESTATES ACT—EXECUTORS AND ADMNIISTRATORS — LAND TITLES ACT—REGISTRY LAWS.

CAVEAT.

See ASSESSMENT AND TAXES—LAND TITLES ACT—REAL PROPERTY ACT — REGISTRY LAWS—VENDOR AND PURCHASER.

CEMETERY.

6 Edw. VII., c. 33, ss. 1 and 7—*Application of statute to unsold lots.*]—W. sold certain lots to S. and B. to be held for cemetery purposes. They had a plan made according to which they sold burial lots to plaintiff and others, two cents per square foot extra being charged to form a sinking fund for caretaking purposes, defendant town being custodian of that fund. The unsold portions of said lots became revested in W. Under s. 7, s. 33, 6 Edw. VII., plaintiffs claimed to be trustees not only of the burial lots but of the unsold portion:—*Held*, that they are trustees of the burial lots only, and as such are entitled to recover from W. two cents per square foot for all lots sold or to be sold by him, he having had notice of the terms on which the lots were sold by S. and

B. The town must also pay sinking fund in their custody to plaintiffs. *Serson* v. *Wilson*, 13 O. W. R. 180.

Family burial ground — *Land-locked plot—Reservation in deed—Interference with graves—Right of descendants to restrain—Abandonment — Possessory title — Access to plot—Way of necessity.*]—Persons having an interest in a plot of ground set apart and used as a family burying ground, in which bodies of relatives are interred, may maintain an action to restrain injury to, or interference with the graves or monuments over them. *Moreland* v. *Richardson*, 22 Beav. 596, and 24 Beav. 33, followed. Part of a farm was set apart as a family burial plot in or about the year 1827, and in 1838 a parcel of the farm was conveyed to defendant's predecessor in title, "save and except about ¼ of an acre of said lands used as a burying ground." In 1890 one of the family erected on what he supposed to be the plot, a monument to two of his ancestors, and surrounded the supposed plot with a hedge:—*Held*, upon the evidence, affirming judgment of Teetzel, J., that there was a burying ground in respect of which the reservation was made in the deed of 1838; that there was not an abandonment; that the hedge planted in 1890 enclosed a portion at any rate of the original plot; that neither defendant nor any of his predecessors in title had acquired a possessory or other title to plot; and that plaintiffs had shewn a sufficient interest in or title to the plot to enable them to maintain the action. The plot being a land-locked piece of ground, reserved out of a grant of surrounding property, there was an implied way of necessity to and from it, limited to purposes for which the plot was expressed to be reserved. *May* v. *Belson* (1906), 10 O. L. R. 686, 6 O. W. R. 462.

Owner of plot — Removal of corpse—Mistake of caretaker—Right of action. *McNulty* v. *City of Niagara Falls*, 4 O. W. R. 443, 5 O. W. R. 63.

Private burial ground—Setting apart —Reservation in deed — Ascertainment of location—Injunction against interference—Title—Interest of plaintiffs—Status to maintain action—Right of access—Way of necessity. *May* v. *Belson*, 6 O. W. R. 462, 10 O. L. W. 686.

See BURIAL—MANDAMUS.

CENSUS.

See INJUNCTION.

CERTIFICATE OF ENGINEER.

See CONTRACT.

CERTIFICATE OF IMPROVEMENTS.

See MINES AND MINERALS.

CERTIFICATE OF TITLE.

See LAND TITLES ACT.

CERTIORARI.

Acquiescence in conviction—*Bar.*] — The acquiescence of the accused in a conviction made by a justice of the peace, in a matter for summary trial, deprives the accused of his remedy by *certiorari*, even when moved for within the proper time. *Meunier* v. *Beauchamp*, 5 Que. P. R. 280.

Application for — *Forum—Conviction under Masters' and Servants' Act.*]— An order under the Masters and Servants' Act, R. S. M. c. 96, for payment of wages, was made by a justice of the peace.—On a motion for a *certiorari* the question was raised whether the matter was one of a quasi-criminal nature, or on the Crown side of the Court, which should be brought before the full Court, or one which could be brought before a single Judge.—The Court was not at first disposed to consider that the matter was in any sense a criminal matter, but, in view of such opinions as those expressed in *Seaman* v. *Burley*, 75 L. T. 91, *Payne* v. *Wright*, 66 L. T. 148, and *Ex p. Schofield*, 64 L. T. 780, was of opinion that the question deserved further argument.—A matter of this kind in which only a small sum is involved should not be delayed for the time that would be necessary if the motion for a *certiorari* were argued before the full Court, and it would be best to adjourn the motion into Chambers if the parties were willing; otherwise to dismiss it without prejudice to a motion in Chambers.—By consent the matter was adjourned into Chambers. *In re Dupas*, 20 Occ. N. 23, 12 Man. L. R. 653.

Assessment — *Prescription — Delay of Judge—Jurisdiction — Statutes—Time.*] — Where a statute authorising commissioners to assess lands provided that no writ of *certiorari* to review assessment should be granted after expiration of 6 months from the initiation of commissioners' proceedings: *Held*, affirming judgment appealed from, *In re Trecothic Marsh*, 38 N. S. R. 23, Girouard, J., dissenting, that an order for issue of writ of *certiorari* made after expiration of prescribed time was void, notwithstanding that it was applied for and judgment on the application reserved before time had expired.—Per Taschereau, C.J.C.:—Where jurisdiction has been taken away by statute, the maxim *actus curiæ neminem gravabit* cannot be applied, after expiration of times prescribed, so as to validate an order either by antedating it or entering it *nunc pro tunc;* in present case the order for *certiorari* could issue, as the impeachment of proceedings of the inferior tribunal was sought upon the ground of want of jurisdiction, but appellants were not entitled to it on merits.—Per Girouard, J., dissenting:—In the circumstances, the order in this case should be treated as having been made on the date when judgment on application was reserved by the Judge. Upon merits the appeal should be allowed, as the commissioners had no jurisdiction in the absence of proper notice as required by s. 22 of the Marsh Act, R. S. N. S. 1900, c. 66. *Dom. Cotton Mills Co.* v. *Trecothic Marsh Commissioners, In re Trecothic Marsh* (1906), 26 C. L. T. 185, 37 S. C. R. 79.

Assessment roll — *Return — Default— Proceedings of ministerial character—Superseding writs improvidently issued.*]—A writ of *certiorari* was directed to the road commissioners of district 17 in the municipality of Halifax, to remove the record of the assessment roll of said district assessing the inhabitants for road taxes, and the return made to the county treasurer of persons who had made default. A writ was also directed to the stipendiary magistrate for the county to remove the record of a return of defaulters who had not paid or commuted their taxes, and the warrant of distress issued by him thereon. There was a motion to quash or set aside the assessment roll, the warrant of distress, etc. It appeared that the allowance of the writs had not been opposed, and there was no motion to set aside the orders, or to quash the writs or either of them. The amount of the tax was fixed by law, the value of the property by the county assessors, and the rate of assessment by the county council; and the stipendiary magistrate, in issuing his warrant of distress against defaulters, was not called upon to exercise any judicial function:—*Held*, that the proceedings were of a purely ministerial character, and were not a proper subject for *certiorari*:—*Held*, that, the process having improvidently issued, the Court had power of its own motion to set it aside, and that, in the circumstances appearing, the writs should be superseded and the returns thereto taken off the files of the Court. The affidavits filed shewed an intention to attack the legality of the formation of the district under Acts of 1900, c. 23, and the appointment of the commissioners:— *Held*, that this could not be done in this form of proceeding. *Rex ex rel, Corbin* v. *Peveril*, 36 N. S. Reps. 275.

Canada Temperance Act — *Certiorari.*] —In an election under the Canada Temperance Act for the city of Charlottetown, electors from the Royalty, which is not included, in the city, took part, but it did not appear that their votes affected the election. Carroll and others having been convicted under that Act before the Stipendiary Magistrate applied for a *certiorari* to remove the proceedings into this Court on the ground that the Act was not properly in force owing to the above circumstances:—*Held* (Hensley, J.), that act was properly in force and the *certiorari* must be refused. *R.* v. *Carroll* (1881), 2 P. E. I. R. 436.

Commitment by justice — *Sunday — Resisting peace officer.*]—A *certiorari* will not be granted to remove a justice's commitment of an accused person for trial. *Semble*, that the arrest and commitment of the defendant on a Sunday for resisting a peace officer were legal. *Rex* v. *Leahy, Ex p. Garland*, 35 N. B. Reps. 509.

Conviction of magistrates — *Killing dog—Damages awarded for injury—Criminal Code, ss. 537, 1124—Amending irregularity—Rule for certiorari dismissed.*]—The magistrate in fining the applicant for killing R.'s dog, awarded R. $20 for the loss of his dog: —*Held*, that under above s. 537 the magistrate had no power to award damages, and conviction amended under above s. 1124 by striking out the award as to damages. *Re Annie Cook*, 7 E. L. R. 541.

Costs—*Fees of respondents.*]— The respondent or the *mis-en-cause* upon a motion for a *certiorari* is not entitled to a fee. 2. Upon such a motion a fee upon the hearing will not be taxed. 3. A respondent who does not contest the motion has no right to a fee for appearing. *Wing Tee* v. *Choquet*, 6 Que. P. R. 305.

Court for small causes — *Absence of commissioner.*]—For one of the commissioners sitting for the summary decision of small causes to concur in the judgment without having heard the evidence is a grave irregularity, and warrants the issue of a writ of *certiorari*. *Caron* v. *Clement*, 2 Que. P. R. 391.

Date of the return — *Declaration — Clerical errors—C. C. P. 1748, 1298, 1300, 1303.*]—If the Judge who allowed the issue of a writ of *certiorari* has not fixed the day for its return, the prothonotary may do so. —It is not necessary that a declaration be annexed to a writ of *certiorari*.—The fact that the magistrate, whose decision is attacked, is called a "coroner," instead of a "justice of the peace," is not a fatal error. —The Judge of the Court below, who has been called into the case has no interest whatever in the proceedings, and cannot, by exception to the form, complain of irregularities in the proceedings, even if he has been served with a copy of the writ of *certiorari* instead of with the original. *Lynch* v. *McMahon*, 11 Que. P. R. 116.

Declaration annexed to the writ — *Its rejection—C. P. 1294.*]—No declaration should be annexed to a writ of *certiorari*. In any event, any such declaration could not be different from the petition praying for the issue of the writ nor contain further grounds of complaint. *Lavoie* v. *Lanctot & Brousseau*, 11 Que. P. R. 184.

Evidence before magistrate.] — The Court upon *certiorari* cannot inquire into the evidence taken before a magistrate whose conviction is in review. *Wing Tee* v. *Choquette*, 5 Que. P. R. 461.

Evocation—*Recorder's Court.*]— A judgment of the Recorder's Court of the city of Montreal maintaining an action for salary, though the case has been allowed to be evoked to the Circuit Court, will be set aside on a *certiorari*. Section 485 of the Charter of the City of Montreal which has reference to the Recorder's Court concurrent jurisdiction with the Circuit Court only applies to matters respecting lessors and lessees. A declaration of evocation from the Recorder's Court to the Circuit Court is not premature by being filed before plea; the provisions of C. P. 1130 to the contrary, only having application to evocations from the Circuit to the Superior Court. *Ouimet* v. *Fleury*, 11 Que. P. R 41.

Grounds upon which it may be issued—*Erroneous interpretation of the evidence by the Court below—C. P. 1293.*]— Upon a petition for a *certiorari*, the Court has but to consider whether the Court below acted within the limits of its jurisdiction, and if, in the proceedings had before it, the law was observed.—The writ will not be issued if

the petitioner simply alleges that justice has not been done him and that the judgment of the Court below was erroneous. *Wightman* v. *Montreal* (1910), 11 Que. P. R. 318.

Harbour commissioners—*Conviction of pilot—Irregularities — Waiver — By-laws—Proof of.*]—A writ of *certiorari* may issue to remove the conviction of a pilot by the Montreal Harbour Commissioners for the violation of a by-law.—2. A pilot, by appearing, pleading, and attending the investigation of a complaint against him, is held to waive irregularities of service, etc., before conviction, which appear on the face of the record. —3. A copy of the by-laws of the Harbour Commissioners, certified as a true copy under the hand and seal of the secretary, is sufficient, to the extent it covers; but, *semble*, proof should also be made of approval by the Governor-in-Council and of publication in the Canada Gazette.—4. Under the Pilotage Act, R. S. C. c. 80, and the Montreal Harbour Commissioners Act, 57 V. c. 48, the commissioners are authorised to pass a by-law which will make it an offence for a pilot, who is selected for service with one transatlantic line, to handle more than thirty vessels of that line during the season, or to take service on any vessel of another line, but the by-law in question in the present case merely stating that "no pilot making such agreement shall . . . be entitled to any duty as pilot by turn or in rotation," did not actually prohibit the act mentioned.—5. The conviction in this case, as signed, was irregular, inasmuch as it imposed an imprisonment of one month unless the costs of distress and commitment were sooner paid, whereas by the judgment of the pilotage committee the only penalty imposed on the petitioner was that he be fined $20 without costs. *Perrault* v. *Harbour Commissioners of Montreal*, Q. R. 17 S. C. 501.

Harbour commissioners—*Pilot's license —Appeal.*]—A writ of *certiorari* may issue to remove a sentence or conviction of a pilot by the Montreal Harbour Commissioners. The appeal to the Court of Queen's Bench, Crown side, provided in s. 879 of the Criminal Code of Canada, does not extend to or cover a conviction by the Harbour Commissioners depriving a pilot of his license. *Arcand* v. *Harbour Commissioners of Montreal*, Q. R. 17 S. C. 497.

Incomplete return—*Motion to correct—Practice.*]—To a writ of *certiorari* to remove a conviction, the magistrate certified that he had sent "the transcript of the proceedings against P. G., whereof in the same writ mention is made with all things touching the same to our Lord the King," etc., and he annexed the certificate, the original proceedings, and the conviction to the writ:—*Held*, per Barker, McLeod, and Gregory, JJ., Tuck, C.J., and Landry, J., dissenting, that the return was incomplete, as the certificate did not authenticate the proceedings returned to be the original proceedings and conviction commanded by the writ.—If the magistrate, through ignorance or error, and with no intention of disobeying the writ, makes an incomplete or improper return, the practice is to move that the proceedings be sent back for correction and not to move for an attachment for contempt in not obeying the writ. *Rex* v. *Kay. Ex p. Gallagher*, 3 E. L. R. 454, 38 N. B. R. 228.

Irregularities—*Prejudice.*]—A *certiorari* will not be granted on account of irregularities in procedure, if such irregularities have not prevented justice being done. *Huot* v. *Paquette*, 3 Que. P. R. 502.

Irregularities in procedure—*Injustice —Conviction—Evidence not taken down in writing.*]—The remedy by way of *certiorari* cannot be exercised unless there are grave irregularities of procedure, and there is ground for believing that justice has not been or will not be done.—2. A demand for *certiorari* because the accused has been convicted upon evidence not taken down in writing, will be refused if it appears that he has not suffered any actual prejudice. *Hill* v. *City of Montreal*, 10 Que. P. R. 122.

Jurisdiction—*Irregular procedure — Injustice.*]— The sole duty of the Superior Court upon a writ of *certiorari* is to ascertain if the inferior Court has acted within the limits of its jurisdiction, and if in the procedure it has followed the forms and rules indicated by law; and a *certiorari* will not be sustained, on the ground that the procedure has been irregular, unless the petitioner demonstrates that he has suffered injustice. *Carpentier* v. *Lapointe*, 6 Que. P. R. 202.

Jurisdiction of Judge in Chambers *Conviction for breach of a municipal by-law.*]—A Judge in Chambers has jurisdiction to order the issue of a writ of *certiorari* to bring up the record of a conviction for a breach of a municipal by-law, if the application is made when neither the Court of Appeal nor the full Court of King's Bench is sitting. But all further proceedings after the return of the writ must be taken in one or other of these Courts.—*Regina* v. *Beale*, 11 Man. L. R. 448, *Regina* v. *Crothers*, 11 Man. L. R. 567, and *In re Dupas*, 12 Man. L. R. 654, referred to. *Re Hunter*, 16 Man. L. R. 489; *Rex* v. *Hunter*, 5 W. L. R. 268.

Justice of the Peace—*Jurisdiction — Interest—Statute. taking away right—Appeal — Crown—Discretion.*]— 1. *Certiorari* and not appeal is the appropriate remedy to raise the question of want of jurisdiction, e.g., whether proper service has been made and jurisdiction over the person acquired, or whether the justice was disqualified through interest. 2. A statutory provision taking away the right of *certiorari* does not deprive the Superior Court of its power to issue the writ to quash a proceeding on the ground of want of jurisdiction. 3. When there is a defect in the jurisdiction of justices or inferior Courts, the common law right of *certiorari* should not be refused merely because a new trial might be had by means of an appeal. 4. Even where an appeal is pending, a *certiorari* for want of jurisdiction should not be refused unless the question of jurisdiction is being raised on the appeal. 5. A writ of *certiorari* may be claimed by the Crown as a matter of right on application of the Attorney-General, without the production of any affidavit. 6. Except where applied

for on behalf of the Crown, a *certiorari* is not a writ "*of course*," and the Court must be satisfied that there is a sufficient ground for issuing it. 7. No more latitude is given the Court for the exercise of its discretion in granting or refusing a *certiorari* than in respect to other applications which are in the discretion of the Court. *Re Ruffles*, 35 N. S. Reps. 57.

License commissioners—*Inferior tribunal—Jurisdiction of Superior Court.*]—The Superior Court is competent to grant and adjudicate upon a *certiorari* issued against the license commissioners of Montreal, as an inferior tribunal; a declinatory exception denying the right will be dismissed with costs. *Garépy* v. *License Commissioners of Montreal*, 10 Que. P. R. 77.

Motion for—Intituling of proceedings—Crown Rules—Name of informant. *Ex p. Harris* (N.W.T.), (1906), 4 W. L. R. 530.

Motion for—*Intituling of proceedings—Name of informant.*]—Proceedings to obtain a writ of *certiorari* to quash a conviction, where an order quashing it is not asked upon the return of the application for the writ, do not require to shew the name of the informant, as part of the style of cause. *Ex p. Harris*, 4 W. L. R. 530; *Rex* v. *Harris*, 6 Terr. L. R. 376.

Motion for—*Preliminary objection—Dismissal—Second application.*]—Where an application for a writ of *certiorari* has been dismissed, the Court will not entertain another application for the same purpose, although the first was dismissed on a preliminary objection. *Rex* v. *Geiser*, 9 B. C. R. 503.

Motion to maintain and quash writ.]—In a matter of *certiorari*, an inscription alone is sufficient, and a motion made by the petitioner to maintain the *certiorari*, and another made by the respondent to quash the *certiorari*, will both be dismissed with costs as useless. *Levesque* v. *Asselin*, 6 Que. P. R. 63.

Motion to quash for delay—*Necessity for notice to proceed.*]— Rule 188 of the Crown Rules (Nova Scotia) directs that in all causes in which there have been no proceedings from one year from the last proceeding had, the party, whether prosecutor or defendant, who desires to proceed, shall give one calendar month's notice to the other party of his intention to proceed. The defendant, pursuant to the order of a Judge, removed a conviction made by a magistrate into the Court, and took no further steps in the matter. The informant moved to quash the *certiorari* on the ground that no steps had been taken by the defendant for upwards of a year:—*Held*, that the informant must first give one month's notice of intention to proceed. *Rex* v. *McDonald*, 23 Occ. N. 17.

Motion to quash for delay—*Practice—Costs.*]—To an application by the prosecutor to quash a *certiorari* removing a conviction for delay in proceeding it is not an answer that the defendant had given notice of motion to quash the conviction before the launching of the motion to quash the writ, as long as the delay is unexplained. Costs were given against the defendant. *Rex* v. *McDonald*, 23 Occ. N. 95.

Order nisi in Chambers to quash conviction—Motion to make absolute not opposed — Order absolute granted as of course. *R.* v. *Sweeney and Bourque, Ex. p. Cormier* (1906), 2 E. L. R. 161.

Peremption—*Time.*]—The writ of *certiorari* is the commencement of the proceeding, and therefore a proceeding upon *certiorari* cannot be declared barred before the expiration of two years from the date of the last step in the proceeding. *Allan* v. *Weir*, 3 Que. P. R. 163.

Petition for—*Service.*]—A petition for a writ of *certiorari* must be served on the parties interested, and a notice of its presentation must be given to them. *Rex* v. *Warren*, Q. R. 25 S. C. 31.

Proceedings before County Court Judge—*Assignments and Preferences Act—R. S. O. 1897, c. 147—Certiorari after judgment—Discretion—Motion for leave to appeal.*]—A *certiorari* order may be made by a Judge of the High Court in Chambers to bring up proceedings taken before a County Court Judge, under the Assignments and Preferences Act, R. S. O. 1897, c. 147, and this notwithstanding that a right of appeal by leave of a Judge of the Court of Appeal exists under 63 V. c. 17, s. 14 (O.). — Before judgment the right to *certiorari* is absolute, but after judgment there is a judicial discretion to grant or refuse; and in such a case as the above *certiorari* should not be granted after judgment until application is first made for leave to appeal. *In re Erb (Aaron) No. 2*, 12 O W. R. 118, 16 O. L. R. 597.

Prohibition Act, 1900 — *Witness — Principal and agent—Answer incriminating employer—Order of dismissal final.*]—That the magistrate improperly refused to compel defendant's clerk to answer a question concerning his selling intoxicating liquor at defendant's place of business is no ground for *certiorari*. Order refused. *Re Jenkins*, 7 E. L. R. 543.

Prosecution—*Diligence — Extension of time.*]—There must be continuous diligence throughout the stages of applying for a writ of *certiorari*, causing it to issue, and proceeding to judgment upon it; and where the delay fixed for the return of the writ is allowed to lapse without any step being taken to obtain a new order, the petitioner cannot afterwards obtain an extension of the delay: and especially where more than two years have lapsed since the expiration of the delay, and the reason for not complying with the original order is not shewn. *Joannette* v. *Weir*, Q. R. 26 S. C. 288.

Public wharf — *Construction of statute abridging public right — Lieut.-Governor in Council has not power under 15 Vic. c. 34, s. 12, to impose rates on boats or head-money on passengers using wharf—"Vessel" does not comprehend "boat."*]—The 15 Vic. c. 34, s. 12, gave the Lieut.-Governor in Council control of Minchen's Point wharf, with power

to establish rates of wharfage for vessels, and to make such rules and regulations as he might think fit. An order under this section provided that any boat or vessel used by any one but the licensed ferryman in ferrying passengers, or landing or taking off the same from the wharf, should pay 1s. for each such passenger, and 2s. 6d. for each time such boat or vessel touched at or landed passengers on the wharf, to be paid by the persons owning or working such boat or vessel. A boat of defendant's, used in ferrying without hire, touched several times at the wharf, and passengers embarked in the boat from the wharf. Judgment was recovered by plaintiff in the Mayor's Court, and was now removed by *certiorari* into the Supreme Court. Defendant contended that under the Act the Governor in Council had power to impose rates, on vessels only, that a boat was not a vessel, and the order was therefore void as to boats, that the Act gave no power to impose a charge of head-money in respect of persons embarking from the wharf in such a boat:—*Held*, that the Act is one abridging a public right and must be strictly construed, and it did not give power to impose such rates, and that the judgment in the Mayor's Court must be quashed. *Bourke* v. *Murphy* (1856), 1 P. E. I. R. 126.

Recognizance—*Affidavit of justification—Rule of Court.*]—A Rule of Court required that no motion to quash a conviction should be entertained unless the defendant were shewn to have entered into and deposited a recognizance in $300 with one or more sufficient sureties, or to have made a deposit of $200. On a motion to make absolute a rule *nisi* to quash a certain conviction a recognizance had been entered into and deposited, but without an affidavit of justification of the sureties or other evidence of their sufficiency:—*Held*, following *Regina* v. *Richardson*, 17 O. R. 729, that the Rule of Court had not been complied with, and therefore the rule must be discharged.—But $200 having been deposited a day or two before the return day of the rule *nisi*, with a view of complying with the Rule of Court:—*Held*, that the ends of justice would be served by allowing the applicant to make a new rule *nisi* in the terms of the one discharged, and this privilege was accordingly granted. *Regina* v. *Petrie*, 1 Terr. L. R. 191.

Recorder's Court—*Jurisdiction—Review of judgment.*]—*Certiorari* does not lie to review the decision of the recorder in a case in which he has jurisdiction, and the Superior Court will not upon *certiorari* inquire whether his judgment is right or wrong. *Wolf* v. *Weir*, 4 Que. P. R. 430.

Recorder's Court—*Removal of conviction—Remedy by appeal.*]—A *certiorari* will not be granted to remove a conviction or order of a recorder, when there is an appeal to the Court of King's Bench on its criminal side. *O'Shaughnessy* v. *Recorder's Court*, 6 Que. P. R. 287.

Recorder's Court — *Writ to Recorder personally—Objection.*]—A writ of *certiorari* against a decision of one of the recorders for the city and district of Montreal, may be directed to the recorder personally, and not necessarily to the Court, and if objection to its being so directed could be taken at all, it could only be taken by the recorder himself and not by the party in whose favour the judgment complained of was given. *Poirier* v. *Weir*, 7 Que. P. R. 69.

Removal of cause from inferior Court—*Grounds—Want of jurisdiction—Irregularity—Injustice.*]—The only duty of a Superior Court, on an application for *certiorari*, is to determine whether the inferior Court has acted within the limits of its jurisdiction, and whether it has complied with the practice and principles of law, and it will not be granted upon the latter ground if the applicant does not shew that he has suffered an injustice. Therefore, the application will be dismissed and the conviction of the lower Court sustained when the applicant alleges only that justice has not been done and the decision of the lower Court is erroneous, without alleging any grave irregularity in the proceedings. *Carpentier* v. *Lapointe*, Q. R. 25 S. C. 395.

Removal of conviction—*Previous appeal to County Court—Destruction of line fence—Criminal Code, s. 887.*]—The right of the Court to grant a *certiorari* is not taken away by s. 887 of the Criminal Code in the matter of a conviction under the Code for destroying a part of a line fence, made by a justice acting without jurisdiction, by reason that the title to land was in dispute, from which conviction an appeal was taken to a County Court under s. 879 of the Code, and dismissed, without consideration of the merits, on the ground that the appeal had not been perfected. *Rex* v. *O'Brien, Ex p. Ray*, 3 E. L. R. 425, 38 N. B. R. 109.

Removal of conviction, notwithstanding statute — *Jurisdiction.*]—Notwithstanding the amendment to s. 7 of the Ontario Summary Convictions Act, by s. 14 of 2 Edw. VII. c. 12, taking away the right to *certiorari*, a conviction made by a magistrate without jurisdiction may be removed by *certiorari;* and where the offence for which a conviction is made is found not to come within the statute defining the offence, or the municipal by-law defining the offence is not within the statute which gives the power to pass a by-law, there is such absence of jurisdiction as warrants the issue of a *certiorari*. *Rex* v. *St. Pierre*, 22 Occ. N. 233, 4 O. L. R. 76, 1 O. W. R. 365.

Review of decision of inferior Court — *Grounds.*]—There is no appeal to the Superior or Circuit Courts by way of *certiorari* from decisions of Courts of inferior jurisdiction, on the ground of *mal jugé*, or where the Judge of the lower Court has failed to properly appreciate the evidence. *Calvert* v. *Perrault*, Q. R. 26 S. C. 94.

School rates—*Judicial act.*]—An application to bring up by writ of *certiorari* the school rate fixed by the trustees of the section, was granted. *In re Cape Breton School Section No. 121*, 24 Occ. N. 95.

Security — *Deposit—Preliminary objections.*]—A deposit by the accused with the proper officer of $100 cash, though unaccom-

panied by any written document, is a sufficient compliance with the requirements of Rule 13 of the Consolidated Rules of Courts, 1895. After a writ of *certiorari* has issued preliminary objections thereto should be raised promptly and by means of a substantive motion to quash the writ. *Regina* v. *Davidson*, 21 Occ. N. 98, 4 Terr. L. R. 425.

Time for issue—*Extension.*]— A party who has obtained an order for a writ of *certiorari*, must cause the same to be issued and returned within the delay fixed when his application was granted, and cannot, by motion, obtain leave to issue it afterwards. *Joannette* v. *Buller*, 6 Que. P. R. 146.

Transfer by husband to wife—*Declaration that transfer void as against creditors —Operation of execution upon lands.*]—On the 29th January, 1896, J. mortgaged land to his wife to secure $3,750, and on the 23rd March, 1907, he transferred his interest in the land to her. This transfer was made without consideration, and solely at the suggestion of J., who said that he told his wife that there was then about $7,000 due on the mortgage, and the property was of about that value. The wife knew nothing of the transaction, and could not remember whether her husband spoke to her about it before he made the transfer. At the date of the transfer J. was indebted to the plaintiffs in a large sum, and was in insolvent circumstances. The plaintiffs, having obtained judgment against J., sought, in an action against him and his wife, a declaration that the transfer was void as against them and J.'s other creditors, and also asked that the transfer should be set aside and the registration thereof vacated:—*Held*, on the evidence, that, at the date of the transfer, J. believed that the property was worth more than the amount due upon the mortgage, and that his sole object in making the transfer was to put his interest in the property beyond the reach of his creditors and, therefore, the transfer should be declared void as against the plaintiffs; but the plaintiffs were not entitled to a judgment setting the transfer aside or vacating its registration. With the above declaration the plaintiffs would be in a position to proceed to realise under execution upon their judgment, and a purchaser at a sale under the execution would be entitled to be registered as owner, subject to the mortgage to the wife. *Union Bank* v. *Johnson* (1910), 13 W. L. R. 519.

See ARBITRATION AND AWARD—ARREST — ASSESSMENT AND TAXES — COURTS—CRIMINAL LAW—INTOXICATING LIQUORS —JUSTICE OF THE PEACE.

CHALLENGE.

See TRIAL.

CHAMPERTY AND MAINTENANCE.

Action brought by assignee-trustee—*Assignor beneficially interested in proceeds—No right of indemnity against assignor—Assignment champertous—R. S. O. (1897) c. 327.*]—It is champerty of the plainest sort to bring an action on an assignment coupled with an agreement that assignee will sue and recover, and out of the proceeds pay costs and then divide balance equally between assignor and assignee; there being no right of indemnity against assignor. *Colville* v. *Small* (1910), 17 O. W. R. 4, 2 O. W. N. 77, 22 O. L. R. 33. *See* 16 O. W. R. 908, 2 O. W. N. 12, 22 O. L. R. 4.

Agreement to assist party to action — *Consideration — Invalidity — Intent.*] — The plaintiff, who had been a shareholder and secretary of a mining company for a number of years and had charge of its books and an intimate knowledge of its affairs, entered into an agreement in writing with the defendant, the principal shareholder of the company, to give him certain assistance for the purpose of enabling him to win a suit then pending between the defendant and another shareholder in relation to an option upon an adjoining property originally held by the company, but which the defendant had had transferred to himself. In consideration of the proposed assistance, the defendant agreed to pay the plaintiff a sum of money in cash in the event of his winning the suit, and a further sum when a sale of the property was effected. At the time of the agreement the plaintiff had ceased to be a shareholder, and had been paid his salary as secretary, and no interest, either legal or equitable, was shewn to justify his interference in the litigation:—*Held*, that the contract was illegal on the ground of maintenance, and that the plaintiff could not recover. *Craig* v. *Thompson*, 42 N. S. R. 150, 4 E. L. R. 383.

Contribution to costs of appeal — *Members of family — Agreement to divide lands in question—Succession rights—Litigious rights—Deed—Description.*]—The appellants who were desirous of recovering certain property, known as the Dorval Islands, which had formerly belonged to an ancestor, entered into an agreement with the respondents, who were all connected with the same family by relationship or marriage, by which, in consideration of each contributing one-tenth of the cost of taking an appeal to the Supreme Court, they agreed to transfer to each of them one-tenth of what might be recovered in the suit. The appeal was successful, and the present action was brought by the respondents to be declared proprietors of their shares of the island:—*Held*, that the agreement was not champertous, all the parties contributing to the cost of the appeal having an interest to see the property restored to the family, and either a direct or contingent expectancy of succeeding thereto. To constitute champerty there must be an unlawful interference of a third person to support litigation in a matter which in no way concerns him, for a compensation consisting of a share of the amount recovered. 2. Art. 710, C. C., had no application to this case inasmuch as the rights sold by the appellants were not succession rights. 3. Art. 1582, C. C., cannot be invoked by the party who has sold a litigious right, to annul his own contract. 4. The real estate in question constituting a distinct and separate area, and bearing a single cadastral number, a

special description thereof in the deed of sale was unnecessary. *Meloche* v. *Deguire*, Q. R. 12 K. B. 298.

Damages for wrongfully maintaining action—*Liability — Proof of special damage.*]—Upon proof of special damage, an action for unlawful maintenance lies, notwithstanding that the action maintained was unsuccessful:—*Held*, on the evidence, Hunter, C.J., dissenting, that the plaintiff had suffered no damage. Decision of Duff, J., 3 W. L. R. 303, reversed. *Newswander* v. *Geigerich*, 12 B. C. R. 272.

Deed of land — *Contract—Joinder of claims — Partition — Specific performance—Litigious rights—Retrait successoral.*]—The heirs of M. induced several persons related to them, either by consanguinity or by affinity, to assist them as plaintiffs in the prosecution of a law suit for the recovery of lands belonging to the succession of an ancestor, and, in consideration of the necessary funds to be furnished by these persons, six of the respondents and the *mis-en-cause* entered into the agreement sued on by which the plaintiffs conveyed to each of the seven persons giving the assistance one-tenth of whatever might be recovered should they be successful in the law suit. In an action *au petitoire et en partage* by the parties who furnished such funds, for specific performance of this agreement:—*Held*, reversing the judgment in Q. R. 12 K. B. 298 (Davies, J., dissenting), that the agreement could not be enforced, as it was tainted with champerty, notwithstanding that the consanguinity or affinity of the persons in whose favour the conveyance had been made, might have entitled them to maintain the suit without remuneration as the price of the assistance:—*Held*, further, that there could be no objection to the *demande au petitoire* being joined in the action for specific performance. 2. That the defence of *retrait de droits litigieux* could not avail in favour of the defendants, as it is an exception which can be set up only by the debtor of the litigious right in question. *Powell* v. *Watters*, 28 S. C. R. 133, referred to. 3. That, as the conveyance affected a specific share of an immovable, the exception of *retrait successoral* could not be set up under Art. 710, C. C. *Baxter* v. *Phillips*, 23 S. C. R. 317, and *Leclerc* v. *Beaudry*, 10 L. C. Jur. 20, referred to. 4. That the laws relating to champerty were introduced into Lower Canada by the Quebec Act, 1774, as part of the criminal law of England, and as a law of public order, the principles of which and the reason for which apply as well to the province of Quebec as to England and the other provinces of the Dominion of Canada. *Price* v. *Mercier*, 18 S. C. R. 303, referred to. *Meloche* v. *Deguire*, 24 Occ. N. 75, 34 S. C. R. 24.

Interest in mineral claims—*Transfer — Consideration — Prior litigation.*]— In *Briggs* v. *Newswander*, 32 S. C. R. 405, the plaintiff was held entitled to a conveyance from the defendants of a quarter interest in certain mineral claims. In that action Newswander *et al.* were only nominal defendants, the real interest in the claims being in F. After the judgment was given, the plaintiff conveyed nine-tenths of his interest to G., the expressed consideration being moneys advanced and an undertaking by G. to pay the costs of that action and another brought by Briggs, and by a subsequent deed, which recited the proceedings in the action and the deed of the nine-tenths, he conveyed to G. the remaining one-tenth of his interest, the consideration of that deed being $500 payable by instalments. Briggs afterwards assigned the above mentioned judgment and his interest in the claims to F. In an action by G. against F. for a declaration that he was entitled to the quarter interest:—*Held*, affirming the judgment in 10 B. C. R. 309, that the transfer to G. of the nine-tenths was champertous, and the Court would not interfere to assist one claiming under a title so acquired:—*Held*, also, that the transfer of one-tenth was valid, being for good consideration and severable from the remainder of the interest. *Giegerich* v. *Fleutot*, 25 Occ. N. 7, 35 S. C. R. 327.

Malicious motive — *Cause of action—Costs of unsuccessful defence—Damages.*]—A defendant against whom a lawsuit has been successfully prosecuted cannot recover the costs incurred for his defence as damages for the unlawful maintenance of the suit by a third party, who has not thereby been guilty of maliciously prosecuting unnecessary litigation. *Bradlaugh* v. *Newdegate*, 11 Que. B. D. 1, distinguished. *Giegerich* v. *Fleutot*, 35 S. C. R. 327, referred to. Judgment appealed from, 12 B. C. R. 272, affirmed. *Newswander* v. *Giegerich*, 27 C. L. T. 783, 39 S. C. R. 354.

Void agreement — *Parties entitled to take advantage of—Res judicata — Estoppel by conduct—Costs.*]—The laws of maintenance and champerty, as they existed in England on the 19th November, 1858, are in force in British Columbia, and an agreement for a champertous consideration is absolutely null and void. The defence that an agreement is champertous and therefore void is open to others than those who are parties to the agreement. Per Hunter, C.J., it is not open to a man to stand by and assist another to fight the battle for specific property to which he himself claims to be entitled, and, in the event of the latter's defeat, claim to fight the battle over again himself. He is not bound to intervene, and if he does not, he must accept the result so far as concerns the title to the property. At the trial the plaintiffs obtained judgment declaring that the defendant was a trustee of an undivided one-quarter interest in two mineral claims; on appeal by the defendant the plaintiff's interest was declared to be only one-fortieth. The Court allowed the defendant the costs of the appeal, but allowed no costs of the trial to either side. *Briggs and Giegerich* v. *Fleutot*, 24 Occ. N. 290, 10 B. C. R. 309.

CHANGE OF VENUE.

See VENUE.

CHARGE ON LAND.

Deed — *Priority as between unregistered equitable charge and subsequent registered conveyance—Effect of grant of land by regis-*

tered owner to an assignee in trust for creditors — Assignments Act — Lien Notes Act—Registry Act.]—The defendant B., having executed an agreement under seal creating an equitable lien or charge on his farm land in favour of the plaintiffs for the price of certain machinery, which agreement could not, under s. 4 of the Lien Notes Act, R. S. M. 1902, c. 99, be registered, subsequently executed a deed of assignment to the defendant H. as trustee for creditors. As regards B.'s lands, the wording of the assignment was as follows: "The said debtor according to his estate and interest therein and as fully and effectually as he lawfully can or may . . . . by these presents doth hereby grant . . . . unto the said trustee . . . . all the real estate, lands, tenements, and hereditaments of the said debtor . . . of or to which he may have any estate, right, title, or interest of any kind or description, with the appurtenances." This assignment was made and duly registered shortly after the commencement of this action: — *Held*, that such deed purported to deal only with such estate or interest in the land as the assignor then had, and did not operate or assume to operate so as to convey the land free from the equitable charge or lien previously given to the plaintiffs. Sections 6 and 7 of the Assignments Act, R. S. M. 1902, c. 8, do not help the assignee, as the assignment was not in the words, or to the like effect of the words, given in ss. 6 and 7 provides only that every assignment . . . shall vest the estate "thereby assigned" in the assignee, and does not assume to give the deed any larger effect in the way of passing property than on its face it purports to have. The only interest, therefore, that passed to the assignee, being what was left after the plaintiff's equitable charge should be satisfied, neither s. 72 of the Registry Act, R. S. M. 1902, c. 150, nor s. 7 of the Lien Notes Act, can have any application, as they only apply to invalidate an unregistered instrument as against a registered instrument that affects the same estate or interest in lands. *Canadian Port Huron Co.* v. *Burnett*, 5 W. L. R. 270, 17 Man. L. R. 55.

Document under seal creating charge —*Implied covenant to pay debt.*]—The defendant executed under seal an instrument creating a charge on land in favour of the plaintiffs, for the price of an engine bought from them and interest to be paid by specified instalments. The instrument further provided that if notes should be given by the defendant for the several instalments, such notes should not be in satisfaction of the said lien and charge, but the same should continue until payment in full of such notes and any renewals thereof. It contained no covenant or promise to pay the debt:—*Held*, that a covenant or promise to pay the debt could not be implied from the terms of the deed, and that the plaintiffs could not have a personal order for payment of the debt based upon anything contained in it. *Waterous Engine Works Co.* v. *Wilson*, 11 Man. L. R. 287, distinguished. *Abell (John) Engine and Machine Works Co.* v. *Harms*, 16 Man. L. R. 546.

See ANNUITY—DOWER — EXECUTION—VENDOR AND PURCHASER—WILL.

CHARITIES.

See WILL.

CHARLOTTETOWN CITY COURT.

See APPEAL.

CHARTER.

See MUNICIPAL CORPORATIONS.

CHARTERPARTY.

See INSURANCE—SHIPPING.

CHARTERED ACCOUNTANTS.

Fees — *Tariff.*] — The tariff of chartered accountants contains no provision allowing fees for attendance at Court to be sworn, or attendances at their offices to receive papers, etc. 2. Chartered accountants are only allowed a fee of $10 for attendance at a meeting for hearing parties or to take evidence, when the duration of the session is over an hour and a half. 3. A chartered accountant is not entitled to any fee upon a provisional report prepared by him. *Singer Manufacturing Co.* v. *Pinsonneault*, 6 Que. P. R. 112.

CHATTEL MORTGAGES AND BILLS OF SALE.

1. BILLS OF SALE, 584.
2. CHATTEL MORTGAGES, 589.
3. LEASE OF CHATTELS, 606.

1. BILLS OF SALE.

Absolute transfer — "*Defeasance*" — *Oral understanding—Property remaining in grantor's possession — Filing—Renewal.*]—The defendant, a constable, levied upon goods and chattels in the possession of S. under an execution issued on a judgment recovered against S. by M. At the time of the levy the goods were covered by a bill of sale to the plaintiff to secure $150. The document purported on its face to be an absolute transfer, with a right to immediate possession, but it was referred to in the affidavit as a bill of sale, and the evidence shewed that there was an understanding, not reduced to writing, that S. should get the property back on payment of the amount secured. After the filing of the bill of sale, the property was allowed to remain in the possession of S.:—*Held*, that the fact of the property remaining in the possession of the grantor was not a fraud in itself, but a matter for the consideration of the trial Judge, and he having found that the amount named as the consideration was due from the grantor to the grantee, and that the transaction was not tainted with fraud, and the amount of property transferred not being excessive, there was no reason for disturbing his finding. The same principle would apply to the fact that the provision for redemption of the pro-

perty covered was not reduced to writing. The oral agreement for the return of the property was not a "defeasance" in the sense in which that term is used, and the section of the Act which requires every defeasance to which a bill of sale is subject to be filed with it, was not applicable. The bill of sale having been made and filed prior to the passage of the Bills of Sale Act of 1899:—*Held*, that it was validly filed subject to the special clause as to the filing of a renewal statement, and, the time prescribed for the filing of a renewal statement not having elapsed, that the bill of sale was in no way affected by such provision. *Fraser* v. *Murray*, 34 N. S. Reps. 186.

Actual and continued change of possession—Rights of execution creditors—Rule 356 (N.W.T.)—Consideration—Past indebtedness—False statement in bill—Interpleader. *Mueller* v. *Cameron* (N.W.T.), 7 W. L. R. 524.

Affidavit of bona fides—*Execution — Fraudulent assignment.*]—The Bills of Sale Ordinance makes necessary an affidavit "that the sale is . . . not for the purpose of holding or enabling the bargainee to hold the goods. . . . against *any* creditors of the bargainor."—*Held*, that the use of the words "*the* creditors" instead of "*any* creditors" in the affidavit of *bona fides* did not invalidate the bill of sale.—The same Ordinance makes necessary an affidavit "of a witness thereto of the due execution thereof."—*Held*, that, as attestation is not made essential to the validity of a bill of sale, it is not necessary to call the attesting witness to prove the execution thereof.—*Held*, also, on the evidence, that, inasmuch as the trial Judge could reasonably find, as he had, that there was no fraudulent intent on the part of the bargainee, the bill of sale could not be held void as being made with intent to defraud creditors of the bargainor, and that, inasmuch as the trial Judge could reasonably find, as he had, that the bargainee was not in fact a creditor of, but a *bona fide* purchaser from, the bargainor, the bill of sale could not be held void as being made with intent to give, or as having the effect of giving, a preference to one creditor over another, and that therefore the bill of sale was not void under the Ordinance respecting preferential assignments. *Emerson* v. *Bannerman*, 1 Terr. L. R. 224.—Affirmed 19 S. C. R. 1.

Bailee—*Sheriff's liability — Jus tertii.*]—Defendant as sheriff under an execution against A. the father of plaintiff seized a horse which plaintiff claimed, and which he also alleged belonged to B. by virtue of a bill of sale to the latter.—On motion for new trial on the ground that the Judge refused to direct the jury that the bill of sale to B. was an answer to the plaintiff's case:—*Held*, (Peters, J.), that the bill of sale was an answer to the plaintiff's case. *Stewart* v. *Gates* (1881), 2 P. E. I. R. 432.

Consideration — *Marriage settlement — Past indebtedness—Necessity for truly stating.*]—The claimant in an interpleader issue claimed under a bill of sale whereby the goods seized were assigned to her for an expressed consideration of $1,000. In support of this consideration, she proved a marriage settlement, whereby the defendant in the main action, her husband, in consideration of marriage, settled on her the sum of $3,000, and charged this sum on his property, and she alleged that the bill of sale was given in pursuance of this settlement, which settlement was properly made and executed in accordance with the laws of the province of Quebec:—*Held*, that under the provisions of s. 11 of the Bills of Sale Ordinance (c. 43, C. O. 1898), the bill of sale was void as against creditors, inasmuch as the consideration therein was not truly expressed. *Saskatchewan Lumber Co.* v. *Michaud*, 1 Sask. L. R. 412, 8 W. L. R. 946.

Crops — *Assignment of interest in as security for defendant—Bills of Sale Ordinance — Assignment not filed — Invalidity against execution creditors of assignor—Interpleader.*] — Summary trial of an interpleader issue. The sheriff had seized the defendant's interest in 500 bushels of grain, defendant as landlord receiving half of the crop. The claimants held an assignment of the lease as security. The claimants were barred, there being no change of possession and the lease not having been registered. *Robinson* v. *Lott*, 9 W. L. R. 684, 2 Sask. L. R. 150, reversed, 11 W. L. R. 59, 2 Sask. L. R. 276.

Document having effect of bill of sale—*Taking possession under — Necessity for filing — "Hirer, lessor, or bargainor."*]—Action for a declaration that a transfer of goods from the defendant to his brother, was void under c. 11 of the Acts of 1898, and ss. 1, 3, and 4 of R. S. N. S., 5th ser., c. 92, because it was not filed. By the document in question the defendant transferred a stock of goods in store to the amount of $1,500, and agreed to pay for the same by paying notes of B. & Co. to the amount of $500, and by giving them notes for the balance of $100 each, one payable every six months. The document concluded: "The said G. H. to hold the goods in store, and whatever goods may come in after shall become the property of the said G. H. until the said G. H.'s claim is paid in full. If I fail to pay any of the above named notes, the said G. H. can take over possession of the business and all stock in the said store at time of me failing to meet or pay above or aforesaid named notes." This document was not filed, and was not accompanied by any affidavit. After G. H. had taken possession of the stock of goods under the power, plaintiffs attached the goods as the property of an absent or absconding debtor, and sought to have the transfer set aside.—*Held*, that the document in question came within the term "bill of sale," as defined by R. S. N. S. c. 92, s. 10, and should have been filed, and was liable to be defeated for non-filing up to the time that G. H. took possession under it:—*Held*, also, that G. H. did not come within the category of a "hirer, lessor, or bargainor," within the meaning of s. 3 of c. 92, and that such section had therefore no application. *Manchester* v. *Hills*, 34 N. S. Reps. 512.

Evidence—Copy certified by registrar of deeds in foreign country—Secondary evidence of contents of original—Evidence of sale in foreign country—Application of foreign law — Delivery and change of possession —

Fraudulent intent—Consideration — Untrue statement in bill—Interpleader. *Hennenfest* v. *Malchose* (N. W. T.), (1906), 3 W. L. R. 171.

Extension of time for registration—*R. S. B. C. 1897, c. 32, s. 7 (2)—Order—Terms—Intervening rights.*]—A company, domiciled in Toronto, Ontario, took a bill of sale on goods in Grand Forks, British Columbia. It was not possible to send the instrument to Toronto and have it returned for filing with the registrar with the affidavit of *bona fides* within the five days required by s. 7, s.-s. 2, of the Bills of Sale Act, 1905:—*Held*, that in the order granting an extension of time for filing the instrument there should be a provision protecting intervening rights. *Re Ellis (W. P.) & Co.*, 7 W. L. R. 371, 13 B. C. R. 271.

Failure to renew—*New bill—Previous agreement — Validity—Absence of Fraud — Statute of Frauds — Possession—Affidavit—Commissioner — Solicitor.*]—A bill of sale given in connection with the sale of a business held by the vendor for the benefit and protection of the plaintiffs, who had endorsed certain promissory notes given by the vendee in payment of the purchase money, having expired, in consequence of failure to renew it under the provisions of the Act, the plaintiff, in pursuance of an agreement made at the time of the sale, demanded and received a second bill of sale, to secure the amount for which he remained liable in respect of the original endorsements, as well as certain amounts for which he had become liable as endorser of other promissory notes. There being no question of insolvency on the part of the maker at the time the second bill of sale was given, and no fraudulent purpose, and the terms of the agreement being accurately set forth:—*Held*, that there was no pretence for holding the bill of sale void under the Statute of Elizabeth; that the fact that the plaintiff had taken possession under his bill of sale, and was in possession at the time the sheriff made his levy, was sufficient, in the absence of fraud, to enable the plaintiff to maintain his action; and, following *Creighton* v. *Reid*, 27 N. S. Reps. 72, that the affidavit to the bill of sale was not bad because it had been sworn before the solicitor by whom the bill of sale was prepared. *Mosher* v. *O'Brien*, 37 N. S. Reps. 286.

Fraudulent bill of sale—*Conversion of goods by holder of subsequent unregistered lien—Justification.*]—In an action for conversion, the plaintiff claimed title under a registered bill of sale which the jury found was made without consideration; and in fraud of creditors, the defendant justified the taking under an unregistered lien note given subsequent to the bill of sale:—*Held*, that the verdict was properly entered for the defendant. *Poitras* v. *Pelletier*, 2 E. L. R. 463, 38 N. B. R. 63.

Hire receipts—*Transfer of rights—Conditional sales—Subrogation.*]—The purchaser of a piano under a hire receipt, by which, on his completing certain payments on account, the property was to pass to him, but in the meanwhile to remain in the vendors, before he had paid the required sum, agreed with his wife that she should purchase his interest and pay the balance due the vendors. There was no bill of sale registered, nor such change of possession as required by the Bills of Sale and Chattel Mortgage Act, R. S. O. c. 148.—*Held*, that the transaction was invalid as against execution creditors, under s. 37 of that Act; and that the transaction was not within s. 41, s.-s. 4, which was intended to except only conditional sales of chattels, within R. S. O. c. 149.—*Held*, however, that the wife was entitled to be subrogated to the rights of the vendors of the piano to the extent of the payments made by her. *Eby* v. *McTavish*, 20 Occ. N. 376, 32 O. R. 187.

Invalidity—Security — *Mala fides*—Contract—Construction — Sale of goods—Property not passing—Scope of contract—Priorities. *Bloomstein* v. *J. D. McArthur Co.* (Man.), 8 W. L. R. 753.

Invalidity—Transfer of goods in the ordinary course of business—Sale of stock *en bloc*—Application of Bills of Sale Act. *Greenburg* v. *Lenz* (B.C.), 2 W. L. R. 64.

Mining agreements by which owner or lessee of a mine authorizes another to work it on shares need not be registered under B. C. Bills of Sale Act, 1905. *Traves* v. *Forrest* (1909), 14 B. C. R. 183; affirmed 42 S. C. R. 514.

Non-compliance with Bills of Sale Ordinance—Insufficient description of goods—Invalidity—Actual and continued change of possession—Bargainor remaining in apparent possession. *Svaigher* v. *Rotaru* (N.W.T.), (1906), 3 W. L. R. 486.

Sale without change of possession—*Absence of fraud—Pledge—Third persons.*]—The sale of an immovable thing, not followed by change of possession, but made in good faith and without fraud, even if the purpose be to give the article in pledge to the purchaser, transfers the property to him as well against third persons as between the contracting parties. *Bergeron* v. *Campeau*, Q. R. 25 S. C. 26.

Security in form of absolute sale—*Bills of Sale Act.*]—When the transaction evidenced by an instrument in the form of an absolute bill of sale is in fact the giving of security for an existing debt, the parties cannot evade compliance with ss. 2 and 3 of the Bills of Sale Act, R. S. O. 1897 c. 148, merely by the form of the instrument. If, however, the real transaction is a sale with a right of re-purchase upon certain terms, the vendor can only be required to observe the provisions of s. 6. *Hope* v. *Parrott*, 24 Occ. N. 206, 7 O. L. R. 496, 2 O. W. R. 248, 3 O. W. R. 499.

Staying sale — *Payment into Court — Amount.*]—In suit by mortgagor to set aside bill of sale, an interim injunction order to restrain a sale by mortgagee was granted, upon condition of mortgagor paying into Court the amount due mortgagee.—The bill of sale was collateral security for promissory notes, some of which had been endorsed over for value:—*Held*, that the amount to be paid into Court should not be reduced by amount of such notes. *Petropoulos* v. *F. E. Williams Co.* (1906), 26 C. L. T. 468, 3 N. B. Eq. 267.

Taking possession—*Bills of Sale Act—Defeasance—Authority of partner to execute bill—Locus standi of creditor.*]—Where the goods comprised in a bill of sale were within 21 days after its execution *bona fide* taken possession of by the bargainee, the Bills of Sale Act was held not to apply, and it was immaterial that the bill was subject to a defeasance not contained in it. *Semble*, that a judgment creditor of the bargainors (a partnership) had no *locus standi* to attack the bill on the ground that a member of the firm had no authority to execute the bill on behalf of the firm:—*Held*, that he had implied authority, or that his act was ratified, or that his partners were estopped from denying his authority. *McClary Mfg. Co.* v. *Howland*, 9 B. C. R. 479.

"Transfer of goods in the ordinary course of business"—*Sale of stock en block—Application of Bills of Sale Act.*]—The plaintiff bought a stock of goods *en bloc*, and the defendant attacked the sale, on the ground that it was part of a scheme between the plaintiff and his vendor to defraud certain wholesale houses. A jury found that the transaction was *bona fide*, but, on motion for judgment, the defendants questioned the validity of the bill of sale to the plaintiff, on a number of grounds, one of the plaintiff's replies to which was that the Bills of Sale Act did not apply, as this was a transfer of goods in the ordinary course of business, excluded from the operation of the Act by s. 2 (R. S. B. C. 1897 c. 32; B. C. stat. 1905 c. 8, s. 3):—*Held*, that the words "transfer of goods in the ordinary course of business," were wide enough to include the sale of a stock in trade *en bloc*. *Greenburg* v. *Lenz*, 12 B. C. R. 395.

Validity as against execution creditors of bargainor — Consideration—Marriage settlement — Past indebtedness—Consideration not truly expressed—Bills of Sale Ordinance, s. 11—Interpleader. *Saskatchewan Lumber Co.* v. *Michaud* (Sask.), 8 W. L. R. 946.

Want of registration — *Validity as against fraudulent sale with notice.*]—Bill of sale of a horse, given to secure a balance due on purchase price, although unregistered, cannot be defeated by a fraudulent sale to third party with notice.—In an action for alleged wrongful taking and detention of a horse, defendants relied on an unregistered bill of sale given to defendant E. by owner M., in trust to sell the horse, retain a balance due on purchase price, and pay balance to M.:—*Held*, the bill of sale so given, although unregistered, was not defeated by a fraudulent sale to plaintiff, who was not a *bona fide* purchaser for value and who had notice of the claim. *McLeod* v. *Doucette* (1906), 38 N. S. R. 151.

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2. CHATTEL MORTGAGES.

Action by creditors to declare fraudulent and void—Failure of proof of insolvency of mortgagor — Defect in chattel mortgage—Affidavits of *bona fides*—Renewal — President of incorporated company—Necessity for authority from directors — Construction of Chattel Mortgage Act and amendments—Seizure under mortgage—Excess—Inventory—Waiver—Abatement of action by assignment of plaintiffs *pendente lite*—Revivor in name of assignee—Right of assignee to question validity of mortgagee. *Universal Skirt Manufacturing Co.* v. *Gormley*, 10 O. W. R. 918.

Action to set aside a chattel mortgage as fraudulent and void and have an account taken of defendant's dealings in connection with purchase of a restaurant:—*Held*, upon the evidence, that the chattel mortgage for $630 should be reduced to $502.55. *Vlahos* v. *Poppas* (1909), 14 O. W. R. 465.

Affidavit for renewal — *Words having same meaning as those in form prescribed — Ownership of offspring of mares covered by mortgage — Removal of chattels out of division — Subsequent purchaser — Bills of Sale and Chattel Mortgage Act, R. S. M. 1902, c. 11, ss. 20, 29.*]—The legal estate in the offspring of mares comprised in a chattel mortgage covering them and also "the increase" from them, is in the mortgagee, and title to such offspring cannot be acquired by one who purchases them in good faith for value, although he receives delivery from the mortgagor before the mortgagee attempts to get possession. *Dillaree* v. *Doyle*, 43 U. C. R. 442, and *Temple* v. *Nicholson*, Cassels' Sup. Ct. Dig. 114, followed.—2. Section 29 of the Bills of Sale and Chattel Mortgage Act, R. S. M. 1902, c. 11, is sufficiently complied with by the use of the expression "kept on foot" in the mortgagee's affidavit for renewal of a chattel mortgage, instead of the words "kept alive" used in that section, as the two expressions mean the same thing. *Emerson* v. *Bannerman*, 19 S. C. R. 1, followed.—3. The "subsequent purchaser" mentioned in s. 29 of the Act, against whom a chattel mortgage will cease to be valid upon goods removed out of the division where it is registered, unless a certified copy is registered in the division to which the goods have been removed within 6 months after the removal, must be one who purchased after the expiration of such period of 6 months. *Hulbert* v. *Peterson*, 36 S. C. R. 324, followed. *Roper* v. *Scott*, *Wallace* v. *Scott*, *Galbraith* v. *Scott*, 5 W. L. R. 341, 16 Man. L. R. 594.

Affidavit of bona fides—*Affidavit upon renewal—Bills of Sale and Chattel Mortgage Act, s. 10—3 Edw. VII. c. 7, s. 30 (O.) — President of incorporated company — Necessity for authority from directors — Knowledge of facts — Position of deponent — "Officer or agent" — Creditors following proceeds of goods — Status of creditors attacking chattel mortgage.*]—Under s. 10 of the Bills of Sale and Chattel Mortgage Act, as enacted by 3 Edw. VII. c. 7, s. 30 (O.), the affidavit of *bona fides* and the affidavit required upon the renewal of a chattel mortgage, where the mortgagees are an incorporated company, if made by the president, vice-president, manager, assistant manager, secretary, or treasurer of the company, need not state that the deponent is authorised by resolution of the directors in that behalf, nor (Riddell, J., dissenting) that he is aware of the circumstances connected with the mortgage and has personal knowledge of the facts deposed to; the words "officer or

agent" in the section, according to its proper construction, being confined in their application to an officer or agent who is not one of the principal officers above enumerated.—*Bank of Toronto* v. *McDougall*, 15 C. P. 475, and *Freehold Loan and Savings Co.* v. *Bank of Commerce*, 44 U. C. R. 284, applied and followed, notwithstanding the amendments to the statute.—Per Mabee and Riddell, JJ., that the statute does not make it imperative that the position of the deponent should be sworn to.—*Semble*, per Britton, J., that a creditor, although suing on behalf of himself and all the creditors of his debtor, the latter not having made an assignment for the benefit of creditors nor having been declared an insolvent, cannot follow the proceeds of goods taken under a conveyance not void for fraud in fact, but simply declared invalid by reason of non-compliance with the Bills of Sale and Chattel Mortgage Act. Riddell, J., *contra*.—Riddell, J., in coming to the conclusion that the plaintiffs were entitled to succeed in their attack upon the defendants' chattel mortgage, considered various defences concerning the status of the plaintiffs and other matters. *Universal Skirt Manufacturing Co.* v. *Gormley*, 17 O. L. R. 114, 11 O. W. R. 1110.

Affidavit of bona fides—*Jurat—Bills of Sale and Chattel Mortgage Act — "Sworn" — Agent — Occupation of mortgagee.*] — 1. The affidavit of *bona fides* on a chattel mortgage is sufficient, although it purports to be the joint affidavit of two mortgagees, and the *jurat* does not shew that they were severally sworn.—2. The insertion in the affidavit of a clause reading "that I am the duly authorised agent of the mortgagee," was an apparent mistake, and did not vitiate it, although it was the affidavit of the mortgagees themselves.—3. The fact that it is stated in the *jurat* that the affidavit has been "sworn," whereas the deponents affirmed, is not a fatal objection, as by the Interpretation Act the expressions "swear" and "sworn" respectively include "affirm solemnly" and "affirmed solemnly."—4. The Bills of Sale and Chattel Mortgage Act, R. S. M. 1902, c. 11, s. 5, does not require that the occupation of the mortgagee should be stated in the affidavit of *bona fides*. *Brodie* v. *Ruttan*, 16 P. C. R. 207, followed. *Dyck* v. *Graening*, 6 W. L. R. 171, 17 Man. L. R. 158.

After acquired property—*Transfer of chattels and business to incorporated company—Seizure and sale of chattels by mortgagees — Conversion — Estoppel — Pleading — Description.*] — The plaintiffs in May, 1907, in pursuance of a previous agreement, purchased the business, plant, and stock in trade of L. Bros., subject to their debts and liabilities. One of these was a loan of $4,000 from the defendants secured by a chattel mortgage of all the plant and stock in trade of L. Bros. This chattel mortgage contained a provision that it should cover all after-acquired goods and chattels brought upon the premises owned or occupied by the plaintiffs or used in connection with their business during the currency of the mortgage. The plaintiffs had been incorporated as a company prior to the date of the chattel mortgage, and L. Bros. were the principal promoters and became the president and vice-president respectively, being in fact the controlling shareholders. $2,104.64 of the money lent by the defendants to L. Bros. was handed over to the plaintiffs, and by them applied towards payment of the debts of L. Bros. The plaintiffs paid on instalment of the interest due to the defendants on the $4,000 loan:—*Held*, that the provision in the chattel mortgage as after-acquired goods was as binding upon the plaintiffs as purchasers of the mortgaged property with notice of it as it would be upon the executors or administrators of the mortgagors, and that the defendants had a good valid lien and charge upon all after-acquired goods brought upon the premises in question by the plaintiffs. *Mitchell* v. *Winslow*, 2 Story 630, followed. 2. That the plaintiffs were, in the circumstances, estopped from disputing such lien and charge. *Pickard* v. *Sears*, 6 A. & E. 469, and *Freeman* v. *Cooke*, 18 L. J. Ex. 119, followed. And the defendants were entitled to shew in evidence the facts constituting such estoppel, although it had not been pleaded, as an estoppel *in pais* need not be pleaded to make it obligatory. 3. That the mortgage was not void as to the after-acquired goods because of the generality and vagueness of the description. *Lazarus* v. *Andrade*, 5 C. P. D., followed. *Imperial Brewers Limited* v. *Gelis*, 18 Man. L. R. 283, 9 W. L. R. 99.

Buildings — *Appurtenances of ferry — Remedy—Detinue—Estoppel.*]—The defendant gave a chattel mortgage to the plaintiffs on certain buildings, and also a certain ferry, and "the ferry boat with cables, pulley, and other machinery used therewith."—*Held*, that detinue or replevin would not lie for the buildings, at least where the defendant was in possession of the land on which they stood; nor for the ferry boats or attachments, as they were appurtenant to the ferry, which was an easement arising in respect of land.—(2) That there was no estoppel by the mortgage, in such sense as to make detinue or replevin an appropriate remedy for property of the character in question. *Stimson* v. *Smith*, 1 Terr. L. R. 183.

Collateral contract — *Rectification of mortgage — Performance of contract — Evidence — Seizure under chattel mortgage — Counterclaim for breach of contract.*]—The plaintiff sued for damages for wrongful seizure and conversion of horses. The defendant alleged that the horses were seized under a chattel mortgage made by the plaintiff to him, the defendant. The mortgage contained a clause enabling the defendant to seize if he felt insecure. The defendant alleged that at the date of the seizure (14th October, 1908), the payments under the chattel mortgage were overdue, and also that the plaintiff had attempted to sell the horses, and that he (the defendant) felt insecure. The amount of the chattel mortgage was by its terms, to be repaid in two instalments, on the 1st August, 1907, and the 1st February, 1908. The defendant counterclaimed for the balance due under the chattel mortgage, after crediting the proceeds of the sale of the horses, and also for expenses incurred for the plaintiff at his request in defending an action, and also for damages for breach of an agreement whereby the plaintiff agreed to deliver cordwood to the defendant. In reply the plain-

tiff alleged that the chattel mortgage was given as security for the wood agreement, under which the plaintiff was to deliver the wood before the 1st April, 1908; that he did deliver large quantities of wood, until, on the 30th January, 1908, the defendant requested him to postpone delivery of the residue until the following winter, and that he (the plaintiff) had always been willing and ready to complete. The plaintiff also asked that the chattel mortgage should be rectified so as to conform to the agreement:—*Held*, that, even if the mortgage were rectified, the plaintiff would still be in default, as on the 1st April, 1908, he admittedly had not wholly repaid the defendant either in wood or money; and upon the evidence, the plaintiff had not established that the defendant had requested him to delay delivery of the rest of the wood:—*Held*, also, that, on the evidence, the plaintiff was not entitled to succeed upon his counterclaim.—Both action and counterclaim dismissed with costs. *Mayer* v. *Mackie* (1910), 15 W. L. R. 128.

Consideration—*Endorsement of promissory note.*]—Under s. 56 of the Bills of Exchange Act, 1890, a person who endorses a promissory note, not endorsed by the payee, is liable as an endorser to the latter. Judgment of the Court of Appeal, 2 O. L. R. 63, 21 Occ. N. 375, on this point reversed. The provisions of the Ontario Bills of Sale Act requiring the consideration of a chattel mortgage to be expressed therein is satisfied when the mortgage recites that the endorsement of a note is the consideration, and then sets out the note. Only the facts need be stated, not their legal effect. Judgment of the Court of Appeal on this point affirmed. *Robinson* v. *Mann*, 22 Occ. N. 2, 31 S. C. R. 484.

Contracts—*Setting aside contracts made in fraud of creditors—Prescription—Opposing seizure based on an act of alienation—Lapse of a year without suit brought—Gift disguised under the name of a sale.*]—An execution creditor who permits more than a year to pass after the production by his opponent of a bill of sale under which the latter claims to be the owner of the goods seized is no longer entitled to contest the title of his opponent by declaring the invalidity of the bill of sale as made in fraud of creditors. A bill of sale in which the price mentioned is fictitious has the same force as a gift. *Ross* v. *Lefebvre*, 1909, Q. R. 36 S. C. 210.

Creditor refusing to accept debt tendered him and proceeding to realize on security.]—A creditor who, holding collateral security, refuses to accept the amount due him, duly tendered by the debtor, and proceeds to collect or realize on the security, is liable for the damage thereby caused the debtor. *Desgroseillers* v. *Anderson* (1909), Q. R. 36 S. C. 234.

Default—*Seizure of chattels—Sale—Best price not realised—Liability of mortgagee.*]—When a mortgagee seizes chattels under a chattel mortgage, he must, if he sells the goods, realise the best price that can be obtained; and if he fails to make use of such means as may be necessary to secure such price, he must account to the mortgagor for the full value of the property. *Grimes* v. *Gauthier*, 7 W. L. R. 485, 1 Sask. L. R. 54.

Description — *Renewal — Time.*] — Goods were described in a chattel mortgage as follows:—"All and singular the goods, chattels, stock-in-trade, fixtures, and store building of the mortgagors used in or pertaining to their business as general merchants, said stock-in-trade consisting of a full stock of general merchandise, now being in the store of the said mortgagors on," etc. *Held*, Rouleau, J., dissenting, that the description was sufficient. The mortgage was filed 12th August, 1886, at 4.10 p.m.; a renewal was filed 12th August, 1887, at 11.49 a.m. *Held*, Rouleau, J., dissenting, that the renewal was filed within one year from the filing of the mortgage. *Quirk* v. *Thompson*, 1 Terr. L. R. 159.

Description — *Construction — Ejusdem generis rule.*]—*Held* that the following description in a chattel mortgage, "All office fixtures, lamps, desks, chairs, furniture, stationery, and all goods, chattels and effects now in the store and office of the mortgagors," did not include a safe, the general words being restricted by the preceding words. *Goldie* v. *Taylor*, 2 Terr. L. R. 298.

Description — *Sufficiency — Cattle — Identification—Situation — License to mortgagor to sell cattle—Contemporaneous agreement—Consideration.*]—In a chattel mortgage the property was described as follows:—"All cattle and horses of whatever age and sex branded '3' on the left side and all increase thereof from time to time until the moneys hereby secured are fully paid, together with the '3' brand and the branding irons for said brand, and all right, title, and interest therein and thereto:"—*Held*, a sufficient description. For the purpose of identification, it was not necessary that *all* the brands borne by each animal should be referred to.—*Held*, also, that the mention of the locality where the cattle were when the mortgage was made was unnecessary. The mortgage in question contained the following proviso: "Provided always, anything hereinbefore contained to the contrary notwithstanding, that the said mortgagors shall be at liberty at any time to sell bulls and steers." *Held*, that this power was restricted to sales authorized by a contemporaneous agreement between the mortgagor and mortgagee, viz., of such animals as it might become necessary to sell to pay running expenses. *Held*, also, upon the evidence, that the consideration was duly expressed in the mortgage. *Graveley* v. *Sprenger*, 20 Occ. N. 147.

Endorsement of note—*Payment — Setting aside mortgage.*]—While the endorsing by a person not a party to a note of his name upon it, before it had been endorsed by the payee, is not an endorsement in the legal sense so as to make that person legally liable to the payee, a chattel mortgage to the intending endorser to secure him against the liability intended to be incurred cannot be set aside by the mortgagor's assignee for creditors after the mortgagee had paid the note in question. *Robinson* v. *Mann*, 21 Occ. N. 375, 2 O. L. R. 63.

Executed in blank—*Filled in later according to mortgagors' instructions — Compliance with—R. S. O. (1897), c. 148.*]—Plaintiff as assignee of the estate of M. H. Craig, of Huron Co., brought action to re-

cover damages for alleged illegal seizure and sale of Craig's goods. Defendants seized the goods, before plaintiff's assignment, on chattel mortgages, which Craig had signed in blank and which were filled in later according to Craig's instructions. Teetzel, J., *held*, that the mortgages were valid, despite the manner in which they were made. Counterclaim was also dismissed.—Divisional Court affirmed above judgment on the ground that the statute was sufficiently complied with. *Wade* v. *Bell* (1910), 16 O. W. R. 636, 1 O. W. N. 1052.

Execution — Filing—Validity—Renewal—Machinery—Interpleader—Rights of execution creditor—Payment out of Court—Costs. *Trussler Brothers Limited* v. *Quinn*, 6 O. W. R. 371.

Execution not authorized by mortgagor company — *Trading company — Affidavits of execution and bona fides sworn before solicitor for parties to mortgage — Alberta Bills of Sale Ordinance—Rule 308—Alberta Assignments Act, s. 40.*] — Interpleader issue as to validity of a chattel mortgage. Chattel mortgage held valid where executed by president, secretary and managing director, the company being composed of these three persons. In such a case there was no necessity of a shareholders' meeting and the passing of a formal resolution:—*Held*, that the company had power to mortgage. It is not invalid because affidavits of execution and *bona fides* sworn before solicitor for parties to the mortgage.—*Held*, further, the mortgage valid as to one creditor and invalid as to the other, the former having used pressure and agreed to make future advances. *Barthels Shewan & Co., Ltd.* v. *Winnipeg Cigar Co.* (Alta.), 10 W. L. R. 263.

Foreign chattel mortgage — *Removal of goods to Territories — Non-registration—Rights of mortgagee—Bona fide purchaser.*] —A chattel mortgage made in a foreign country upon goods there, which is valid and binding there as against not only the mortgagor, but also subsequent mortgagee and purchasers, is valid and binding to the same extent in the Territories, notwithstanding that the provisions of the Bills of Sale Ordinances of the Territories have not been complied with. Where, therefore, goods then being in a foreign country were comprised in such a mortgage and subsequently removed to the Territories, and there taken by the agent of the mortgagee out of the possession of a *bona fide* purchaser for value without notice to the mortgagor, and the latter sued the agent for conversion: — *Held*, that the plaintiff could not succeed. *Bonin* v. *Robertson*, 2 Terr. L. R. 21, 14 Occ. N. 150.

Growing crops—*Seed grain—Affidavit of bona fides — Landlord and tenant — Distress for rent.*] — 1. Under a lease for a year, dated the 6th April, reserving as rent one-third of the crops, and providing that the lessee should thresh the grain and draw it to the elevator or cars to be stored and shipped as might be agreed between the parties in the name of the lessor, but fixing no time when that was to be done, there is no rent due until the end of the year, and a distress by the landlord in November following is illegal.—2. A distress for rent is unlawful if the tenant is not in possession at the time.—3. A chattel mortgage will not be held void, under s. 12 of the Bills of Sale and Chattel Mortgage Act, R. S. M. 1902, c. 11, because the affidavit of *bona fides* made by an agent stated that he had "a knowledge of all the facts connected with the said mortgage," instead of saying, in the words of the section, that he was "aware of all the circumstances." *Emerson* v. *Bannerman*, 19 S. C. R. 1, and *Rogers* v. *Carroll*, 30 O. R. 328, followed.—4. It is no objection to a mortgage on growing crops to secure the price of seed grain supplied, that the grain had not been sold to the mortgagor by the mortgagee himself, but was purchased by him for the mortgagor from a third party. *Kirchoffer* v. *Clement*, 11 Man. L. R. 460, followed.—5. Under s. 39 of the Act, it is a fatal objection to a mortgage on growing crops or crops to be grown, if it is taken for anything beyond the price of the seed grain furnished and interest thereon. *Meighen* v. *Armstrong*, 16 Man. L. R. 5.

Husband and wife—*Creditors—Fraudulent conveyance—Description of goods—Affidavit—Mistake in recital — After-acquired property.*]—F., the husband of the plaintiff, in 1895 gave to C. a chattel mortgage upon a livery stable stock described as eight horses and harnesses now in livery stable owned by F., six waggons in storehouse, four pungs, coach harness, buffaloes, and robes now in said stable, and upon property which might be substituted for or added to such stock. In March, 1896, F., being indebted to the plaintiff to the extent of $600 and upwards, gave her a chattel mortgage in which the property conveyed was described in almost the same words as in the mortgage to C., but the schedule, after enumerating specifically a number of articles, concluded as follows: "Also all other goods . . . now or hereafter during the continuance of these presents used in connection with the livery stable . . . and all property hereafter acquired therein. In July, 1896, C. assigned his mortgage to the defendant, but the assignment was silent as to after-acquired property. In September, 1896, F. gave a further chattel mortgage to the defendant, covering all the property he had mortgaged to the plaintiff, and shortly afterwards handed him a delivery order authorizing the defendant to take possession of everything connected with the livery stable business, which he did. The plaintiff had also given to her husband $100 with which he was to buy her a phaeton. Without her knowledge, he bought her one on credit for $100, which she accepted. This, though not mentioned in any of the mortgages, was seized by the defendant. The mortgage to the plaintiff was first drawn to secure $500 but before execution it was changed to $600 in every place except the recital, where the word "five" was inadvertently left. In an action for the conversion of the phaeton and all the property conveyed to the plaintiff except such as was covered by the mortgage to C.:—*Held*, 1. That the mortgage was not invalid by reason of its having been made by the husband directly to the wife. 2. That there was no evidence that it was made to delay or hinder creditors. 3. That it contained a sufficient description of the mortgaged property to satisfy the Bills of Sale Act (1893); and that there was no such untrue statement in the affidavit attached to the mortgage as

would invalidate it, the evidence affording a satisfactory explanation of the mistake in the recital. 4. That it was sufficient to cover after-acquired property. 5. That it was not bad under 58 V. c. 6. 6. That the mortgage to C. and the assignment thereof to defendant were insufficient to cover after-acquired property. 7. That the circumstances under which the phaeton buggy was purchased made it the separate property of plaintiff, and as such not liable to seizure by defendant. *Fraser* v. *Macpherson*, 34 N. B. Reps. 417.

Interest — *Bank Act — Pleading — Amendment — Excessive interest voluntarily paid — Acknowledgments — Errors in calculation of interest — Account — Costs and charges of seizure under chattel mortgage — Ordinance respecting distress for rent and extra-judicial seizure — Excessive charges — Claim to treble the amount of the excess — Place of seizure — Judicial district — Conversion — Exercise of power of sale — Negligence — Advertisement — Reference — Costs.*] — Action for an account of proceeds of sale of horses under a chattel mortgage and for damages for negligence in exercising power of sale, etc. Account directed to be taken. Proper costs of sale and distress to be ascertained:—*Held*, that there was negligence in the bringing of the horses to the place of sale, and defendants liable for death of some horses. *McHugh* v. *Union Bank*, 11 W. L. R. 667.

Moneys advanced — *Growing crops included in mortgage — Seizure — Sale two days later.*]—Action to set aside chattel mortgage and for an account. Defendant having seized under his chattel mortgage, sold two days after seizure. The speed was caused by the fact that rent would be due on the day following sale: — *Held*, that the mortgagee standing in a fiduciary character must take all reasonable means to prevent a sacrifice. There should have been at least five days' notice of sale. Defendant offered to take proceeds of sale in full. If not accepted, reference directed. *Wood* v. *Detlor* (1909), 14 O. W. R. 192.

Ownership of goods—Estoppel—Fraudulent intent of true owner—Actual advance by mortgagee—Absence of knowledge. *Lee* v. *Nisbet* (1906), 7 O. W. R. 149.

Printed form — *Blanks not filled in — Construction and effect of investment — Seizure of goods — Sale — Conversion — Authority to seize — Quantity seized — Damages — Measure of general damages — Special damage — Pleading — Solicitor's fee for drawing mortgage.*] — Lien-notes given by the plaintiff to the defendant G., the agent of the defendant company, for the price of goods sold to the plaintiff, were endorsed by G. to the company, and, after they were overdue, the plaintiff executed a document purporting to be a chattel mortgage upon some wheat in shock to secure the amount due upon the notes. The document was a long printed form of chattel mortgage, containing many blanks to be filled in, but only some of the blanks were filled in, namely, those left for the names of the mortgagor and mortgagee, the consideration for executing the document, $312.98, and the property intended to be mortgaged. The form contained what was intended to be a redemption clause, but the amount to be paid or when it was to be paid was not filled in. It appeared from extrinsic evidence that the $312.98 was the amount due upon the notes: —*Held*, that the instrument was a mortgage to secure $312.98, payable on demand, with interest at 5 per cent.—*Held*, also, that, upon the evidence, the Court could not interfere with the finding of the trial Judge that the defendants seized the plaintiff's grain under the mortgage; but that the finding that the defendants agreed to allow the plaintiff to market the grain could not be supported.—*Held*, also, that it was immaterial whether the seizure was legal or illegal; if it was illegal, the measure of damages would be the value of the goods seized, less the interest of the mortgagees therein; if it was legal, the defendants, not having sold the grain at public auction, but by private sale, would be liable to be charged with the highest price obtainable if the defendants had used reasonable and proper care, as prudent persons, to obtain the best price; and the trial Judge having found that they did not use such care, and having charged them with the highest price, the Court would not be justified in interfering with his finding; but the defendants were entitled to charge against that the amount due on their mortgage and what they paid out for carriage, etc., but not more than the amount provided for by C. O. ch. 34.—*Held*, also, that the finding that 506 bushels of wheat were delivered at the elevator, and that the defendants were chargeable therewith, ought not to be disturbed.—*Held*, also, that the allowance of $75 as "general damages" was unwarranted.—*Held*, also, that nothing could be allowed for special damage, as, *e.g.*, that the plaintiff's landlord descended upon him for rent, no such damage being specifically alleged in the statement of claim; and *quære*, whether such damage would not be too remote.—*Held*, also, that the defendants were not, in the circumstances, entitled to charge the plaintiff with a fee paid to a solicitor for drawing the chattel mortgage; and certain other charges should also be disallowed. — Judgment of Maclean, Dist. Ct. J., 13 W. L. R. 682, varied. *Coupland* v. *Paris Plow Co.* (1910), 14 W. L. R. 680.

Registration — *Subsequent purchaser — Removal of goods.*]—For purposes of registration of deeds the North-West Territories is divided into districts, and it is provided by Ordinance that registration of a chattel mortgage, not followed by transfer of possession, shall only have effect in the district in which it is made. It is also provided that if the mortgaged goods are removed into another district, a certified copy of the mortgage shall be filed in the registry office thereof within three weeks from the time of removal, otherwise the mortgage shall be null and void as against subsequent purchasers, etc.:—*Held*, reversing the judgment in appeal, that the "subsequent purchaser" in such case must be one who purchased after the expiration of the 3 weeks from the time of removal, and that, though no copy of the mortgage is filed as provided, it is valid as against a purchase made within such period. *Hulbert* v. *Peterson*, 25 Occ. N. 118, 36 S. C. R. 324.

Removal of goods from one province to another — *Non-registration — Bona fide purchaser for value without notice—Title—Validity of mortgage — Conversion — Detinue — Measure of damages.*]—The owner of goods, having executed a chattel mortgage, which was duly recorded in the proper registration district in the province of Saskatchewan, afterwards fraudulently removed them to the province of Alberta, where he sold them to a *bona fide* purchaser for value without notice of the mortgagee: —*Held*, that such sale conferred no title to the goods as against the chattel mortgage, the mortgage being good as between the parties, and the Bills of Sale Ordinance, which requires a certified copy of the mortgage to be filed in the registration district to which the goods were removed, being inoperative as a law of the province of Saskatchewan, beyond the boundaries of that province. If the mortgage is good according to the law of the *situs* of the goods at the time of execution as between the parties, it is good in every other *situs* to which the goods may be removed, even as against subsequent purchasers and creditors; and if registration is only required by the law of the original *situs* to protect creditors and subsequent purchasers, this means creditors and subsequent purchasers seeking to enforce their claims within the judicial territory of the original *situs;* and, consequently, whether registered in either jurisdiction or not, the mortgage, valid between the parties, is valid to all intents and purposes in any foreign (including other provincial) jurisdiction. *Semble*, that in an action by the mortgagee for a return of the goods and damages for detention, the goods having been returned, the measure of damages is the amount of the interest on the price paid by the defendant for the goods. *Jones* v. *Twohey*, 8 W. L. R. 295, 1 Alta. L. R. 267.

Removal of goods to new district—*Sale within three weeks—Omission to refile mortgage — Subsequent purchaser.*]—Where chattels have been mortgaged in one registration district, a purchaser from the mortgagor within three weeks after their removal to another district requires a good title if the mortgagee omits within the three weeks to refile his mortgage: Scott, J., *dissentiente*. *Peterson* v. *Hulbert*, 6 Terr. L. R. 114. Reversed in *Hulbert* v. *Peterson*, 36 S. C. R. 324.

Renewal—Change of possession—Parent and child—Execution creditor: *Goodyear* v. *Goodyear*, 1 O. W. R. 405.

Renewal — *Statement — Affidavit—Payments—Principal—Interest.*] — The objection taken to the validity of a chattel mortgage was, that the renewals were not sufficient, in the (1) they were not signed by the mortgagee, and (2) were not upon their face sufficiently explicit in regard to the payments made. On the back of each statement was an affidavit, signed by the mortgagee and sworn by him, referring to the statement upon which it was indorsed:—*Held*, following *Barber* v. *Maughan*, 42 U. C. R. 134, that this might be read as part of the statement and being so read shewed the statement to be that of the mortgagee, which was all that the statute required: R. S. O. 1897 c. 148, s. 18. The statement of payments made did not set forth in detail the date and amount of each payment made, but only the total sum paid. It went on to state "that no payments have been made upon the said mortgage;" but it clearly shewed that payment of a certain sum had been made on account of the interest, and no other payments: —*Held*, that the statute had been sufficiently complied with. *Christin* v. *Christin*, 21 Occ. N. 284, 1 O. L. R. 634.

Renewal—*Statement of payments — Repetition.*] — In an interpleader matter between an execution creditor and a chattel mortgagee of the execution debtor, the validity of the renewals of a chattel mortgage was questioned, on the ground that, while the first renewal statement shewed all the payments made during the year and the total amount due, the subsequent renewal statement began with the total amount due in the preceding statement, and did not repeat the payments there set out and credited:—*Held*, sufficient. *Christin* v. *Christin*, 1 O. L. R. 634, followed. *Kerr* v. *Roberts*, 17 Occ. N. 337, overruled. Judgment of MacWatt, Co.J., in the 2nd Division Court, Lambton, 3 O. W. R. 327, affirmed. *Rogers* v. *Marshall*, 24 Occ. N. 172, 7 O. L. R. 291, 3 O. W. R. 327.

Renewal—*Time of filing—Computation of year—Validity—R. S. O. 1897 c. 148, s. 18.*] —In computing the year within which the renewal of a chattel mortgage must be filed under s. 18 of the Bills of Sale and Chattel Mortgage Act, R. S. O. 1897 c. 148, the day on which the mortgage was filed is to be excluded.—Judgment of McMahon, J., 10 O. W. R. 264, affirmed. *McCann Milling Co.* v. *Martin*, 10 O. W. R. 681, 15 O. L. R. 193. Leave to appeal refused, 10 O. W. R. 1053.

Right of mortgagor to possession—Seizure by mortgagee — Damages—Counterclaim — Costs. *Clay* v. *Canada Grocers, Limited*, 3 O. W. R. 850.

Sale of business as a going concern—*Chattel mortgage by new firm covering book debts.*]—V. & C. sold their grocery business, including all their stock in trade and book debts, to H. & B., who shortly afterwards gave a chattel mortgage to E. covering the stock-in-trade of the grocery business, and also all book debts due to H. & B. in the business carried on by them as grocers—*Held*, that the book debts originally due to V. & C. and assigned by them to H. & B. were covered by the chattel mortgage. *Robinson* v. *Empey*, 24 Occ. N. 343, 10 B. C. R. 466.

Sale or exchange of mortgaged property—*Verbal license — Ordinary course of business.*]—The defendant, a farmer, executed a chattel mortgage to one M., whereby he assigned all the goods, chattels, and property mentioned in a schedule, and also any and all the property that might thereafter be bought to keep up the same, in lieu thereof and in addition thereto, either by exchange or purchase. The instrument also contained a proviso that the defendant should remain in possession of the mortgaged property until default, with power to use the same in the ordinary way while so in possession, but with full power, right, and authority to M. to enter and take possession of the pro-

perty in case of default of payment, or on the death of the defendant, or in the event of the seizure of the property at the suit of any creditor, or in the event of the defendant disposing of or attempting to dispose of or make away with said property or of any part thereof without the written consent of M. Included in the property mortgaged was a stallion, which a few months after the execution of the mortgage and before any default on the part of the defendant, but without the written consent of M., he exchanged with the plaintiff for a horse belonging to him. After the exchange the plaintiff, having discovered that the stallion was covered by the mortgage, attempted to avoid the transaction, sending the stallion back to the defendant and demanding the return of his own horse, which the defendant refused to deliver:—*Held*, that, as the mortgage must be taken to contain the whole contract entered into between the defendant and M., the Judge of the Court below was in error in giving any effect to a mere verbal license, which preceded the mortgage and was not in harmony with many of its provisions; and that it was clearly a condition of the mortgage, and the intention of the parties thereto, that the defendant should be allowed to sell or exchange the mortgaged property, provided such sale or exchange was in the ordinary course of the defendant's business, and as whether this exchange had been in the ordinary course of the defendant's business or not was a question of fact which had not been passed upon by the Court below, there should be a new trial in order to have that point determined. *McPherson* v. *Moody*,, 35 N. B. Reps. 51.

Sale under—Injunction against by second mortgagee—Payment—Appropriation of payments. *McDonald* v. *Scearce* (Y.T.), 5 W. L. R. 324.

Sale under power—*Fair sale — Negligence as to animals—Damages—Quantum—Excess—Measure—Bank—Overcharges of interest — Right to surcharge and falsify — Acknowledgments—Estoppel — Deed—Bank Act—Excessive rate of interest—Account—Acquiescence—Voluntary payments — Knowledge—Reduction of rate—Statute of Limitations—Ordinance respecting distress for rent and extra-judicial seizure—Excessive costs—Treble damages—Judicial notice—Seizure by bailiff — Penalty — Discretion — Relief — Terms of mortgage.*]—The plaintiff was a customer of the defendants' bank, and gave the defendants chattel mortgages to secure a large indebtedness. The mortgage being in default, the defendants seized a large number of horses covered by the mortgage, took them to Calgary, and sold them by public auction. The plaintiff alleged that the defendants had been careless and improvident in their method of handling the horses and in conducting the sale, and asked for damages therefor:—*Held*, affirming the judgment of Beck, J., 11 W. L. R. 667, that the sale had been fairly conducted as to length of advertisement and otherwise, but that the defendants had been negligent in bringing 360 horses to Calgary, considering their condition, the time of the year, and the road over which they were driven, and that the defendants were also responsible for the death of 3 of the horses at Calgary by their negligence. —*Held*, however, that the amount at which the damages were assessed by Beck, J. ($2,800) was excessive. Where a mortgagee is guilty of improvidently and negligently conducting a seizure and sale under the powers contained in his mortgage, the proper measure of damages is the difference between the amount realised at the sale and the fair value of the goods sold *at the time and place of seizure*. A reference was directed for the assessment of damages upon that basis.—*Held*, also, affirming the judgment of Beck, J., that the plaintiff should be permitted to surcharge and falsify the accounts of the defendants, it appearing that some important errors were made in calculating the interest chargeable against the plaintiff. The Court should not treat the mortgages or the monthly statements as anything more than stated or settled accounts. The doctrine of estoppel could not be applied against the plaintiff, in respect at least of the monthly statements and acknowledgments, because it was clear that the defendants had in no way altered their position on the faith of the correctness of those statements, or would in any way be prejudiced by the rectification of any errors in calculation of interest. The mortgages being under seal, might operate an estoppel by deed, but that applies only where the action is brought directly on the deed; and a mortgagor is entitled in any case to shew that the sum mentioned in the mortgage does not represent the exact amount of the money advanced or of the indebtedness secured.—*Held*, also, that the charging of a rate of interest in excess of that allowed by the Bank Act could, in the circumstances of this case, amount merely to an important error such as would give the plaintiff leave to surcharge and falsify. In the absence of knowledge that an excessive rate was being charged, the plaintiff could not be said to have paid the illegal rate voluntarily. Up to the 31st December, 1904, the date of the first chattel mortgage, the account should be taken at 7 per cent.; but after that date, as the mortgage contained a definite promise to pay 8 per cent., he knew the rate which the defendants were charging him, and for the period between that date and the 28th May, 1907, when the second mortgage was signed, his acquiescence in the charges made in his accounts and pass books must be taken as amounting to voluntary payments. With respect to the rate chargeable after the 28th May, 1907, the rate of 8 per cent. was illegal, but it should not be reduced to 5, but only to 7 per cent., the maximum rate allowable.—*Held*, also, that the effect of the Statute of Limitations is that, in taking the account, the plaintiff must be limited to a period commencing 6 years prior to the issue of the writ of summons.—*Held*, also, reversing in this respect the judgment of Beck, J., that the plaintiff was entitled to treble damages provided by the Ordinance respecting Distress for Rent and Extra-judicial Seizure, because the defendants retained from the proceeds of the sale, as the costs thereof, sums in excess of those allowed by the Ordinance. The Court will take judicial notice of the limits of the various judicial districts, and the evidence shewed that the animals were within the district of Calgary when seized and also when sold. The defendants made the seizure under the chattel mortgage,

though they acted by an agent or bailiff. Under s. 3 of the Ordinance the Court or Judge had no discretion to refuse to adjudge the penalty, the facts bringing the case within the statute; and sec. 7, s.-s. 2 of the Act of 1907 did not enable the Court to relieve against a penalty or forfeiture imposed by statute.—*Held*, also, that the plaintiff had not, by the terms of the mortgages, contracted himself out of the Ordinance; he was authorised by such terms to retain only such costs and expenses as the law permits. *McHugh* v. *Union Bank* (1910), 14 W. L. R. 642.

Seizure by mortgagee—Sale of goods—*Bona fides*—Right of vendee as against execution creditor of mortgagor—Bills of Sale Act—Actual and continued change of possession. *Munro* v. *Ferguson* (Man.), 6 W. L. R. 755.

Seizure under—Action by mortgagor for conversion and trespass—Sale of mortgaged goods—Business continued as going concern—Payment of rent to save distress—Statement of demand and costs—R. S. O. 1897 c. 75, s. 15—Account — Interest — Costs. *Gormley* v. *Brophy Cains Limited*, 10 O. W. R. 913.

Seizure under—Breach of trust—Damages. *Watts* v. *Sale*, 1 O. W. R. 681, 2 O. W. R. 1020.

Seizure under—Signature of mortgagor—Mistake or fraud—Damages for wrongful seizure—Findings of jury—Claim of mortgagees—Set-off—Costs. *Morin* v. *Valois*, 12 O. W. R. 923.

Seizure under without default—Possession of goods till default—Absence of redemise clause—Collateral security—Covenant to keep up stock—Arrears—Interest—Issue of writ of summons—Condition against selling—Damages: *Stevens* v. *Daly*, 1 O. W. R. 621.

Sufficiency of description of goods mortgaged — *Contemporaneous agreement under seal — Statement of consideration.*] — The property covered by chattel mortgage was described as "all cattle and horses of whatever age and sex branded $\overline{5}$ on the left side and all increase thereof, together with the said brand and branding irons." The defendant, the mortgagee, had owned a number of cattle some of which were branded "M. S." and others $\square$ and others "$\overline{5}$" with one or both of the other brands. All those branded "$\overline{5}$" were sold to the mortgagor:—*Held*, that the description was sufficient for identification, and that no mention of the locality where the cattle were at the time the mortgage was given was necessary. By a contemporaneous agreement under seal, the mortgagor agreed for three years to give his whole time and attention to looking after the horses and cattle, the mortgagee agreeing to allow the mortgagor to sell sufficient to pay running expenses:—*Held*, that the agreement did not affect the correctness of the statement of consideration, which was stated as $3,000, the purchase price of the cattle. *Graveley* v. *Springer*, 3 Terr. L. R. 120.

Time for redemption of goods covered by chattel mortgage extended for three months, on condition that mortgagors pay costs of this motion, $25, $1,000 on 4th December, prox., and $1,000 on 4th January, 1910. If necessary, a new account can be taken and the exact amount ascertained, allowing for storage charges, insurance, etc. *Mitchell* v. *Kowalsky* (1909), 14 O. W. R. 792, 1 O. W. N. 95.

Transfer of ownership of goods — *Possession retained—Rights of creditors — Fraud—Preference — Pressure.*] — The defendant, by an agreement in writing, transferred to the opposant, his creditor, the ownership of his furniture, as security for the opposant's claim. The transfer was made subject to a right on the defendant's part to recover the ownership, on paying the amount of his indebtedness, for which he had given the opposant a demand note. By the contract transferring the effects, it was agreed that the opposant should have the right to take possession of the effects if the note were not paid, and that the effects should be left in the defendant's possession until he made default. The note had not been paid, but some small payments had been made on account, and judgment had been obtained by the opposant on the note. The effects transferred having been seized in the defendant's possession by the plaintiff, a judgment creditor, the opposant claimed them as his property, under the transfer:—*Held*, that where tnere is no evidence of intention to defraud or of simulation, a debtor from whom his creditor demands security, can, for the purpose of furnishing such security, transfer to the creditor the ownership of movable effects, so as to give the latter, without his taking possession of the movables transferred, a good title thereto as against other creditors of such debtor, including even a creditor anterior to the one whose claim was secured by the transfer. *Creed* v. *Haensel*, Q. R. 24 S. C. 178.

Valid agreement to give mortgage—*Mortgage subsequently given—Right to rely on agreement.*]—Where an agreement to give a chattel mortgage is duly made and registered under R. S. O. c. 148, s. 11, and subsequently a mortgage is made and registered, the giving of such mortgage, whereby the legal estate becomes vested in the mortgagee, does not revest in the debtor the equitable title which the mortgagee had by virtue of the agreement, but it continues to exist as before, and the mortgagee is enabled to rely on it where the legal mortgage is ineffectual for any purpose. Judgment of Boyd, C., 2 O. L. R. 128, 21 Occ. N. 378, affirmed. *Fisher* v. *Bradshaw*, 22 Occ. N. 281, 4 O. L. R. 162, 1 O. W. R. 282.

Validity—Bills of Sale Ordinance—Advances to mortgagor to enable him to carry on business—Period of liability—Computation of years—Agreement for advances—Recital — Estoppel — Company — Affidavit of *bona fides* — Vice-president — Agent — Extent of liability—Price of goods supplied —Promissory notes. *Newlands* v. *Higgins* (Alta.), 7 W. L. R. 59.

Validity — *Bills of Sale Ordinance — Future advances — Period of liability — Computation of years — Agreement —*

Recital — Estoppel — Affidavit of bona fides — Vice-president of mortgagee company — Agent — Consideration.]—It is not essential to the validity of a chattel mortgage to secure future advances that such advances should be made to enable the mortgagor to enter into business as well as to carry it on. —*Goulding* v. *Deeming*, 15 O. R. 201, followed. A mortgage dated the 8th February, 1907, whereby the time fixed for repayment is the 8th February, 1909, does not extend the liability beyond two years from its date. Where the affidavit of *bona fides* is made by an officer of an incorporated company, the company is like an individual, bound by the recitals in the mortgage, *e.g.*, recital of an agreement in writing for future advances.— The affidavit of *bona fides*, where the mortgagee is an incorporated company, may be made by the company's vice-president, who need not be described as agent. *Newlands* v. *Higgins, Re Great West Saddlery Co.*, 7 W. L. R. 59, 1 Alta. L. R. 18.

Validity — *Form—Witness—Affidavit of Execution — Irregularities — Interpleader—Amendment of affidavit.*]—The Bills of Sale Ordinance, C. O. 1898, c. 43, s. 7, provides that "except, etc., a mortgage . . . may be made in accordance with form A. . . . Form A., in the place intended for the witnesses' signature, has the words, "Add name, address, and occupation of witness." No form of affidavit of execution is given:—*Held*, that neither (1) the omission to state the address and occupation of the witness after his signature, nor (2) the omission of the deponent's name and occupation in the body of the affidavit of execution, which was signed by him, nor (3) the omission to state in the *jurat* a more definite place than "the North-West Territories," rendered the registration of the mortgage invalid. The claimant in interpleader was allowed an adjournment to amend the affidavit supporting his claim. *Commercial Bank of Manitoba* v. *Fehrenbach*, 4 Terr. L. R. 335.

Variance in amount in affidavit of bona fides—*Guarantee by company signed by president.*]—A company sold a branch of their business taking a chattel mortgage for $5,066.74 as security. By mistake the affidavit of *bona fides* stated that the mortgagor was justly indebted to the company in the sum of $5,000:— *Held*, that the mortgage was a valid security for $5,000. *Mader* v. *McKinnon* (1892), 21 S. C. R. at p. 652, followed: *Midland Loan* v. *Cowieson* (1891), 20 O. R. 585, distinguished. In order that the mortgagor might obtain an advance from a bank, the president of the company signed a guarantee in this form, "A. E. Thomas, Ltd.," and under that name "A. E. Thomas, Pres.":—*Held*, that the guarantee was binding on the company. The mortgage covered the stock in trade, fixtures and all book debts. The company did not notify the debtors of the assignment of the debts as required by the Judicature Act, s. 58 (5). The mortgagor later assigned the book debts to the bank as collateral security for the advance: —*Held*, that the bank had taken their assignment without notice of the company's claim and having collected the debts were entitled to retain the proceeds. The mortgagor also gave the bank a document purporting to be a further security, under s. 88 of the Bank Act, covering 230 cases of matches, and the bank took possession of the matches: —*Held*, that as the matches were covered by the chattel mortgage it was not necessary to consider whether the document claimed by the bank was of any value in view of s. 90 of that Act. Judgment given bank against the company for the amount of the guarantee. Judgment given the company against the bank for conversion of the matches, the bank to have right to retain the matches on payment to the company the amount of their mortgage. Reference to the Master in Ordinary to take accounts. Costs and further directions to be dealt with after the Master's report. *Thomas Ltd.* v. *Standard Bank; Standard Bank* v. *Thomas Ltd.* (1910), 15 O. W. R. 188, 1 O. W. N. 379. Affirmed 1 O. W. N. 548.

Voluntary handing over of chattels to mortgagee—Creditor—Sale of chattels — Application of proceeds in payment of mortgage and unsecured claim — Attack by another creditor — Fraudulent transfer of goods—Evidence—Surplus. *Robinson* v. *Wilson*, 12 O. W. R. 198, 763.

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3. Lease of Chattels.

Reduction in rent *in case the lessee does not use the machines leased—Lessor's remedy.*]—In the present case, the judgment rendered on a first action which was taken by the plaintiff against the defendants with the object, even by means of an injunction, of forcing them to use certain machines leased to them by the plaintiff, and to have them ordered to fulfil their obligations as lessees of such machines, the whole in conformity with the leases existing between the parties, and also with the object of recovering damages suffered to that date by reason of the breach on the part of the defendants of their obligations under such leases, cannot be considered as *res judicata* in so far as the present action is concerned, which was taken subsequently, by the same plaintiff, and wherein is claimed from the same lessees the rent or royalty agreed upon and stipulated in the same leases respecting the said machines.—The following clause is contained in the leases entered into between the plaintiff and defendants: "The lessee guarantees that the rent or royalty herein provided (less all abatements) shall amount in each calendar year ending December 31st, to, at least, fifteen dollars for each calendar month and at the end of each such calendar year, the lessee shall pay to the lessor the amount, if any, by which the rent or royalty paid for said year is less than such guaranteed rent or royalty, provided, however, if, in any such calendar year, the factory of the lessee remains wholly idle for any entire month, then, the amount of rent or royalty guaranteed for that year shall be reduced by one-twelfth for each such month that the factory thus remains wholly idle." — *Held*, the foregoing clause must be understood to refer to an involuntary and temporary idleness and not to a voluntary and permanent one, in view of the fact that a contrary interpretation would allow the lessees to disregard their obligations under the leases.

United Shoe Machinery Co. v. *Brunet* (1910), 16 R. de J. 467. See report of first action in C. R. [1909] A. C. 148; [1909] A. C. 330; 78 L. J. P. C. 101, 100 L. T. R. 579, 17 Que. K. B. 435.

See BANKRUPTCY AND INSOLVENCY—BILLS AND NOTES—COMPANY — CRIMINAL LAW — EXECUTION — MORTGAGE—SALE OF GOODS—SERVICE OUT OF JURISDICTION.

CHEESE AND BUTTER COMPANIES ACT.

See ARBITRATION AND AWARD.

CHEMINS DE FER.

See RAILWAYS.

CHEQUES.

See BANKS AND BANKING—BILLS OF EXCHANGE AND PROMISSORY NOTES — TRUSTS AND TRUSTEES — VENDOR AND PURCHASER.

CHICKENS.

See ANIMALS.

CHILD STEALING.

See CRIMINAL LAW—EXTRADITION.

CHINESE IMMIGRATION.

See ALIENS.

CHOSE IN ACTION—ASSIGNMENT OF.

Action by assignee—Claim for damages by defendant—Set-off — Counterclaim—Consideration—Notice. *Lillie* v. *Thomas* (N.W. T.), 1 W. L. R. 467.

Action by assignee — Failure to give notice to defendant—Pleading—Evidence—Amendment—Statute of Limitations—Partnership. *Reynolds* v. *McPhalen*, 7 W. L. R. 380.

Agreement to purchase logs—Assignment thereof by vendor to creditor—Advances by purchaser to vendor thereafter. *Union Bank* v. *Dickie*, 1 E. L. R. 264.

Assignment of—*Absence of notice—Assignment made in pursuance of agreement with debtors.*]—D. being financially embarrassed, an arrangement was made by him with the plaintiff, representing his creditors, and the defendants, for a lease of D.'s business premises to the defendants, and an assignment of the rents accruing under the lease to the plaintiff as trustee for D.'s creditors. This arrangement was carried out, and the lease and assignment executed at a meeting at which D., the plaintiff, and the defendants were all present:—*Held*, that the lease and assignment formed one entire agreement, to which the defendants were parties; and therefore, in an action by the plaintiff for rent due, it was not necessary to shew notice of the assignment to the defendants, in pursuance of the provisions of the statute regarding notice of assignments of choses in action. *Lavell* v. *McDonald* (1910), 15 W. L. R. 243.

Assignment of — *Beneficial interest — Action by assignee—Interest of debtor.*]—The plaintiffs sued to recover for goods sold by them and P. & Co. and C. & Co., the claims of the latter firms having been assigned to the plaintiffs to avoid bringing two other actions. The defence raised the objection that the claims assigned to the plaintiffs were merely held in trust by them and that the plaintiffs were not beneficially entitled thereto or interested therein. 2. That the plaintiffs, being a corporation under the Joint Stock Companies Act, were not empowered to become assignees and could not sue for claims other than their own: — *Held*, that under the Assignments Act, R. S. M. c. 7, s. 3, the assignee of debts and choses in action may bring an action thereon in his own name, although they have been transferred only for the purpose of joining a number of claims in one suit, and the assignee has no beneficial interest in them. 2. That the defendant had no interest whatever in the assignments, and was in no way prejudiced by them; he was a mere stranger to the assignments, and not competent to raise the point in question. *Stobart* v. *Forbes*, 20 Occ. N. 446.

Assignment of — *Consideration — Stifling prosecution.*]—An assignment of a chose in action made to the complainant for the purpose of causing the withdrawal of a criminal charge against a relative of the assignor is void, although valuable consideration may be given for a part of the subject of the assignment. *Frigon* v. *Cossette*, Q. R. 16 S. C. 340.

Assignment of—*Partnership—Authority of partner—Pleading—Objection—Costs.*] — The plaintiff sued as assignee of a firm, creditors of the defendant. The transfer was signed by S. M. L., and a copy of it sent to the defendant. The defendant pleaded, denying, among other things, the validity of the transfer. In reply, the plaintiff alleged that S. M. L. was one of the members of the firm and had all the rights and authorization of the firm:—*Held*, that this reply was good in law, but the matter of it should have been set up in the declaration. The objection of the defendant should have been taken by way of exception to the form, and not by demurrer. The demurrer was disposed of by ordering *preuve avant faire droit*, reserving costs. *D'Arcy* v. *Hughes*, 2 Que. P. R. 492.

Assignment of — *Right of action.*]—A person to whom debts and choses in action

have been assigned by an instrument in writing may, under the Assignments Act, R. S. M. c. 1, s. 3, bring an action thereon in his own name against the debtor, although they have been transferred to him only for the purpose of joining a number of claims in one suit, and he has no beneficial interest in them. *Wood* v. *McAlpine*, 1 A. R. 234, distinguished. *Mussen* v. *Great North-West Central Rw. Co.*, 19 Occ. N. 117, 285, 12 Man. L. R. 574

Assignment of book debts to creditor—*No notice to debtors—Validity of — Cheques — Transfer.*]—The plaintiffs were assignees of certain book debts, notice of the assignment of which was not given to the debtors. Subsequently the debts were paid by cheques to the assignor, who was collecting them for the plaintiffs under an arrangement with them. The defendants, who were also creditors of the assignor, and who had notice of the assignment, obtained possession of the cheques from a clerk of the assignor: —*Held*, that the plaintiffs were entitled to recover the amount of the cheques, as absence of notice to the debtors under s.-s. 5 of s. 58 of the Judicature Act could not be taken advantage of by the defendants, after the debtors had paid the agent of the assignees. *Eby-Blain Co.* v. *Montreal Packing Co.*, 12 O. W. R. 578, 912, 17 O. L. R. 292.

Assignment of claims of several to one—*Action in name of one for payment of all—Addition of parties—Amendment.*]—The plaintiff, a contractor in Canada, and two contractors in the United States, had performed some work on a theatre in Canada, for which the owner refused to pay. The American contractors, at the instance of their solicitors, but without the knowledge of the plaintiff, assigned all their claims to him absolutely, with a view of collecting the amounts due in the name of the plaintiff. This was communicated to the plaintiff, who assented to the arrangement, and he was indemnified against costs and guaranteed payment of his claim:—*Held*, on objection taken at the trial, that this was not an "absolute assignment" within s. 58, s.-s. (5), of the Judicature Act, R. S. O. 1897, c. 51, but leave to amend by adding the American contractors as plaintiffs was granted. *Mills* v. *Small*, 9 O. W. R. 421, 14 O. L. R. 105.

Assignment of debt—*Notice to debtor Right of assignee to sue—Costs.*]—The service of a notice of the sale or the assignment of a specialty debt is not an essential condition precedent to the bringing of an action to recover the debt by the assignee against the debtor. The notice which brings to the latter knowledge of the assignment and proof of it (in this case by the filing of it) is sufficient to give the plaintiff a useful possession of the debt as against the debtor at the time of the hearing on the merits. The Court is then in a position to pass upon the merits of the controversy, and may take into consideration the conduct of the parties in adjudicating upon the question of costs. *Brunel* v. *Cloutier*, Q. R. 33 S. C. 408.

Assignment of debt as security for loan—*Accelerated payment of debt to assignee—Liability to account—Time.*] — A person to whom a debt payable by deferred instalments is assigned as security for a loan made to the assignor, on condition of reassignment upon repayment of the loan within a time fixed, who obtains within the time so fixed and by acceleration, payment of the amount of the debt assigned, is liable to account to the assignor and to repay him the difference between the loan and the amount received, even after the expiration of the time within which the loan was repayable. *Hus* v. *Lemaire*, Q. R. 33 S. C. 266.

Assignment of future debts—Validity —Contract—Earnings by use of machinery sold—Machinery rented to third person — Notice—Interpleader — Costs. *American-Abell Engine and Thresher Co.* v. *Hay*, 9 W. L. R. 594.

Assignment of informal orders for payment of money—*Acceptance—Authority of agent—Equitable assignment—Estoppel.*]—The informal orders for payment of moneys in this case were held to be equitable assignments. *Handley* v. *Crow's Nest*, 11 W. L. R. 210.

Assignment of legacy — Rights of assignee for creditors of legatee—Interpleader. *Lamb* v. *Secord*, 2 O. W. R. 43.

Assignment of lien note.]—Action on a note which was held to be a lien note—not a promissory note:—*Held*, further, that a letter from the plaintiffs' solicitor demanding payment was a sufficient notice of assignment under the Judicature Act C. O. (1898), c. 21, s. 10 (5), and (1907), c. 5, s. 7 (3). In second action plaintiffs given damages, the horse in question having been misrepresented. *Imperial Bank* v. *Georges*, *Georges* v. *Kidd*, 12 W. L. R. 398.

Claim against estate—Notice to executors—Judgment debtor—Unjust preference—Attachment of same fund by judgment creditor—Issue as to validity of assignment—Assignment of portion of fund. *Fairbanks* v. *Saunders*, 9 O. W. R. 184.

Company—Resolution of directors assigning indebtedness—Boom company—Claim for driving logs—Necessity of alleging delivery in boom limits. *Lynch* v. *William Richards & Co.*, 2 E. L. R. 141.

Company—*Resolution of directors — Assignment by—Pleading—C. S. N. B. 1903, c. 111, s. 155.*]—In an action for tolls for driving lumber by the assignee of a river driving company, an allegation in the declaration that the company did, by resolution of its board of directors, recorded upon the minutes of the company, containing apt words in that behalf, assign and transfer to the plaintiff a certain debt and chose in action arising therefrom, is not a sufficient allegation of the assignment to satisfy the requirements of s. 167 of c. 111, C. S. N. B. 1903, which provides that "every debt and any chose in action arising out of contract shall be assignable at law by any form of writing which contains apt words in that behalf," and is bad on demurrer. *Lynch* v. *William Richards Co.*, 2 E. L. R. 141, 37 N. B. R. 549.

Delegation of payment—*Acceptance — Privity—Revocation.*]—A delegation of payment, once accepted by the delegate, establishes a privity between him and the debtor. The latter cannot set up a pretended revocation of the delegation by the person delegating. *Hood* v. *Bank of Ottawa*, Q. R. 43 S. C. 506.

Equitable assignment — Consideration —Notice—Appropriation of fund to specific purpose. *Hunter* v. *Wilkinson Plough Co.*, 2 O. W. R. 1029.

Equitable assignment — *Form of — Solicitor.*]—No writing or particular form of words is necessary to constitute an equitable assignment; an intention to pass the beneficial interest being all that is required. *Hughes* v. *Chambers*, 22 Occ. N. 333, 14 Man. L. R. 163, approved. A client who was indebted to a solicitor for costs incurred, instructed him that, on the receipt by him of certain moneys which he was to collect for the client, he was to pay certain obligations, including his own bill of costs:—*Held*, that this constituted a good equitable assignment. *Re McRae Estate*, 6 O. L. R. 238, 2 O. W. R. 220, 268, 409, 618.

Equitable assignment—Fund in hands of chattel mortgagees — Written order by mortgagor—Mistake as to balance due—Assignment by mortgagors—Rival claimants of fund—Interpleader application—Dismissal — Subsequent interpleader action—Disposal of fund—Costs. *Elgie* v. *Edgar*, 8 O. W. R. 944.

Equitable assignment — Oral promise to repay overdraft at bank—Specified source. *Ray* v. *Oliver*, 2 O. W. R. 988.

Equitable assignment—*Order—Specific fund.*]—The Dominion Government was indebted to B. for transport services rendered during the N.-W. Rebellion. On the 25th July, W., a Government transport officer, notified B. by letter to put in his account, certified, to the H. B. Co., Winnipeg, "where it will be paid."—B. being indebted to the plaintiffs, wired them on the 1st August: "Will send order on transport account, payable in Winnipeg." B. also wrote to the plaintiffs 4th August, enclosing a copy of W.'s letter, and an order reading: "4th August. To the H. B. Co., Winnipeg. Please pay Messrs. G. F. & J. Galt or order amount of my account."—This order was presented to the company, but payment was refused for the reason assigned that the Government had stopped payment on transport accounts. —Subsequently B. made a general assignment for the benefit of his creditors to the defendant, to whom the Government eventually paid the amount of B.'s claim. The plaintiff sought to recover the amount from the defendant, as money had and received to their use:—*Held*, that the order *per se* did not constitute an equitable assignment:—*Held*, McGuire, J., dissenting, that the order in conjunction with the other documents, could not operate as an equitable assignment because the evidence did not shew that the company either were debtors to B. or held a specific fund to which he was entitled. *Galt* v. *Smith*, 1 Terr. L. R. 129.

Income of fund—Trust agreement or settlement—Construction—Payment of debt Subrogation—Priorities—Power of attorney —Revocation—Equities. *Re Blake and Perley and Toronto General Trusts Corporation*, 11 O. W. R. 841, 972.

Insurance moneys—Various assignments —Re-assignment—Notice — Distribution of fund—Bank — Trustee — Equities — Lien —Interest—Costs. *Hall* v. *Queen Insurance Co.*, 5 E. L. R. 468.

Litigious rights — *Offers—Contract — Conditions — Action by contractor before completion of work.*] — A defendant may plead at the same time the nullity of the obligation invoked against him and the fact that it constitutes a litigious right. 2. Offers made on condition that the party to whom they are made gives a quittance upon receipt of the sum offered, are legal offers. 3. If in a contract for the performance of work it is stipulated that the contractor will be paid in the course of the work to the extent of 75 per cent. of the value of the work done as certified by the architect charged with the superintendence of the work, and the balance 30 days after completion, such contractor cannot, without having finished the work, sue for such balance, even where he offers to deduct the cost of the work remaining to be done. 4. The smallness of the price paid for an assignment of a debt is a circumstance which raises a presumption that the claim is a litigious one. 5. The litigious character which a claim has at the time of its first transfer remains attached to it if it is again transferred by the first transferee. *Crevier* v. *Evans*, Q. R. 21 S. C. 309.

Money order—*Indorsement of—Parol assignment — Interpleader.*]— The defendant under contract to build for one W., purchased the materials from the plaintiffs, who subsequently got judgment against him, and who garnished the moneys due from W. to the defendant under the contract. Moneys due the contractor were to be paid on the certificate of the architect. Before the garnishee proceedings the defendant had accepted the following order drawn upon him by a firm to whom he was indebted on a sub-contract: "Please pay to Champion & White the sum of $270, and charge the same to my account for plastering Place Block, Hastings street, W., in full to date;" upon which order the defendant indorsed a memorandum addressed to the architect as follows: "Please pay that order and charge to my account on contract for Robert Walker block on Hastings street, city;"— *Held*, in interpleader, that, apart from the order, there was a parol assignment specifically appropriating to the assignees the sum in question of the moneys to arise out of the contract. *British Columbia Mills Lumber and Trading Co.* v. *Mitchell*, 21 Occ. N. 363, 8 B. C. R. 71.

Money payable in "respect of the contract"—*Damages for interference with the work—Attachment of debts.*] — *Held*, affirming the decision of Street, J., 23 Occ. N. 334, 6 O. L. R. 428, 1 O. W. R. 138, 358, that the assignment to the claimants of the moneys to become due and payable "in respect of a certain contract" for municipal drainage work, included the damages awarded

to the contractor by the judgment in *Bourque* v. *City of Ottawa*, 23 Occ. N. 263, 6 O. L. R. 287, and therefore these moneys were not attachable by a judgment creditor of the contractor. *Graham* v. *Bourque*, 24 Occ. N. 54, 6 O. L. R. 700, 2 O. W. R. 927, 1182.

Moneys due from insurance company —*Bill of exchange drawn on company—Oral agreement—Notice—Equitable assignment — Moneys payable in futuro.*]—M., the owner of a ship, being indebted to the plaintiff, became entitled to receive from an insurance company a sum of money. On being pressed for payment of the debt due to the plaintiff, M. intimated that all he could give was the insurance money on the ship, and, being then in Boston, he gave the plaintiff a draft dated the 6th January, 1883, on the insurance company. Notice of this, as being an assignment of the insurance money, was given to the insurance company on the 27th January, 1883. Afterwards M. executed a formal assignment of the policy and of the other property to the defendant B., another creditor. M., at or before the time of giving this assignment, informed B. that he intended the plaintiff to be paid out of the insurance money:— *Held*, that the whole transaction between the parties—the oral agreement between M. and plaintiff, and the notice of it to the insurance company and to B.—made the case not a case of a mere bill of exchange as an ordinary mercantile transaction, but constituted a valid equitable assignment, which the bill of exchange was given to effectuate:— *Held*, also, that the fact that the insurance money was not payable at the time of this assignment could not affect the right of the assignee. *Wolfe* v. *Hart*, 40 N. S. R. 17.

Moneys due under a contract — *Assignment to secure advances—Equitable assignment—Notice.*]—A firm of contractors having a contract with a town corporation and desiring advances from a bank, assigned "all or any money or moneys due or which may become due from the corporation of the town;" and thereafter the cheques for all moneys coming to the contractors, payable to their order, were handed to the bank. The contractors subsequently executed another instrument as follows: "We hereby, for and in consideration of advances heretofore made . . . assign, transfer, and make over to" (another branch of the same bank) "as a general and continuing collateral security, balance of the account" against the town corporation. It was admitted that the bank knew that there was but one contract upon which the contractors would be entitled to receive money from the town corporation, and that the assignments were simply taken as security for the advances made or to be made to the contractors:—*Held*, that the assignments to the bank were good equitable assignments, and that no notice of them to the town corporation was necessary. *Sovereign Bank* v. *International Portland Cement Co.*, 10 O. W. R. 161, 14 O. L. R. 511.

Non-acceptance—*Action by assignor.*]—A creditor who assignes a debt due him to a creditor of his own, does not thereby lose his right of action against his debtor, so long as his creditor has not accepted the assignment. *Legault* v. *Désaulniers*, 5 Que. P. R. 444.

Notice—*Cause of action.*]—Where a debt has been assigned by way of mortgage, but no notice in writing of the assignment has been given to the debtor, the cause of action still remains in the assignor. *Okell* v. *Dickson*, 9 B. C. R. 151.

Notice—*Knowledge—Notice of action.*]—1. A sale or transfer of a debt does not invest the transferee or purchaser with a right of action against the debtor, unless the transfer has been signified to him. 2. The necessity for such signification is not removed by proof of the debtor's knowledge of such transfer. 3. Signification of the action is insufficient and does not take the place of the signification to which the debtor is entitled. *Maple Leaf Rubber Co.* v. *Brodie*, Q. R. 18 S. C. 352.

Notice—*Notary—Notice of action.*]—It is not necessary that notice of the transfer of a debt should be given by the instrumentality of a notary. 2. The service upon the debtor of process in an action brought in the name of the assignee, claiming payment of the debt, is a sufficient notice of the transfer. Judgment in Q. R. 11 K. B. 251, reversed. *Bank of Toronto* v. *St. Lawrence Fire Ins. Co.*, Q. R. 12 K. B. 556, [1903] A. C. 59.

Notice—*Service—Notary.*] — It is not necessary that service of a notice of a transfer of a debt should be made through the instrumentality of a notary. *Bayard* v. *Drouin*, Q. R. 22 S. C. 420.

Notice — *Sufficiency — Notarial Act — Debtor—"Third person."*] — Under Arts. 1570 and 1571 of the Civil Code of Lower Canada, signification to the debtor of the act of sale of his debt need not be by a notarial act. *Quære*, whether the debtor is a "third person," within the meaning of the latter article, against whom signification was necessary in order to perfect possession. *Murphy* v. *Bury*, 24 S. C. R. 668, doubted. The institution of an action against the debtor is of itself a sufficient signification of the transfer of the debt. Judgment of the Court of King's Bench, Quebec, affirming judgment in Q. R. 21 S. C. 251, reversed. *Bank of Toronto* v. *St. Lawrence Fire Ins. Co.*, [1903] A. C. 59.

Notice of transfer of debt—*Necessity for—Action—Service of process.*]—A transferee of a debt cannot sue his transferor's debtor for the recovery of the same without first serving a copy of the transfer on the debtor, or, at least, serving a copy thereof on the defendant, with the action. Service of process in the action alone is not sufficient notice of the transfer, and is not a sufficient compliance with the law. *Karn (D. W.) C.* v. *Lough*, Q. R. 26 S. C. 64.

Notice to debtor — *Judicature Act — Sufficiency of notice.*]—H., to whom the defendants owed $184.93, being $124.80 for oak lumber, and $60.13 for basswood lumber, assigned his claim to the plaintiff. The only notice which the plaintiff gave the defendants of this assignment stated that he had an order from H. for the amount due in respect to a purchase of oak lumber bought by the defendants' agent. At the same time an account of H.'s against the defendants in the

matter went to shew that, as above stated, only $124.80 was due for oak lumber, while the balance, $60.13, was for basswood lumber. The plaintiff drew on the defendants for the amount, and the defendants refused to accept the draft, on the ground that they had no order from H. to pay the $184.93. Thereupon the present action was brought:—*Held*, that, though there was sufficient to put the defendants upon inquiry in the notice they received, as to an assignment to the plaintiff of the money due them to H., yet it was not sufficiently clear and express to entitle the plaintiff to sue, under the section of the Judicature Act relating to assignments of choses in action, being ambiguous enough to justify them in asking the plaintiff whether the assignment covered the oak lumber only, or the basswood as well as the oak. The statute requires the notice to be express notice in writing, and there should be nothing equivocal about it, nothing to put the debtor in doubt whether the whole debt or only a part of it has been assigned. The notice here fell short of this requirement. *McMillan* v. *Orillia Export Lumber Co.*, 23 Occ. N. 244, 6 O. L. R. 126, 2 O. W. R. 529.

Order for payment of money—*Equitable* assignment — Existence of fund. *Kelly* v. *Wilson*, 2 O. W. R. 508.

Order for payment of money—*Equitable assignment of fund—Estoppel.*] — The defendant had in his hands $1,307.67 belonging to M., being the proceeds of the sale of a mining property. The plaintiff claimed all this money, and presented to the defendant a document which he said was an order for the whole of the fund. There was consideration for the order. The defendant paid the plaintiff $209.67 on the day of the presentation of the order, made an entry in his book of this payment on the order, and gave the plaintiff to understand that the balance of the amount of the order would be paid him on the following Monday. Three days after the entry in his book, he was advised by M. that the plaintiff had an order:—*Held*, that the document being conditional was not a bill of exchange, and that the transaction constituted an equitable assignment of the fund coming from the mining property, to the extent expressed in the order.—Doctrine of estoppel applicable. *McDonald* v. *McDonald*, 40 N. S. R. 71.

Order for payment of money—*Validity as assignment—Signature of assignor—Assignment of undefined portion of future debt—Previous assignment — Priority—Notice—Interpleader.*]—A signature inserted in such a manner as to govern the whole instrument is a sufficient signature.—2. Under the provisions of C. O. 1898, c. 41, an assignment of an undefined portion of a future debt is valid.—3. As between two claimants under assignments of different dates, where the fund has not been paid over by the stakeholder, that assignment which is first in point of time has priority, notwithstanding that the last assignee has first given notice of the assignment. *Re Miller and American-Abell Engine and Thresher Co. and Webster*, 7 W. L. R. 839; *In re Miller* (A. B.), 1 Sask. L. R. 91.

Power of attorney—*Death of grantor—Revocation.*]—Pending a suit upon a mortgage for foreclosure and sale of the mortgaged premises, the mortgagor executed and delivered a writing in favour of a creditor authorising him to collect, recover, and receive, and apply on account of his debt, any surplus from the sale, and declaring that the power might be exercised in the name of the grantor's heirs, executors, and administrators, and should not be revoked by his death. The sale resulted in a surplus. Before the sale the mortgagor died:—*Held*, that the writing was not an equitable assignment, but a power of attorney revocable by the grantor's death. *Ex p. Welch—Chapman* v. *Gilfillan*, 21 Occ. N. 96, 2 N. B. Eq. Reps. 129.

Requirements—*Intention.*] — To constitute an equitable assignment of a chose in action neither writing nor any particular form of words is required, but any words or acts from which it is to be inferred that there was an intention to pass the beneficial interest are sufficient. *Hughes* v. *Chambers*, 22 Occ. N. 333, 14 Man. L. R. 163.

Right of action—*Parties—Prête-nom.*] —*Held*, affirming the judgment in Q. R. 24 S. C. 119, that where a fraud is not alleged, the transferee of a debt, under a transfer duly served upon the debtor, is entitled to sue for the recovery of such debt in his own name, although, in fact, the claim was transferred to him for collection only. *Deserres* v. *Dastous*, Q. R. 24 S. C. 119.

Right of assignee to sue—Claim for price of goods sold—Evidence—Inferences—Invoices — Credits — Foreign commission—Status of commissioner. *Miller* v. *Williams* (Y.T.), 3 W. L. R. 264.

Right to sue in name of assignor—*Acceptance of assignee by debtor — Novation.*]—The plaintiffs had transferred to another loan company their claim against the defendant. Subsequently the defendant accepted the transferees as his creditors, and by agreement became their debtor:—*Held*, that, in the circumstances, the transferees had no right of action in the name of their transferors against the defendant, although the deed of transfer, to which the defendant was not a party, authorised the transferees to use the name of the transferors; the transferees must bring the action in their own name. *Montreal Loan and Investment Co.* v. *Plourde*, O. R. 23 S. C. 399.

Salary of city solicitor—Agreement—Repudiation—Action—Notice to corporation—Service on treasurer—Public policy—Public officer—Equitable assignment — Parties. *Graham* v. *McVeity*, 5 O. W. R. 395, 521.

Sale of goods by partnership—*Subsequent incorporation — Delivery by incorporated company—Necessity for signification of transfer.*]—Where goods are sold by an unincorporated commercial firm, representing the succession of a trader deceased, and this firm, before delivery of the goods, becomes an incorporated company, and as such carries out the contract of sale by making delivery of the goods, signification of the transfer from the firm to the company is not necessary to entitle the company to bring suit against the

purchaser for the amount of the debt. Intention to effect novation is not apparent from the fact that the note of a third party was accepted on account of the debt, for which note a receipt was given in these terms: "Received from J. V. (the debtor) the note of M. S. & Sons for $160 at 30 days, on account of pony and buzz planer;" and in the event of the note not being paid at maturity the creditor retains his recourse against the debtor for the debt. *Cowan* v. *Vezina*, Q. R. 26 S. C. 7.

Setting off claim in damages against assignor—*Pleading.*]— In an action by an assignee of a chose in action, the defendant may set up by way of defence a claim sounding in damages, if flowing out of and inseparably connected with the transaction giving rise to the subject of the assignment.—*Government of Newfoundland* v. *Newfoundland Rw. Co.*, 13 App. Cas. 199, followed. *Lillie* v. *Thomas*, 1 W. L. R. 467, 6 Terr. L. R. 263.

Trading corporation — *Competency as trustee—Objection by debtor.*]— A trading corporation, created by letters patent under the Manitoba Joint Stock Companies Act, has power to take an assignment of a chose in action and hold and collect it by suit for the benefit of the assignor. *In re Rockwood, etc., Agricultural Society*, 12 Man. L. R. 655. *Regina* v. *Reed*, 5 Q. B. D. 483, and *Ashbury Railway Carriage Co.* v. *Riche*, L. R. 7 H. L. 653, distinguished. A debtor who has no interest in an assignment of the claim against him, and is in no way prejudiced by it, cannot raise any objection to the competency of the assignee to take the assignment and to sue upon the claim. *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511, followed. *Stobart* v. *Forbes*, 20 Occ. N. 446, 13 Man. L. R. 184.

Transfer of hypothecary claim — *Signification—Acceptance — Tender by personal debtor.*]— When the transfer of an hypothecary claim has been duly registered, and signification of it has been made, with delivery of a copy bearing a certificate of its registration to the possessor (*détenteur*) of the hypothecated property, a tender by the personal debtor to the transferee of a part of the claim as the balance due is a sufficient acceptance by such personal debtor of the transfer under Art. 1571, C. C., and relieves the transferee from the obligation to serve the transfer upon him. *Daoust* v. *Daoust*, Q. R. 28 S. C. 356.

Transfer pendente lite—*Action—Parties.*]—Where the plaintiff has transferred his debt after issue joined, he may, nevertheless, continue the action and obtain judgment in his own name. *Larivière* v. *Town of Richmond*, Q. R. 21 S. C. 37.

Validity—Agreement — Cheque — Attachment of debts—Issue. *Brown* v. *Thomas* (Man.), 5 W. L. R. 332.

Validity—*Assignee not named—Evidence to supply omissions.*]—By an informal instrument in writing an insolvent debtor professed to assign all his interest in certain specified property and "all moneys due to me from any source whatever," but did not in the operative part of the instrument name the assignee, who was indicated only by these words at the end of the document: "And I hereby appoint the said G. D. B. my irrevocable attorney . . . to receive any and all moneys owing to me from any source whatever." G. D. B. was the agent of the plaintiffs to whom the insolvent was indebted and the insolvent sent the assignment to G. D. B. in an unsigned letter in his own handwriting, in which he wrote, "I have made an assignment of everything to you." A debt due to the insolvent having been attached by the defendants, who were also creditors, the plaintiffs claimed the amount under the assignment to their agent, and an issue was directed:— *Held*, that the letter could be looked at to aid the assignment, and the assignee's name should be read in; and, therefore, the plaintiffs were entitled to the money. *Newell* v. *Bradford*, 37 L. J. C. P. 1; *Catling* v. *King*, 64 L. J. Ch. 384; *Warner* v. *Wilmington*, 25 L. J. Ch. 662; *Re Bacon's Will*, 31 Ch. D. 460; *Turner* v. *Hellard*, 30 Ch. D. 390; *Pearce* v. *Gardner*, [1897] 1 Q. B. 688, and other cases, considered. *Bank of Montreal* v. *Burns*, 22 Occ. N. 342.

Validity—*Notice—Bank Act—Statute of Elizabeth—Execution — Interest in partnership—Sale—Action—Parties.*] — Action by husband and wife to set aside an assignment to a bank by the husband's execution debtor of his share or interest in the assets and business of a partnership. The assignment was made in February, 1896, as security for a past due debt exceeding the amount of the assignor's interest in the partnership. The husband recovered judgment against the assignor in May, 1896, in an action brought before the assignment, and placed execution in the sheriff's hands in July, 1896. Under that execution, the sheriff, without making any actual seizure of the partnership assets, purported to sell and convey to the wife in October, 1896, all the undivided share or interest of the assignor exigible under execution in the partnership assets or business. This action was begun in November, 1898:—*Held*, that the assignment was not invalid under the Bank Act, nor under the Statute of Elizabeth, there being no evidence that it was made with intent to delay and defraud the husband in his action against the assignor. Under the law as it stood at the date of the assignment, notice thereof to the assignor's partners was not necessary to its validity. Per Armour, C.J.O.—Debts are not included in the expression "goods, wares, and merchandise," as used in the Bank Act. The effect of placing the execution in the sheriff's hands was to bind the goods of the partnership, so that they were liable to be seized, but no seizure of any specific assets having been made, and all the assets of the partnership having been sold, realized, and disposed of, the execution creditor lost any benefit which he might have derived from the seizure of specific assets and the sale thereunder of the undivided interest of the execution debtor therein; and nothing passed to the wife by the sale to her. *Per* Osler, J.A.—The husband was not a proper party. Judgment in 1 O. L. R. 303, 21 Occ. N. 183, affirmed. *Rennie* v. *Quebec Bank*, 22 Occ. N. 171, 3 O. L. R. 541, 1 O. W. R. 286.

Voluntary assignment of fund to wife of assignor—Informality—Validity of equitable assignment—Subsequent assignment for value—Priority — Notice to holders of fund—Executors—Oral notice to one. *McMurchie* v. *Thompson*, 8 O. W. R. 247, 637.

Warranty — *Fictitious debt—Remedy—Estoppel.*]—A lender who assigns to a third person, with a warranty, a debt which he believes to be a real one, but which is only fictitious, does not thereby renounce the remedy which he would have against those by whom such debt has been fictitiously contracted, and who are the cause of the repayment which he must make to his assignee. *Awde* v. *Chaurest*, Q. R. 30 S. C. 9.

See ATTACHMENT OF DEBTS—BANKS AND BANKING — CONTRACT — DAMAGES—DEED, EQUITABLE ASSIGNMENT — INSURANCE — JUDGMENT — MINES AND MINERALS—MORTGAGE—PARTIES—SALE OF GOODS—SOLICITOR —VENDOR AND PURCHASER.

CHRISTIAN SCIENTISTS.

See STATUTES.

CHURCH.

Anglican church—*Incumbent—Churchwardens—Corporation — Temporalities Act, s. 6—Institution—Induction.*] — A clerk in holy orders of the Church of England appointed by the Bishop of Montreal under his sign manual to be the incumbent of a parish during the pleasure of the bishop, and therefore removable, is the incumbent within the meaning of s. 6 of the Temporalities Act of the United Church of England and Ireland, in the diocese of Montreal. As such, he is the corporation referred to in the above section.—An incumbent of a parish need not be a rector. He holds his office by virtue of his appointment by the bishop of the diocese, and neither "institution" nor "induction" is required to invest him with the rights and powers pertaining to it. *Incumbent and Churchwardens of St. Edward's Church* v. *Synod of Montreal*, Q. R. 30 S. C. 265, 8 Que. P. R. 178.

Change in doctrine—*Secession of members—Possession of land—Religious Institutions Act—Trust.*]—Land was conveyed to certain persons in trust for a religious body called the United Brethren in Christ, and a congregation was organized and a church built. Subsequently a division took place in the religious body, and it was *held*, in *Itter* v. *Howe*, 23 A. R. 256, 16 Occ. N. 158, that the party to which the congregation in question adhered were seceders. This congregation continued to use the church, and, some of the original trustees having died, appointed new trustees to act with the survivors, and these trustees refused to give up possession to the representatives of what had been declared to be the true body:—*Held*, that the trustees must be treated as being trustees for the true body, who were entitled to enforce the trust and to have possession of the church, and that it was not necessary to organize another congregation and appoint new trustees for that congregation under the Religious Institutions Act.—Judgment in 19 Occ. N. 218, reversed. *Brewster* v. *Hendershot*, 20 Occ. N. 201, 27 A. R. 232.

Change of site—Resolution of congregation—Notice of meeting—Injunction. *Kopman* v. *Simonsky*, 2 O. W. R. 617.

Churchwardens—*Accounts — Discharge —Vestry board—Approval of ordinary—Interference by Civil Court.*]—The accounts of a churchwarden going out of office must be submitted to the vestry board. 2. A churchwarden going out of office may be compelled to render an account at the suit of two parishioners. 3. The reception of accounts by the vestry board and their approval by the Ordinary, constitute a discharge in favour of a churchwarden going out of office. Such discharge is final and will not be interfered with by the civil Courts. *Dubé* v. *Mercier*, Q. R. 13 K. B. 114.

Churchwarden — *Parish corporation — Contract — Sale — Quo warranto — C. P. 987.*]—Where a churchwarden has sold and delivered merchandise to the corporation of a parish of which he is one of the churchwardens, and while he was in office, a freeholder of such parish may cause a writ of *quo warranto* to issue against such churchwarden although he goes out of office on the 31st of December and the petition for the writ was made but a few days previously. *Hamelin* v. *Dugal* (1910), 16 R. L. n. s. (Que.) 321; 38 Que. S. C. 196.

Clergy Commutation Trust Fund — Annuitants — "Junior on the pay list"—Canons and by-laws governing—Construction —Decision of diocesan chancellor—Award—Acquiescence—Laches — Exchange of benefices. *Geoghegan* v. *Synod of Niagara*, 5 O. W. R. 364, 6 O. W. R. 717.

Destroyed by fire — *Insurance.*]—See *Quebec Fire Ins. Co.* v. *St. Louis*. Digested under INSURANCE.

Diocese of Toronto—*Churchwardens — Agreement to repay rector's expenditure — Award.*]—An agreement by the churchwardens of a congregation of the Church of England in the diocese of Toronto, raising funds by voluntary contributions, to repay to the rector thereof, in consideration of his resigning his charge as desired by the congregation, the amount theretofore expended by him in repairs and improvements to the rectory-house, such amount to be settled by arbitration, is an agreement beneficial to the congregation and binding upon the churchwardens in the corporate capacity conferred upon them in that diocese by 47 V. c. 89 (O.) An order was made for the enforcement of an award made in pursuance of the agreement, although the churchwardens had in their corporate capacity no property or funds out of which the award could be satisfied. *Daw* v. *Ackerill*, 25 A. R. 37, distinguished. *In re Kirkby and Churchwardens of All*

Saints, Collingwood, 24 Occ. N. 358, 8 O. L. R. 385, 4 O. W. R. 142.

Discipline — *Expulsion of minister — Domestic forum—Appeal.*]—Where an appeal raised the question of the proper or improper exercise of disciplinary powers of the Conference of the Methodist church, the Supreme Court refused to interfere, the matter complained of being within the jurisdiction of the Conference. Judgment of the Court of Appeal, 27 A. R. 602, 21 Occ. N. 21, affirmed. *Ash* v. *Methodist Church*, 22 Occ. N. 3, 31 S. C. R. 497.

Dispute as to ownership of land and building—Rival claimants — Difference in tenets—Question of fact—Onus — Appeal. *Zacklynski* v. *Kerchinski* (N.W.T.), 1 W. L. R. 32.

Expulsion of member — *Domestic tribunal—Injunction.*]—The plaintiff sought an injunction restraining the trustees of St. Peter's Church, in Berlin, from enforcing a resolution, passed by them, expelling him from membership in the church, on the ground of certain actions of his, not necessary to mention here. No notification was given calling upon the plaintiff to attend the meeting at which the resolution was passed, nor was he made aware in any way of the intention of the trustees to expel him. The plaintiff's civil rights were not affected by the expulsion:—*Held*, that the Civil Courts would not, after an adjudication by the domestic tribunal depriving the plaintiff of his membership, investigate the legality or regularity of the proceedings, and the action must be dismissed. *Pinke* v. *Bornhold*, 24 Occ. N. 395, 8 O. L. R. 575, 4 O. W. R. 257.

Letting pews—*Rights of parishioners—Mandamus—Husband and wife — Survivorship.*]—The remedy of mandamus to compel churchwardens to let vacant pews in a parish church can only be granted to a member of the congregation or a parishioner who has a special interest therein. The lease of a pew in a church made, in observance of a usage, to a husband and wife during their lives, does not infringe upon any existing law, and is valid. The wife surviving her husband has the enjoyment of it even after a second marriage. *Lemay* v. *Curé and Churchwardens of the Parish of Ste. Croix*, Q. R. 29 S. C. 528.

Members—Trustees—Meetings — Resolution authorizing new building—Regularity—Injunction. *Heine* v. *Schaffer* (Man.), 2 W. L. R. 310.

Parish boundaries — *Erection of new parish—Donation of site for church—Compliance with intention of donor—Trust.*]—*Held*, in construction of trust-deed of certain property for church purposes, that the intervenants who had formed another parish distinct from that existing at the creation of the trust were not entitled to the property or a share therein. *Incumbent and Churchwardens of Parish of St. Edward* v. *Synod of Diocese of Montreal (Que.)*, 6 E. L. R. 281.

Power to allot free seats—*Power to rent pews.*]—Under the trusts set out in the schedule to 47 V. c. 88 (O.) and 47 V. c. 146 (D.), the trustees of a Methodist church have no power to allot free seats to particular members of the congregation, although they have the general power possessed by the officers of any place of public worship, to distribute the members of the congregation in a particular manner at any particular service for the purpose of preventing disorder during the service. They have, however, the power to rent pews at a reasonable rent to particular members, reserving as many free seats where and as may be thought necessary or expedient. *Carleton Place Methodist Church Trustees* v. *Keyes*, 22 Occ. N. 50, 3 O. L. R. 165, 1 O. W. R. 10.

Right to pew—*Parties—Intervention—Interest.*]—A parishioner and pewholder has no interest entitling him to intervene in an issue between another parishioner asking to be put in possession of a pew, of the one part, and the *curé* and churchwardens, of the other part, in support of the plaintiff's demand; the interest of the intervener appearing rather to be the same as that of the *curé* and churchwardens; such an intervention will be dismissed upon demurrer. *Bédard* v. *Monette*, 2 Que. P. R. 501.

Roman Catholic Episcopal Corporation—*Corporation sole — Action by—Pleading—Proof of corporate character—Contract—Statutes—Nomination of bishops—Ratification by Crown.*]—The denial by the defendant of the legal existence of the plaintiff as a public corporation, obliges the latter to prove his corporate character, but this rule is subject to exception when the action is begun for the purpose of giving effect to a contract made between the defendant and the corporation, in which the existence of the latter is impliedly admitted. 2. The above rule is applicable to Roman Catholic bishops, constituted public corporations sole by special statutes, as they cannot take upon themselves the quality of public functionaries. 3. The special statutes referred to make the existence of the Episcopal corporations dependent upon the bishops' nomination, as they have a provision, in case of the death of the latter, to continue these corporations in the person of the administrators of the dioceses. 4. In the absence of a statutory provision to that effect, the ratification by the sovereign of the nomination of the bishop is not a condition of the existence of the corporation that he forms. *St. Hyacinthe Roman Catholic Episcopal Corporation* v. *St. Hyacinthe Macadam Co.*, Q. R. 34 S. C. 362.

Subscription—Condition that it be paid out of insurance premium—Contract. *Church of St. James the Apostle* v. *Upton*, 3 E. L. R. 212.

Syndic—*Election—Incapacity—Statute — Incapacity arising after election.*]—In this case the facts alleged and proved shewed an incapacity at common law, if not by statute, to exercise the office of syndic of a church. 2. It is not necessary that such incapacity should be declared by a statutory provision in order to bring it within Art. 987, C. P. C.,

which applies to an incapacity arising after the election or nomination of the incumbent, as well as to an incapacity existing at the time of his election. *Martel* v. *Prévost*, 6 Que. P. R. 244.

Title of land — *Church dispute — Construction of trust — Ascertainment of beneficiaries — "Greek Catholic Church."*]—At a meeting of a congregation of Galicians subscriptions were collected, trustees appointed, and a site chosen on which to build a church. A Uniate priest connected with the See of Rome visited the congregation and held services for a short time; later two orthodox priests, familiar with their dialect, conducted services there, and still later the Roman bishop of the diocese visited the settlement and held services. His Grace assured them that he would do his best to secure for them land on which to erect a church. He applied to the Crown Lands Office and received a grant "in trust for the purpose of the congregation of the Greek Catholic Church at Limestone Lake." He paid the patent fees, but made no declaration of the trust as required by the Crown Lands Office, but there was in that office at the same time a document declaring the names of the trustees and the purposes of the trust. Pending the bishop's application, the trustees applied for a permit to cut logs, stating the position of the church, and that the building they erected was "for the mission of the Greek Orthodox Church and for no other purpose." The permit was granted accordingly. A dispute arose between the Roman bishop and the congregation, and finally the bishop assigned the land to the trustees; the trust, however, was left to stand, "for the purposes of the congregation of the Greek Catholic Church":—*Held*, upon the evidence, that the purpose for which the land was vested in the trustees was for building a Greek Orthodox Church and not a Greek church in communion with the Church of Rome. Judgment of the Supreme Court of Canada, 37 S. C. R. 177, affirmed; judgment of the Supreme Court of the North-West Territories, 1 W. L. R. 32, and judgment of Scott, J., at trial discharged. *Zacklynski* v. *Polushie*, C. R., [1908] A. C. 23.

Title to land and building—*Ambiguous description of grantee—Declaration of trust in favour of Greek Orthodox Church—Construction—Ascertainment of beneficiaries—Exclusion of Roman Catholic and Uniate Churches.*]—Emigrants from Galicia settled in the North-West Territories in 1892, and in 1896 there were thirty Galician families in the neighbourhood of Star, who resolved to provide a place for religious worship and secure the services of a priest. In Galicia the population is divided between Poles and Little Russians, the former being Roman Catholic, the latter Orthodox Greek, who, as a condition of being allowed to use their own liturgy and conduct their services in the old Slavonic language, are compelled to acknowledge the supremacy of the Pope, all else being allowed to remain Greek. There results a composite church known as the Uniate Church, liable in Galicia to taxation by the Pope, in consequence of its enforced union with Rome. The respondents, trustees of the Star congregation, on the 7th December, 1897, obtained from the land office a permit to cut logs for a church on the Government land in suit, "to be used in the erection of a church building for the mission of the Greek Orthodox Church and for no other purpose:"—*Held*, that this permit being an invitation to the trustees to build a church on the land in suit, the land become, when the permit was acted on, impressed in the hands of the Government with a trust for that purpose, and was dedicated by the Government to the use of the mission of the Greek Orthodox Church, and not of the Roman Catholic or Uniate Church. In an action by the appellants as representative members of the Star congregation for relief as for a breach of trust in consequence of the respondents having, without previous consultation with the congregation, appointed an Orthodox priest, it appeared that, after the permit was granted, the lands in suit had been irregularly granted by the land office to the Roman Catholic bishop of the diocese in which Star was situated, "in trust for the purposes of the congregation of the Greek Catholic Church" at Star, and had been by the bishop assigned to the respondents with the sanction of the land office, but without any alteration in the declaration of trust contained in the grant to the bishop:—*Held*, that the operative trust was that created by the permit, and that there had been no breach thereof. Judgment in *Polushie* v. *Zacklynski*, 37 S. C. R. 177, affirmed. *Zacklynski* v. *Polushie*, [1908] A. C. 65.

Title to land and building—*Ambiguous description of grantee—"Greek Catholic Church" — Evidence—Construction of deed—Reversal of concurrent findings.*]—Where Crown lands were granted "in trust for the purposes of the congregation of the Greek Catholic Church at Limestone Lake," N. W. T., and it appeared that this description was ambiguous and might mean either the Greek Orthodox Church or the Greek Church in communion with the Church of Rome, it was *held*, that the construction of the grant should be determined by the facts and circumstances antecedent to and attending the issue of the grant, and that, in view of the evidence adduced, the words did not mean a church united with the Roman Catholic Church and subject to the jurisdiction of the Pope. Judgment in *Zacklynski* v. *Kerchinski*, 1 W. L. R. 32, reversed, Taschereau, C.J.C., and Girouard, J., dissenting, on the ground that the concurrent findings of the Courts below upon matters of fact ought not to be disturbed. *Polushie* v. *Zacklynski*, 37 S. C. R. 177.

Vestry-board — *Defence of action — Authorization — Parish meeting — Exception to form.*]—A vestry-board cannot defend an action without previous authorization by the parish meeting, and the board must file this authorization with its defence, in default of which the plaintiff may, by exception to the form, obtain the striking out of the defence. *Sénécal* v. *Cure and Churchwardens of St. Paul*, Q. R. 12 K. B. 142.

Vestry corporation—*Defence to action—Authority—Resolution.*]—A vestry corporation may file a defence to an action without a resolution authorizing its solicitors to that effect. *Sénécal* v. *Vestry of the Parish of St. Paul*, 6 Que. P. R. 462.

Will—*Devise to religious institution — "Acquisition" of land — Commencement of period—Life estate.*]—The seven years during which a religious institution may hold land after its "acquisition" under s. 19 of R. S. O. 1877 c. 216 (now s. 24 of R. S. O. 1897 c. 307), does not commence to run, in the case of a devise of a remainder dependent upon a life estate, until the expiry of the life estate. *In re Naylor*, 23 Occ. N. 69, 5 O. L. R. 153, 1 O. W. R. 809.

See CRIMINAL LAW—DEFAMATION—WILL.

CHURCHWARDEN.

See CHURCH.

CIRCUIT COURTS.

See APPEAL—COURTS.

CITY COURT, NEW BRUNSWICK.

See COURTS.

CIVIL ENGINEERS, CANADIAN SOCIETY OF.

Statute incorporating—*Qualification of Members—Practising — Admission—Mandamus—Interference by Court.*]—The statute incorporating the Canadian Society of Civil Engineers gives the right to become a member to every one who practised as a civil engineer in this province at the time of the passing of the Act. The plaintiff, claiming to have satisfied this requirement, presented a request for admission containing allegations of fact to satisfy the law, verified by his own deposition under oath. On the refusal of the society to comply with his request, he prayed that a peremptory writ of mandamus be issued to effect his purpose:—*Held*, that it was not for the Court to decide whether the plaintiff was qualified as a civil engineer, or whether he had pursued the studies and possessed the knowledge requisite for a civil engineer, but only whether he had practised as a civil engineer at the time of the passing of the Act. 2. That he who has himself done work requiring the special knowledge of a certain profession is not by reason of that alone deemed to have practised such profession, but the contrary is the case with one who has devoted himself to the practice of a profession for the public and who in fact practices it, though his clientele may be very limited. 3. That the depositions on oath of the plaintiff did not constitute conclusive and irrefutable proof of the facts contained in it, but that it was only a formality to prevent useless applications, and only raised a presumption which might be refuted by evidence to the contrary. *Taché* v. *Society of Canadian Civil Engineers*, Q. R. 26 S. C. 215.

CIVIL SERVANT.

See CROWN.

CLASS SUIT.

See COSTS—PLEADING.

CLERK OF EXECUTIVE COUNCIL.

See MANDAMUS.

CLIMATIC CONDITIONS.

See SALE OF GOODS—WATER AND WATERCOURSES.

CLOSE OF PLEADINGS.

See PLEADING.

CLOSING HIGHWAY.

See WAY.

CLUB.

Authority to make rules—*Expulsion of member—Regularity of admission—Meeting—Two-thirds vote.*]—A club for amusement, etc., organized under Arts 5487 *et seq.* of the R. S. Q., by which such association is authorized to make rules and regulations respecting the admission and expulsion of its members, has authority to adopt a rule providing for the expulsion of any member who commits an act "derogatory to the honour and interests of the club," although no definition be given in the rule of what constitutes such acts. 2. Where a social club has formally passed a resolution expelling a member for acts derogatory to the honour and interests of the club, it cannot afterwards, in defence to an action of the member for the rescission of the vote of expulsion, be allowed to justify such expulsion on the ground that the plaintiff had never been regularly admitted a member. 3. Where the rule of the club provides for the expulsion of a member by a two-thirds vote at a general meeting regularly called, the resolution of expulsion must be voted for by two-thirds of the active members of the club present at the time the resolution is put to the meeting. *Lemarche* v. *Le Club de Chasse à Courre Canadien*, Q. R. 19 S. C. 470, 4 Que. P. R. 75.

Fish and game club — *Election of officers—Statutes—Companies Act — Voting by proxy — Estoppel — President — Meeting.*]—When the general Act under which a fish and game club is incorporated provides that, in so far as applicable, the clauses of the Joint Stock Companies Act shall govern associations organized thereunder, s. 10 of the last named Act, which provides that every shareholder may vote by proxy, applies and enables members of the club to vote in that manner at the election of its officers. The president of a club is not estopped from challenging before the Courts the election of one of its officers (the secretary) because he called an informal meet-

ing of the board immediately after the election, at which the officer in question was present, to discuss matters of detail. *Sanderson* v. *Henry*, Q. R. 16 K. B. 78.

Injunction — *Expulsion of member of association—Right of property—Jurisdiction of Court.*]—To give jurisdiction to Court to interfere by way of injunction to restrain expulsion of a member of a club or association, it must appear that he has some right of property therein. The right to use the club or association rooms, property and effects, on payment of a subscription, without any right to participate in assets, if distribution ensued, is merely a personal one. The only remedy in such case, if the expulsion is wrongful or injurious, is by action for damages. Where, therefore, an injunction was granted restraining a hockey association from expelling a member, whereby he would be debarred from playing in a specified game, there being no allegation or proof of his having paid any subscription, or that he had any right of property in the association, injunction was set aside and action therefor dismissed with costs. *Rowe* v. *Hewitt* (1906), 12 O. L. R. 13, 7 O. W. R. 543.

Liability for article stolen.]—The plaintiff, who was not a member of the defendant club, went there upon the invitation of a member and put his coat in the cloak room. It was taken away during his absence in another part of the club, and he sued for its value and for money paid to detectives in attempting to recover it:—*Held*, that, as the defendants were a club, and did not fall under the provisions of the Civil Code respecting innkeepers, keepers of boarding-houses, and hotel-keepers, under similar circumstances, they were not liable for articles brought upon their premises. *Martel* v. *Military Institute Club*, 23 Occ. N. 119.

License re billiard tables—*Incorporation under Ontario Companies Act—"Proprietary club"—Billiard tables and bowling alley on club premises—Municipal by-law requiring license—"Hire or gain"—"House of public entertainment or resort"* — *Police magistrate—Case stated under Ontario Summary Convictions Act—Forum—Divisional Court—Scope of case—Admissibility of evidence.*]—A club was incorporated by letters patent under the Ontario Companies Act to encourage and promote billiard playing and other athletic and amateur sports, etc. The members were all shareholders in the capital stock of the club, and no person could become a member unless he subscribed for and became the holder of a share or shares, and no person other than members were permitted to have the use of the club premises. Premises were leased by the club in the city of Toronto, whereon there were bowling alleys and billiard tables. Fees were paid by the members for games played on the bowling alleys and billiard tables, and such fees went into the funds of the club, and were used for paying the expenses of managing and carrying on the club. By a resolution of the club, the directors were empowered to apply fees paid for games played on the alleys or tables of the club as payment for shares subscribed. A by-law of the police commissioners for the city of Toronto passed pursuant to the powers conferred by the Consolidated Municipal Act, 1903, s. 583, s.-s. 4 (as amended by 8 Edw. VII. c. 48, s. 14) and 10, provided that a license should be taken out by (9) every person who, for hire or gain, directly or indirectly keeps or has in his possession, or on his premises, any billiard table, or who keeps or who has a billiard table in a house or place of public entertainment or resort, and every proprietary club (as defined by the Consolidated Municipal Act, 1903), which directly or indirectly keeps or has in its possession or on its premises any billiard table; and also (10) by every person who owns or keeps for hire or profit a bowling alley. The club had no license for billiard tables or for a bowling alley:—*Held*, that the club was not a "proprietary" one, as defined by the amending Act, 8 Edw. VII. c. 48, s. 14; and (Riddell, J., dissenting), that the billiard tables and bowling alley were not kept or in the possession of the club for hire or gain directly or indirectly, nor was the place where the tables were kept a house of public entertainment or resort, within the meaning of the by-law. *Newell* v. *Hemingway* (1888), 60 L. T. R. 544, applied and followed;—*Held, per curiam*, that cases stated by a police magistrate under R. S. O. 1897, c. 90, ss. 2, 1 and 8, as amended by 1 Edw. VII. c. 13, s. 2, and so (by reference) under R. S. C. 1906, c. 146, s. 761, properly came before a Divisional Court, under 4 Edw. VII. c. 11, s. 2 (Judicature Act, s. 67, s.-s. (1) (e)); but that, under s. 761, all that can be done is to "question a conviction, order, determination or other proceeding," and so a question as to the admissibility of evidence cannot form part of a stated case, and per Riddell, J., that the evidence taken before the magistrate should not be sent up by him as part of the case.—*Semble*, per Falconbridge, C.J.K.B., that the magistrate was right, on a charge preferred against the incorporated club, in refusing to allow questions to be put to a witness with the object of shewing that the club was incorporated for the purpose of enabling an individual to evade the provisions of the by-law. *Rex* v. *Dominion Bowling & Athletic Club* (1909), 19 O. L. R. 107, 14 O. W. R. 468, 15 Can. Cr. Cas. 105.

Life member — *By-law exacting further fees—Ultra vires.*]—The plaintiff was duly elected a life member of the defendant club, and paid $50, the fee demanded by the by-laws. Subsequently, at a meeting of the members of the club, a by-law was adopted that every life member should pay an additional sum of $25 for that year only, and that any life member who failed to do so should be expelled from the club simply by a resolution of the board of directors to that effect. The plaintiff contended that the by-law was *ultra vires*, and asked that the Court should declare it to be so:—*Held*, that the by-law was *ultra vires*, and that the plaintiff was therefore not bound by it, nor could his status be thereby affected. *Beaudry* v. *Club St. Antoine*, 21 Occ. N. 83, Q. R. 19 S. C. 452.

Public Inquiries Act (B.C.)—Benevolent and Friendly Societies Act (B.C.) — Commission of inquiry — Jurisdiction. *Re Railway Porters' Club* (B.C.), 2 W. L. R. 102.

Public Inquiries Act—*Benevolent Societies Act—Commission of inquiry—Jurisdiction — Powers of Lieutenant-Governor in Council.*]—The city of Vancouver petitioned the Lieutenant-Governor in council, alleging that certain societies incorporated under provisions of the Benevolent Societies Act, were abusing their corporate powers and applying them to purposes other than those authorized by statute, and praying that, under the powers thereby conferred, these societies be dissolved. The Lieutenant-Governor in council appointed a commissioner, under authority of s. 4 of the Public Inquiries Act, to inquire into facts bearing upon allegations contained in and the prayer of the petition:—*Held*, that the power of Lieutenant-Governor in council to dissolve societies created under the Benevolent Societies Act, though not for any public purpose, is one of the powers of Government exercisable by the executive, and the investigation of the facts leading to a conclusion on the question whether that power shall be exercised, as well as the determination to exercise it, and the executive act in which the determination culminates, are all matters connected with the good government of the province within meaning of s. 4 of Public Inquiries Act. *Re Rw. Porters' Club* (1906), 11 B. C. R. 398, 2 W. L. R. 162.

COAL MINES ACT.

See MINES AND MINERALS.

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See MUNICIPAL CORPORATIONS.

CODE OF PROCEDURE, QUEBEC.

See PEREMPTION.

CODICIL.

See WILL.

COLLATERAL SECURITY.

Enforcement — Bar—Promissory notes for price of machinery—Retaking and selling machinery under conditional sale contract—Chattel mortgages collateral to notes—Effect on. *Massey-Harris Co.* v. *Lowe* (N.W.T.), 1 W. L. R. 213.

Life insurance policy — Promissory notes—Account—Entries in books — Appropriation of payments—Mortgage—Merger — Surety—Discharge. *Harvey* v. *McKay*, 5 O. W. R. 711.

Realization — Judgment — Appropriation of payments—Accounts—Trustees—Interest. *Horstein* v. *Heisterman* (B.C.), 5 W. L. R. 280.

See BANKS AND BANKING — BILLS AND NOTES—SALE OF GOODS.

COLLECTION ACT, NOVA SCOTIA.

Appeal from examiner's ruling — *County Court Judge's power to extend time — Adjournment — Prohibition.*] — Under the provisions of the Collection Act, R. S. N. S. 1900, c. 182, s. 32, "notice of appeal must be served upon the solicitor of the respondent or upon the respondent personally within 10 days of the date of the decision appealed from." No notice was given within the 10 days, and the Judge of the County Court subsequently made an order *ex parte* extending the time. The appellant failed to prosecute his appeal within the period of 30 days prescribed by s. 33, as amended by Acts of 1901, c. 15, and a writ of prohibition was applied for:—*Held*, per Townshend, J., Weatherbe, C.J., concurring, that the Judge had power, on proper application, to extend the time for giving notice of appeal, but that such application should be made within the period of 10 days prescribed by s. 31; also, that it was not within the power of the Judge to adjourn the matter to a date beyond the 30 days and then make an adjudication; and that the writ of prohibition should go. Per Meagher, J. (who concurred that the extension of time should not have been granted), that there was no appeal from the order extending the time, and prohibition would not lie. Russell, J., dissented. *McLure* v. *Parker*, 1 E. L. R. 270, 39 N. S. R. 413.

Assignment — *Collusion — Preference—Creditors.*]—Where an assignment under the Collection Act is obtained by collusion between the creditor and debtor, such assignment comes within the category of transfers made "with intent to defeat, hinder and delay creditors," or "with intent to give the creditor an unjust preference over other creditors," and will not give the assignee a better title than the assignor himself had. *Farlington* v. *Ingraham*, 36 N. S. R. 467, distinguished. *Zwicker* v. *Ross*, 3 E. L. R. 75, 41 N. S. R. 332.

Compulsory assignment by debtor to creditor—*Bills of Sale Act—Affidavit of bona fides—Rights of creditor—Fraudulent conveyance — Sheriff levying under execution.*]—The assignment made by a debtor under the provisions of the Collection Act, R. S. N. S. 1900, c. 182, s. 28, is to be regarded as part of the legal process provided by the statute to enable the creditor to enforce payment of his debt, and essentially differs from, and is in no way analogous to, a voluntary assignment, and is not subject to the provisions of the Bills of Sale Act requiring an affidavit of *bona fides*, or other requirements of the Act. The assignee in such case does not take his rights under the assignor, so as to be bound or affected by his fraudulent act, but as a judgment creditor enforcing his statutable remedy, and he may in that capacity attack any previous fraudu-

lent conveyance made by his assignor. The assignment so obtained confers upon the judgment creditor an absolute title to the property assigned in trust to satisfy his judgment, and, in the next place, to hold the balance for the benefit of those beneficially entitled thereto. An assignee under the Act, who has taken possession under his assignment, is entitled to recover against the sheriff levying under executions placed in his hands subsequently to the date of the assignment. *Farlinger* v. *Ingraham*, 38 N. S. R. 467, 1 E. L. R. 1.

Fraudulent disposition of property—Fraud in facts—Costs. *Short* v. *Bent*, 40 N. S. R. 628.

Judgment—*Order for payment by instalments — Default — Arrest — Discharge under Indigent Debtors Act—Re-arrest.*] — The defendant was examined under the provisions of the Collection Act and ordered to pay the monthly instalments, a judgment recovered by the plaintiff. On default of payment an execution was issued by order of the examiner, and under this execution the defendant was arrested. The defendant was subsequently discharged from custody under the Indigent Debtors Act. The defendant having failed to pay subsequent instalments, the examiner made an order for the issue of another execution for the arrest of the defendant, and the defendant was again arrested:—*Held*, that the defendant, under the foregoing circumstances, having been discharged from custody, could not be arrested again under a second execution issued on the same judgment. *McLeod* v. *Forsyth*, 40 N. S. R. 389. See, also, *McDonald* v. *Dominion Coal Co.'s Relief Fund*, *ib.* 390*n*; *McMillan* v. *Watson*, *ib.* 391*n*; *In re W. T. Grant*, *ib.* 391*n*.

Order for arrest—*Insufficiency—Jurisdiction of commissioner.*]—An order under which the defendant was arrested and brought before a commissioner under the Collection Act, did not conform to the statute, and was insufficient. The commissioner nevertheless, made an order against him, under which he was imprisoned:—*Held*, that, as the sheriff had no power to take the defendant before a commissioner under the first order, the commissioner was without jurisdiction to make an order against him. He was therefore discharged.—Headnote in *In re G. R. Johnson*, 10 N. S. R. 51, corrected. *Forsyth* v. *Ozon*, 40 N. S. R. 219.

See JUDGMENT DEBTOR.

COLLECTION OF TAXES.

See ASSESSMENT AND TAXES.

COLLECTOR.

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See FRAUDULENT CONVEYANCE—INSURANCE —RAILWAY—SHIP—TRIAL.

COLLUSIVE ACTION.

See INTERVENTION.

COLONIAL COURTS OF ADMIRALTY ACT.

See APPEAL.

COMMISSION DES CHEMINS DE FER.

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COMMISSION OF INQUIRY.

See CLUB.

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COMMISSIONER OF EDUCATION.

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COMMITTEE.

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COMMON BETTING HOUSE.

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COMMON CARRIERS.

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COMPANY.

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1. Formation.

Amalgamation of companies—*Failure to amalgamate — Winding-up — Contributories.*]—Twenty-seven parties signed a subscription list for stock in a proposed company. A meeting was called, when a committee was appointed to carry on negotiations. At different committee meetings, directors of the V. company were present and it was finally arranged that the proposed company be amalgamated with the V. company:—*Held*, that at the time of the winding-up of the company, the arrangement for an amalgamation had not been carried through. The directors of the latter company and those on the subscription list are not liable as contributories. Payment of instalments did not waive the condition that old shares were to be surrendered and new ones issued. *Re Victor Wood Works, Ltd.*, 7 E. L. R. 55.

Amalgamation of companies — *Fiduciary relationship of directors—Secret profits—Accounting—Costs.*] — Defendants organised plaintiff company and sold it the assets of two other companies which defendants owned, making a profit of $27,691.76. Plaintiff company brought action to recover the profit from defendants. MacMahon, J., at trial, *held* (14 O. W. R. 489), that defendants were not required to do more than furnish the directors of plaintiff company with a schedule of the assets, etc., belonging to the two companies proposed to be sold, with prices attached, and dismissed the action. Court of Appeal *held*, that it was the duty of defendants to place the affairs of the two companies before an independent board of directors of plaintiff company, having full knowledge of the transactions proposed, and that this had not been done; that plaintiff company had not been properly represented in the bargaining; that defendants had effected the sale by secrecy and without making proper disclosures and should be held liable to the extent to which each shared in the profits made by the sales. Costs to plaintiffs throughout. *Stratford Fuel, Ice, Cartage & Const. Co.* v. *Mooney* (1910), 16 O. W. R. 246, 21 O. L. R. 426, 1 O. W. N. 914.

Amalgamation—*Restraint against selling out—Agreement — Forfeiture—Laches—Waiver—Notice.*]—In 1889 the city of Toronto entered into similar agreements with the defendant companies by which they authorised these companies to lay down and operate underground wires and appliances for the distribution and supply of electricity, and gave them other privileges in connection with their business. By these agreements the defendants were forbidden to lease to, amalgamate with, or sell out to any other company, without the consent of the plaintiffs; and if they did so, all rights granted thereby were to cease and determine. In 1896 the Incandescent Co. sold out all their assets and the shareholders transferred their shares to the Electric Light Co.:—*Held*, that the Toronto Electric Light Co. had not in purchasing fallen within the prohibition clause, for to hold to the contrary would be to add the word "buy" to that clause.—*Held*, also, that what had been done was not an amalgamation of the two companies, inasmuch as the purchase was for cash and for cash only, and the Incandescent Light Co. acquired no interest whatever in the assets and affairs or otherwise of the other company.—*Held*, further, that inasmuch as the actions were not commenced till April, 1902, the plaintiffs had by their long delay in bringing suit and also by their conduct after the alleged breach and before the action lost their right to complain. The plaintiffs had by their conduct waived the alleged forfeiture, the evidence clearly shewing that they had knowledge throughout of the facts upon which the right to claim a forfeiture rested, and it was not necessary to prove actual notice. — *Held*, lastly, that notice to the city engineer was in the circumstances of this case sufficient, although the evidence shewed much more than that, and warranted the conclusion that knowledge of the absorption of the one company by the other was common and general throughout the city and might safely be imputed to the city council as a whole, especially as no civic official had denied such an inference. *City of Toronto* v. *Toronto Electric Light Co.*, *City of Toronto* v. *Incandescent Light Co. of Toronto and Toronto Electric Light Co.*, 10 O. L. R. 621, 6 O. W. R. 443.

Letters patent—Supplementary letters—Increase in capital stock—Non-compliance with s. 20 of Companies Act — Meeting of shareholders—Absence of notice of purpose of meeting—Revocation of letters patent—Action by Attorney-General — Irregularities —Companies Act, s. 96—Purchase of shares —Refusal to transfer — Stock certificates—Production—Assignment—Mandamus. *Meyers* v. *Lucknow Elevator Co.*, 6 O. W. R. 291.

Moneys advanced by corporator as loan—*Lands transferred as security by another corporator.*]—Action by liquidator to compel defendant A. to convey certain lands to the plaintiff as liquidator, and to pay moneys due on unpaid shares of the company's capital stock. As the parties cannot be placed in *statu quo, held,* that defendant A. is entitled to a charge upon the lands for moneys advanced; subject thereto, he is declared a trustee of the lands. *Wessel* v. *Tudge,* 10 W. L. R. 499.

Organisation — Acquisition of business concerns—Moneys paid for liabilities—False representations—Action by shareholder—Repayment to company of moneys paid out—Costs. *O'Sullivan* v. *Clarkson,* 9 O. W. R. 46.

Organisation — Service of promoter — Claim for payment against co-promoters—Share of municipal bonus. *Patterson* v. *Brown,* 6 O. W. R. 204.

Promoters who bought property with funds of a company incorporated by themselves and turned the property over to the company were not permitted to recover against the company any profits on the transaction. *Minister of Railways and Canals* v. *Que. Southern Rw. Co. (Hodge & White's Claim)* (1908), 12 Ex. C. R. 11.

Promoters — *Fiduciary relationship.*]—Where promoters proposed to acquire property and turn it over to a company to be formed, in exchange for bonds and stock, it was held, that there was no fiduciary relationship existing between the parties, such as partners or agents, and no agreement between the promoters would bind the company to be formed. *Kalner* v. *Baxter* (1866), L. R. 2 C. P. 174; *Natal Land Co.* v. *Pauline,* [1904] A. C. 120, and *Bright* v. *Hutton* (1852), 3 H. L. C. 341, followed. *Garvin* v. *Edmondson* (1909), 14 O. W. R. 435. Affirmed, 15 O. W. R. 210.

Transfer of property by incorporators—*Prior agreement — Payment — Promoters—Profit.*]—The owner of a patent in April, 1898, induced the defendants to take an interest in it with a view to introducing the patented article into public use. They subsequently decided to form a company. An actual assignment to the defendants was executed in June, 1898, pending the issue of the letters of incorporation, the expense of which the defendants undertook to bear; and by agreement of even date they agreed to sell to the company, when incorporated, the patent and all improvements, in consideration of the company paying them $5,000, and crediting $4,500, in respect to 500 shares subscribed or to be subscribed by them. In August, 1898, after incorporation of the company, an instrument was accordingly executed by the defendants, and the company adopted and confirmed the agreement above mentioned, and the patent was assigned to the company, and the $5,000 paid:—*Held,* that the defendants were entitled to retain the $5,000 as against the company, as they did not become promoters until after they had become entitled by agreement to interests in the patent, which were afterwards, and before incorporation, actually transferred to them.—*Semble,* that, even if the defendants had acquired their interests without consideration, that would be of no consequence to the company unless acquired for them. Judgment of Boyd, C., 2 O. W. R. 151, affirmed. *Highway Advertising Co.* v. *Ellis,* 24 Occ. N. 208, 7 O. L. R. 504, 3 O. W. R. 505.

Trustees for company to be incorporated—*Contracts by.*]—No personal liability is incurred by parties who contract, as trustees, on behalf and in the name of a company of which they seek the incorporation and which is subsequently incorporated, and the party contracting with them, in the above manner, is estopped from setting up against them any pretended irregularity in their proceedings for incorporation. *Hand Fireworks Co.* v. *Baikie* (1910), 39 Que. S. C. 227.

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2. NAME.

Incorporation under Dominion Act—*Company with identical name subsequently incorporated under Provincial Act—Fraud—Injunction.*] — Where a Dominion trading company are incorporated under a certain and somewhat odd name, the subsequent incorporation of a provincial company with that identical name is so palpably a fraud upon the public and a wrong to the existing company, that the onus is very strong upon the new company to justify their position.—Interim injunction granted to restrain the defendants until the trial of the action from acting upon their certificate of incorporation. —*Semble,* that when once a company is incorporated under the Dominion Act, with a particular name, the field is exclusively occupied so far as that identical name is concerned.—*La Compagnie Hydraulique de St. Francois* v. *Continental Heat and Light Co.,* C. R. [1909] A. C. 49, specially referred to. *Semi-Ready Ltd.* v. *Semi-Ready Ltd.* (1910), 15 W. L. R. 321. B. C. R.

Name liable to confusion.]—The remedy given by s. 7438 R. S. O. 1909, is open to a joint stock company against a general partnership which has adopted, in its registered declaration, a name liable to cause the confusion provided for in the said section. Hence, a joint stock company, incorporated under the name of "Lamontagne, Limited," is entitled to demand the cancellation of a declaration of a general partnership under the firm name of "Lamontagne & Co." *Laing Packing and Provision Co.* v. *Laing,* 25 Que. S. C. 344, followed. *Lamontagne, Ltd.,* v. *Girard* (1910), 39 Que. S. C. 179.

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3. MEMORANDUM AND ARTICLES.

Privileged shareholders—*Right to elect majority of directors—Ultra vires.*]—In the memorandum of association of a joint stock company organised under the British Columbia Companies Act, 1890, and its amendment in 1891, there was a clause purporting to give to the holders of a certain block of shares, being a minority of the capital stock issued, the right at each election of the board

of directors to elect 3 of the 5 directors, notwithstanding anything in the Act:—*Held*, that the shares to which such privilege was sought to be attached could not be considered preference shares within the meaning of the statute, and that the agreement was beyond the powers conferred by the statute, and null and void, being repugnant to the conditions as to elections of directors imposed by the Act as matters of public policy. Judgment in 9 B. C. R. 275, reversed. *Colonist Printing and Publishing Co.* v. *Dunsmuir*, 23 C. L. T. 65, 32 S. C. R. 679.

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4. PROSPECTUS.

Advertisement—*Ontario Companies Act, ss. 95, 99, 100—Director—Penalty.*]—A mining company incorporated on the 17th November, 1908, pursuant to the provisions of the Ontario Companies Act, 7 Edw. VII. c. 34, filed a prospectus with the Provincial Secretary on the 27th November, 1908, and subsequently inserted in certain newspapers an advertisement, for which the defendant, one of the directors, was responsible, giving particulars about the organisation of the company, the mining lands owned by the company, and the operations of the company, and stating that shares were for sale at a named price, but not complying in all respects with the requirements of the Act as regards a prospectus, and not filed with the Provincial Secretary:—*Held*, that the advertisement was a "prospectus" within the meaning of s. 99 of the Act, being an advertisement designed to accomplish the purpose mentioned in s. 95 (1), and that the defendant was liable to the penalty imposed by s. 100.—*Semble*, that an advertisement merely stating that a company are offering shares for sale, and that a prospectus can be obtained upon application, would be a "prospectus" within the meaning of the Act. *Re Rex* v. *Garvin*, 18 O. L. R. 49, 13 O. W. R. 575, 14 Can. Crim. Cas. 283.

False statements — *Liability of president.*]—In March, 1898, the prospectus of a trading and mining company was published. In it the defendant was named as president, and it contained false assertions, such as the statement that the company was formed by several important men of business in Montreal; that some of them, whose names were given, had consented to act as directors, and that a provisional board of directors had been formed. The defendant had consented to act as president of the company, at a salary of $1,000 a year, he had approved of the prospectus and of contracts made with workmen, and had deposited in the bank, as trustee, sums of money received from the latter as subscriptions to the capital of the company. Certain promoters had engaged the plaintiff and other workmen in the name of the company, had made them subscribe for a certain number of shares in the company and pay half the amount of their subscriptions, and had sent them to Edmonton upon a hiring for two years. The plaintiff, before signing his contract, had seen the defendant, and the latter had not warned him as to the false assertions of the prospectus. The workmen were abandoned at Edmonton:—*Held*, that, under these circumstances, the defendant was liable to the plaintiff for the amount which the latter had paid upon his subscription for shares and the damages which he had suffered by the breach of the contract made with him in the name of the proposed company. *Bonhomme* v. *Bickerdike*, 17 Que. S. C. 28.

Misrepresentations — *Action for money paid for shares — Reserve fund—Capital—Onus.*]—Plaintiff sought to recover payments made to defendants and damages on account of statements alleged to be false and fraudulent contained in a prospectus issued by directors of defendants on faith of which plaintiff was induced to subscribe and pay for a number of a new issue of preference shares. One of the principal matters complained of was a statement to the effect that undrawn profits or assets of the company to a large amount had been appropriated to a "reserve fund," whereas, as plaintiff alleged, defendants never had any reserve or sinking fund. Evidence shewed that profits, which were supposed to have been earned, instead of being distributed in dividends, were transferred to an account referred to and known as the "reserve account:"—*Held*, that the words "reserve fund," as used in the prospectus, did not necessarily mean a reserve fund which was invested, but the important thing was the reserving of amount out of property available for distribution in dividends, and appropriating it in the books of the company to meet contingencies, which was shewn in this case to have been done. And that, even if plaintiff understood the fund to be invested this, in the case of a manufacturing company, would not be a material representation which would influence the conduct of plaintiff in taking shares:—*Held*, also, it appearing that the directors employed competent managers, upon whom they were dependent for information, and that their auditor used due care in performance of his duties, that directors were not responsible for a representation in regard to cost of materials, affecting the profits, which was not discovered to be mistaken until some time after prospectus had been issued:—*Held*, also, as to a representation in the prospectus regarding appropriation of profits earned in payment of dividends on common and preferred stock, that the expression "appropriated" did not mean "paid," but that the sum mentioned was appropriated or devoted to a particular purpose and might be payable later.—The prospectus contained a representation that proceeds of the issue of stock would be applied, among other things, to replacing "working capital" already expended in erection of a mill, known as "Cowie's mill:" — *Held*, that the words "working capital" were not a technical expression or likely to mislead plaintiff, it being usual to speak of money used in the business of a company, whether borrowed on debentures or raised by sale of shares, as "capital:"—*Held*, also, as to application of moneys to other purposes than those mentioned in the prospectus, that the burden was on plaintiff to shew that directors, at time prospectus was framed, intended that the proceeds of new shares should be so applied, or that, on proper inquiry, they would have learned that the money could not be applied in the way stated, and were reckless. *Kennedy* v. *Acadia Pulp and Paper Mills Co.* (1906), 38 N. S. R. 291.

Misrepresentations — *Agent—Liability of directors—Rescission of contract to purchase shares—Delay in bringing action.*]—F. in June, 1903, purchased paid-up shares in the capital stock of an industrial company, on the faith of statements in a prospectus prepared by a broker employed to sell them. In January, 1904, he attended a meeting of shareholders, and from something he heard there suspected that some of the statements were untrue. After investigation he demanded back his money from the broker, and wrote to the president and secretary of the company repudiating his purchase. At subsequent meetings of shareholders he repeated such repudiation and demand for repayment, and in December, 1904, brought suit for rescission:- *Held*, that his delay, from January to December, 1904, in bringing suit, was not a bar, and he was entitled to recover against the company.—*Held*, also, that he could not recover against the directors who had instructed the broker to sell the shares, as they were not responsible for the misrepresentations in the prospectus.—Judgment of the Supreme Court of New Brunswick, *Farrell* v. *Portland Rolling Mills Co.*, 38 N. B. R. 364, 4 E. L. R. 500, affirming the decision at the hearing, 3 N. B. Eq. 508, reversed. *Farrell* v. *Manchester*, 40 S. C. R. 339, 5 E. L. R. 293.

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5. CAPITAL.

Exhibition association—*Original capital stock—Sale of stock—Discretion of directors—Confirmation by company — Form of bill.*]—At a meeting of the directors of an exhibition association, a large number of shares of the original capital stock of the company were allotted to the secretary of the company at par, he having subscribed for them; and immediately afterwards he disposed of a number of these shares at par to the directors themselves individually, in varying amounts. It was established in evidence that the transaction was for the purpose of retaining control of the company, in order that it might be carried on for the purposes for which it was organised. It was also established that the plaintiff had previously purchased a large number of shares, for many of which he had paid a premium: — *Held*, that this allotment of shares by the directors was not illegal, as the transaction was *bona fide*, and not *ultra vires* of the corporation itself; that the directors were acting within their powers when they exercised their discretion, and in the interest of the whole body of shareholders sold shares at par which might have brought a premium:—*Held*, that, as no fraud had been shewn, and relief was sought only for the company, the bill should have been filed in the name of the company itself. *Harris* v. *Sumner*, 4 N. B. Eq. 58, 5 E. L. R. 161.

Increase of capital stock—*Allotment of new shares by directors to themselves at par—Shareholders—Rights of minority—Voting power—Powers of directors—Statutes—Fraud — Injunction — Costs.*] — The directors of an electric railway company passed a by-law increasing the capital stock by 2,000 shares, and this was sanctioned by a majority of two-thirds in value of the body of shareholders at a meeting. The first batch of 350 shares the directors *ex parte* allotted at par to five of themselves, and also allotted the remaining 1,650 to the same five, but after issuing a circular to the body of shareholders, whereby the latter were invited to state whether they desired to increase their holdings, and wherein it was set forth that such shares might be allotted as seemed to the directors desirable and necessary. The plaintiff and other shareholders acting with him made no response except by way of protest. By the company's Act of incorporation, 56 V. c. 95, ss. 13 and 46 (O.), the capital stock could be increased, and certain traffic and other arrangements with other companies could be permitted, only upon approval by two-thirds in value of the shareholders. The directors did not wish or intend to allot the new stock among the shareholders *pro rata*, but so to deal with the last 1,650 shares, as to appropriate for themselves enough shares to give them more than a two-thirds majority in value of shareholders:—*Held*, that the minority shareholders were not required to submit to the form of application proposed by the circular; there was no recognition of any right on the part of existing shareholders to claim a *pro rata* division of the proposed new issue, and at this time, by the appropriation of the 350 shares, the minority had become less than one-third in value of the shareholders; and, therefore, the plaintiff was not precluded from seeking relief in respect of the total issue and allotment of the new stock.—The only statutory direction affecting this company as to the allotment of stock is in the general Railway Act of Ontario, R. S. O. 1897, c. 207 (incorporated with the special Act), s. 34 (16) of which enacts that the directors shall make by-laws for the management and disposition of stock, not inconsistent with the laws of the province; but no by-laws appeared to have been made with relation to the allotment or disposal of new shares:—*Held*, that the disposal made by the directors of the new shares was not within the general powers and functions of the directors of such companies; it was a one-sided allotment of stock, which ignored the just claims of many shareholders, and in effect amounted to a prejudicial encroachment on the voting power of the minority; it was not within the power conferred upon the directors by s. 6 of the Act of incorporation, to exclude any one from subscribing for stock who, in their judgment, would hinder, delay, or prevent the company from proceeding with and completing their undertaking under the provisions of the Act; and, therefore, the allotment should be declared invalid, and the defendants be restrained from voting upon the increased capital shares.—The plaintiff was allowed his general costs, although he had alleged fraud, and had not established it; any costs arising from the charge of fraud were excluded. *Martin* v. *Gibson*, 15 O. L. R. 623, 10 O. W. R. 66.

Toronto Gas Company — *Increase of capital—Statutory restrictions — Payments to directors — Dividends — Reserve fund — Investment in business—Plant and buildings —Renewal fund—Reduction in price of gas —Audit by municipality—Charges for depreciation or loss—Construction of statute.*]—Upon a consideration of the provisions of

50 V. c. 85 (O.), an Act to further extend the powers of the Consumers' Gas Company of Toronto:—*Held*, that the defendants were not bound to keep the reserve fund, as an actual separate sum of money, apart from their other property, and invested in the securities mentioned in s. 4, but were at liberty to use it in their business, as they did from year to year, without objection by the plaintiffs' auditors; and were not bound to carry to the credit of the fund its share of the increase in the value of the defendant's property which it had helped to acquire while invested in the business. 2. That charges for decrease in the value of gas mains, for iron gas lamps which became useless, and for gas meters destroyed, were not charges for renewal or repair, but for depreciation and loss, and did not come within s. 6 so as to be chargeable to the plant and buildings renewal fund. 3. That under s. 6 the defendants were entitled to continue to contribute to the plant and renewal fund the five per cent. authorised, even although it should not appear necessary to do so for the purposes for which the fund was to be used. These sections were construed in *Johnston* v. *Consumers' Gas Co.*, 27 O. R. 9, upon a special case, but the decision was reversed (23 A. R. 566, [1898] A. C. 477).

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6. MANAGEMENT—DIRECTORS, ETC.

Abuse of powers—*Forfeiture—Informant — Security — Pleading — Irregularity —Exception.*]—In a suit by the Attorney-General against a company for a declaration of forfeiture of its corporate rights on account of the abuse of its powers, it is sufficient to give the name of the informant and the amount of the security furnished in the petition, to which the information drawn up refers, without reciting the facts anew. If there were an irregularity in this respect, it would be the subject of an exception to the form, and not of a demurrer. *Archambeault* v. *St. Lawrence Investment Society*, 2 Que. P. R. 519.

Appointment of manager—*Want of by-law and seal—Services rendered—Salary — Compensation.*] — The plaintiff was appointed by the board of provisional directors of a company to be a director, and was also appointed manager before the company was organised. In an action for salary or compensation for services rendered, in which it was shewn that the services rendered had not resulted in any benefit to the company, and that the company had never gone into operation: —*Held*, that, as he was not appointed by by-law approved of by the shareholders, and had no contract under seal, he could not recover. *Re Ont. Express Co.*, 25 O. R. 587, commented on. *Birnie* v. *Toronto Milk Co.*, 23 Occ. N. 11, 5 O. L. R. 1, 1 O. W. R. 736.

Authority to make promissory notes —Formation of company — Date of letters patent. *Baldwin Iron and Steel Works (Limited)* v. *Dominion Carbide Co.*, 2 O. W. R. 6, 170.

Bonus to directors.]—A shareholder in an incorporated company cannot have an unanimous resolution of the shareholders, adopted at a general meeting (at which plaintiff was present and, in answer to a request, replied that he had no objections to offer) for the purpose of bonusing the directors, set aside on the ground that the by-laws of the company fix what is to be done with any surplus funds, without providing for such a case as the one at issue. *Gignac* v. *Gignac*, 37 Que. S. C. 174.

Breach of trust—Sale of machinery to company — Consideration — Shares in company — Fraud — Contract — Setting aside transactions—Payment of fair value of machinery. *Boyle* v. *Rothschild*, 10 O. W. R. 696.

By-laws not to be passed *without unanimous consent of all shareholders.*] — Plaintiff sought to have it declared that there was an agreement entered into by plaintiff and defendants, on the formation of a company, that no by-laws, resolutions or proceedings of that company should be had or taken without the unanimous consent of all shareholders and directors of the company, and for an injunction restraining defendants from any breach of such agreement. Trial Judge held in favour of plaintiff. Divisional Court reversed the trial Judge. Court of Appeal affirmed the Divisional Court. *Berkinshaw* v. *Henderson* (1908), 12 O. W. R. 919; affirmed (1909), 14 O. W. R. 833, 1 O. W. N. 97.

Cancellation of letters patent — *Action by Attorney-General—Order in Council —Pendente lite—Injunction—Crown—Extra-judicial opinion.*] — An action having been brought by the Attorney-General against an incorporated company for a declaration that they were carrying on an illegal business and for forfeiture of their charter, the Attorney-General, while the action was pending, summoned the defendants before him to shew cause why their charter should not be revoked by order in council:—*Held*, that, whether the right of cancellation of letters patent of incorporation be now only statutory (see R. S. O. 1897, c. 191, s. 99), and merely a power, not a duty, or whether the prerogative right still subsists, the bringing of an action does not clothe the Court with jurisdiction to restrain the exercise of the power. The Court has no jurisdiction, at the suit of a subject, to restrain the Crown or its officers acting as its agents or servants or discharging discretionary functions committed to them by the Sovereign. It is not proper for a Judge to express an extra-judicial opinion as to the mode in which the discretion of the Attorney-General should be exercised. *Attorney-General for Ontario* v. *Toronto Junction Recreation Club*, 24 Occ. N. 373, 8 O. L. R. 440, 3 O. W. R. 387, 4 O. W. R. 72.

Change in number of directors — *Nullity of by-law.*] — The formalities prescribed in the Companies Act, R. S. C. 1906, c. 79, s. 76, for the adoption of a by-law to change the number of directors of a company, must be complied with under pain of nullity. Hence, a by-law to reduce the number from seven to five, passed at a general annual meeting, without special notice and not published in the *Canada Gazette*, is null and void.—An election held under such a pretended by-law is also void and confers

no right on those elected to act or hold office as directors.—3. An action in the nature of *quo warranto* proceedings under Art. 987 *et seq.* C. P., lies to oust those who assume, under colour of such an election, to act as directors of a private company, and may be brought by a shareholder present at the meeting when it took place and not objecting. No acquiescence can cover the nullity above mentioned. *Sherker* v. *Rudner* (1910), 39 Que. S. C. 44.

Directors allotting shares *to themselves in payment for services—No confirmation by shareholders—Illegal scheme—Control of company—8. 89, 7 Edw. VII. c. 34.*]—Each of four directors claimed to have accounts against a company for services. At a directors' meeting they passed resolutions allowing the accounts and ordering them to be paid, no director voting in respect of his own account. They then took stock for their accounts and sold certain other stock which was not paid for:—*Held*, to be an illegal scheme to get control of the company, and the issue of stock was set aside. *Thorpe* v. *Tisdale*, 13 O. W. R. 1044.

Directors — *Power of.*]—The governing body of a trading corporation cannot, in general, use the funds of its community for any purpose other than those purposes for which they were contributed, or authorised to be used. The charter incorporating a company creates a contract between the company and its shareholders, and any act of the directors or company not within its express or implied powers would be a breach of such contract, and therefore *ultra vires*. The capacities and powers of trading and other companies are limited in degree, according to the purposes of such companies, and the measure of a company's liability in respect of its contracts must be co-extensive with its power to make them. Where any application of the funds of a company to a purpose not within its charter, would be restrained by injunction at the suit of a shareholder, the Court cannot declare such company's funds liable therefor, as such a proceeding would be giving judicial sanction to a breach of trust, or an act *ultra vires* of the company. *Re Central Bank—N. A. Life Ins. Co.'s Case* (1890), 30 C. L. T. 275.

Directors — Remuneration.]—A resolution of shareholders is necessary to authorise payment of salaries to directors of a company. *Minister of Railways and Canals* v. *Que. Southern Rw. Co. (Hodge & White's Claim)* (1908), 12 Ex. C. R. 11.

Directors, powers of. *St. Jerome* v. *Commercial Rubber Co.*, C. R. [1908] A. C. 444, digested under MUNICIPAL CORPORATIONS.

Diversion of funds—Payment of liabilities of business assumed by company—Agreement with partnership — Confirmation by shareholders — By-laws — Withdrawal of partners—Notice—Power of company to acquire assets—Account of profits—Resolution of directors. *Wade* v. *Pakenham*, 2 O. W. R. 1183, 3 O. W. R. 47, 5 O. W. R. 736.

Election—General meeting of shareholders—Shareholders prevented from voting—Meeting voting shares to directors as remuneration for services—7 Edw. VII. c. 34, s. 88 (O.) — By-law authorising payment to directors — Necessity for passing by board and confirmation by shareholders—Consideration for shares voted—Abandonment of appeal in previous action — Validity — Directors lending money to company—Repayment — Illegality — Costs. *Beaudry* v. *Read*, 10 O. W. R. 622.

Election of board—*Action for declaration of irregularity—Parties—Proxies — By-law regulating—By-law proper for directors —General power of shareholders.*] — Action by certain shareholders of a company, on behalf of themselves and all other shareholders, except the individual defendants, to have the election of the latter as directors set aside for irregularity:—*Held*, that the action must be dismissed unless the plaintiffs obtained the consent of the company to sue in the company's name; as, however, the company was a party defendant and all necessary parties before the Court, it was proper to dispose of the case on the merits, conditionally on such consent being obtained and the record amended.—Under s. 47 of the Ontario Companies Act, R. S. O. 1897, c. 191 (7 Edw. VII. c. 34, s. 87), by-laws regulating the requirements as to proxies are to be made by directors, and shall have force only until the next annual meeting of the company, and, unless confirmed thereat, shall cease to have force. The shareholders themselves, therefore, have no power to initiate and pass such a by-law at a general meeting; and, in the absence of any valid by-law regulating the matter, nothing more is necessary to a proxy than valid execution by the shareholder. *Kelly* v. *Electrical Construction Co.*, 16 O. L. R. 232, 10 O. W. R. 704.

Election of president — *Meeting—Legality — Quo warranto — Provisional director — Pleading — Shareholders.*] — A person who is sued for having usurped a public office is entitled to plead that the meeting at which he was elected was legal and regular, and can set up the illegality of the meeting at which the election relied upon by the plaintiff took place.—2. The fact that a meeting of a company at which an election took place was called by one provisional director only, would not necessarily render such election absolutely and radically null, so as to justify the rejection of a paragraph alleging such election, in answer to a *quo warranto*.—3. If a fact, which appears to be legal and relevant, is set up at great length in a pleading, and the opposite party inscribes in law, not against the parts of allegations containing such useless details, but against the fact itself, which he alleges should not have been pleaded, the useless details will not be struck off on such inscription.—4. Where parties sue for usurpation of office, not in any particular quality, but in their own names, and allege in their pleading their quality as shareholders and their interest as such, allegations of the defence denying such quality and interest will not be rejected upon an inscription in law. *Caisse Générale* v. *Dupuis*, 2 Que. P. R. 478.

Electric lighting companies — *Statutory powers — Concurrent exercise in same territory — Distance between wires.*]—Where

the Legislature has given to two companies similar powers, to be exercised over the same territory, the Court must necessarily conclude that the Legislature has intended to give the companies current powers; in such a case the Court, submitting to the legislative authority, should not intervene between the different companies unless and until one of them has infringed the rights acquired by the other. 2. In the case of two companies carrying on the business of electric lighting over the same territory, it seems that according to experts a distance of three feet between their wires is a sufficient distance to prevent any immediate danger. *Jacques Cartier Water and Power Co.* v. *Quebec Rw. Light and Power Co.*, 11 Que. K. B. 511.

Endorsement of bills for accommodation—*Authority of secretary—Discount—Notice to bank—Presumption.*]—The secretary of a company, whose authority was limited to the acceptance of drafts, endorsed, in the company's name, a number of drafts in which the company had no interest, for the accommodation of C. The trial Judge found that the plaintiffs, who discounted the drafts, had knowledge that the endorsements were made for the accommodation of C.:—*Held*, that the defendants were not liable:—*Semble*, that where the directors might, under the power given them, delegate to the secretary power to endorse for the company, the bank taking the paper *bona fide*, would be entitled to assume that the secretary had such power, although it had not, as a matter of fact, been delegated. *Union Bank* v. *Eureka Woolen Mfg. Co.*, 33 N. S. Reps. 302.

Endorsement of promissory note—Transfer to bank—Lawful holder—By-law—Transfer of debt—Powers of directors—Solicitor. *First Natchez Bank* v. *Coleman*, 2 O. W. R. 358.

Expropriation — *Compensation — Remedy — Action — Arbitration — Statute.*]—An arbitration clause in a private Act of Parliament will not oust the jurisdiction of the Court, and an action for damages will lie, unless the necessary steps are taken, under the Act, to vest the power to exercise the right, or to do the thing for which compensation would be due under the Act. *Barter* v. *Sprague's Falls Manufacturing Co.*, 3 E. L. R. 353, 38 N. B. R. 207.

Filling vacancies in board—*Quorum—Special meeting of shareholders.*]—By-laws of a company, incorporated under Ont. Cms. Act, provided that there should be seven directors, four of whom should be a quorum. Four directors ceased to be qualified, having sold and transferred their stock:—*Held*, that the remaining directors had not power, under s. 43 of the Act, to fill the vacancies, notwithstanding that by s. 40 the board might consist of only three members.—*Held*, also, that the vacancies could only be properly filled by a meeting of shareholders duly called for that purpose. Decision of MacMahon, J., affirmed. *Sovereen Mitt, Glove and Robe Co.* v. *Whiteside* (1906), 12 O. L. R. 638, 8 O. W. R. 279, 582.

Hotel company — Contract—Architects—Preparation of plans—Acceptance by directors — By-law — Delegated powers of president—Building new hotel—*Ultra vires*—Companies Act — Charter — Incidental powers—Meeting of shareholders—Resolution—By-law—Undertaking by third person with directors to pay debts of company and indemnify company — Assignment of undertaking to creditors of company — Action against promissor — Parties — Avoidance of circuity—Privity. *Stewart* v. *Stratford Hotel Co.*, 12 O. W. R. 157.

Illegal transactions—Action by shareholder and director—Issuing of stock to director in payment of assets of business taken over—Payment of commission to director on sale of stock—Expenses of promotion—Sale of stock at a discount—Amendment—Participation of plaintiff in illegal transactions—Estoppel—Increase in number of directors—Costs. *Stickney* v. *Buckel*, 6 O. W. R. 469, 522, 751.

Incorporated agricultural society—*Borrowing — Mortgage — Ultra vires — Statutes—Real Property Act.*]—An agricultural society incorporated under the Agricultural Societies Act, 55 V. c. 2 (Man.), has no implied power to borrow money or to mortgage real estate belonging to it, notwithstanding the provisions of s. 9 of the Act; and a district registrar was right in declining to register a mortgage of such a society given to secure a loan of money to erect buildings on its real estate.—*The Queen* v. *Reed*, 5 Que. B. D. 583, and *Blackburn Building Society* v. *Cunliffe*, 22 Ch. D. 61, followed.—*Bickford* v. *Grand Junction Rw. Co.*, 1 S. C. R. 696, distinguished.—A statute passed in 1899 empowering the municipality of Rockwood to guarantee a loan to the society, "to be effected or procured for the purpose of erecting buildings and the improvement of the grounds of the said society," could not be construed as giving the society any power which it had not before, for a misapprehension of the law by the Legislature has not the effect of making that the law which the Legislature had erroneously assumed to be the law. *North-West Electric Co.* v. *Walsh*, 29 S. C. R. 33, followed. *In re Rockwood Agricultural Society*, 20 Occ. N. 25, 12 Man. L. R. 655.

Invalid resolution—*Payments to officers.*]—By the by-laws of a publishing company the board of directors was to consist of three persons, two of whom constituted a quorum. At a meeting, at which two of the directors, C. and G., were present, one being the president and the other the secretary of the company, a resolution was passed that "the matter of the compensation of C., the editor, and G., the advertising solicitor of the company, was considered, and the sum of $1,000 each ordered to be placed to their respective credits in the books of the company for services rendered during the year 1895, in addition to their regular salary, and to be charged to their salary account." C. as a matter of fact, had not been appointed editor, nor G. advertising solicitor, the object of the resolution being to appropriate all the funds of the company, and to prevent a stockholder, who owned the greater part of the stock, and had made a claim against the company, being paid.—*Held*, that the resolution could not be sustained, nor could any

moneys received under it be retained. *Gardner* v. *Canadian Manufacturer Publishing Co.*, 20 Occ. N. 174, 31 O. R. 488.

Judgment against company—Unsatisfied execution — Action against directors — Companies Ordinance, 1905, s. 54 — "Labourer" — Miner — Wages — Payment for work done — Method of payment—Two directors only sued — Writ of execution—Signature of deputy clerk of Court—Proof of return *nulla bona*. *Crew* v. *Dallas*, 9 W. L. R. 598.

Judgment for wages—*Liability of de facto directors—Manitoba Joint Stock Companies Act.*]—1. Persons who accept transfers of shares in a company incorporated under the Manitoba Joint Stock Companies Act, R. S. M. 1902, c. 30, and are elected and act as directors of the company, cannot escape the liability for wages of employees imposed upon directors by s. 33 of the Act, by shewing that they do not hold the shares absolutely in their own right, but only as security or in trust, notwithstanding that, under s. 27 of the Act, such persons are not legally qualified to be directors.—2. The provisions of s. 33 are remedial and not penal in their nature, being only the withholding from directors, in respect of wages, of the freedom which the statute would otherwise give them from personal liability for all debts of the company. *Macdonald* v. *Drake*, 4 W. L. R. 434, 16 Man. L. R. 96.

Lease of elevator — Shareholder's right to account of profits—Ratification by shareholders—Meetings — Irregularities—Parties —Amendment. *Meyers* v. *Cain*, 6 O. W. R. 297, 834.

Lien on shares for debt of shareholder—*Seizure under execution—Claim of lien — By-laws — Powers of company — Manitoba Joint Stock Companies Act—Promissory note — Liability — Extinguishment—Waiver by discounting note—Estoppel.*]—A company incorporated under the Manitoba Joint Stock Companies Act, R. S. M. 1902, c. 30, has, by virtue of s. 41 of the Act, power to make a by-law providing that a lien shall exist upon the shares of any stockholder for any debt or liability to the company; and, if such by-law has been passed, the company may maintain such lien as against an execution creditor of a stockholder whose shares have been seized by the sheriff under execution. — *Child* v. *Hudson's Bay Co.*, 2 P. Wms. 207, and *Société Canadienne Francaise* v. *Daveluy*, 20 S. C. R. 449, followed.—The shares in question, which were not fully paid up, stood in the name of the defendant's wife, but the plaintiff on the 1st May, 1907, recovered a judgment against the defendant, his wife, and the company, declaring that the said shares were the absolute property of the defendant and available under execution in satisfaction of the plaintiff's judgment. At that time a note given to the company for the balance due on the shares was held by the bank in which it had been discounted; but, before the time of the seizure of the shares by the sheriff, that note had fallen due and had been taken up by the company:—*Held*, that, at the time of the recovery of the last mentioned judgment, there was no debt due from the defendant or his wife to the company for which the company could then have set up a lien, and they were not estopped by the judgment from setting up the lien as soon as they had taken up the note.—*Held*, also, that the right to the lien had not been waived or lost by the taking and discounting of a promissory note for the debt for which the lien was claimed. *Montgomery* v. *Mitchell*, 7 W. L. R. 518, 18 Man. L. R. 37.

Managing director — *Appointment by board of directors—Absence of resolution of shareholders — British Columbia Companies Act—Salary of "manager."*]—The plaintiff, who was a director of the defendant company, was appointed by himself and his co-directors managing director of the company, at a salary fixed by the directors. There was no resolution of the shareholders entitling the plaintiff to remuneration. The company was incorporated under the laws of British Columbia, and there were no by-laws; so that table A. of the Companies Act governed, and by s. 54 of that table, the remuneration of the directors is to be determined by the company in general meeting; but, under s. 55, the directors can appoint a manager and fix his remuneration; and it was contended that, where a manager is appointed by the directors from among their number, he *ipso facto* ceases to be a director, by virtue of s. 57:—*Held*, that a director's office is vacated automatically as soon as he accepts a position of emolument under the company; but the plaintiff was not appointed manager, but managing director; and was not entitled to recover from the company the salary fixed by the directors. *Eales* v. *Cumberland Black Lead Mine Co.* (1861), 6 H. & N. 481, distinguished. Judgment of Morrison, J., reversed. *Claudet* v. *Golden Giant Mines* (1910), 13 W. L. R. 348.

Managing director—*Authority—Ratification — Negligence — Costs — Fraud.*] — Plaintiffs in equity, though successful as to part of their claim, were deprived of general costs of suit, on ground that unfounded charges of fraud were made as to the other part, and were ordered to pay costs applicable to the charges of fraud. — The managing director of a company, without authority but with knowledge of all his co-directors except one, erected, at a cost of $17,000, a fuel house for storage of mill wood and a conveyor for the purpose of moving the mill wood from his mill to the company's pulp mill to be used for fuel and pulp. The fuel house and conveyor became of no use to company by reason of the discontinuance of the use of mill wood:—*Held*, that there was no such gross negligence on the part of the managing director as made him liable for expense of erecting the fuel house and conveyor. *Cushing Sulphite Fibre Co.* v. *Cushing* (1906), 37 N. B. R. 313.

Managing director — *Powers—Breach of trust — Pleading — Charges of fraud — Failure—Costs.*] — The defendant promoted the formation of the plaintiff company for the manufacture of pulp, upon the understanding that slab wood from his saw mill should be used as fuel and pulp wood. The defendant was made managing director, and without orders, but with the knowledge of

all the directors except P., erected, at a cost of about $17,000 to the company, a fuel house and conveyors thereto from his saw mill for the conveyance of mill-wood. The expenditure was necessary if the company were to use mill-wood. The defendant supplied the company with mill-wood under an agreement that it should be paid for on the basis of its relative value to round wood for pulp and coal for fuel. The wood was invoiced by the defendant at $2 per thousand of mill cut, on account of which he paid himself $52,391.30, leaving a balance due of $10,589.57. The mill-wood was of a poor quality. No practical test was made of its relative value. In the absence of any other than an approximate estimate, the Court *held* it should be charged at $1.90 per cord for pulp wood and 90 cents per cord for fuel wood, on which basis the defendant had overpaid himself $2,432.92. The defendant resigned his position as managing director at the end of ten months, and the company refused to use mill-wood. The company sought to charge the defendant with the cost of the fuel house and conveyors, which were no longer of use, as an unauthorised and improper expenditure, and made for the defendant's benefit. The defendant had always been willing to have the price of the mill-wood determined by an actual test. Charges of fraud against the defendant were preferred in a number of sections of the bill, which were unsupported at the hearing:—*Held*, that the defendant should not be charged with the cost of the fuel house and conveyors; that the decree in the plaintiffs' favour for the balance due by the defendant on overpayment should be without costs; and that the defendant should have the costs of the sections of the bill alleging fraud. *Cushing Sulphite Co.* v. *Cushing*, 24 Occ. N. 243, 2 N. B. Eq. Reps. 539.

Managing director — *Powers of—Promissory notes.*] — The defendant company were incorporated by letters patent under the Manitoba Joint Stock Companies Act, R. S. M. c. 25, for the purpose of carrying on a trading business, and the plaintiffs sued as endorsees of three promissory notes given by the managing director of the company in their name to C. for tea ordered from him, but never delivered. There was no by-law, resolution, or other act expressly defining the powers or duties of the managing director, but the evidence shewed that the course of business of the company was such that he had frequently given similar promissory notes which had been paid by the company's cheques, without objection on the part of the other directors or the auditors:—*Held*, that the notes sued on had been made in general accordance with the powers of the managing director, within the meaning of s. 62 of the Act, and were binding on the company. *Imperial Bank* v. *Farmers' Trading Co.*, 21 Occ. N. 449, 13 Man. L. R. 412.

Managing director—Salary—By-law of board of directors—Approval by shareholders—Money expended for company—Action by assignee—Addition of assignor as plaintiff—Set-off — Misrepresentations — Payment for stock allotted to managing director for services — Voluntary winding-up — Reference—Costs. *Benor* v. *Canadian Mail Order Co.*, 10 O. W. R. 899, 1091.

Managing director—*Warehouse receipt—Disappearance of goods.*]—The failure of an individual director of a warehousing company to inform the holder of a warehouse receipt of the disappearance of the goods covered by such receipt, does not, in the absence of any accusations of fault against the director in respect thereof, give the holder of such receipt a right of action against him. *Ontario Bank* v. *Merchants Bank of Halifax*, 5 Que. P. R. 392.

Meetings of — Invalidity — Protest—Withdrawal of director—Assent to mortgage—Seal. *Harris* v. *English Can. Co.* (B.C.) (1906), 3 W. L. R. 5.

Meeting of shareholders—*Election of directors—Fraudulent haste in opening and closing — Illegality.*] — Meetings of shareholders of societies or joint stock companies called for a fixed time should not be opened in haste as soon as the moment arrives; a reasonable delay should be granted to late comers. Therefore, a meeting called for 12 noon for the election of directors, which is opened by the shareholders present at one minute after 12, and which proceeds to the election and constitution of the board of directors in such a fashion that all is over and the meeting closed at 10 minutes after 12, must be adjudged to have been held and conducted, by reason of such precipitancy, in fraud of the absent shareholders and declared illegal and void. *Armstrong* v. *McGibbon*, 15 Que. K. B. 345.

Moneys paid to executors of deceased president—Secret trust—Action to divert moneys into treasury of company—Status of plaintiff as shareholder and creditor—Parties—Company not before Court—Leave to add in Master's office—Distribution of moneys—Reference—Practical winding-up. *Jenns* v. *Oppenheimer*, 7 W. L. R. 774.

Powers—*Conditional municipal bonus—Acceptance — Hypothec — Authorisation of shareholders — Assignment — Contestation—Reservation.*] — The directors of a joint stock company, incorporated under R. S. C. 1906, c. 119, have the power under the "general powers" clause (s. 35) of the Act, without referring the matter to the shareholders and obtaining their approval, to accept a conditional bonus granted the company in a municipal by-law, and to create a hypothec on the immovable property of the company, in favour of the municipality for a specified sum, as security for the fulfilment of the conditions. Even if the authorisation of the shareholders was required, failure to get it would not defeat the right of the municipality to the security, on the ground of the nullity of the hypothec, but would make it the duty of the company to cure the irregularity by giving a valid hypothec instead.—2. The reservation by the assignee, in a deed of assignment of the hypothecated property, of his right to contest the validity of the hypothec, or his repudiation of the claim of the municipality, can in no wise affect the legality of either the claim or the hypothec. *Commercial Rubber Co.* v. *Town of St. Jerome*, Q. R. 17 K. B. 274 (J.C.).

Powers of officers—*Power of attorney—Seal—Signatures.*]—A power of attorney

given in the name of the company and under its common seal, by the managing officers of the company, and also signed by the secretary, is valid and is *prima facie* the act of the company. *In re Brook (James A.) Co.*, 7 Que. P. R. 206.

Provisional directors — *Powers—Advances of money to subscribers for shares—Delegation of powers to committees.*]—By the Act incorporating the plaintiff company, certain persons were declared provisional directors, who, it was enacted, "may forthwith open stock books, procure subscriptions of stock, make calls on stock subscribed and receive payments thereon, and shall deposit in a chartered bank in Canada all moneys received on account of stock subscribed or otherwise received by them on account of the company, and shall withdraw the same for the purposes only of the company, and may do generally what is necessary to organise the company:"—*Held*, that the provisional directors had no right to enter into an arrangement by which, to induce a person to subscribe for shares, they were to advance out of the funds of the company moneys to enable the intending subscriber to make payments on the shares:—*Semble*, also, Meredith, J.A., dissenting, that, in the absence of express provision, the provisional directors had no power to delegate their powers to committees; but, *per* Meredith, J.A., there was no evidence that they had done so. *Monarch Life Insurance Co.* v. *Brophy*, 9 O. W. R. 151, 14 O. L. R. 1.

Provisional directors—*Sale of rights—Nullity—Bartering office of trust—Public policy—Sale of charter.*]—A sale to be valid must have a certain, fixed subject, or a subject at least susceptible of being fixed, and which is of commercial value.—2. The persons named in a statute constituting a corporation, as provisional directors, to receive subscriptions for the shares, make allotment of the shares among the subscribers, and proceed to the definite organisation of the company, exercise an office of trust, and do not thereby acquire rights or interests which may be the subject of a sale. *A fortiori*, the sale by one of them of the charter itself is void, and the expression "charter" in an act of sale under seal cannot apply to a part which the provisional director claims as his own.—3. The fact of being declared a provisional director, even if it gives rise to rights or interests susceptible of being determined, does not confer rights of commercial value. —4. A sale which has the effect of substituting a purchaser for one who was named in the statute as designated to fill a position of trust, is contrary to public policy and therefore void. *Vipond* v. *Robert*, Q. R. 17 K. B. 403.

Public corporations, created for purposes ancillary to the good government of the country, are governed by the rules of the common law of England in force in Quebec and have impliedly all powers necessary to attain the object of their existence. *Montreal Harbour Commissioners* v. *Record Foundry* (1909), 38 Que. S. C. 161.

Purchase and sale of land — *Irregularities in proceedings.*]—A mining company subject to the provisions of the Ontario Companies Act, R. S. O. 1897, c. 191, and the Ontario Mining Companies Incorporated Act, R. S. O. 1897, c. 197, has power to buy and sell land, and a sale in good faith of all the land owned at the time by the company is not necessarily invalid, for there is nothing to prevent the business of the company being continued by the purchase of other land. Nor can such a sale made in good faith be restrained at the instance of a dissentient minority of shareholders on the ground that irregularities have occurred in the conduct of the proceedings of the company leading up to the sale, or on the ground that the approving majority are also shareholders in a rival company, and are in carrying out the sale furthering the interests of that rival company. Judgment of Street, J., 1 O. L. R. 654, 21 Occ. N. 291, affirmed. *Ritchie* v. *Vermillion Mining Co.*, 22 Occ. N. 382, 4 O. L. R. 588, 1 O. W. R. 624.

Purchase of mineral claim by directors of mining company — *Rights of shareholders — Fraudulent scheme — Meetings of directors.*]—As fiduciary donees of their power, the directors of a company are bound to exercise them *bona fide* for the purposes for which they were conferred and generally the corporate body to which they owe this duty is entitled, in the case of a breach of it, to invoke the remedial action of the Court.—A director acting in a certain way, with the primary object of deriving an improper personal advantage, financial or otherwise, cannot save himself by shewing that his action was also of benefit to the company. If the circumstances are such that his actions are equivocal, and open to two constructions, he must, seeing that he is in a fiduciary capacity, be prepared to shew beyond all reasonable doubt the single-mindedness of his intentions.—The purchase by the directors of a mining company of a mineral claim was set aside on the ground of fraud, upon actions brought by shareholders. Duty of directors as to calling meetings. *Madden* v. *Dimond*, *Rudolph* v. *Macey*, 12 B. C. R. 80, 3 W. L. R. 49, 52.

Residence abroad — *Eligibility—Companies Act—Refusal of discharged servant to give up books—Collateral enquiry.*] — A company were incorporated by letters patent under the Nova Scotia Joint Stock Companies Act, R. S. N. S., 5th series, which contained a provision that the majority of directors should, at all times, be persons resident in Nova Scotia. Subsequently the company took advantage of the provisions of the Nova Scotia Companies Act, 1900, and became incorporated under that Act, which did not contain this provision. The defendant, who had been the secretary of the company, was removed from office, and he refused to give up to the company the minute book and stock book of the company, on the ground that a majority of the directors were not resident in Nova Scotia:—*Held*, that the defendant could not set up the contention that the directors were not eligible or properly elected; that they were *de facto* directors, and their eligibility could not be enquired into in this collateral way; and that he must give up the books.—*Quære*, whether the provision in question applied to this company in view of s. 118 of the Companies Act. *Woodstock Mining Co.* v. *Harris*, 40 N. S. R. 330.

Resolution — *1 Edw. VII. c. 67 (Q.)—Construction—Powers of company—Purchase—Effect of resolution by an insufficient quorum.*]—*Held*, that under the Quebec Act, 1 Edw. VII. c. 67, the appellant company were empowered to acquire and hold for the purpose of their business real or immovable estate not exceeding a specified sum in yearly value in any part of the province except the judicial district of Quebec; and that, acting *bona fide*, they were the sole judges of what was required for that purpose.—Where a purchase, *intra vires* of the above Act, had been effected by the company under a resolution of the directors at a meeting on the 17th July, 1901, which authorised the completion thereof, subject to an option of reconveying within a specified time:—*Held*, that, after the lapse of the specified time, the purchase was absolute, and that the company, which had furnished the vendor with a copy of the resolution as one which had been duly and regularly passed, could not avoid it by shewing that it had been passed by an insufficient quorum.—Judgments in Q. R. 25 S. C. 473, 14 K. B. 108, affirmed. *Montreal and St. Lawrence Light and Power Co.* v. *Robert*, [1906] A. C. 196, Q. R. 15 K. B. 137.

Returns to Provincial Treasurer — *Taxation—Default — Penalty — Navigation company — Agents—Pleading—Amendment.*]—In an action against two defendants, described as incorporated companies, for the recovery of penalties for non-compliance with the requirements of Art. 1149, R. S. Q., the plaintiff restricted his demand to the penalties for 300 days between two stated periods. The action was dismissed in the first Court, as to the first defendant, on exception to the form based on the ground that no such corporation as that described in the writ existed. The other defendants had not pleaded, and the plaintiff subsequently caused an amended declaration to be served on the attorneys, alleging that the defendant first mentioned was an unincorporated company, and claiming the same amount of penalties for a different period of 300 days, and as to which the prescription enacted by Art. 2615, R. S. Q., had accrued at the date of the service of the amended declaration unless prescription had been interrupted by the service in the original action: — *Held*, affirming, but for different reasons, the judgment in Q. R. 22 S. C. 510, that prescribed under Art. 2615 was not interrupted by the service of process in the original action inasmuch as the period for which the penalty was claimed therein, was not the same as the period claimed for in the amended declaration, and, moreover, the latter claim included a period for which the plaintiff had abandoned his claim in the original action. Further, the original action being brought against the defendant as the agent of an incorporated company, whereas the amended declaration alleged that the defendant was the agent of an unincorporated company, such amendment should not have been allowed, inasmuch as it changed the nature of the demand within the meaning of Art. 522, C. C. P. *Lambe* v. *Donaldson Steamship Line and Navigation Co.*, 23 Que. S. C. 469.

Rights and powers of shareholders —*Will of the majority and recourse of the minority—Sale or letting the privileges and the enterprise of the company—Common advantage—Acts done in the interests of a part of the shareholders only—Competence of the Superior Court to set them aside.*]—Outside of the cases specially provided for in the charter or in the statute forming a joint stock company, the will of the majority of the shareholders, legally expressed, concerning the business of the enterprise, ought to prevail as a rule. Nevertheless if the question is as to acts which involve the abandonment of the enterprise, or at least the giving up of its independent operation or a departure from the statute as to the object of the company, such as the granting, or selling or renting for a number of years of the privileges of the company of its establishments, factories, etc., they must be manifestly in the interest of all the shareholders in order that the minority may be bound by the majority. The Superior Court by virtue of its general powers of surveillance and relief (Art. 50 C. P.) is always competent to take cognizance of the complaint of one or several shareholders, of the circumstances of these operations, and to pronounce them null, if they are not for the equal and evident advantage of all, and upright and of perfectly good faith, especially if they appear fraudulently combined in a speculative purpose profitable to a part only, even though it may be the majority of the shareholders. *Amyot* v. *Dom. Cotton Mills Co.*, Q. R. 36 S. C. 35.

Right to acquire business—Provisions of charter—Powers of company—Injunction — Shareholders — Acquiescence — Goodwill. *Ryckman* v. *Toronto Type Foundry Co.*, 3 O. W. R. 434, 522.

Right to guarantee debt of another —*Ultra vires.*]—It is *ultra vires* of a tug company, incorporated for the purpose of carrying on a general carrying, towing, wrecking, and salvage business in all its branches, to guarantee payment by the owner of a tug employed by the company of a boiler purchased by him to operate the tug. *Williams (A. R.) Machinery Co.* v. *Crawford Tug Co.*, 16 O. L. R. 245, 11 O. W. R. 321.

Rival boards of directors—*Judgment for payment of money to company — Attempted satisfaction—Payment into bank to credit of company — Attachment — Issue as to satisfaction of judgment.*] — A Divisional Court had directed the trial of an issue to determine whether a certain judgment was satisfied. An appeal to the Court of Appeal dismissed. *Boyle* v. *Rothschild*, 11 O. W. R. 963, 12 O. W. R. 168, 13 O. W. R. 800.

Sale of assets by directors to managing director—Action to set aside—Direction to hold meeting of shareholders to ratify or disapprove sale. *Ellis* v. *Norwich Broom and Brush Co.*, 8 O. W. R. 25.

Sale of bonds—*Conversion of preferred stock into bonds—Ultra vires—Commissions paid to secretary—Trust—Ratification—Recovery of moneys illegally paid—Mistake of law.*]—By a resolution of the directors, the secretary of the company had been authorised to sell the company's bonds, for which

he was to be paid a commission at the rate of 5 per cent. on the amounts received. Subsequently, at a time when they had no authority to do so, the directors converted the preferred stock held by certain shareholders into bonds, and paid the secretary for his services in making the conversion, at the rate of 5 per cent. on the amount of bonds thus disposed of. In an action to recover from the secretary the moneys so received by him as commission:—*Held*, that, although the secretary had received the commissions under mistake of law, yet, as he must be assumed to have had knowledge of the illegality of the transaction, the moneys could be recovered back by the company.—Subsequently the scheme of conversion was approved of by a resolution of the shareholders, but it did not appear that they had been fully informed as to the arrangement for the payment of a commission to the secretary in that respect, in addition to his regular salary: — *Held*, that the resolution of the shareholders had not the effect of ratifying the payment of the commissions. *Rountree* v. *Sydney Land and Loan Co.*, 42 N. S. R. 49, affirmed, 39 S. C. R. 614.

Sale of plant and assets—*Secret profit by directors—Action for accounting—Fraud—Directors held trustees—Reference to take accounts—Costs—Further directions and costs reserved.*]—An action for a declaration that defendants were trustees of the moneys and other considerations received by them from the Dominion Canners Ltd., for the use and benefit of the shareholders of the Lakeside Canning Co., and that the interests of all parties interested might be ascertained, for a full discovery and account of the profits received by defendants, etc. Defendants received from Dominion Canners $33,750 in cash and $15,250 in preferred stock in one certificate issued in the name of defendant company, and $15,000 of stock issued in one certificate also in the name of defendant company. They subsequently apparently received further consideration in cash, which Dominion Canners Ltd., paid for portions of the property of defendant company purchased by it, but not included in option.—Sutherland, J., *held*, that there should be judgment for plaintiffs, declaring that the individual defendants were trustees for plaintiffs of the shares in defendant company respectively transferred by plaintiffs to individual defendants, and that plaintiffs were entitled to be paid all profits realised by individual defendants, in respect of such shares, and directing a reference to Master at Picton to enquire and state what profits said individual defendants had respectfully realised as to such shares. Further directions and costs reserved. *Hyatt* v. *Allen* (1911), 18 O. W. R. 850, 2 O. W. N. 927.

Sale of mining properties to company — Acquisition by director—Agent or trustee for company—Secret profits—Affirmance of contract by company — Return of notes and shares—Costs. *Ruethel Mining Co.* v. *Thorpe*, 9 O. W. R. 942, 10 O. W. R. 222.

Secret profits—*Laches.*]—M. desired to have the village of Havelock lighted by electricity. He purchased a piece of land with water power for $300. He next interested 4 other persons in the project and they obtained a charter for a company. Then M. sold his property to the company for $5,000, and after some financing each of the five persons forming the company received $1,000 in paid up shares in the company. Later other persons became shareholders in the company, and after considerable delay brought action to set aside above transaction as fraudulent and void. At trial Britton, J., *held*, that M. did not purchase the property in question for any company to be formed, but on his own account; that there was no fraud in selling the property to the company at $5,000, as it was the only property available for the purposes of the company, and under the circumstances it was not an exorbitant price, and dismissed the action, without costs. Divisional Court *held*, that there was some understanding by which a secret profit was provided for the directors and allowed the appeal with costs as against the defendant directors, except Mathieson, and entered judgment for $1,000 against them severally. As to Mathieson the action and appeal was dismissed. *Hay's Case, In re Canadian Oil Works Corporation*, L. R. 10 Ch. 593, followed. Judgment of Britton, J., 15 O. W. R. 111, reversed. *Bennett* v. *Havelock* (1910), 16 O. W. R. 19, 21 O. L. R. 120.

Telephone company—*Sale of assets and franchise—Power of companies—Outstanding contract for use of lines of vendor company—Right of third party to restrain sale.*]—By agreement, which was to be in force for 10 years, the Cumberland Telephone Co. and the Central Telephone Co. were to have the use of each other's lines and of any connections either then had or might thereafter acquire over the lines, of any other company. Shortly after the making of the agreement the Central Co. sold their property to the New Brunswick Telephone Co. By their charter the Central Co. had power to amalgamate with any other company, and the Act of incorporation of the New Brunswick Co. empowers them to acquire other telephone lines. The agreement of sale provided that the Cumberland Co. should have, by virtue of their agreement with the Central Co., the use of so much of the New Brunswick Co.'s lines as were acquired from the Central Co. The Cumberland Co. sought to restrain the sale unless provision were made in the agreement of sale that they should have the use of the whole system of the New Brunswick Co.:—*Held*, that the bill should be dismissed.—*Held*, also, that the sale and purchase being within the powers of the companies, could not be objected to, and, even if it were *ultra vires*, the plaintiffs had no status entitling them to raise the question.—*Semble*, that the sale should not have been enjoined, even if the New Brunswick Co. had not assumed the contract of the Central with the Cumberland Co. *New Cumberland Telephone Co.* v. *Central Telephone Co.*, (1906), 2 E. L. R. 101, 3 N. B. Eq. 385.

Trading company — *Doing business—Forfeiture of charter—Art. 4750, R. S. Q.*]—A joint stock company chartered by letters patent issued by the Lieutenant-Governor of the province, for the making of wines, etc., and the exploitation of a business in connection therewith, who, having received subscriptions for its shares, elected and re-elected directors, acted by the latter at several meet-

ings, and purchased a considerable stock of wines and other goods, although the purchase is not followed by delivery, have made use of their charter and commenced their regular operations, in such a way as to prevent the operation of the forfeiture enacted by Art. 4750, R. S. Q. *Compagnie Générale des Boissons Canadiennes* v. *Procureur-Général de Québec*, 15 Que. K. B. 536.

Transfer of shares before first payment made—*Breach of duty—Ontario Companies Act—Inquiry into solvency of transferees—Contributories.*]—On the issue of letters patent under the Ontario Companies Act, R. S. O. 1897 c. 191, incorporating a company, the directors subscribed for stock, making no provision, however, for the payment, nor making any calls thereon—while applications for stock by others were only accepted on their paying 25 per cent. on subscription and 25 per cent. on allotment. Subsequently, and some time before the company were declared insolvent, the directors, knowing of the insolvent condition, and desiring to get rid of their stock, on which nothing had been paid, employed the promoter of the company to procure persons willing to take the stock. He accordingly procured 5 persons, who he knew were of little or no substance, and as to whom he had carefully abstained from any inquiry, to take all of the directors' stock, except one share each on which they could qualify and make the transfers, informing the transferees that they would become directors, and, as to 4 of them, that they would incur no liability on the stock, as he would arrange for its disposal. The purchasers gave their promissory notes for the first 25 per cent., payable in 6 months without interest, before the transfers were made, payable to the company, instead of to the directors, the object being that they should be treated as payment of the 25 per cent. for which the directors were liable:—*Held*, that the transfers were invalid, as being made contrary to s. 30 of the Act, before all calls had been paid, the liability of the directors for the 25 per cent. being substantially the same as a call; and also in that the directors were guilty of a breach of trust in not exercising their powers in the best interests of the company by taking special care and caution in procuring responsible transferees. The directors were therefore directed to be placed on the list of contributories for this stock. *Re Peterborough Cold Storage Co.*, 9 O. W. R. 850, 14 O. L. R. 475.

Ultra Vires Acts—*Do not bind minority.*]—The rule that in the management of the affairs of a joint-stock company, the will of the majority of the shareholders, legally ascertained and expressed, should prevail, applies only in matters that are within the scope and powers of its incorporation. Acts that are *ultra vires*, adopted by the majority of shareholders, at regularly convened meetings, are null and void, and therefore not binding on the minority. An act of a joint stock company that amounts to an implied renunciation of its charter rights, or involves the risk of forfeiture of its franchise, is *ultra vires*. Such an act is the demise by a manufacturing company, by a twenty-one years' lease, for a fixed rental, of all its property, "mills, plan and accessories," practically a surrender of its whole business. *Amyot* v. *Dominion Cotton Mills Co.* (1910), 38 Que. S. C. 457.

Unauthorized expenditure—*Liability of innocent directors.*]—The directors of a limited company, without authority from the shareholders, passed a resolution providing that, in consideration of a firm, of which two directors were members, carrying on business of a similar character, continuing the same until the company could take it over, the company indemnified it from all loss occasioned thereby. K. and F., two members of the firm, refused their assent to the terms of this resolution and declared their intention, of which the majority of the directors were made aware, to retire from the firm. F. subsequently wrote to the president and another director reiterating her intention to retire, and declaring that she would not be responsible for any further liability. The company afterwards took over the business of the firm, paying therefor $30,000, and receiving assets worth $12,000, and having eventually gone into liquidation, the liquidator brought an action to recover from the members of the firm the difference. The Court of Appeal (*Wade* v. *Pakenham*, 5 O. W. R. 736), *held* that K and F. were not liable, though their partners were:—*Held*, reversing that decision, that K. and F., having received the benefit of the money paid by the company, were also liable to repay the loss. *Wade* v. *Kendrick*, 26 C. L. T. 124, 37 S. C. R. 32.

Wages—*Liability of director—"Labourer or servant"—Foreman of works.*]—A person engaged to perform manual work, at a daily wage, and who is actually occupied in doing such work, is a "labourer," within the meaning of 2 Edw. VII. c. 15, s. 71 (D.), although, being a workman of superior capacity, he is also intrusted with the supervision of other workmen, and, to that extent, fills the position of a "boss," or foreman. *Fee* v. *Turner*, 13 Que. K. B. 435, 24 C. L. T. 402.

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7. Debentures and Mortgages.

1. *Debentures*, 658.
2. *Mortgages*, 659.

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1. *Debentures.*

Corporate powers—*Price of elevator—Guaranty by railway company.*]—A company whose charter provides that it "may acquire, own, lease, and sell real estate," and "build, sell, lease and otherwise deal with elevators," etc., and further "may issue bonds bearing interest to an amount not exceeding the cost of any elevator built by it," has the power to issue such bonds for the price of an elevator bought by it.—A guarantee of bonds issued by a company for the price of an elevator, given by a railway company to which the elevator is leased, and amounting in effect to an undertaking to pay the rent to a trustee for the bond-holders, is valid and binding and may be enforced against such railway company. *Royal Trust Co.* v. *Great Northern Elevator Co.*, Q. R. 30 S. C. 499.

Trust deed to secure debentures—*Pleading—Purchase for value without notice—Onus—Evidence—Affirmative and negative evidence—Weight of evidence.*]—The question was as to the validity of a specific security created by a trading company, in the ordinary course of business, as against the floating security created by a previous trust deed to secure bonds issued by the company:—*Held*, that the plea of purchase for value without notice must be proved in its entirety by the party offering it; it is not incumbent on the opposite party to prove notice after the purchase for value is established.—Where a conversation over the telephone was relied on as proof of notice, the evidence of the party asserting that it took place, and giving the substance of it in detail, must prevail over that of the other party who states only that he does not recollect it.—Judgment of Supreme Court of Nova Scotia in *Indian and General Investment Trust Limited* v. *Union Bank of Halifax*, 3 E. L. R. 409, affirmed. *Union Bank of Halifax* v. *Indian and General Investment Trust*, 40 S. C. R. 510.

Validity of debentures — *Powers of provisional directors — By-law—Ratification by shareholders—Preferential lien on personality of company—Necessity for registration under Bills of Sale Act.*]—At a meeting of the provisional directors of a joint stock company incorporated under the Ontario Companies Act, a by-law was passed, under the power conferred by s. 49 of the Act, authorising the directors from time to time to borrow money upon the credit of the company, to issue bonds or debentures of the company for the amounts borrowed, and to pledge the real or personal property, rights and powers, of the company, to secure such bonds or debentures. On the same day a meeting of the shareholders of the company was held, at which all the shareholders were present, when this by-law was confirmed, and all the provisional directors duly elected the directors of the company. This by-law purported to be enacted by the directors (not the provisional directors), and had the seal of the company affixed to it:—*Held*, that, whether or not the provisional directors had power to pass the by-law (as to which there was a difference of opinion in the Court), it was a valid by-law and sufficient authority for the subsequent issue of debentures by the directors: —*Held*, also, Garrow, J.A., dissenting, that the debentures issued, though purporting to create a lien or charge upon the property of the company, were not mortgages or conveyances intended to operate as mortgages of goods and chattels of an incorporated company, within the meaning of the Bills of Sale and Chattel Mortgage Act, and were not, therefore, void as against the defendant, the assignee of the company for the benefit of creditors, because not registered under the provisions of that Act. *Johnston* v. *Wade*, 17 O. L. R. 372, 11 O. W. R. 598, 12 O. W. R. 951.

2. *Mortgages.*

Action to set aside mortgage and bonds—*Fraud upon minority shareholders—Receiver — Value of property misapplied.*] — Two companies existed in Yarmouth, a gas company, and an electric light company. Attempts were unsuccessfully made to consolidate them. Certain members of the electric light company promoted a new company called the Merchants and Manufacturers Company, which acquired the property and assets of the electric light company. The promoters of the new company afterwards acquired a controlling interest in the gas company, and proceeded to sell out all the property and assets of the Merchants and Manufacturers Company to the gas company, issuing bonds of the gas company secured by mortgage of all their property to pay for it. An action was brought by certain of the minority shareholders of the gas company to set aside the mortgage and the bond issue. On the trial, an amendment of the statement of claim was granted, allowing the plaintiffs to amend by inserting a paragraph alleging the action to be brought on behalf of themselves and the other shareholders, not being defendants, and also to make necessary amendments of the statement of claim in conformity with the evidence. The Judge found that the scheme of the promoters of the Merchants and Manufacturers Company, who also constituted a majority of the shareholders of the gas company, was a fraud upon the minority shareholders of the gas company, and an attempt to benefit themselves at the expense of such shareholders: —*Held*, that, as the bonds were in the hands of third parties, who, on taking the bonds, were not bound to go beyond the terms of the bonds, the instrument securing them, and the charter of the company, neither the bonds nor the mortgage could be set aside.—*Held*, further, that the plaintiffs were entitled to relief. A reference was ordered to ascertain the value of the company's property misapplied, and it was also held that a receiver might be appointed and the company wound up. The certificates of shares issued to the Merchants and Manufacturers Company were ordered to be delivered up and cancelled. *Cann* v. *International Trust Co.*, 40 N. S. R. 65.

Chattel mortgage — *Construction—Resolution to authorise mortgage by directors—Insolvency—Concurrence of intent to prefer — Presumption against shareholder mortgagee.*]—*Held*, that s. 98 of the Companies Ordinance relating to the powers of a company to borrow and mortgage, applies only to mortgages and other securities to secure money borrowed, and does not restrict the implied powers of a trading company to give security for existing debts. That the unanimity of the members of the company in authorising a mortgage obviates the necessity for any meeting. *Adams* v. *Bank of Montreal*, 8 B. C. R. 314, affirmed, 32 S. C. R. 719, referred to. That the affidavit of *bona fides* of a chattel mortgage may be sworn before a solicitor acting for the mortgagee. *Baker* v. *Ambrose*, [1896] 2 Q. B. 372, not followed. Where there is lacking a knowledge of insolvency and intent to prefer, delay, defeat, hinder or prejudice creditors, on the part of either the mortgagor or the mortgagee, the mortgage not being attacked within 60 days from the date of its execution, is not invalid under the Assignments Act. Where a mortgagee is a director and one of the shareholders of a company mortgagor, concurrence of intention will be presumed. Where there are

two mortgagees named in one mortgage and the property is mortgaged to them severally in certain ascertainable proportions, and the security to one mortgagee is declared valid and to the other invalid, the valid security will only be enforcible against the proportion mortgaged to mortgagee. *Barthels, Shewan & Co.* v. *Winnipeg Cigar Co.* (1909), 2 Alta. L. R. 21, 10 W. L. R. 263.

Claim by mortgagee to plant and chattels.] — On application of mortgagee liquidator directed to deliver up plant and chattels mentioned in applicant's mortgage. If parties cannot agree as to the specific chattels, mortgagee may bring an action or an issue will be directed. *Shortreed* v. *Raven Lake Portland Cement Co.*, 13 O. W. R. 720.

Consent of shareholders — *Ratification.*]—A mortgage made by the directors of a company prior to the consent of its shareholders, without which consent there was no power to borrow, may be ratified by the shareholders. *Adams* v. *Bank of Montreal*, 8 R. 314, 32 S. C. R. 719.

Future acquired property — *Book debts, whether included—Power of trading company to mortgage — Power of mortgage company to accept mortgage—Effect of ultra vires mortgage.*]—A trading company gave a mortgage to a loan company on all its assets, real and personal, and all its property, real and personal, that should thereafter be acquired or owned by it. The loan company assigned the mortgage to H. and subsequently the trading company was ordered to be wound up under the Dominion Winding-up Act:—*Held*, that future book debts are covered by the mortgage and that the trading company had power to mortgage them: even if loan company has no power to lend on personal security, the mortgage is binding on liquidator until set aside. He can redeem. *Re Perth Flax and Cordage Company*, 13 O. W. R. 1140.

Hypothec—*Promissory note—Payment by indorser—Absence of protest — Recovery by indorser.*]—Under the Joint Stock Companies Act of the Province of Quebec, directors may contract a hypothec, which will be binding on the company if made in the interest of the company. 2. A director of the company who accepts such hypothec, to secure indorsations made by himself and other directors, cannot afterwards, in good faith, question the legal right of the directors to authorize the granting of such hypothec. 3. Where no proof of a protest or the waiver of protest, is made, the indorser of a promissory note who pays, cannot recover, and he must be held to have paid without any obligation to do so; and the payment must be attributed to his own generosity. 4. Where the person who accepts an hypothec to secure the payment of certain debts, does not bind himself personally, there is no obligation on his part which renders him liable in case the debtor does not pay. *Savaria* v. *Paquette*, 20 Que. S. C. 314.

Mortgage — *Rate of interest—Acceleration clause.*]—Bonds of a company dated the 1st July, 1902, provided for payment of the principal in 10 years from date, and that in the meantime interest thereon should be paid at the rate of 10 per cent. Default having been made in payment of interest, the trustee under a mortgage given to secure the bonds, made on the 1st January, 1905, a declaration calling in the principal and interest, under an acceleration clause in the mortgage:—*Held*, that interest at the rate provided for, and not at the statutory rate, was payable after the date of the declaration. *Eastern Trust Co.* v. *Cushing Sulphite Fibre Co.*, 2 E. L. R. 93, 3 N. B. Eq. 392.

Mortgage by company to bank to secure existing debt.]—Plaintiff, liquidator of the New Ontario Brewing Co., brought action to set aside a mortgage by the company to defendants, on the ground (1) that it was made within three months preceding the commencement of winding-up proceedings; (2) that no by-law of the company was passed authorising the mortgage.—Sutherland, J., *held* (15 O. W. R. 536), 1 O. W. N. 519), that the consideration mentioned in the mortgage was proved to have consisted of an existing debt from the company to the bank, and that the bank was endeavouring to get security therefor. Plaintiff was entitled to succeed under s. 94 of the Winding-up Act, but the by-law was not properly ratified, and was without effect for the purpose of making the mortgage valid. Judgment for plaintiff as liquidator of the New Ontario Brewing Co., setting aside the mortgage, and the defendants will execute a discharge of it. Costs to plaintiff.—Court of Appeal *held*, that the attack upon the mortgage failed and the appeal should be allowed and the action dismissed, but the circumstances were such as to invite enquiry, and costs should not be allowed either party. *Hammond* v. *Bank of Ottawa* (1910), 17 O. W. R. 121, 2 O. W. N. 99, 22 O. L. R. 73.

Sale under power—"*Proceeding against the company*"—*Winding-up Act, R. S. C. 1906, c. 144, s. 22.*]—A company being in liquidation, the mortgagees went into possession prior to the issue of the winding-up order. On an application to restrain the mortgagees from selling under their security, objection was taken that the attendance of the mortgagees on an application and the approving of the winding-up order was such a taking part in the winding-up as gave the Court jurisdiction to restrain them. This being overruled, the liquidator sought to restrain the mortgagees from selling without the sanction of the Court, on the ground that such sale would be a "proceeding against the company" under s. 22 of the Winding-up Act:—*Held*, that the mortgagees were proceeding rightfully. *In re British Columbia Tie and Timber Co.*, 14 B. C. R. 81, 9 W. L. R. 495.

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8. SHARES.

1. *Subscription and Allotment*, 663.
2. *Issue*, 672.
3. *Calls*, 673.
4. *Cancellation*, 675.
5. *Transfer*, 677.
6. *Register*, 683.

1. *Subscription and Allotment.*

Action by assignee of company to recover value of shares subscribed for —Conditional subscription — Allotment—Notice—Written offer — Conduct — Estoppel—Director. *Bank of Hamilton* v. *Johnston*, 7 O. W. R. 111.

Action to set aside subscription and allotment—Grounds of fraud and misrepresentations—Riddell, J., granted judgment for plaintiff as asked—Nothing in laches as defence—Money paid to be returned with interest — Costs to plaintiff—Action against individual defendants retained until further application. *McGaffigan* v. *National Husker Co.* (1911), 18 O. W. R. 370; 2 O. W. N. 600.

Advances—Trusts — Notice — Mortgage —Parties to action. *Birkbeck Loan Co.* v. *Johnston*, 6 O. L. R. 258, 1 O. W. R. 163, 2 O. W. R. 556.

Agent to solicit subscriptions—*False representations — Ratification — Benefit.*]—Promoters of a company employed an agent to solicit subscriptions for stock, and W. was induced to subscribe, on false representations by the agent of the number of shares already taken up. In an action by W. to recover the amount of his subscription from the promoters:—*Held*, affirming the judgment of the Court of Appeal, 2 O. L. R. 261, 21 Occ. N. 493, that the latter, having benefited by the sum paid by W., were liable to repay it, though they did not authorise and had no knowledge of the false representations of their agent. Per Strong, C.J., that neither express authority to make the representations, nor subsequent ratification or participation in benefit, were necessary to make the promoters liable; the rule of respondeat superior applies as in other cases of agency. *Wilson* v. *Hotchkiss*, 22 C. L. T. 3; *S. C., sub nom. Milburn* v. *Wilson*, 31 S. C. R. 481.

Agreement by defendant to purchase shares from plaintiff — *Consideration—Reasonable time to make demand.*] — *Held*, on appeal, that defendant ought to take stock from plaintiff as he had agreed that there was no stipulation that plaintiff should demand this to be done before he paid for the stock. As to the evidence not admitted by the trial Judge, it would have made no difference in the result. *Coburn* v. *Clarkson*, 13 O. W. R. 135.

Agreement to pay calls—*Absence of allotment.*]—Where an application was made by the agent of a company to W. to subscribe for shares in the company, and W. agreed with the company to take shares and pay the calls thereon, the transaction was complete, and W. thus became a shareholder, although no shares were formally allotted to him and no notice of allotment was given to him. *Acadia Loan Corporation* v. *Wentworth*, 40 N. S. R. 525.

Agreement to take shares—Rescission — Misrepresentation — Laches. *Gourley* v. *Chandler*, 433; *Saunders* v. *Chandler*, 1 E. L. R. 433.

Application for shares — *Withdrawal before notice of allotment — Notice of withdrawal given to agent of company.*]—1. An agreement to take shares in a company, although accompanied by the giving of a promissory note in part payment, is nothing more than an application for the shares, and is not binding on the applicant until acceptance by the company and notice thereof given to him; and, if the applicant gives notice of withdrawal of his application before notice of acceptance reaches him, he will be released from any obligation under his agreement or under the promissory note in the hands of the company or in the hands of any person having no better right to it than the company would have had.—2. Notice of such withdrawal, if given to the general agent of the company who procured the subscriptions, will be sufficient notice to the company. *Kruger* v. *Harwood*, 4 W. L. R. 401, 16 Man. L. R. 433.

Banking company — *Shares—Application for — Attempted withdrawal.*]—Action to recover price of shares in plaintiff's capital stock. On 28th April defendant, while intoxicated, signed an application for said shares. On 30th April the provisional directors received the application. Defendant telegraphed same morning revoking application. The Court was not satisfied it was received before meeting of provisional directors. Two provisional directors had not been notified so as to be able to attend directors' meeting:—*Held*, no meeting, and therefore no allotment of stock to defendant and no subsequent confirmation. Action failed. *Farmers Bank* v. *Sunstrum* (1909), 14 O. W. R. 288.

Conditional subscription — *Allotment —Acceptance—Calls.*]—H. asked defendant to subscribe for stock. Both were hard of hearing. H. thought he was authorised to sign defendant's name, whereas defendant said he would subscribe but on certain conditions:—*Held*, no contract. Notice of allotment was sent defendant, and within a reasonable time he replied saying he had subscribed conditionally. Having rejected the shares he was not called on to get his name off the register. Action for calls dismissed. *Silliker* v. *Evans*, 7 E. L. R. 560.

Conditions not fulfilled—*Representation of agent of company—Materiality—Untruth.*] — Action brought by incorporated body to recover $500, the amount of 5 shares of plaintiff's capital stock for which the defendant subscribed on 20th April, 1892. Defendant set up that he was induced to become a subscriber for the shares by the representations of plaintiff's agent, that Mr. G. A. Cox and Mr. H. A. Massey had each subscribed or promised to subscribe for $10,000 of stock, upon the condition that subscriptions for $50,000 were obtained on or before 1st January, 1893; that defendant's subscription was required in order to assist in making up what was still required of the $50,000, and that his subscription would not be binding unless the $50,000, including the subscription of Messrs. Cox and Massey, were fully subscribed on or before 1st January, 1893. It was proved that neither Mr. Cox nor Mr. Massey had subscribed or promised

to subscribe for $10,000 each, either conditionally or unconditionally, nor did they do so at any time after defendant's subscription, nor was $50,000 subscribed on or before 1st January, 1893:—*Held*, that the representations were proved to have been made; that, by reason of them, defendant was induced to subscribe for the stock "as a sort of escrow; it was not to be effective nor operative unless the $50,000 was obtained within the limited period of time." The circumstances of this case seem to bring it within the rule laid down in *Wallis* v. *Littell*, 11 C. B. N. S. 369. *Ontario Ladies' College* v. *Kendry*, 5 O. W. R. 605, 10 O. L. R. 324.

Contract by deed—*Delivery*—"*Issue*" — "*Allotment*" — *Calls* — *Resolutions* — "*Offer*"—*Preference shares.*]—*Held*, reversing the judgment of Lount, J., 2 O. L. R. 390, 21 Occ. N. 500, that the defendant's undertaking to take shares in the plaintiff company, when issued and allotted, being by deed, for valuable consideration, and being delivered to an agent of the company, was not revocable as a mere offer would be, and that the resolutions of the company and the letters to the defendant were a sufficient "issue" and "allotment" of the shares. *Xenos* v. *Wickham*, L. R. 2 H. L. 296, followed; *Nasmith* v. *Manning*, 5 A. R. 126, 5 S. C. R. 417, distinguished:—*Held*, also, that (provision having been made therefor in the memorandum and articles of association), the preference shares of the company were lawfully created. *Nelson Coke and Gas Co.* v. *Pellatt*, 22 C. L. T. 382, 4 O. L. R. 481, 1 O. W. R. 595.

Delegation of authority—*Withdrawal of application — By-laws—Number of directors.*]—At a general meeting of the shareholders of the plaintiff company, incorporated under the Ontario Companies Act, it was resolved that a board of three directors should be elected to manage the affairs of the company, and three of the five provisional directors were elected as directors. The three directors met and adopted by-laws, one of which provided that the affairs of the company should be managed by a board of five directors, and another provided for the terms upon which stock subscriptions should be received. About ten months later, a document in the form of an agreement to purchase stock was signed by the plaintiff, and the words "accepted by" written at the foot over the signature of one of the three directors, who had been elected president and general manager; and at a meeting of the directors a resolution was passed giving to the president full power to deal with the defendant's "application." On the following day the president wrote to the defendant notifying him that calls had been made upon the shares subscribed for by him, "which have this day been allotted to you by by-law of this company." Nothing further was done in the way of allotting shares to the defendant, and his name did not appear in the register of shareholders. About two weeks after the receipt of the president's letter, the defendant wrote to the company withdrawing and cancelling his application:—*Held*, in an action for the amount of calls alleged to be due, that the directors had no power to delegate to the president their authority as to the allotment of shares or their authority to accept the offer of the defendant; there was, therefore, no valid allotment, and the withdrawal was effectual.—*Semble*, that the fact that the by-laws passed by the directors provided for a board of five directors, while a board of only three assumed to manage the affairs of the company, would be a bar to the plaintiffs' success in the action. *Twin City Oil Co.* v. *Christie*, 18 O. L. R. 324, 13 O. W. R. 756.

Directors allotting themselves shares *as fully paid up—Misfeasance—Winding-up Act, R. S. C., 1906, c. 144, s. 123.*]—An original subscriber and provisional director of a company who had only paid $25 on account joined with the other provisional directors in passing a resolution, at the organisation meeting of the company in 1902, that the shares of capital stock subscribed for by them should be allotted to them as fully paid up, which was done. In 1904 he transferred his shares, receiving therefor the sum of $125 more than he had paid. In 1906 the shares were forfeited, by resolution of the directors, for non-payment of a call of 100 per cent. made upon them:—*Held*, in the winding-up proceedings (Meredith, J.A., dissenting as to the measure of damages), that the original subscriber for the shares was liable as for breach of trust under s. 123 of the Winding-up Act, R. S. C. 1906 c. 144, in assuming to accept the shares as fully paid up; but the measure of damages was the market value of the shares at the date of the allotment, and the sum of $125 was all that he was liable for in this proceeding. Per Meredith, J.A.:—The measure of damages was the par value of the shares. Judgment of Teetzel, J., affirmed. *In re Manes Tailoring Co., Crawford's Case* (1908), 18 O. L. R. 572, 11 O. W. R. 498, 13 O. W. R. 829.

Directors, discretion of, as to purchaser and price of shares.]—At a meeting of the directors of an incorporated company they allotted all the unissued shares, being 40 per cent. of the capital stock, to the secretary of the company at par, he having subscribed for them, and immediately afterwards he disposed of a number of these shares at par to the directors individually. No shares had been sold for three years previously, and in the meantime the company's real estate had greatly increased in value, and the plaintiff had recently purchased a large number of shares, nearly all at a premium, and some at a premium of 150 per cent. *Held*, that this transaction by the directors was not illegal, as the shares were allotted *bona fide* to the secretary with intent to further the company's interests and without intent on the part of the directors to profit personally thereby: that the directors were acting within their powers when they exercised their discretion and sold shares at par which might have brought a premium; and that they were not obliged to offer the unissued shares to the shareholders *pro rata* or put them up at auction before disposing of them to one shareholder at par. *Harris* v. *Sumner* (1909), 39 N. B. R. 204.

Failure to organise company—*License—Insurance Act.*] — To constitute a binding

contract to take shares in a company, when such contract is constituted by application and allotment, there must be an application by the intending shareholder, an allotment by the directors of the company of the shares applied for, and a communication by the directors to the applicant of the fact of the allotment having been made. The subscription for stock amounts to nothing more than an offer, and requires to be completed by an allotment of stock to the subscribers. The company in question here never was organised; it had no business existence; it never had stock to allot; it never had directors; and, therefore, it never could make an allotment:—*Held*, also, that, as no license was obtained by the company from the Minister of Finance within two years from the passing of the Act incorporating the company, such Act expired and ceased to be in force on the 13th June, 1900, and the company ceased to exist. The Insurance Act, R. S. C. c. 124, s. 24. *Hodgins* v. *O'Hara*, 22 C. L. T. 29, 133.

Implied acceptance and allotment.]—A subscription for shares in a joint stock company becomes a contract by acceptance of the subscription and the distribution and allotment of the shares made by the company. Such acceptance and allotment may be implied as well as express. Consequently, the transfer by a company to a third person of a subscription for a specific number of shares, followed by notice to the subscriber, is an acceptance of the subscription and an implied allotment of the shares subscribed for. *Robert* v. *Banque des Cantons de l'Est*, 17 Que. K. B. 157.

Increase of capital stock—Agreement to take shares before issue of supplementary letters patent—No necessity for allotment—Co. having no shares to sell—Amendment—Rights of defendant under contract. *Port Hope Brewing and Malting Co.* v. *Cavanagh* (1906), 8 O. W. R. 985, 10 O. W. R. 531.

Issue of certificate—Payment by promissory note—Estoppel — Action to cancel shares—Status of shareholder as plaintiff—Right of action—Payment of promissory note *pendente lite*—End of cause of action — Costs—Summary application. *O'Sullivan* v. *Donovan* (1906), 7 O. W. R. 78, 8 O. W. R. 319.

Man of no means—*Outward form to cover real transaction—Double contract — Purchase of patent of invention—Bonus to purchasers of preferred shares—Ont. Co. Act, ss. 113, 119.*]—Defendant company allotted 50,000 shares of $10 each to a man of no means who did not pay for them and was not expected to do so. They were intended to be given as a bonus to purchasers of preferred shares.—At trial Clute, J., *held*, 15 O. W. R. 105, that the agreement was *ultra vires* of the company, and the pretended allotment and issue of said shares should be cancelled.—Divisional Court *held*, that the contract was double and separate; that 10,000 shares were given allottee as purchase price of a patent of invention, and was a valid transaction, but that the allotment of the other 40,000 shares was a "colourable transaction" to enable the company to issue shares at a discount, and was *ultra vires*. *Lindsay* v. *Imperial Steel and Wire Co.* (1910), 16 O. W. R. 406, 21 O. L. R. 375, 1 O. W. N. 930.

Mining company — *Shares—Failure of consideration—Abandonment of enterprise—Promissory notes — Effect of renewals.*]—Action on bill of exchange for $3,046.85 drawn by plaintiffs and accepted by defendant. Defendant pleaded an entire failure of consideration, and counterclaimed for $3,000 paid by him to plaintiffs on 17th September, 1899, to take up a promissory note which had been made by him to plaintiffs, upon the ground that the consideration had entirely failed: — *Held*, plea good defence. Plaintiff argued that the effect of two renewals was to estop the defendant from the defence of want of consideration in the original note:—*Held*, if an original note is voidable for failure of consideration no amount of renewals will cure the defect, unless some new consideration is introduced, and that a mere compliance with defendant's request to renew does not constitute such consideration:—*Held*, defendant entitled to recover back his $3,000 paid on other note. *Bullion Mining Co.* v. *Cartwright*, 5 O. W. R. 522, 6 O. W. R. 505, 10 O. L. R. 438.

Misrepresentation—Agent—Settlement of action—Threats. *McCallum* v. *Sun Savings and Loan Co.*, 1 O. W. R. 226.

Misrepresentation by agent of promoters—*No adoption after incorporation—Rescission — Remedy.*]—The plaintiffs were induced to sign an agreement to take stock in a proposed company, upon the representation of P., acting for the promoters in securing subscriptions, that one of the plaintiffs, G., would be appointed agent and representative of the company for the province of Prince Edward Island. After the incorporation of the company, notices were sent out to subscribers requiring payment of a first call upon the stock subscribed for by them. The plaintiffs paid the amount of the call, but subsequently—the company having refused to appoint G. as their agent, as agreed by P. at the time the agreement to take shares was signed—claimed a rescission of the contract and a return of the money paid by them:—*Held*, that the plaintiffs could not recover.—*Per* Longley, J., that the company were not responsible for representations made prior to the incorporation unless such representations were expressly adopted by the company after incorporation; and that the plaintiffs could not escape liability as shareholders on the ground of the misrepresentations alleged, their remedy in such case being against P. personally. *Gourlie* v. *Chandler and Hart Limited*, *Saunders* v. *Chandler and Hart Limited*, 3 E. L. R. 45, 41 N. S. R. 341.

Notice — *Waiver—Preferred shares—By-law — Resolution — Directors — Reduction of numbers of—Promissory note—Failure of consideration.*]—The Ontario Companies Act, R. S. O. 1897, c. 191, s. 47, provides that a company may by by-law increase or decrease the number of its directors, but no such by-law shall be valid or acted upon unless sanctioned by vote of not less than two-thirds in value of the shareholders at a meeting of the company duly called for considering the

subject, nor until a copy certified under the company's seal has been transmitted to the Provincial Secretary and published in the *Gazette*. By s. 22 it is enacted that the directors may make a by-law for creating and issuing any part of the capital stock as preferred stock, but no such by-law shall have any force or effect whatever until after it has been unanimously sanctioned by a vote of the shareholders present or represented at a general meeting duly called for considering the same, or unanimously sanctioned in writing by the shareholders, or approved by the Lieutenant-Governor as therein provided. The plaintiffs, at their first general meeting of shareholders, at which all of the existing shareholders, being the 5 persons named as provisional directors in the letters patent of incorporation, were present, unanimously adopted a resolution that the number of the directors of the company should be 4, and thereupon 4 of the provisional directors were elected directors. Another motion was then carried authorising the directors to arrange for terms and conditions of sale of stock, preferred and common, and to allot or dispose of the same on such terms as they deemed best. Thereupon the 4 directors immediately held a meeting, elected officers, and adopted a form of application for preferred stock. It was then moved and carried "that we offer for sale not more than 1,500 shares of the company to be sold as preferred stock of the company at par value of $10 per share," etc. Immediately after this directors' meeting the shareholders' meeting was resumed, all shareholders being present, and the full minutes, resolutions, etc., of the board of directors were presented and confirmed unanimously. Some two months afterwards the first annual general meeting of the company was held, when a motion was carried that the shareholders "approve and confirm the sale by the directors of $3,900 of the preferred capital stock of the company, and hereby authorise the directors to make any further sales of the said preferred capital stock that they may deem necessary in the interests of the company:" — *Held*, that the preferred shares had not been properly and validly issued, for s. 45 above mentioned, with regard to decreasing the number of directors, had not been complied with and, even if the motion for issue of preferred shares carried at the directors' meeting amounted to a by-law, although in form only a resolution—which was very doubtful—s. 22 required that such a by-law should be passed by the directors first and then confirmed by the shareholders, thus prescribing consideration twice, and by two different bodies, acting in different capacities; and, moreover, the resolution did not create any specific number of shares as preferred shares, as it should have done, but left uncertain not only the amount of preferred stock, but also the amount of common stock:—*Held*, therefore, in this action, in which the plaintiff sued the defendant upon a note given for the amount due in respect of certain preferred shares alleged to have been allotted to him, that, as there were in fact, under the above circumstances, no such shares to allot, there had been a total failure of consideration for the note, and the action must be dismissed.—*Semble*, that where an application for shares contains an absolute covenant to pay, notification of withdrawal before allotment is invalid. *Manes Tailoring Co.* v. *Willson*, 9 O. W. R. 209, 14 O. L. R. 89.

Notice of allotment—*Contributory.*]—Where an applicant had agreed to take shares in a company conditional on his receiving certain moneys which would enable him to pay for them:—*Held*, that he had the right to withdraw his application, as he did, not having received any formal notice of allotment, by informing the company of his inability, owing to non-receipt of the moneys, to pay for the shares, and that he was not liable as a contributory. *In re Publishers' Syndicate, Mallory's Case*, 22 C. L. T. 162, 3 O. L. R. 552, 1 O. W. R. 142.

Payment of calls—*Evidence of notice of call—Certificate of indebtedness — Unqualified directors—Acts of board — Quorum — Validity — Election — Unanimous vote — Ballot.*]—1. Subscribers for shares in the stock of a company who have already paid one call cannot be heard to deny the allotment of their shares.—2. The production of a certificate of indebtedness for unpaid calls on stock in a company incorporated by letters patent under the Manitoba Joint Stock Companies Act, R. S. M. 1902, c. 30, made in accordance with s. 53 of the Act, is *prima facie* evidence of notice of the call as well as of the other matters referred to in that section.—3. The presence on the board of directors of such a company of three who were not qualified, by reason of being in arrears in respect of unpaid calls at the time of their election, is not sufficient to invalidate the acts of the board if done by a legal quorum of properly qualified directors. — *Scadding* v. *Lorant*, 3 H. L. C. 443; *Bank of Liverpool* v. *Bigelow*, 12 N. S. R. 236, and *Munster* v. *Cammel Co.*, 21 Ch. D. 183, followed.—4. Although the Act requires that the election of directors shall be by ballot, an election by unanimous vote without balloting will be valid if no more than the necessary number are nominated. *Morden Woollen Mills Co.* v. *Heckles*, 7 W. L. R. 715, 17 Man. L. R. 557.

Principal and agent — *Authority of agent—Conditional agreement.*]—S. signed a subscription for shares in a company to be formed and a promissory note for the first payment, both of which documents he delivered to the promoter of the company, to which they were transferred after incorporation. In an action for payment of calls, S. swore that the stock was to be given to him in part payment for the goodwill of his business, which the company were to take over. The promoter testified that the shares subscribed for were to be in addition to those to be received for the goodwill:—*Held*, that, though S. could, before incorporation, constitute the promoter his agent to procure the allotment of shares for him and give his note in payment, yet the possession by the promoter did not relieve the company from the duty of enquiring into the extent of his authority, and, whichever of the two statements at the trial was true the promoter could not bind S. by an unconditional application. *Ottawa Dairy Co.* v. *Sorley*, 24 C. L. T. 202, 34 S. C. R. 508.

Promissory note given for price—Misrepresentation — Condition — Absence of allotment — Acceptance of plaintiff as shareholder — Estoppel — Recovery on note. *Fischer* v. *Borland Carriage Co.* (1906), 8 O. W. R. 579, 9 O. W. R. 193.

Prospectus—*Unreasonable delay—Departure—Res judicata.*]—On the 28th January, 1899, the defendant and others subscribed for a certain number of shares of the stock of a projected company, the purpose of which was to build an hotel. The prospectus stated that it was intended to apply for a charter forthwith, and to commence building as soon as $40,000 of the stock had been subscribed, and that the buildings were estimated to cost about $45,000, and to be ready for opening at the beginning of the summer season of 1899. The company, however, was not formed, nor was anything done towards getting the hotel ready for occupation by the time mentioned. Prior to the 24th October, 1899, only $28,700 had been subscribed, but additional subscriptions obtained on that date and shortly afterwards brought the total up to $40,150. On the 24th November, 1899, letters patent of incorporation were issued. About the 1st July, 1900, the hotel was completed, and cost about $15,000 more than originally contemplated:—*Held*, that, as the undertaking had not been proceeded with within a reasonable time from its inception, and as the defendant had not at any time after the 1st October, 1899, agreed to be bound by his subscription, or approved of then proceeding with the erection of the hotel, or that it should cost the sum it was afterwards erected for, he could not now be held bound to pay for the shares.—*Semble*, that a judgment in an undefended action brought by the defendant against the company, declaring that the defendant was not a shareholder, was not a defence to this action, brought by other subscribers to compel the defendant to pay for the shares he had subscribed. Change in the law as to who become shareholders in a company incorporated by letters patent (R. S. O. 1897, c. 191, s. 9). *Patterson* v. *Turner*, 22 Occ. N. 163, 3 O. L. R. 373, 1 O. W. R. 82.

Subscriber for stock before incorporation—Liability to pay for shares—Execution of memorandum of incorporation—Original corporator—6 Edw. VII. c. 27, s. 3—Prospectus—R. S. O. 1897, c. 191, ss. 9, 15—Bonus from town corporation—Agreement—By-law—Change in terms. *Modern Bedstead Co.* v. *Tobin*, 12 O. W. R. 22.

Subscription — Allotment—Acceptance—Notice of meeting of shareholders. *Robert* v. *Eastern Townships Bank*, 2 E. L. R. 525, 4 E. L. R. 123.

Undertaking to subscribe for shares—*Liability to co-promoters.*] — The defendant wrote a letter to A., who was desirous of organising a driving park company, undertaking to subscribe for $1,000 of stock in a company to be formed, subject to the conditions that before the formation of the company an amount of $7,000 be guaranteed, and that this subscription be obtained within three months from date. Subsequently the defendant cancelled this letter, and refused to sign the stock book. In an action for a first call, instituted by all the underwriters on the stock book, before the incorporation of the company:—*Held*, that an action for a first call could not be maintained on the defendant's letter, until the company had been organised. In the absence of a special contract on the part of and between the co-adventurers, no legal call can be made prior to the organisation of the corporation, because until then there is no board of directors capable of making a call. *Cazelais* v. *Picotte*, 18 Que. S. C. 538.

Winding-up — *Contributory.*]—R. was not one of the incorporators of this company, nor did he sign the memorandum of agreement which accompanied the application for the charter. He had previously signed a similar memorandum and the liquidator now claimed the latter was an irrevocable application for shares, and that he should be placed on the list of contributories. R. claimed to have subscribed to the latter memorandum conditionally. This condition not being fulfilled he notified the company that he would not take the shares that he had subscribed for. When allotment was made shares were allotted to all but R., who signed the same agreement as the others, though about a year after this an allotment was made to him of which he had notice. No certificate ever issued to him, nor did he ever attend a shareholders' meeting but one, and then to protest from being considered a shareholder. —*Held*, on appeal from a local Master, that R. should not be placed on the list of contributories. *Re Nipissing Planing Mills, Ltd., Rankin's Case*, 13 O. W. R. 360.

2. *Issue.*

Certificate—Payment by promissory note—Estoppel—Action to cancel shares—Status of shareholder as plaintiff—By-law of directors—Acquiescence by plaintiff. *O'Sullivan* v. *Donovan* (1906), 7 O. W. R. 78, 8 O. W. R. 319.

Improper issue of stock controlling meeting of shareholders — Internal government—Order restraining holders of stock improperly issued from voting. *Glace Bay Printing Co.* v. *Harrington* (N.S. 1910), 9 E. L. R. 265; *Glace Bay Printing Co.* v. *Hart* (N.S. 1910), 9 E. L. R. 268.

Issue at a discount—*Payment for services — Transfer — Certificate.*] — Where shares in a company incorporated under the Dominion Joint Stock Companies Act, R. S. C. c. 119, were issued as paid up shares, but part of the alleged payment consisted of an amount allowed by the company to the shareholders for services which by a contemporaneous agreement they agreed to render to the company, it was held, in a judgment creditor's action, that the shares, to the extent of the amount so allowed, must be treated as unpaid shares.—Where, without any transfer being executed, certificates of shares issued under the above circumstances were surrendered by the original holder to the company, and new certificates were, on the application of the transferor, issued by the company, to the alleged transferee, it was *held*, having regard to s. 48 of the Act and the by-laws of the company, that the original holder had not divested himself of liability to a judgment creditor of the com-

pany suing under s. 55 of the Act. *Union Bank* v. *Code*, *Union Bank* v. *Morris*, 20 C. L. T. 300, 27 A. R. 396.

New shares—Allotment by directors to themselves at par—Shareholders—Right of minority—Voting power—*Ultra vires*—Ratification — Statutes — Fraud — Injunction — Costs. *Martin* v. *Gibson*, 10 O. W. R. 66.

New stock issued and allotted in shares to the actual shareholders by a joint stock company that has the power to increase its capital, when the issue does not amount to a conversion of profits into capital, accrues to the principal, or original stock, by right of accession. Hence, in the case of shares held subject to *usufruct*, the proprietor, and not the *usufructuary*, is entitled to the benefits of such new issue of stock. *Lamb* v. *Lamb*, 19 Que. K. B. 49, 5 E. L. R. 546.

Preference shares — *Interest* — *Dividends.*]—The Halifax Academy of Music, a body corporate, in pursuance of a resolution of shareholders to that effect, issued preferential stock, the same to be a first charge upon the property of the company and its earnings, and to bear "interest" at a stated rate, payable half-yearly. For a number of years there were not sufficient earnings to pay interest or dividends to either the preferred or common stockholders. Latterly, however, the earnings increased, and a contest arose between the holders of the preferential stock and the holders of the common stock, the latter contending that the former should not be paid interest or dividends for the years during which there were not sufficient earnings for the purpose:—*Held*, that the holders of the preferential stock are entitled to receive out of the earnings what is called cumulative interest covering the past years in which dividends or interest remained unpaid on the preferential stock before any dividends are paid on the common stock. *Crockett* v. *Academy of Music*, 22 C. L. T. 301.

3. *Calls.*

Action to invalidate — Parties — Addition of company — Resolution — Forfeiture of shares for non-payment of calls—Fraud and collusion — Qualification of directors—Payment of shares—Irregularities—Meetings of shareholders—Notice of call—Meeting of directors — Quorum — Adjournment—Sunday—Costs. *Paul* v. *Kobold* (N. W. T.), 2 W. L. R. 90, 3 W. L. R. 407.

By-law—*Time for payment — Forfeiture of stock — Assignee for creditors of shareholder—Right to sue—Trust.*]—Under s. 35 of R. S. O. 1897, c. 191, stock may be forfeited, where the amount payable on a call for stock is not paid within the time limited by the special Act incorporating the company, or by letters patent, or by a by-law of the company. Where, therefore, no time was limited in the statute, or letters patent, or in the by-law making the call, such call was held to be illegal, and an attempted forfeiture of the stock ineffectual. An assignment by a shareholder for the benefit of his creditors excepted shares in companies not fully paid up and declared the assignor a trustee of such shares for the assignee:—*Held*, that the assignee was not entitled to call on the company to account to him for the shares or any dealings therewith. *Armstrong* v. *Merchants' Mantle Mfg. Co.*, 21 C. L. T. 123, 32 O. R. 387.

Representatives of deceased shareholder—*Defences to action.*]—In an action by an incorporated company to enforce, against a shareholder's legal representatives, a call on shares subscribed for by the *de cujus*, the defendants cannot plead that the conditions of the Act of incorporation have not been complied with, and that the company has for more than a year carried on the business of insurance in violation of the conditions of the statute incorporating it. *Victoria-Montreal Fire Ins. Co.* v. *O'Neil*, 5 Que. P. R. 4.

Subscription for under seal — *Allotment of shares—Special agreement—Misrepresentation—Prospectus.*]—Plaintiffs brought action to recover $3,250, being the balance of the purchase price of 25,000 shares of stock in plaintiff company subscribed for by defendant under seal at 15 cents per share. Defendant pleaded misrepresentation, and sought to withdraw his subscriptions: —*Held*, that the agreement signed by defendant being under seal was a bar to any right of withdrawal.—*Nelson Coke and Gas Co.* v. *Pellatt*, 4 O. L. R. 481.—*Re Provincial Grocers Ltd.*, 10 O. L. R. 705, followed.—*Held*, as to the defence that the subscription was obtained by verbal representations prior to the receipt by defendant of a copy of the company's prospectus, that the evidence shewed that defendant first obtained a copy of the prospectus and was not induced to subscribe for shares through the misrepresentation of any one on behalf of the company. Judgment for plaintiff with costs. Counterclaim for $500 dismissed with costs. *Gowganda Mines* v. *Smith* (1910), 16 O. W. R. 709, 1 O. W. N. 1071.

Affirmed by Court of Appeal (1911), 18 O. W. R. 663, 2 O. W. N. 731.

Subscription obtained by fraud.] — Defendant, a widow, admittedly signed a subscription for $3,000 of the capital stock of the plaintiffs' company, therein covenanting to pay $300 within 60 days, and all calls as made by the directors. She paid the $300 and received a certificate for 30 shares. Subsequent calls were made, but she did not pay, and this action was to recover the calls. To avoid liability, defendant set up that, while she knew she was subscribing for $3,000, she was assured that she never would be called upon to pay more than $300, and that the subscription she signed was read over to her as containing such provision. Her son corroborated her:—*Held*, that there is no rule in our law that requires a Judge or jury to accredit any witness even though not contradicted, and disbelieving defendant's witnesses plaintiffs were given judgment for amount claimed with interest and costs. *Rex* v. *Van Norman* (1909), 14 O. W. R. 659, at p. 661, followed. *Traders Ins. Co.* v. *Apps* (1910), 15 O. W. R. 562, 1 O. W. N. 534.

Unpaid calls — *Assignment of by company for loan—Action by assignee on assignment.*]—Defendant subscribed for 20 shares of Shortells Limited, and was registered in the books of that company as owner of said

shares. The company assigned to plaintiff $1,000 due on the said shares by defendant, and plaintiff brought action to recover the same. Defendant set up that he was induced to subscribe for the shares by fraudulent misrepresentations of the agent of the company, and that the assignment to plaintiff was a security only for $1,000 which the company had borrowed from plaintiff, and that the directors had no authority to borrow, therefore, the assignment was invalid. Meredith, C.J.C.P., *held*, that defendant failed on both grounds, and gave plaintiff judgment with interest and costs. *Stephens* v. *Riddell* (1910), 16 O. W. R. 277, 21 O. L. R. 484, 1 O. W. N. 993.

Voidance of contract—*Material alteration in stock-list—Reduction of shares without holder's consent.*]—Defendant subscribed for 50 shares in the plaintiff Co., signed the share-list and paid a call. By the Act of Incorporation other calls were to be paid as called for. The company made 6 other calls, but defendant did not pay them. Before making the calls sued for, the number of defendant's shares was changed, without his consent, on the share-list from 50 to 25 shares, and the company having brought this action for the amount of the calls, he pleaded *nunquam indebitatus*, and an equitable plea setting out the above facts, and contending that by the alteration his contract to become a shareholder was rendered void, and that he thereupon ceased to be a shareholder. The case was, by consent, tried by a Judge without a jury:—*Held* (Peters, J.), that the verdict must be for the defendant on all the issues raised. *Stadacona Ins. Co.* v. *Hodgson* (1882), 2 P. E. I. R. 480.

4. *Cancellation.*

Deprivation of shares — *Remedy — President of company.*]—A company which, along with its president, appropriates to itself shares of its capital to the prejudice of a shareholder, is bound to indemnify the shareholder against the injury caused to him. *Acer* v. *Percy*, 5 Que. P. R. 401.

Forfeiture for non-payment of call—*Promissory note—Non-presentment — Effect of—Bills of Exchange Act, s. 183—Condition—Extension of time—Suspension of debt—Revival on non-payment of note—Covenant under seal to pay call—Effect of parol arrangement—Remedy for illegal forfeiture — Declaration—Damages.*] — The plaintiff, in subscribing for 10 shares of the capital stock of the defendants, an incorporated company, covenanted under seal to pay $12.50 per share and "all other calls, if any, as the same may from time to time be made." He paid the $12.50 and an additional call of 2½ per cent., and received a stock certificate. The defendants subsequently made a call of 5 per cent., and, in writing to the plaintiff requesting him to pay $50 therefor, they offered to take a promissory note for that amount, and enclosed a blank note for the purpose, stating in the letter that the giving of a note simply meant an extension of time for payment, and that in the event of non-payment the shares would be liable to be forfeited. The plaintiff filled up and signed the note, but made some alterations therein—one being the addition of the words "at the Molsons Bank, market branch." This was accepted by the defendants, but was not presented for payment at the branch indicated, where the plaintiff at all times had a sufficient balance to pay it, and it was not paid. The board of directors thereupon purported to forfeit the plaintiff's shares, and notified the plaintiff of the forfeiture: — *Held*, that, giving effect to the notice in accordance with which the note was sent, and consequently to the terms of which the plaintiff must be considered to have agreed, the sole effect of the note was to give time to pay the debt; and, the debt admittedly not having been paid at the due date of the note, the defendants were within their legal rights in forfeiting the shares.—But, if there were no such condition, the most that could be said was that the note was given for and on account of the debt, and the only effect of non-presentment upon such a note is upon the question of costs (Bills of Exchange Act, s. 183); the note is, *quoad* the debtor, a promise to pay generally; and the debt, as the note became overdue and was unpaid and unproductive in the hands of the creditor, revived. Dictum of Armour, C.J., in *Merchants Bank of Canada* v. *Henderson*, 28 O. R. 360, followed.—*Held*, also, that a call having been regularly made, an action could have been brought upon the plaintiff's covenant, and payment enforced notwithstanding the parol arrangement.—*Held*, also, that the plaintiff would not, in any view, be entitled to damages for the forfeiture of his stock, but at the most to a declaration that the forfeiture was a nullity, which relief had been offered to him and refused. *Freeman* v. *Canadian Guardian Life Insurance Co.*, 12 O. W. R. 781, 17 O. L. R. 296.

Non-payment — *Forfeiture — Abandonment of shares by acquiescence in forfeiture—Recall of abandonment.*] — Plaintiffs held shares in defendant company on which 80 per cent. had been paid up. The company made a further call of 2½ per cent., which plaintiffs failed to pay, the company's prospects being doubtful at that time. Notice was sent plaintiffs that the shares would be declared forfeited if the call was not paid, and later at a meeting of the directors a resolution was passed declaring forfeiture. Some months later plaintiffs offered to pay up the arrears but were informed that the shares had been forfeited. Then action was brought:—*Held*, that plaintiffs had elected to abandon the shares at a time when the company's prospects were doubtful and such election could not be recalled when the company turned out to be in a prosperous condition. Action dismissed with costs.—Judgments of the Supreme Court of British Columbia, 14 B. C. R. 285, 11 W. L. R. 220, and Hon. Mr. Justice Clement at trial affirmed. *Jones* v. *N. Vancouver Land Co., C. R.*, [1910] A. C. 1, [1910] A. C. 317, 79 L. J. P. C. 89, 102 L. T. 377.

Shareholders whose shares have been forfeited are not liable to be placed on list of contributories in winding-up proceedings, but may be sued (if the articles of association so provide) for amount unpaid on calls made. *In re D. Wade Co.* (1909), 2 Alta. L. R. 117, 10 W. L. R. 407.

When a call is made it is the duty of the directors to use all reasonable means to compel every shareholder to pay the call, and the directors must *bona fide* believe that payment cannot be obtained before they are justified in invoking the power of forfeiture. *In re D. Wade Co.*, 2 Alta. L. R. 117, 10 W. L. R. 407.

5. *Transfer.*

Agreement to take shares in exchange for profit on lands acquired by company—Status of shareholder—Action to establish. *Bogle* v. *Kootenay Valley Co.* (Man.), 5 W. L. R. 139.

Certificate—*Lien—By-laws.*]—A provision in a certificate of ownership of paid up shares issued by a company incorporated by special Act, that "the articles of the company are part and parcel of this contract," is not sufficient to make applicable to a purchaser in good faith of the shares, a by-law of the company purporting to give to the company a lien on all shares held by any shareholder for "any and all amounts that may be owing by the shareholder or his assigns to the company," and the purchaser is, upon compliance with the necessary formalities, entitled to be registered as transferee. Order of Ferguson, J., 3 O. W. R. 156, affirmed. *In re McKein and Canadian Birkbeck Investment and Savings Co.*, 24 C. L. T. 128, 7 O. L. R. 241, 3 O. W. R. 335.

Certificate—*Transfer by indorsement—Right of transferee to registration as shareholder—Share not fully paid—Right of transferee against transferor.*]—A *promesse d'action* issued by a joint stock company, commonly called a stock certificate, does not entitle the holder to a paid-up share. Therefore, one who becomes the purchaser and holder of such a certificate, by indorsement, cannot require the company to inscribe his name in its books as the owner of a paid-up share in its capital stock, unless he delivers to the company a document of title to that effect.—2. The vendor of a share in the capital of a joint stock company does not fulfil his obligation to deliver by indorsing and handing to the purchaser the certificate for a share issued by the society, and certifying that he holds one of its shares, where he has paid only 40 per cent. of the sum which it represents. A purchaser who suffers prejudice on this head has a remedy *en garantie* against the vendor to compel h. a to pay the 60 per cent. which remains. *Beauchemin* v. *Richelieu Foundry Co.*, 23 Que. S. C. 261.

Certificates—*Binding statement in—Purchasers—Discount.*]—A portion of the shares in a joint stock company, purporting on the face of their certificates to be of a certain par value and paid up, were allotted to three promoters. One of them sold part of his allotment at a discount and had them transferred by the company direct to the purchasers, who were not aware that the shares were not really paid up:—*Held*, in an action by the company, that the purchasers were not liable for the discount on such shares, inasmuch as the company were bound by their statement in the certificates that the shares were "fully paid and non-assessable." *Kettle River Mines (Ltd.)* v. *Bleasdel*, 7 B. C. R. 507.

Company's books—*Mandamus to enforce transfer—Interlocutory order—Appeal.*]—The owner of two shares of stock in the defendant company, assigned them to the plaintiff, indorsing the assignment on the certificate. The plaintiff called at the head office and demanded that the necessary transfer should be made on the company's books, and also saw the president; and, after some correspondence, the transfer not having been made, he procured a duplicate assignment of the stock, and placed the matter in the hands of his solicitor, who thereupon wrote the company demanding a transfer, and enclosed one of the duplicate assignments, and stated that he would attend on a named hour, ready to surrender the certificate, and have the transfer completed, and, on receiving a reply that it could not then be attended to, this action was brought, in which an order for a mandamus was claimed.—An interlocutory order made by a Judge in Chambers directing a mandamus to issue, was, on appeal to a Divisional Court, set aside, and the matter left for decision at the trial. *Nelles* v. *Windsor, Essex and Lake Shore Rapid R. W. Co.*, 16 O. L. R. 359, 11 O. W. R. 463, 623.

Company by-law—*Refusal to register—Mandamus—Ontario Joint Stock Companies Act.*]—Motion for mandamus to compel the Trusts and Guarantee Co., Limited, as transfer agents and registrars of the Imperial Starch Co., Limited, to rectify the register of the Imperial Starch Co., Limited, and to enter and record the transfer of 2 shares of the preference stock of the Imperial Starch Co., Limited, from William M. Leacy to the applicant:—*Held*, while by s. 28 of the Act the directors may refuse to allow the entry to be made of any transfer of shares of stock in any such book whereof the whole amount has not been paid in, but their power does not extend to fully paid up shares. Order for the transfer of the 2 shares to the applicant. *Re Benson and Imperial Starch Co.*, 5 O. W. R. 591, 10 O. L. R. 22.

Conditional transfer—*Action to recover shares.*]—Plaintiff, as assignee for benefit of creditors, brought action to recover 705 shares of the capital stock of the Nipissing Mines, Ltd., or, in the alternative, for damages for conversion thereof, and for an account. At the trial Riddell, J., dismissed the action with costs. The Court of Appeal dismissed an appeal therefrom. *Barber* v. *Wills & Kemerer* (1909), 15 O. W. R. 209.

Contract—*Payment — Security — Conditional sale—Rescission.*]—A contract by the acceptance of a proposal to purchase shares in a joint stock company for a price payable half in bonds and half in preferred stock of a company to be formed, with a covenant that the shares purchased shall be deposited as security for the payment of the bonds, and that as soon as all the shares of the company are so deposited and its real estate is transferred to the new company, a mortgage deed will be executed to secure the payment of the bonds, is a sale subject to a resolutory condition. In the event of the new company acquiring the property of the old

one, and mortgaging it to secure the bonds given in payment, the sale becomes complete and effective. In the event of such acquisition not being made, or being rendered impossible then the consideration, viz., bonds secured by mortgage, failing, the sale is ineffective and subject to resolution at the suit of the seller. *Angers* v. *Dominion Textile Co.*, 30 Que. S. C. 56, 6 E. L. R. 127.

Delivery—*Promissory note—Allotment—Notice — Resolution.*] — The defendant purchased 50 shares in the plaintiff company, giving his note for $5,000 therefor, payable 10 days after date, signing at the same time an application for the shares. There was some evidence of an arrangement between the defendant and the president of the company that the defendant was to be employed as a foreman by the company, and that, if he proved unable to perform the work, the president should take back the shares and refund the money. Apparently there was no formal allotment of the shares by the company, beyond a resolution empowering the president to dispose of the shares, but the president placed the shares and the note in escrow in the bank, the shares to be delivered up on payment of the note:—*Held*, that upon the signing of the application and the delivery of the note, the defendant became the owner of the 50 shares, with power forthwith to validly assign them to any one else, or to have bound himself to do so on the issue of the certificates if the company's articles of association required indorsement of the certificates; and that there was no notice of allotment necessary. *Anglo-American Lumber Co.* v. *McLellan*, 7 W. L. R. 422, 9 W. L. R. 469, 13 B. C. R. 318.

Directors — *Refusal to allow transfer.*] —Motion to compel a company to allow a transfer to plaintiff of 5 shares of fully paid-up stock. The only question was whether, under the statute and by-laws of the company, the directors can be compelled to allow the transfer to be made upon the books of the company. At trial Teetzel, J., (15 O. W. R. 534), *held*, that while the directors acted in good faith in refusing to allow the transfer to be made, and were honest in the position taken that it was not in the interests of the company to permit the applicant to become a shareholder; yet the Act nowhere authorised a company to refuse to transfer on their books fully paid-up shares, notwithstanding that the company had passed a by-law providing that no transfer should be valid until approved by the directors, and that all transfers should be at the discretion of the directors. Motion granted with costs. *In re Imperial Starch Co.* (1905), 10 O. L. R. 22, 5 O. W. R. 591, followed. *Re Macdonald and Mail Printing Co.* (1876), 3 P. R. 309; *Re Gresham Life Assurance Society* (1872), 8 Ch. 446, and *Re Coalport China Co.* [1895], 2 Ch. 404, not followed. Divisional Court affirmed above judgment and dismissed the appeal with costs. Court of Appeal on motion for leave to appeal ordered that upon the company undertaking to pay respondent's costs of appeal, as between solicitor and client, in any event of the appeal, it be at liberty to appeal upon the sole question of the power to restrict the transfer of fully paid-up shares in the manner provided by the by-law in question. The costs of appeal to be to respondent in any event. If not accepted, the application to be dismissed with costs. *Re Good and Shantz* (1910), 16 O. W. R. 30, 21 O. L. R. 153, 1 O. W. N. 508.

Evidence of title — *Duty of vendor—Defective certificate—Registration.*] — When shares in the stock of a company are sold for cash and transfer endorsed purporting to be signed by the holder named therein, who is not the seller, the latter must be taken to affirm that a title which will enable the purchaser to become the legal holder is vested in him by virtue of such certificate and transfer.—A transfer was signed by the wife of the holder at his direction, but not acted upon until after his death:—*Held*, that the authority of the wife to deal with the certificate was revoked by the holder's death, and, on a cash sale of the shares, the purchaser who received the certificate and transfer so signed, being unable, under the company's rules, to be registered as holder, had a right of action to recover back the purchase money from the seller.—The fact that the purchaser endeavoured to have himself registered as holder of the shares was not an acceptance by him of the contract of sale which deprived him of his right of action to have it rescinded. Nor was his action barred by loss of the defective certificate by no fault of his nor of the seller.—Judgment appealed from, 13 B. C. R. 351, 7 W. L. R. 412, reversed. *Castleman* v. *Waghorn*, 41 S. C. R. 88.

Illegal consideration—*Fraud—Officers of company—Breach of trust.*]—With a view to overcoming financial difficulties of a mining Co. and securing control of its property, the manager entered into a secret arrangement with respondent, whereby latter was to acquire the liabilities, obtain judgment thereon, bring the property to sale under execution, and purchase it for a new Co. to be organised, in which respondent was to have a large interest. The manager, who was a creditor of the Co., was to have his debt secured and to receive an allotment of shares in the new Co. proportionate to those held by him in the insolvent Co., and he agreed that he would not reveal this understanding to the other shareholders:—*Held*, affirming judgment appealed from, *Lasell* v. *Thistle Gold Co. and Hannah* (1906), 11 B. C. R. 466, 3 W. L. R. 149, Sedgewick, J., dissenting, that the agreement could not be enforced as the consideration was illegal and a breach of trust by which the other shareholders were defrauded. *Lasell* v. *Hannah* (1906), 26 C. L. T. 384, 37 S. C. R. 324.

Irregularity—*Interest of infants—Remedy—Restitution of benefit.*]—Shares of stock in a joint stock company, belonging to a person deceased, and in which stock his minor children, after his death, were entitled to a share, were irregularly transferred to the widow individually, without any authorisation having been obtained for the transfer. The widow, however, used the shares in good faith, and to the best advantage of the minors, in settling debts of the estate, which was virtually insolvent:—*Held*, that the children having benefited to the full value of the shares, or more, and having made no offer of restitution of such benefit, had no claim

against the transferor, or against the company itself, to recover the shares or their value: Arts. 1011, 1139, 1144, C. C. *Acer* v. *Percy*, 24 Que. S. C. 378.

Judgment creditor—*Action, by against shareholder — Transfer of shares — Evidence.*]—Judgment creditors of an incorporated company, being unable to realise anything on their judgment, brought against H. as a shareholder, in which they failed, from inability to prove that he was owner of any shares. They then brought action against G., in which evidence was given, not produced in the former case, that the shares once held by G. had been transferred to H., but were not registered in the company's books: —*Held*, affirming the judgment in 33 N. S. Reps. 77, that the shares were duly transferred to H., though not registered, as it appeared that H. had acted for some time as president of and executed documents for the company, and the only way he could have held shares entitling him to do so was by transfer from G.:—*Held*, also, that, although there appeared to be a failure of justice from the result of the two actions, the inability of the plaintiffs to prove their case against H. in the first could not affect the rights of G. in the subsequent suit. The company in which G. held stock was incorporated in 1886 and empowered to build a certain line of railway. In 1890 an Act was passed authorising additional works to be constructed, increasing the capital stock, appointing an entirely different set of directors, and giving the company larger powers. One clause repealed all Acts and parts of Acts inconsistent therewith. G. had transferred his shares before the latter Act came into force. The judgment against the company was recovered in 1895:—*Held*, that G. was never a shareholder of the company against which such judgment was obtained. *Hamilton* v. *Grant*, 20 C. L. T. 450, 30 S. C. R. 566. See also *Hamilton* v. *Holmes*, 33 N. S. R. 100n.

Lien on — Amount due to company. *Walkerton Binder Twine Co.* v. *Higgins*, 1 O. W. R. 403.

Mandamus.]—*Held*, affirming the judgment in 15 Que. S. C. 396, that the writ of mandamus is the remedy open to one who wishes to have entered upon the books of a company a transfer of shares; but the writ should be directed against the company itself, and not against the directors of such company. *Upton* v. *Hutchison*, 8 Que. Q. B. 505.

Mandamus.]—Motion by plaintiffs for a mandamus to defendants to record the transfer of 3,000 shares of their capital stock to plaintiffs. Falconbridge, C.J.K.B., *held* that, in view of the apparently *bona fide* contention that the shares in question were not fully paid up, being the subject of an action which might be very soon disposed of, and of the fact that the plaintiffs had abundant notice of such contention, he ought not at present to interfere, either by granting a mandamus in this action or by prerogative writ of mandamus. Motion refused, costs in the cause to defendants. *Warren, Gzowski & Co.* v. *Peterson Lake Silver Cobalt Mining Co.* (1909), 1 O. W. N. 211.

Misrepresentation — *Fraud—Action for deceit—Accord and satisfaction—Release.*]—G., a director in an industrial company, transferred 290 shares of the capital stock to the president to be sold for him. The president instructed an agent to sell said shares along with some of his own and some belonging to the company. The agent sold 25 shares of G.'s stock to J. G., representing and believing that it was treasury stock, and getting a note for the price in favour of the company. The note was indorsed over to G. Later J. G. discovered that the stock he had bought was not treasury stock, and had some correspondence with the secretary of the company, in which he complained of having been deceived by the agent. Eventually he gave a 4 months' note in renewal of that given for the price of the stock, but when it fell due refused to pay it, the company having in the meantime become insolvent. In an action on the renewal note he filed a counterclaim for damages based on the misrepresentation and deceit. Judgment was given against him on the note and for him on the counterclaim: —*Held*, that G. was responsible for the fraud practised on the purchaser of his shares by the misrepresentations of the agent who sold them.—*Held*, also, Girouard and Davies, JJ., dissenting, that the settlement of the claim for the price of the shares by giving the renewal note, and thus obtaining further time for payment, was not a release of the purchaser's right of action for deceit.—Judgment in *Gould* v. *Gillies*, 42 N. S. R. 28, 3 E. L. R. 541, affirmed. *Gould* v. *Gillies*, 46 S. C. R. 437, 5 E. L. R. 325.

Offer to sell — Acceptance—Attempted withdrawal — Promissory note — Liability. *McDowell* v. *Macklem*, 4 O. W. R. 482.

Payment — *Disbursements of secretary-treasurer—Credit in company's books—Set-off—Winding-up—Contributory.*]—The appellant was secretary-treasurer of the company and the holder of shares upon which 50 per cent. of the value had been paid. On the 6th October, 1905, the balance due upon the shares, $275, was called up by the directors, and was payable on the 10th October. The plaintiff on the 31st December, 1905, entered to his credit in the company's cash-book, for "services rendered," $275, thereby shewing his shares as having been paid up in full. In fact, the company at that date owed the appellant $271.06, moneys properly disbursed for the company. The appellant acted in good faith. A winding-up order was made on the 31st March, 1906, and it was sought to make the appellant liable as a contributory in respect of the whole balance of $275:—*Held*, that the disbursements made by the appellant constituted a good payment in fact upon his shares, and the effect was the same as if he had credited the sums from time to time as they were disbursed. It was not necessary to consider the effect of the winding-up order upon the general right of set-off. *Re Ottawa Cement Block Co., Macoun's Case*, 9 O. W. R. 305, 409, 14 O. L. R. 389.

Res judicata—*Representation as applied to res judicata; joint stock company and its shareholders—Petition for and mandamus to order registration of transfer of stock—Shareholders' agreement to not sell their stock—Its effects as regards third parties—Its right*

arising from contracts with third parties.]—A joint stock company, defendant in a suit of mandamus, to have it forced to register a transfer of some of its stock, purchased by plaintiff, is the representative of its shareholders, and the latters' interest in such suit are identical with its own. It follows that judgment rendered, declaring the mandamus peremptory, is *res judicata* for the shareholders as for the company. Cross, J., dissenting. An agreement between all the shareholders of a joint stock company, whereby their shares were not to be transferred or sold except under certain specified conditions, cannot take the place of a by-law of the company upon the same object, and is without effect towards third parties. The emissary (*prête-nom*) is an agent for his principal only. As regards third parties, he is the interested principal and qualified to apply the remedies which arise from the contracts made in his own name.—Cf. *Barnard* v. *Duplessis Independent Shoe Machinery Co.*, 31 Que. S. C. 362. *Barnard* v. *Desautels*, 19 Que. K. B. 114.

Refusal to register—Mandamus. *Re Dominion Oil Co.*, 2 O. W. R. 826.

Refusal to register—*Temporary closing of transfer books—Mandamus — Absence of statutory authority.*]—Motion to compel the trust company to record a transfer to Panton of 4 shares of common stock in the steel company. The transfer was in order and would have been recorded by the secretary of the trust company, but for the instructions they received from the secretary of the steel company on the 21st July not to do so until after 30th July. Order made as asked. *Re Panton and Cramp Steel Co. and National Trust Co.*, 4 O. W. R. 109, 25 C. L. T. 42, 9 O. L. R. 3.

Registration — *Injunction preventing—Loss of sale—Damages.*]—The plaintiff purchased from the defendants 1,000 shares of mining stock, and received from them a certificate for that number of shares, made out in favour of one C., and by him indorsed with a transfer in blank:—*Held*, that this completed the duty of the defendants as sellers, and it was not incumbent upon them to see that the plaintiff should become registered as owner of the shares upon the books of the company; but they were under obligation to do nothing to prevent the plaintiff from having the shares registered in his name.—The plaintiff, having contracted to sell the shares at a profit, endeavoured to have himself registered as the owner of 1,000 shares and to obtain two certificates for $500 shares each, which were required by the plaintiff's vendee as a term of his purchase, but was refused registration because of an injunction, obtained by the defendants, restraining the transfer agents of the mining company from registering any transfers of shares standing in the name of C.:—*Held*, that the plaintiff was entitled to recover from the defendants as damages the difference between the price at which he had contracted to sell the shares and the price which he afterwards obtained when the injunction was dissolved and he was registered as owner of the shares. Judgment of Mabee, J., affirmed. *Boultbee* v. *Wills & Co.*, 10 O. W. R. 993, 15 O. L. R. 227.

Resolution of company *empowering president to sell—Note given for purchase price—Note and shares placed in bank in escrow pending payment of the note—Allotment.*]—The defendant purchased 50 shares of the stock of the plaintiffs, giving his promissory note for $5,000 therefor, payable 10 days after date, signing at the same time an application for the shares. There was some evidence of an arrangement between the defendant and the president of the plaintiffs that the defendant was to be employed as foreman by the plaintiffs, and that, if he proved unable to perform the work, the president would take back the shares and refund the money. Apparently there was no formal allotment of the shares by the plaintiffs, beyond a resolution empowering the president to dispose of the shares, but the president placed the shares and the note in escrow in the bank, the shares to be delivered up on payment of the note:—*Held*, affirming the judgment of Hunter, C.J., 13 B. C. R. 318, 7 W. L. R. 422, that upon the signing of the application and the delivery of the note the defendant became the owner of the shares. *Anglo-American Lumber Co.* v. *McLellan*, 14 B. C. R. 93, 9 W. L. R. 469.

Subscription — *Payment to director—Winding-up—Contributories.*] — Certain persons assumed to buy shares of a company and received certificates therefor. They signed powers of attorney authorizing an agent of the company "to receive from the vendors a transfer" of shares and to sign an acceptance. No transfers were made, but the powers of attorney were pasted in the transfer book. Several months afterwards a director filled in opposite the names of the appointees transfers of shares as from himself, and procured the agent as their attorney to accept the transfers, for which the agent was paid a commission out of the company's funds: — *Held*, in winding-up proceedings, that the transfers were invalid and the director was a contributory in respect of the shares which he purported to transfer. The payment of the commission to the agent was bad, and the director was liable to refund it. Shortly after the incorporation of the company, at a meeting of the provisional directors, who were then the only shareholders, a resolution was passed authorising the payment to one of the provisional directors, afterwards a director, of $300 out of capital, for alleged services. It did not appear that any service had been rendered by him. The minutes of this meeting were confirmed at a subsequent shareholders' meeting. At the time no profits had been made and nothing paid on account of the stock. No by-law was passed. The payment was subsequently made:—*Held*, that the director was bound to refund. *In re Publishers' Syndicate, Paton's Case*, 5 O. L. R. 392, 2 O. W. R. 65.

Transferred by person without authority—*Liability of company to real owner—Rectification of share register—Bonuses and dividends—Costs.*]—John J. S., at time of his death, was owner of 3 shares in Hamilton Jockey Club upon each of which $40 had been paid. These were not then regarded as worth anything, and when probate of his will was applied for by his widow they were not mentioned. After son's death, John S., his father, assumed to sell these shares to C.

The secretary of the club assumed that S. was executor of his son, made the transfer, after it had been approved by the directors. Mrs. S., the executrix, said she did not know of this transaction till March, 1910, and brought an action in September, 1910, to recover the three shares or the value thereof. —Middleton, J., *held*, that there was no authority whatever in S. to deal with the shares and plaintiff had in no way ratified what he did:—That she was entitled to judgment declaring that she, as executrix of John J. S., was the holder of said shares, and to have the share register of defendants' rectified accordingly:—That she was also entitled to judgment against the defendants for the amount of the bonuses and dividends declared with interest from the dates when they were respectively payable, and her costs. *Stuart* v. *Hamilton Jockey Club* (1911), 18 O. W. R. 493, 2 O. W. N. 673.

6. *Register.*

Application to have name removed from register of shareholders.]—Plaintiff brought action for a declaration that his subscription for 5,000 shares of stock in defendant mining company was not binding upon him, that he was not a shareholder and for an order compelling defendants to remove his name from their stock register:—Boyd, C., *held* (15 O. W. R. 287), that plaintiff signed an agreement to take the shares in the company to be formed and to pay calls thereon. The counterclaim disallowed as the Am. Securities Co. was not before the Court, and it might be possible for plaintiff to resist payment of the calls on grounds other than those pleaded on this record. Action dismissed without prejudice to such further action as plaintiff might be advised to take.—Court of Appeal affirmed above judgment. *Purse* v. *Gowganda Queen Mines* (1910), 16 O. W. R. 596, 1 O. W. N. 1033.

Registry of shareholders — *Power of Court to rectify—Ontario Companies Act, s. 116—Reduction of shares held by consent.*]—Applicant moved to have his name removed from the register of shareholders. His name appeared in the letters patent as holder of 100 shares of $10 each. If his name had been removed it would have reduced the number of shareholders below the statutory minimum. —Middleton, J., dismissed the motion with costs.—Divisional Court, by consent, reduced applicant's holdings to one share, Latchford, J., dissenting. *Re French & Co.* (1910), 17 O. W. R. 1063, 1 O. W. N. 864, 2 O. W. N. 498.

9. CONTRACTS.

Action to set aside contract induced by fraud — *Prescription — Liquidator — Inscription in law.*]—An action by the liquidator of an insolvent company to set aside a deed made in fraud of creditors must be begun within a year counting from the appointment of the liquidator; if not, it is barred and extinguished and will be rejected on an inscription in law. *Hyde* v. *Ross* (1909), 10 Que. P. R. 384.

Cemetery—*Rights of owners of lots.*]—The petitioner acquired two graves in the cemetery of a company. Subsequently he acquired two other graves. Owners of lots for which they had paid $20 were entitled by law to become shareholders in the cemetery company, and the petitioner had paid more than this amount. But the four graves did not form a complete lot on the plan of the cemetery, there being a fifth grave belonging to another person in the same lot. On a petition for a writ of mandamus to compel the company to enter his name as a shareholder:—*Held*, that the price alone did not entitle the petitioner to the privilege of becoming a shareholder; the land acquired must form a complete lot. The distinction between a "lot" owner and a "grave" owner, which had always been recognised since the organisation of the company, though not set forth in the charter or by-laws, was a reasonable one, and the owner of one or more graves forming only part of a lot, was not entitled to be classed as a shareholder, or to have the graves entered as a lot in the books of the company. *Hart* v. *Mount Royal Cemetery Co.*, 18 Que. S. C. 515.

Conditional sale—*Mortgage bonds and preferred stock as price of sale — Non-fulfilment of condition—Action to rescind sale.*]—When a projected company is in course of formation to buy up the stocks and take over the business of several existing companies, a sale to the promoters of shares in the stock of one of them, to be paid for by bonds and preferred stock of the new company, such shares to remain in the hands of a third party in trust, until all the shares of the company shall have been so purchased and its real estate conveyed to the new company, when a mortgage deed shall be executed to secure the bonds thereon, is a conditional sale, and, failing the fulfilment of the condition, the seller has the right to demand the rescission of the sale. Difficulties in the acquisition of the whole stock and of the real estate of the old company, and the offer of bonds not secured as mentioned in the sale, afford no grounds of defence to the action.—Judgment in *Angus* v. *Dominion Textile Co.*, 30 Que. S. C. 56, affirmed. *Dominion Textile Co.* v. *Angers*, 18 Que. K. B. 63. Affirmed, 41 S. C. R. 185, 6 E. L. R. 127.

Contract to sell shares—Consideration — Breach — Proposal — Acceptance — Seal—Mining company—Discount on shares —By-law—Release — Damages. *Gold Leaf Mining Co.* v. *Clark*, 5 O. W. R. 6, 6 O. W. R. 1035.

Employment of agent to sell shares —Action for wages—Absence of formal by-law or resolution of directors—Parol agreement with directors—Validity—Executed contract—Period of hiring—Extension—Sale of shares without prospectus—6 Edw. VII. c. 27, s. 3 (3). *Webster* v. *Jury Copper Mines Limited*, 12 O. W. R. 632.

Employment of manager — Breach—Damages — New agreement — Directors — Insurance company — Novation — Waiver. *Stewart* v. *Nelson*, 4 E. L. R. 246.

Loan company—*Sale of assets to another company—Ratification by shareholders and*

assent by Lieutenant-Governor in council—Rights of holder of terminating shares — Substitution of permanent shares—Absence of schedule — Effect of—Creditor or shareholder—Right of withdrawal—Loan Corporations Act.]—The E. loan company, incorporated under the Loan Corporations Act, R. S. O. 1897 c. 205, were by s. 10 thereof empowered to raise a fund or stock by means of "terminating shares." A number of such shares were in 1901 and 1902 issued by the company to the plaintiff, or had been assigned to him, called "prepaid terminating shares," on each of which he paid $50, and on which he was to receive a semi-annual dividend, not exceeding 6 per cent., out of the profits available therefor, and the balance of the profits after payment of expenses was to be applied on the stock until the maturity value thereof was reached, as stated in the report, the owners of such stock having the right of withdrawal after 3 years by giving 30 days' notice in writing to the company, on the conditions mentioned in the report. The plaintiff was also the holder of dividend-bearing terminating stock certificates fully paid, issued under by-laws of the E. Co., which were by certificates repayable at a date subsequent to the agreement for sale of the assets of the E. Co. In 1903 the E. Co. entered into an agreement with the S. Co., incorporated under the same Act, for sale to latter Co. of all its assets, subject to ratification by the shareholders of the respective Cos., which was subsequently procured, the agreement, as required by the Act, being filed with the corporation's registrar, and assented to by Lt.-Gov. in council, and certificate of Atty.-Gen. issued certifying the same, but no schedule of names of shareholders of the E. Co. was attached to agreement, as required by statute. Permanent stock was then issued by the S. Co. in lieu of stock held by shareholders of the E. Co. The plaintiff, on being notified of the meeting of shareholders of the E. Co. wrote protesting against sale, stating that he would withdraw his money from the Co. before the merging took place, and subsequently he again wrote that he positively refused to allow his certificates to be delivered up in exchange for the substituted stock. Two dividend cheques on the new stock were sent and received by plaintiff, one of which he cashed. The plaintiff alleged that the transaction between him and the E. Co. was, in fact, a loan; and he brought an action to have it declared that he was a creditor of the E. Co. and entitled to be repaid the amount so paid by him; and, before commencing the action, he tendered back to the Co. the amount of the cashed dividend cheque together with the unused one:—*Held*, that, under the circumstances, the sale was valid and binding, and was not affected by the fact that the schedule was not attached to agreement, and that plaintiff was a shareholder in the E. Co. and not a creditor in respect of either class of shares, and was bound by the terms of the agreement of sale. —Judgment of Meredith, J., reversed. *Lennon* v. *Empire Loan and Savings Co.* (1906), 12 O. L. R. 560, 8 O. W. R. 162.

Money advanced to company—Authority of president—Negotiations for formation of new company—Failure of consideration—Recovery of money advanced. *Eveden* v. *Standard Art Manufacturing Co.* (1906), 8 O. W. R. 392.

Payment for shares — *Equivalent for cash—Written contract.*]—M. and C. each agreed to take shares in a joint stock company, paying a portion of the price in cash and receiving receipts for the full amount, the balance to be paid for in future services. The company afterwards failed:— *Held*, affirming the judgment of the Court of Appeal, 27 A. R. 396, 20 C. L. T. 300, that, as there was no agreement in writing for the payment of the difference by money's worth instead of cash, under s. 27 of the Companies Act, M. and C. were liable to pay the balance of the price of the shares to the liquidator of the company. *Union Bank* v. *Morris, Union Bank* v. *Code*, 22 C. L. T. 45, 31 S. C. R. 594.

Payment—*Transfer of business assets—Debt due partnership — Set-off — Counterclaim—Accord and satisfaction — Liability on subscription for shares— R. S. B. C. c. 44, ss. 50, 51.*]—On the formation of a joint stock company to take over a partnership business, each partner received a proportionate number of fully paid-up shares, at their par value, in satisfaction of his interest in the partnership assets:—*Held*, reversing the judgment in 9 B. C. R. 301, Davies, J., *dubitante*, that the transaction did not amount to payment in cash for shares subscribed by the partners, within the meaning of ss. 50 and 51 of the Companies Act, R. S. B. C. c. 44, and that the debt owing to the shareholders as the price of the partnership business could not be set-off nor counterclaimed by them against their individual liability upon their shares. *Fothergill's Case*, L. R. 8 Ch. 270, followed. *Turner* v. *Cowan*, 24 C. L. T. 115, 34 S. C. R. 160.

Pre-incorporation contracts.]—An independent purchaser buying with his own money and selling at an enhanced price to a company, with full disclosures and without fraud, can claim his profit. *Minister of Railways & Canals* v. *Que. Southern Ry. Co. (Hodge & White's Claim)* (1908), 12 Ex. C. R. 11. See also S. C. (*Standard Trust Claim*) 1908), 12 Ex. C. R. 123.

President suing for salary — *No by-law—Resolutions—7 Edw. VII. c. 34, s. 58.*] —Plaintiff brought action to recover $525, alleged to be due him for services as president of defendant company. At trial, Clute, J., *held*, that there had been no compliance with the provisions of the Ontario Companies Act, 7 Edw. VII. c. 34, s. 58, and dismissed plaintiff's action. On appeal to the Divisional Court, a further objection was raised to plaintiff's recovery in that there was no by-law nor any contract under seal defining the amount of the plaintiff's remuneration, nothing but a series of resolutions with exception of a general by-law which Clute, J., *held* to be *ultra vires*.—*Held*, that the appeal should be dismissed with costs, Britton, J., dissenting. *Beaudry* v. *Reed* (1907), 10 O. W. R. 622, considered and approved. *Mackenzie* v. *Maple Mountain Mining Co.* (1909), 14 O. W. R. 1266, 1 O. W. N. 284.

Promissory note—*Authority of secretary —Board of directors — Resolution.* — The secretary of an incorporated company, authorised by resolution of the board of directors to sign promissory notes in settlement of amounts due, when there is no contestation in regard thereto, may validly sign one for a debt in regard to which a special resolution of the board orders him to make arrangements with the creditor. Hence, the company cannot set up, in answer to an action for the recovery of the amount of the note, that it was signed without authority. *Paquet* v. *Métabetchouam Pulp Co.*, 29 Que. S. C. 535.

Promoters — *Scheme of organisation— Managing director — Salary — Adoption by shareholders after incorporation — Ratification.*]—A contract between a private person and a joint stock company in process of formation is without effect as regards the company, after its incorporation by the issue of letters patent. Having had no legal existence, it is not capable of ratification. In order that it may take effect, it is necessary that the company acting, after its incorporation, by its board of directors, shall subscribe or bind itself formally in the manner provided by law.—Therefore, when the promoters of such a company draw up a writing or proposal for the launching of the business, in which it is declared that a certain person will be the managing director, with a specified salary and other advantages, and the shareholders subscribing, have knowledge of this document, and, after the issue of the letters patent and the adoption of by-laws by the provisional directors, a resolution is passed at a general meeting of the shareholders adopting the proposal for incorporating the company, ordering its entry in the books of the company, and the deposit of the original with a notary, such facts do not establish a contract between the person designated as managing director, and the company, in such a way as to give against the company a recourse for recovery of arrears of salary. *Duquenne* v. *La Compagnie Générale des Boissons Canadiennes*, 31 Que. S. C. 409.

Purchase of assets by individual—*Management — Misappropriation.*]—An action in the name of the McAlpine Tobacco Co. on behalf of General McAlpine, the purchaser of the assets of that company, at a time when the company had reached a state when it had become impossible to profitably continue its operations. After some efforts had been made to realise upon the property by tenders it was purchased by McAlpine. The defendant, Consumers' Tobacco Co., was indebted to the McAlpine Tobacco Co. in a large amount.—Teetzel, J., at trial, *held*, that there was no personal liability against the three defendants for the amount claimed against them and dismissed the action against the individual defendants, but gave judgment against the defendant Consumers' Tobacco Co. for $3,398.04 and costs. On appeal, Divisional Court *held*, that the three defendants, Fleming, Straith and Pinchin, should account to plaintiff for the money which they wrongfully obtained, and the credits of which they wrongfully received the benefit. Plaintiff's appeal allowed with costs here and below, and the judgment entered against the Consumers' Tobacco Co. varied accordingly. Reference to the Master-in-Ordinary to take accounts. Costs of reference and further directions reserved. *McAlpine* v. *Fleming* (1910), 15 O. W. R. 479, 1 O. W. N. 548.

Purchase of assets by individual—*Management.*] — Defendant, having a controlling interest in the Eli Van Allen Co., gave an option to plaintiff Strong on Nov. 30th, 1906, which was taken up and the purchase completed. Defendant acted as manager of the business down to Feb. 7th following, and plaintiffs claim *inter alia* that defendant while managing the business applied their assets to a considerable amount in paying liabilities of the former company, for which plaintiffs were not liable, but which should have been paid by defendant out of his own money; that he drew $5,000 a year when he was entitled to draw $3,000 only, and that he was bound to repay them these differences. At trial Britton, J., gave plaintiff judgment for $2,577.69 with costs, and a declaration that the defendant should pay all the debts of the plaintiff company, existing on 31st August, 1906, which did not appear on the books of the company, as of that date, and all liabilities of said company incurred after 31st August, 1906, and prior to 5th December, 1906, other than ordinary expenses and liabilities of said company for said period. Divisional Court dismissed appeal and cross-appeal with costs, Sir Wm. Meredith, C.J.C.P. (dissenting in part), holding that the judgment should be varied by reducing the amount to which respondents had been found entitled by the sums (specified in his judgment), which in his opinion they were not entitled to recover, and with that variation the appeal should be dismissed without costs. *Strong* v. *Van Allen* (1910), 15 O. W. R. 493, 1 O. W. N. 539.

Sale of assets—*Dissenting shareholder— Injunction.*]—The holders of the majority of the shares in the capital stock of a company authorised the selling of the company's property in order to pay debts:—*Held*, that the sale should not be enjoined at the instance of a dissentient shareholder. *Patrick* v. *Empire Coal and Tramway Co.*, 4 E. L. R. 98, 3 N. B. Eq. 571.

Sale of to president—*Salary of directors — Injunction to restrain sale refused.*] — Plaintiffs moved for an injunction to restrain defendants, the company, and the directors thereof, from selling out the plant of the company to its president for $650, on the ground that the property was worth much more, and from paying $65 each to the directors for services, on the grounds that such acts were illegal and fraudulent:—*Held*, that the motion should be refused with costs to defendants in any event but without prejudice to any case that may be made at trial. *Kuntz* v. *Silver Spring Co.* (1910), 15 O. W. R. 826.

Trading company—*Executory contract —Corporate seal—Authority of general manager—By-laws.*]—By letter, signed by their managing director, the defendants, a joint stock trading company, agreed to furnish the plaintiffs malleable iron coupler parts of their manufacture as might be ordered, the letter being subscribed "accepted," by the

plaintiffs. No by-law had been passed defining the general powers of the board of directors or the managing director of the defendant company, except as to borrowing for the purpose of the business. The managing director did not consult the board before signing the letter, and there was no formal subsequent approval or disapproval by the board of what had been done. The managing director knew that to carry out the contract a substantial extension of the defendants' plant and premises would be necessary, and the plaintiffs also knew this. But there was no evidence that they knew anything about the defendants' capital or commercial circumstances, or their ability to furnish the additional plant:—*Held*, affirming the judgment of Falconbridge, C.J.K.B., 7 O. W. R. 436, that, in the absence of bad faith or notice, the plaintiffs were entitled to assume that the managing director was authorised to enter into the agreement, which, when orders were actually given by the plaintiffs, became a binding contract and one to which the board of directors would have had power to bind the company.—*Held*, also, that the circumstance that the contract required an increased plant for its full performance was not in itself sufficient to render it *ultra vires;* though it would have been otherwise if such increased plant had been required to carry on a new or different business from that then being carried on by the company. As it was, the supplying such additional plant would fall under the head of "management," and would, therefore, be within the general scope of the directors' authority.—*Held*, also, that there was no need of the corporate seal, although the contract was an executory one.—*Held*, therefore, that the plaintiffs were entitled to recover so far as they had given orders for the couplers under the contract: Meredith, J.A., dissenting, so far only. *National Malleable Castings Co.* v. *Smith's Falls Malleable Castings Co.*, 9 O. W. R. 165, 14 O. L. R. 22.

Transfer of assets — *Effect of.*] — A transfer of the assets of one joint stock company to another does not merge the two companies into one. *Maple Leaf Rubber Co.* v. *Brodie*, 18 Que. S. C. 352.

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10. Actions by and Against.

Action against shareholder by judgment creditor—*Counterclaim against company struck out by order—Ontario Companies Act, 7 Edw. VII. c. 34, ss. 68, 69—Sheriff returned execution unsatisfied — Con. Rule 251—Action dismissed—Right to bring another action.*]—Plaintiff in January, 1909, obtained judgment against the National Mining and Development Co. for $678.08 damages and $22.54 costs, and on obtaining a return of *nulla bona* from the sheriff who still held the *fi. fa.* in his hands, brought this action against defendant, a shareholder in the company, claiming $500. Defendant filed a defence and counterclaim against the company. Riddell, J., *held*, that the defendant could not succeed on the counterclaim, but as the *fi. fa.* has not been returned unsatisfied, action dismissed with costs. The dismissal not to prevent another action being brought as was done in *Barber* v. *McCuaig*, 31 O. R. 593. Counterclaim dismissed with costs as of a motion. *Grills* v. *Farah* (1910), 16 O. W. R. 285, 21 O. L. R. 457, 1 O. W. N. 978.

Action by judgment creditor against —Payment of dividend when company insolvent — Preferential payments of defendants' claims against company—Judgment for damages — Companies Ordinances, s. 65. *Snow* v. *Benson* (N.W.T.), 2 W. L. R. 350.

Action by liquidators — *Sanction of Court—Liability of general manager to account for profits—Trustee—Dominion Winding-up Act, 1906, c. 144, s. 38.*]—Action by liquidators against former general manager of company for an account of profits:—*Held*, that, under s. 38 above, an order should have been obtained before action commenced: —*Held*, further, that defendant, in acquiring certain timber, did not act as trustee for the company. Obtaining same was not within scope of the authorised business of the company, nor was it done secretly. He did not use any of the company's property, nor was the information that to which the company had any right. He did not acquire the property or information by means of his fiduciary position. Action dismissed. *Kendall* v. *Webster*, 10 W. L. R. 442.

Action by seaman for wages — *Proceedings in Admiralty Court—Arrest of vessel—Leave to proceed in Admiralty—Irregularity.*]—The company which owned the defendant ship was being wound up under the above Act. After winding-up order made but before permanent liquidator appointed, through error a writ of summons in the Admiralty Court was issued without leave of the Supreme Court of British Columbia in which the winding-up proceedings were being taken. The writ was served and the ship seized:—*Held*, that the plaintiff may proceed with the action. *Re British Columbia Tie and Timber Company; Colan* v. *The "Rustler,"* 10 W. L. R. 370.

Action directed against the chairman of a committee *which is not a corporation and action against such committee — Exception to the form.*] — A committee which has no corporate existence is not a legal person who may be sued in a court of justice, and an action taken against such committee will be dismissed on exception to the form. Similarly, a person who is sued by the same action in his quality of chairman of the same committee, may ask for the dismissal of the action on exception to the form. *Baldwin* v. *Com., etc., & Prati*, 16 R. de J. 228.

Action to compel registration of share certificate—*Consideration—Dealings with agent repudiated by company—Action dismissed.*]—Plaintiff brought action for a declaration that he was the holder of 25 fully paid-up shares of the capital stock of defendant company, upon which shares $2,500 had been paid, together with $625 for premium, and that defendants should be ordered to register him as a shareholder accordingly. Defendants disputed plaintiff's claim on the ground that plaintiff's alleged rights arose out of his dealings with one Ostrom, not the defendant company.—Riddell, J., *held*, that

there was no evidence of anything else, than that Ostrom should in some way put himself in a position to transfer the shares to the plaintiff; that while Ostrom was an agent of defendants for some purposes, yet it was clear that he had no power to bind the company by the delivery of the share certificate although signed by first vice-president, and that plaintiff dealt with Ostrom, not with the company, and took at his own peril what Ostrom gave him. Action dismissed without costs. *Mackenzie* v. *Monarch Life Ins. Co.* (1910), 16 O. W. R. 933, 2 O. W. N. 45.

Appeal — *Leave — Order refusing jury trial.*]—In winding-up proceedings, leave to appeal is obtainable from a Judge of the Court in regard to "an order or decision," without limitation as to whether it is final or interlocutory. Therefore leave to appeal will be allowed from an order refusing a jury trial in a winding-up proceeding. *Tetrault Shoe Co.* v. *Kent*, 10 Que. P. R. 283.

Bonds — *Distribution amongst the shareholders—Revendication — Paulian action—C. C. 1032 to 1040.*]—Articles 1032 to 1040 C. C., referring to the Paulian action, are not applicable to a case where a company divides amongst its members not only the accumulated profits, but also bonds, without paying its debts. Therefore, an action instituted by the liquidator of the company to revendicate these bonds or the value thereof is not a Paulian action which is barred by statute after one year. *Hyde* v. *Ross* (1910), 17 R. L. n. s. 88.

Collusion of directors — *Rights of minority shareholders — Application to set aside judgment—Action.*]—At a meeting of directors of the defendant company a resolution was passed that an action brought by the plaintiff, who was president of the company and held a majority of the shares, against the company, should not be defended; that the plaintiff should be allowed to take judgment for the amount of his claim with interest; and that an account rendered to the plaintiff by the secretary of the company should be withdrawn and treated as rendered without authority. There was ground for inferring collusion, and a question as to whether the plaintiff was entitled to recover anything in his action against the company:—*Held*, that the judgment entered against the company was properly set aside, and that the applicant G., the secretary of the company, was properly permitted to defend and plead a counterclaim on behalf of the company. *Northwest Transportation Co.* v. *Beatty*, 12 App. Cas. 596, distinguished:—*Held*, also, as to the remedy in equity, that if the plaintiff's claim was not properly due, and the directors, representing a majority of the shareholders, were acting collusively in allowing judgment to go by default, G. could, on behalf of himself and the others in the minority, maintain an action against the plaintiff and the directors to restrain proceedings on the judgment:—*Held*, also, that, by virtue of the Judicature Act, R. S. c. 155, s. 18, s.-s. 5, G. could have the remedy in the action itself *Dimock* v. *Central Rawdon Mining Co.*, 36 N. S. Reps. 337.

Confession of judgment—*Signature of manager—Want of authorisation—Invalidity —Motion to strike out.*]—A writing *sous scing privé* signed by the manager and secretary of a company defendant, without a special authorisation of the board of directors, is not signed by a competent officer, and is not available as a valid confession of judgment, authorising the defendant's attorneys to confess judgment on the company's behalf. A motion by the plaintiff to reject this paper from the record will be granted. *Bessette* v. *Equitable Mutual Fire Ins. Co.*, 10 Que. P. R. 260.

Contract under seal—*Company to transfer shares to servant—Conditional gift or bonus—Evidence—Construction of contract—Rectification.*]—Plaintiff brought action for a declaration that he was the beneficial owner of 25 shares of the capital stock of defendant company, under an agreement of service between the company and plaintiff of Oct. 6, 1904, which provided that five shares should be transferred to him annually as a reward for faithful services. On Feb. 21, 1910, plaintiff was discharged from the service of defendant company, and at that time 25 shares of such capital stock were outstanding in name of defendant Moodie as trustee for plaintiff. Plaintiff claimed and defendants denied that the plaintiff was entitled to the beneficial ownership of these shares.—Court of Appeal, *held*, that reading the contract as a whole, the proper construction was that plaintiff was entitled only while he was in the employment of the company. Action and appeal dismissed with costs and defendants' counterclaim for rectification of the contract allowed. *Gee* v. *Eagle Knitting Co.* (1911), 18 O. W. R. 438, 2 O. W. N. 619.

Deposit of certificates — *Bailment — Trust—Detention.*]—The plaintiff loan company became the holder of 525 shares in the capital stock of a coal company, and of 50 shares in a steel company, and deposited the certificates for the shares with the defendant trust company for safe-keeping. The defendant trust company executed and delivered to the plaintiff loan company a document under seal by which they hold in their safe deposit vaults to the order of the loan company any dividends received in respect thereof, and guaranteed to the loan company that the certificates would be kept safely in deposit vaults and delivered upon demand under proper authority. The document also provided for the remuneration of the trust company. The certificates were put into the name of the trust company. It appeared that 375 of the shares had been acquired by the plaintiff loan company under an agreement with the Atlas Loan Co., who had an interest in the prospective profits to be derived from the sale of the shares. While the certificates were in possession of the defendant trust company both loan companies were ordered to be wound up under the Dominion Act, and the defendant trust company were appointed liquidators of the Atlas Loan Co., and the plaintiff trust company liquidators of the plaintiff loan company. After the commencement of the liquidations, the plaintiff trust company, as liquidators, demanded the certificates from the defendant trust company, but the latter refused to deliver them up, and this action was brought for damages for the detention:—*Held*, that the defendant trust company were merely bailees and not trustees; but, if they were to be regarded as

trustees, the failure to hand over the certificates was not such a breach of trust but for which they ought fairly to be excused under 62 V. (2) c. 15, s. 1 (O.); owing to their dual character, they did not act with singleness of purpose, and therefore acted honestly and reasonably; and the direction of the Master in Ordinary, to whom was referred the winding-up of the Atlas Loan Co., that the whole 575 shares should be retained by the defendant trust company as liquidators, was made without jurisdiction and did not protect them as trustees. 2. The plaintiffs were entitled to damages for the detention (delivery having been made pending the action), based on estimates of what had been lost by the detention; and the measure of damages was the highest price of the shares represented by the certificates between the demand and the delivery. *Elgin Loan and Savings Co.* v. *National Trust Co.*, 24 C. L. T. 55, 2 O. W. R. 1159, 7 O. L. R. 1, affirmed in 5 O. W. R. 466, 10 O. L. R. 41.

Electric light company — Nuisance—Vibration — Injunction — Damages. *Hopkin* v. *Hamilton Electric Light and Cataract Power Co.*, 4 O. L. R. 258, 1 O. W. R. 486.

Employment of workman — *Liability for wages—Absence of contract—Hiring by acting manager—Knowledge of majority of directors.*]—Plaintiff, who worked in defendants' stone quarry, sued for wages. The defendants denied employment. There was no contract under defendants' corporate seal. The acting manager of defendants told him to go to work. Three of the directors knew he was working. The defendants received the benefit of his work. Defendants held liable. *Milne* v. *Ontario Marble Quarries Limited*, 13 O. W. R. 1137.

Goods sold and delivered—*Principal and agent.*]—Plaintiff, a merchant, carrying on business at St. Ignace, in the District of Kenora, sued defendants, an incorporated company, on an account for goods alleged to have been supplied by him to defendants in Nov., 1907, and Jan. and March, 1908, amounting to $555.23. These goods were ordered through one Steele, formerly defendants' manager, but defendants had appointed one McKewan manager in his place in the fall of 1905, and he continued as such down to August, 1907. In August, 1907, the company gave Steele a written option upon its mining property, and directed its employees to turn the same over to him, putting up a notice at the mine that they would not be responsible for any debts incurred in operating same:—*Held*, that plaintiff must look to Steele, against whom he made out the account, rather than the defendant company. Judgment for defendants, with costs. *Davidson* v. *St. Anthony Gold Mining Co.* (1910), 15 O. W. R. 446, 1 O. W. N. 525.

Guarantee by company signed by president—*Chattel mortgage, etc.*]—A company sold a branch of their business taking a chattel mortgage for $5,066.74 as security. By mistake the affidavit of *bona fides* stated that the mortgagor was justly indebted to the company in the sum of $5,000:—*Held*, that the mortgage was a valid security for $5,000. *Mader* v. *McKinnon* (1892), 21 S. C. R. at p. 652, followed; *Midland Loan* v. *Cowieson* (1891), 20 O. R. 585, distinguished.

In order that the mortgagor might obtain an advance from a bank, the president of the company signed a guarantee in this form, "A. E. Thomas, Ltd.," and under that name "A. E. Thomas, Pres.:" — *Held*, that the guarantee was binding on the company. The mortgage covered the stock in trade, fixtures and all book debts. The company did not notify the debtors of the assignment of the debts as required by the Judicature Act, s. 58 (5). The mortgagor later assigned the book debts to the bank as collateral security for the advance:—*Held*, that the bank had taken their assignment without notice of the company's claim and having collected the debts were entitled to retain the proceeds. The mortgagor also gave the bank a document purporting to be a further security, under s. 88 of the Bank Act, covering 230 cases of matches, and the bank took possession of the matches:—*Held*, that as the matches were covered by the chattel mortgage it was not necessary to consider whether the document claimed by the bank was of any value in view of s. 90 of that Act. Judgment given bank against the company for the amount of the guarantee. Judgment given the company against the bank for conversion of the matches, the bank to have the right to retain the matches on payment to the company the amount of their mortgage. Reference to the Master in Ordinary to take accounts. Costs and further directions to be dealt with after the Master's report. *Thomas Ltd.* v. *Standard Bank; Standard Bank* v. *Thomas Ltd.* (1910), 15 O. W. R. 188, 1 O. W. N. 379. Affirmed, 1 O. W. N. 548.

Information against—*Attorney-General—Status of informant — Pleading.*]—To an information in the name of the Attorney-General against a corporation the defendant cannot plead, by means of a pleading *puis darrein continuance*, that the informant has ceased to be a member of the defendant corporation and has lost all interest in the suit, and that all the actual members of the defendant corporation approve the attitude of the corporation. *Archambeault* v. *St. Lawrence Investment Society*, 3 Que. P. R. 71, 17 Que. S. C. 451.

Injunction—*Action to restrain council from acting as such.*] — Interim injunction was applied for by members of lodges to restrain defendants, the Grand Council, from acting as such, it being alleged that certain officials appointed to office in that Council were ineligible, and that various lodges were improperly represented. As an injunction would prevent the Council doing business, the Court in its discretion refused to interfere before trial. An appeal was dismissed. *Sutherland* v. *Grand Council*, 6 E. L. R. 45.

Judgment against for wages—Execution returned *nulla bona*—Action against directors—Manitoba Joint Stock Companies Act, s. 33—Penal or remedial—Directors not properly qualified as absolute holders of shares — *De facto* directors — Right to recover against — Estoppel. *Macdonald* v. *Drake* (Man.), 4 W. L. R. 434.

Leave to bring action *against company in liquidation and liquidator—Discretion.*]—Respondent had a judgment against C. personally and against her as carrying on business under two trade names. His claim was

disallowed against the company in the winding-up proceedings, and a Judge gave leave to bring an action against the company and the liquidator. The Court of Appeal refused to interfere with the discretion of the Judge. *Re Toronto Cream and Butter Co., Ltd.* (1909), 14 O. W. R. 81.

No action against company after winding-up order.]—Provision of R. S. C. (1906), c. 144, s. 22, to effect that after winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against company, except with leave of Court, is imperative and its sanction is absolutely necessary. Want of leave of Court cannot be remedied, on application therefor, after suit taken. For same reason, a plea filed by liquidator, without such leave, will be rejected from record with costs against liquidator personally. *Ruffer* v. *Rattray & Sons, Ltd.* (1910), 39 Que. S. C. 245.

Non-trading corporation created under the Benevolent Societies Act—*Libel of, whether actionable.*]—A non-trading corporation having the right to acquire property which may be the source of income or revenue, the transaction of the business incidental thereto creates a reputation, rights, and interests similar to those of an individual or a trading corporation, and must have the same protection and immunities, and be given the same remedies, in case of injury, as a trading corporation; and an action for libel brought by a company incorporated under the Benevolent Societies Act was held to be maintainable without proof of special damage. *Chinese Empire Reform Association* v. *Chinese Daily Newspaper Publishing Co.*, 6 W. L. R. 489, 13 B. C. R. 141.

Opposition to an execution—*Examination of the claimant, an incorporated company — C. P. 286, 651.*]—An incorporated company opposing an execution may be examined under s. 651 C. P. *Sims* v. *Bach* (1909), 10 Que. P. R. 328.

Parties to action — Authority to use name—Solicitor—Meeting of shareholders—Security for costs. *Woodruff Co.* v. *Colwell* (1906), 8 O. W. R. 302, 314, 493.

Penal action—*Company not using the word "limited."*]—A penal action against a company for not using the word "limited" may be taken at the suit of His Majesty only, or of any private party suing as well for His Majesty as for himself. So a private party has no right to sue, as regards the King, in the name of the King himself; if he does so, his action will be dismissed on an exception to the form. A notice of the institution of a penal action must be served upon the Attorney-General without delay. If the action has been served on the 29th of the month of March and the notice served upon the Attorney-General on the 12th of June following, service of said notice was not made without delay. The Attorney-General has no official bureau in Montreal at which said notice could be served. *Lamontagne* v. *Grosvenor Apartments*, 11 Que. P. R. 65 (an appeal to the C. K. B. is pending).

Pledgee of railway bonds has a sufficient interest (in nature of a mortgagee) in such bonds to institute an action for sale of an insolvent railway under Exchequer Court Act, R. S. C. (1906), c. 140, s. 26. *Royal Trust Co.* v. *Baie de Chaleurs Rw. Co.* (1907), 13 Ex. C. R. 1.

President receiving salary—*No sanction of payment by shareholders — Ontario Companies Act, s. 88—Winding up—Money illegally paid for salary—Quantum meruit.*]—In winding-up proceedings the Official Referee found that the president of the company had received $1,100 as salary for which he should account to the company. Middleton, J., *held*, on appeal, that the statute requires the sanction of the shareholders at a general meeting to a by-law of the directors before payment of the president or any director is permitted, and the statute had not been complied with neither in substance nor form, and the president was liable to return the amount so received. *MacKenzie* v. *Maple Mountain*, 15 O. W. R. 728, distinguished. *Re Queen City Plate Glass Co. Eastmure's Case* (1910), 16 O. W. R. 336, 1 O. W. N. 863.

President suing for salary—*By-law—Resolutions—7 Edw. VII. c. 34, s. 88.*]—Plaintiff brought action to recover $525, alleged to be due him for services as president of defendant company. At trial Clute, J., *held*, that there had been no compliance with the provisions of the Ontario Companies Act, 7 Edw. VII. c. 34, s. 88, and dismissed plaintiff's action. On appeal to Divisional Court, a further objection was raised to plaintiff's recovery in that there was no by-law nor any contract under seal defining the amount of plaintiff's remuneration, nothing but a series of resolutions with exception of a general by-law which Clute, J., held to be *ultra vires*. Divisional Court dismissed the appeal with costs, Britton, J., dissenting. Court of Appeal reversed above judgments, finding that a by-law was passed by the company's board of directors providing that the president, among other officers, should receive such remuneration as might by resolution of the board be determined and that by-law had been confirmed by a general meeting of the shareholders, and also a resolution to fix the president's salary at $100 per month:—*Held*, that there was a literal as well as a substantial compliance with the enactment, and with the terms of the by-law also; that there was no necessity that each contract for such payment should be confirmed by the shareholders. Judgment entered for plaintiff with costs. Judgments of Clute, J., and Divisional Court, 14 O. W. R. 1266, 20 Que. K. B. R. 170, reversed. *Mackenzie* v. *Maple Mountain Mining Co.* (1910), 15 O. W. R. 728, 20 O. L. R. 615.

Promoters — *Contract to deliver shares and bonds—Adopted by company—Consideration—Breach of contract — Damages—Evidence—Ascertainment of value at fixed dates—Report—Variation on appeal.*]—Plaintiffs, railway promoters, brought action to recover stock and bonds of a railway company which they alleged were to be given them in consideration of their services. The action was brought under a written agreement against the defendants personally, who were parties

to the agreement, and against the railway company, who were alleged to have ratified and adopted the agreement. The face value of the stock was $72,000, and of the bonds, $45,000.—Court of Appeal (11 O. W. R. 1062), *held*, that the action against the defendants personally should be dismissed; that a reference should be had to ascertain the damages plaintiffs were entitled to recover from the railway company for non-delivery of the stock and bonds.—Local Master made a report and defendants appealed.—Meredith, C.J.C.P., *held*, that defendants deliberately broke their contract to give plaintiffs the bonds and stock, and had put it out of their power so to do; that defendants' contention that they were entitled to go scott free because the bonds and stock were of no value, could not be entertained; that if such were the case, there should be no objection on the part of the holders of the stock, who now control the company, to transferring to the plaintiffs, out of their holdings, 720 shares, which the plaintiffs had offered to accept; that the Master had placed too high a value on the stocks and bonds, and a fair value on 19th October, 1905, would be 20 cents on the dollar for the stock and 45 cents on the dollar for the bonds. Master's report varied so as to agree with above valuation.—No costs of appeal to either party.—*Goodall* v. *Clarke* (1910), 16 O. W. R. 820, 21 O. L. R. 614, 1 O. W. N. 1131, affirmed; (1911), 18 O. W. R. 185, 2 O. W. N. 567, O. L. R. , followed. *Nelles* v. *Hesseltine* (1911), 18 O. W. R. 196, 2 O. W. N. 643.

Qui tam action—*British subject—Failure by a company to file a declaration—Prescription — Right of appeal—Inscription in law.*]—C. P. 44, 191, C. C. 2263, R. S. Q. 2615, 4 & 5 Edw. VII. c. 74. Any one can take a penal action, even if he is not a British subject; in any event one is presumed to be so. A penal action against a company for its failure to file a declaration according to law, is prescribed if it is not taken within a year after the company has commenced to do business; the failure to file such a declaration is not a continuous offence, and there is a single and unique penalty. An appeal lies to the Court of King's Bench from a judgment rendered in a *qui tam* action for the recovery of $400. *Croysdill* v. *Anglo-Am. Telegraph Co.* (1909), 10 Q. P. R. 397.

Railway company director, being a creditor and present at a meeting where authority was given to pledge the bonds of the company, is estopped from setting up the validity of such bonds in an action by the pledgee. *Royal Trust Co.* v. *Baie de Chaleurs Rw. Co.* (1907), 13 Ex. C. R. 1.

Receivers—*Leave to bring action against —Bonds—Priorities.*]—Leave given to bring an action against receivers of a company incorporated under the Ontario Companies Act, to restrain them from carrying out a certain scheme for a fresh bond issue, notwithstanding that the legality of the scheme had been upheld on motion before a Judge of the High Court of Justice in England. *In re Diehl* v. *Carritt, Ex p. Clement*, 10 O. W. R. 403, 15 O. L. R. 202.

Sale of gas works to municipality—*Arbitration as to price—Franchise—Ten per cent. addition.*]—By 54 V. c. 107 (O.), the company was protected against compulsory parting with its works and property to the city until May, 1911; but by an agreement made in 1896 it was provided that, upon the city giving one year's notice, it should have the option of purchasing and acquiring all the works, plant, appliances, and property of the company, used for light, heat, and power purposes, both gas and electric, at a price to be fixed by arbitration; and that, upon the acquisition by the city of the works, plant, and property, the company should cease to carry on its business, the city having exercised its option:—*Held*, affirming the decision of Lount, J., 3 O. L. R. 637, 1 O. W. R. 194, that, in ascertaining the price to be paid by the city, the arbitrators were right in allowing nothing for the value of the earning power or franchise of the company; and in refusing to add ten per cent. to the price as upon an expropriation under R. S. O. 1887 c. 164, s. 99. *In re City of Kingston and Kingston Light, Heat, and Power Co.*, 23 C. L. T. 151, 5 O. L. R. 348, 2 O. W. R. 55, 3 O. W. R. 769.

Sale of goods for use of company about to be formed—Action for price—Goods charged to manager of company personally—Liability. *Vulcan Iron Works* v. *Leary* (Man.), 1 W. L. R. 453.

Settlement of—*Issue of share—Certificate—New action to compel registration of certificate — Consideration — Dealings with agent repudiated by company — Action and appeal dismissed.*]—Plaintiff brought action for a declaration that he was the holder of 25 fully paid-up shares of the capital stock of defendant company, upon which shares $2,500 had been paid, together with $625 for premium, and that defendants should be ordered to register him as a shareholder accordingly, and to issue five certificates for five shares each in place of the certificate held by plaintiff. Plaintiff alleged that such shares were issued to him in consideration of the settlement of an action brought by him against defendants, in which he claimed to be entitled to a large sum of money. Defendants disputed plaintiff's claim on the ground that plaintiff's alleged rights arose out of his dealings with one Ostrom, not with the defendant company.—Riddell, J., *held*, (16 O. W. R. 933, 2 O. W. N. 45), that there was no evidence of anything else than that Ostrom should in some way put himself in a position to transfer the shares to plaintiff; that while Ostrom was an agent of defendants for some purposes, yet, it was clear that he had no power to bind the company by the delivery of a share certificate although signed by first vice-president, and that plaintiff dealt with Ostrom, not with the company, and took at his own peril what Ostrom gave him. Action dismissed without costs.—Court of Appeal affirmed above judgment. Magee, J.A., dissenting. *Mackenzie* v. *Monarch Life Assce. Co.* (1911), 18 O. W. R. 325, 2 O. W. N. 809.

Shareholders—Use of corporate name in litigation. *Cramp Steel Co.* v. *Currie*, 4 O. W. R. 270.

Signature of company, followed by signatures of directors — *Personal liability of directors—Intention—Intrinsic and*

extrinsic evidence.]—Action on a promissory note first, signed by a joint stock company and then by the president and two directors. After the name of the president was the abbreviation "Dir." while after the name of one of the directors was the abbreviation "Mgr.":—*Held*, on appeal, that the company and the three individuals are liable. *Union Bank* v. *Cross*, 12 W. L. R. 539.

Solicitor and client—*Moneys of company in solicitor's hands—Right to apply them on payment of debentures of company held by solicitor—Action by company—Set-off—Creditor ranking pari passu—Preference—Solicitor as trustee—Liquidation of company — Winding-up proceedings.*]—The defendant, when solicitor for plaintiffs, collected certain moneys for them. He was a director of plaintiff company and also the holder of debentures past due:—*Held*, that he had a right to set-off the debenture debt against the moneys collected. He has no right to charge a commission for collection over and above his costs. *Sydney* v. *Solicitor*, 7 E. L. R. 549.

Solicitor's bill of costs.]—An action by a solicitor to recover the amount of a bill of costs. At the trial judgment was reserved as to whether the plaintiff was entitled to recover against defendant company. It was said that he was retained by the company as it existed prior to the sale of all the stock and assets to the company as now constituted, which assumed the liabilities of the old company as they stood on the books at a certain date. Boyd, C., *held* that the plaintiff's claim did not fall within the terms of the engagement. Action dismissed as against the company without costs. *Staunton* v. *Kerr* (1909), 1 O. W. N. 244.

Specific performance.]—Action to compel defendant to assign a trade mark to company as he had covenanted so to do when company purchased his business. Judgment for company with costs. *Tilley* v. *De Forest* (N. B. 1910), 9 E. L. R. 28.

Stay of action *against company.*]—Actions against a joint stock company are necessarily stayed by a winding-up order and any application in reference thereto should be made to the Official Referee. *Duke* v. *Ulrey* (1909), 14 O. W. R. 932, 1 O. W. N. 151.

Summary conviction — *Supplying electricity — Registration — Certificate—Penalty—Time for prosecution—Imprisonment—Distress.*]—The defendants, who were a body corporate, were summarily convicted under 57 & 58 V. c. 39, s. 35, before two justices of the peace, for supplying electricity to purchasers from the 1st August, 1897, to the 27th October, 1897, without having first obtained from the Department of Inland Revenue or from an officer appointed for the purpose, a certificate of registration. The information was laid on the 27th October, 1897. The conviction awarded distress but not imprisonment. See ss. 34, 35 (2), 37 (c).—On the 1st August, 1895, the following regulation was established: "For every failure to procure a certificate of registration, as required by s. 35, and the payment of the fee established therefor, within thirty days after the first day of July in each year, the contractor shall incur a penalty not exceeding $100 and not less than $50:"—*Held*, that the regulation of the Governor in Council imposing a penalty for failing to take out a certificate was authorized by s. 37 (c) of the Act.—2. That the prosecution was commenced in time—there being no reasonable ground for saying that the offence was committed on the 1st July, 1897, and not afterwards. A new offence was committed each day that electricity was supplied without the certificate having been taken out.—3. That the conviction was bad for not awarding imprisonment for want of sufficient distress.—4. That a corporation cannot be convicted summarily. The word "person" in the Summary Convictions Act cannot be held to include a corporation or body corporate, notwithstanding the Interpretation Act, c. 1, s. 7, s.-s. 22. *Ex p. Woodstock Electric Light Co.*, 34 N. B. Reps. 460.

Trespass — *Parol demise by, void.*]—A corporation demised by parol, for one year, land to F. Defendants entered and turned F. out and retained possession, and the corporation brought an action of trespass against them in its own name, and was non-suited on the ground that F. being tenant in possession the action should have been brought in his name:—*Held*, on motion to set aside the non-suit, that as a corporation could only demise under seal the parol demise to F. was void, and the corporation was properly made plaintiff. *St. Andrew's College* v. *Griffin* (1852), 1 P. E. I. R. 80.

Unsatisfied execution—*Action against directors — Alberta Companies' Ordinance, 1905, s. 54—"Labourer"—Signing of deputy clerk of Court—Proof of return nulla bona.*]—Plaintiff, who had judgment against a company, and an execution returned *nulla bona*, now sued two directors under s. 54 Alberta Companies' Ordinance, 1905. As a miner he was paid by the car:—*Held*, he was a "labourer" within above section, and that the directors were liable. Plaintiff may sue two directors where there are more if he wishes. An execution signed "H. C. Deeton for clerk of Court" is good. While no actual return in this case was made by the sheriff, yet the evidence was sufficient to shew that nothing had been realized under this execution. *Crew* v. *Dallas*, 9 W. L. R. 598.

Use of name of plaintiff—Application to stay actions—Meeting of shareholders—Special circumstances. *Saskatchewan Land and Homestead Co.* v. *Leadley*, 2 O. W. R. 745, 850, 917, 944, 1075, 1112, 3 O. W. R. 133, 191, 4 O. W. R. 39, 378, 5 O. W. R. 449; *Saskatchewan Land and Homestead Co.* v. *Moore*, 2 O. W. R. 916, 944, 1075, 1112, 4 O. W. R. 39, 378.

Wages—*Liability of director—"Labourer or servant" — Foreman of works.*] — The plaintiff, who did manual labour in the works of an insolvent company, but was a superior labourer exercising some supervision over others, was held to be a "labourer or servant" within the meaning of 2 Edw. VII. c. 15, s. 71 (O.), and entitled to succeed in an action against a director of the company to recover the amount of the plaintiff's unpaid judgment against the company for wages. *Turner* v. *Fee*, 24 C. L. T. 402.

Wages as mineralogist—*Appointed by directors — Ontario Companies Act (1907), s. 88.*]—Plaintiff brought action to recover $2,500 for personal services as a mineralogist. Defendants denied any knowledge of any contract of hiring or of services rendered and moved for particulars of statement of claim before pleading.—Master in Chambers *held* (16 O. W. R. 947, 2 O. W. N. 46), that they were entitled to particulars as to the contract of hiring, but that particulars as to services rendered could be had on examination for discovery.—The case came on for trial before Sutherland, J., who *held*, that at a meeting of directors, 7th Jan., 1909, plaintiff was appointed mineralogist at the head office of defendant company at a salary of $2,500 per year and travelling expenses. Judgment for plaintiff without interest and with costs. *Bartlett* v. *Bartlett Mines* (1911), 18 O. W. R. 865, 2 O. W. N. 919.

Writ of injunction—*Its object—Company, administration of its capital—Exercise of its rights—C. C. P. 957.*]—The writ of injunction is not intended for the past; its object is to prevent the commission of an act, and not to obtain the compensation to which a person may have a right.—All the moneys received by a company form part of its treasury funds and should be used for the general purposes of the company; no shareholder of the company can demand that the funds of the company, according to whence they are derived, should be put aside and used for the purposes of a certain number of its obligations or contracts.—No shareholder of a company can obtain the issue of an injunction to prevent the company from doing what its charter and its by-laws under the charter authorise it to do. *Prefontaine* v. *Society of Arts of Canada*, 11 Que. P. R. 109.

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11. Foreign Companies.

Authority to representatives—*Directors — Advocates.*]—The authority which a foreign company gives to its advocates or to its representatives ought to be the act of the company itself, or of its directors sitting as a board of direction and acting for the company, and not that of a majority of the directors acting individually.—2. An authority given by an insurance company to one of its servants, authorising him to inspect the agencies and to sue, does not authorise him to give advocates the authority required by Art. 177, C. P. *Kavanagh* v. *Norwich Union Fire Ins. Co.*, 4 Que. P. R. 229.

Authorisation to advocates—*Power of attorney—Form—Date.*] — A foreign company may give a general power of attorney to their advocates for all the causes in which they are or may be concerned.—2. A power of attorney signed in the name of such foreign company by the presidents and the secretary before a notary in England, and sealed with the seal of the company, is valid until proof to the contrary, and there is no need to annex to it a resolution of the board of directors of the company authorising the officers to sign and seal such power of attorney.—3. The power of attorney may be subsequent in date to the institution of the action. *Great Northern Rw. Co. of Canada* v. *Furness, Withy & Co.*, 6 Que. P. R. 404.

Disability to carry on business without license — *Summary application to set aside writ of summons — Contract made in whole or in part in New Brunswick—Resident agents.*]—A writ of summons issued by an unlicensed extra-provincial corporation as the commencement of an action on a contract made in part within New Brunswick, contrary to ss. 12 and 18 of the Act "respecting the imposition of certain taxes on certain incorporated companies and associations," C. S. N. B. 1903 c. 18, may be set aside on summary application: *Per* McLeod, J., and Tuck, C.J.; Landry, J., doubting, and Hannington, J., dissenting.—The plaintiffs, an unlicensed extra-provincial corporation, sold absolutely to the defendants, a corporation within New Brunswick, at Bloomfield, in the State of New Jersey, two car-loads of empire cream separators, to be delivered f. o. b. at Sussex and St. John, to be paid for by promissory notes to be given on delivery; defendants to have the exclusive right of sale in certain named counties, and undertaking not to sell or handle any other separators in said counties. The defendants advertised in New Brunswick as the sole agents of the separators, with the consent and at the expense of the plaintiffs:—*Held, per* McLeod, J., and Tuck, C.J., Landry, J., doubting, and Hannington, J., dissenting, that the defendants were the resident agents of the plaintiffs in New Brunswick, and the sale was a contract made in part within the province, within the meaning of ss. 12 and 18 of the Act, and no action could be maintained on the notes. *Empire Cream Separator Co.* v. *Maritime Dairy Co.*, 38 N. B. R. 309, 4 E. L. R. 191.

Extra-provincial corporations which have not taken out a license under s. 6, 63 V. c. 24 (Ont.), are forbidden by the legislature to sell their goods in the province, and s. 14 provides that so long as such extra-provincial corporation remains unlicensed it cannot maintain any action in any Court in Ontario. *Bessemer Gas Engine Co.* v. *Mills*, 4 O. W. R. 325, 25 C. L. T. 12, 8 O. L. R. 647.

Failure to comply with statute—*Contract — Illegality — Penalty.*]—The plaintiffs, a company incorporated under the laws of Illinois, and having their head office in Chicago in that State, sought to recover damages against the defendant for breach of a contract made at Halifax, Nova Scotia.—By R. S. N. S. 1900 c. 127, s. 18, it is provided that every company not incorporated in the province, shall appoint a resident manager or agent, and that such company, before beginning business in the province, shall transmit to the Provincial Secretary a statement under oath giving certain particulars, including the situation of the head office, the amount of capital stock authorised, subscribed, and paid up, etc., and every company failing to comply with the provisions of the statute is made liable to a penalty of $10 per day during the continuance of such default:—*Held*, that non-compliance with the provisions of the statute did not render invalid contracts entered into by the company within the province, or prevent the company from recovering thereon. *American Hotel Supply Co.* v. *Fairbanks*, 2 E. L. R. 345, 3 E. L. R. 104, 41 N. S. R. 444.

Foreign Companies Ordinance — Action by foreign mining company against manager—Absence of license to carry on business—Mining license from Secretary of State for Canada—Cross-action by manager against company—Moneys expended for company—Concealment—Accounts rendered—Estoppel — Absence of prejudice — Counterclaim — Shortage in accounts—Costs — Cross-action brought to obtain order attaching debts. *McDonald* v. *Klondike Government Concession, Limited, Klondike Government Concession, Limited* v. *McDonald* (Y.T.), 4 W. L. R. 151.

Judgment against foreign company —*Execution—Opposition—Foreign receiver—Locus standi.*]—A receiver appointed by an order of the High Court of Justice in England to an insolvent company incorporated in that country, but owning real estate in Quebec, has no status or quality in which he can make an opposition to a seizure of such real estate in execution of a judgment rendered against the company. *Beauvais* v. *British and Canadian Lead Co.*, 31 Que. S. C. 289.

Jurisdiction of Supreme Court of Canada.] — A company was incorporated under the laws of West Virginia, with head office in New York, the main undertaking being to carry on business in Quebec, which it did. About four or five years after it ceased to do business in Quebec, a winding-up petition under the Dominion Winding-up Act, was presented to the Superior Court of Quebec:—*Held*, that the Superior Court had jurisdiction, and the petition could be presented. *Scott* v. *Hyde*, 5 E. L. R. 573.

Non-registration — "*Carrying on business*"—*Companies Act, s. 123—Principal and agent—Contract of agency—Illegality.*]—The general rule that persons who enter into dealings forbidden by law must not expect any assistance from the law, is not applicable so as to exonerate an agent from accounting to his principal by reason of past unlawful acts or intentions of the principal collateral to the agency. If the money is paid to him in respect of an illegal transaction, he is bound to pay it over, provided that the contract of agency is not itself illegal.—The making of the contract of agency in this case was not a "carrying on business" by an unlicensed extra-provincial company within the meaning of s. 123 of the Companies Act. —Decision of Hunter, C.J., 6 W. L. R. 50, 13 B. C. R. 74, upheld on different grounds. *De Laval Separator Co.* v. *Walworth*, 7 W. L. R. 395, 13 B. C. R. 295.

Non-registration — "*Carrying on business*"—*Companies Act, s. 123—Prohibitive enactment—Effect on contract.*]—An unlicensed extra-provincial company, carrying on business within the province, sued for a balance due on a contract to deliver building stone, entered into within the province. The defence advanced was that, by reason of s. 123 of the Companies Act, the contract was illegal and void:—*Held*, on appeal, that, as the act to be done in pursuance of the contract was prohibited by statute, the contract was therefore unenforceable. *De Laval Separator Co.* v. *Walworth*, 13 B. C. R. 74, 6 W. L. R. 50, overruled. *North-Western Construction Co.* v. *Young*, 7 W. L. R. 397, 13 B. C. R. 297.

Powers of president—*Power of attorney.*]—The president of an incorporated company may institute and prosecute suits for the corporation, and appoint attorneys *ad litem* therefor, without express delegation of power or a resolution of the board of directors, and a power of attorney signed by the president of a foreign company, under its seal, is sufficient in law. *Standard Trust Co.* v. *South Shore Ry. Co.*, 5 Que. P. R. 257.

Provincial corporation — Contract by and between companies—Powers of companies —Making contract beyond limits of Ontario —Seal—Powers of executive committee delegated by directors—License to do business in Ontario—63 V, c. 24—Damages for breach of contract. *Kerlin Bros. Co.* v. *Ontario Pipe Line Co.*, 11 O. W. R. 797.

Right to bring action.] — A foreign company, though of the class described as "extra-provincial corporations" in the Act, 4 Edw. VII. c. 34, that has not been granted a license to do business therein mentioned, is not debarred from exercising its rights and applying for redress of its wrongs under the law. The consequence of its failure to comply with the provisions of the statute is confined to the incurring of the penalty therein prescribed. *Standard Sanitary Mfg. Co.* v. *Standard Ideal Co.*, 37 Que. S. C. 33.

Right of action—*Business of company —Sale of stock—Foreign Companies Ordinance.*]—The sale, in Saskatchewan, of the capital stock of a foreign company not registered in Saskatchewan, is not a transaction in the course of or in connection with the business of the company; and such a company may, therefore, maintain an action in Saskatchewan to recover the price of the stock sold, notwithstanding the provisions of the Foreign Companies Ordinance. *Canadian Co-operative Co.* v. *Traunlezek*, 8 W. L. R. 550, 1 Sask. L. R. 143.

Right of action — *Want of license — Pleading — Exception to form.*]—The fact that a foreign corporation brings an action without having first obtained from the proper authority a license to do business in the province of Quebec must be pleaded by exception to the form, and not by a plea to the merits. *Celluloid Industrial Society* v. *Harbe*, 10 Que. P. R. 87.

Shareholders—*Enforcement of rights — Jurisdiction—Plaintiff out of the Province —Inspection of books—Proof of foreign statute—Rules of construction — Protection of public.*]—A shareholder in a company incorporated under the laws of a foreign state, but having its principal place of business, offices and works in Nova Scotia, may maintain an action in this province to enforce the performance of duties imposed upon the company in relation to its shareholders. The non-residence of the shareholder is no bar to such action. There is no distinction between a foreign and a domestic corporation in respect to the relief asked in such case, and, notwithstanding the rule not to interfere in matters of internal management, the Court has power to compel the inspection of books in proper cases. Proof of a foreign statute by admission is as effective as proof by an expert in *hæc verba*. In the

absence of proof to the contrary, it will be assumed that the rules of construction in the foreign state are the same as in this province. There being no individual right of action to enforce compliance with the provisions of statutes of this province intended for the protection of the public, the decree appealed from was varied to this extent. *Merritt* v. *Copper Crown Co.*, 36 N. S. Reps. 383, 22 C. L. T. 239.

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12. WINDING UP.

Action against company — *Leave of Court.*]—An action brought against a company in course of winding-up, without the permission of a Judge, will be dismissed upon exception to the form. *Soucy* v. *Electric Printing Co.*, 5 Q. P. R. 105.

Action against company — *Leave of Court.*]—An action brought against a bank in liquidation, without the previous authorisation of the Court, will be dismissed upon exception to the form. *Marcotte* v. *Turcot*, 4 Que. P. R. 342.

Action against company — *Leave of Court.*] — The authorisation of the Court must be obtained before suing a company in liquidation. *Baxter* v. *International Steel Co. of Canada*, 9 Que. P. R. 295.

Action against company — *Lease — Liquidator—Third party — Warranty.*]—A suit based upon a lease made to a company before winding-up order, and afterwards transferred, without authorisation, by the liquidator, must be instituted against the company, and not against the liquidator. *Kent* v. *Les Sœurs de la Providence*, 72 L. J. P. C. 62, followed.—2. In such a case the liquidator cannot bring in *en garantie*, in his own name, a third person whom he alleges to be responsible. *Stevenson* v. *McPhail*, 9 Que. P. R. 199.

Action against company — *Rights of shareholders—Contestation in winding-up — Litispendence—Fraud and negligence of officers—Validity of warehouse receipts—Principal and agent—Liability of both.*]—By by-law of a cold storage company, the president, vice-president and secretary-treasurer had power to sign all negotiable instruments. One of the officers of the company, thus expressly authorised, signed and issued fraudulently a number of warehouse receipts previously signed by the other officer of the company, who had to be a party to them. There were no goods in storage to represent these receipts:—*Held*, that a shareholder of a company, from the day in which it is put in liquidation, must be considered a creditor, on a contestation of a claim made against the company, and he is entitled to demand, by direct action, what he might have demanded on a contestation of a claim against the company. 2. Litispendence cannot be pleaded, to such direct action, on the ground that a contestation of the claim has been filed in the hands of the liquidator, where the contestation was filed subsequent to the institution of the direct action. 3. Whenever the very act of the agent is authorised by the terms of the power, that is to say, whenever, by comparing the act done by the agent with the terms or the power intrusted to him, the act is in itself warranted by the terms used, such act is binding on the principal as to all persons dealing in good faith with the agent. The apparent authority is the real one. Consequently, warehouse receipts of a cold storage company, signed fraudulently by one and negligently by another of the company's officers expressly authorised to sign such receipts, are valid as between the company and third persons acting in good faith. 4. The liability of the company being that resulting from an offence, the fact that other persons may be responsible does not diminish the liability of the company, which is jointly and severally liable with the others responsible for such offence. *Ware* v. *Montreal Cold Storage Co.*, 26 Que. S. C. 310.

Action against by creditor—*Authorised by official referee—Discretion of O. R.—Leave to appeal to Court of Appeal—Granted—Grave doubts—Dominion Winding-up Act, ss. 22, 110, 133.*]—Sutherland, J., *held*, that an Official Referee under the Dominion Winding-up Act had power, under that Act and also delegated to him by the Court, to make an order granting a creditor leave to bring an action against the liquidators of an insolvent company being wound up.—That the issues raised in the objections to plaintiff's claim were of such a special and important character as to warrant the O. R. in authorising an independent action.—Teetzel, J., *held*, that there were grave doubts whether an action lies against a liquidator in the absence of fraud, *mala fides* or personal misconduct, and granted leave to appeal to the Court of Appeal. *Re Raven Lake Portland Cement Co., National Trust Co.* v. *Trusts & Guarantee Co.* (1911), 18 O. W. R. 519, 2 O. W. N. 761, 830.

Action against company in liquidation—*Leave of Court—Action begun without—Dismissal.*]—A company in liquidation continues to have a legal existence, and in order to exercise against it rights anterior to the liquidation, the action must be brought against the company itself, and not against the liquidator.—By virtue of the Winding-up Act, no action may be begun against a company in liquidation without permission of the Court first obtained; and an action begun without such permission will be dismissed. *Leonard* v. *Owens* (1906), 8 Que. P. R. 3.

Action begun before winding-up order — Leave to proceed—Special circumstances. *Titterington* v. *Distributors Co.* (1906), 8 O. W. R. 328.

Action by liquidator — *Dismissal — Leave to appeal.*]—The liquidator of a company in liquidation, whose action has been dismissed, may with the leave of a Judge, appeal from that judgment to the Court of Review. *Montreal Coal and Towing Co.* v. *Standard Life Assurance Co.*, 6 Que. P. R. 243.

Action by liquidator — *Motion for leave—Notice to proposed defendant.*]—A petition whereby the liquidator of a company asks to be allowed to sue one of the debtors thereof, need not be served upon the debtor.

before its presentation to the Court or Judge. *Comic Opera Co. of Montreal* v. *Desaulniers*, 7 Que. P. R. 83.

Action by liquidator—*To recover for breach of contract—For sale of goods — Insolvent company in default of payment for previous deliveries.*]—Divisional Court *held* (Riddell, J., dissenting), that the liquidators of an insolvent company having goods bought on credit with instalments unpaid for, have no right to demand future deliveries without paying for them in cash on delivery and also paying the price of the former deliveries notwithstanding the fact that the contract contained that "each monthly delivery is to be treated as a separate contract, independent of deliveries of other months." —*Ex p. Chalmers* (1873), L. R. 8 Ch. App. 289, followed.—Judgment of Britton, J., 16 O. W. R. 694, 1 O. W. N. 1075, affirmed. *Hamilton* v. *Hamilton Steel Co.* (1911), 18 O. W. R. 739, 2 O. W. N. 779. O. L. R.

Action by liquidator—*Want of authorisation—Pleading.*]—The fact that the liquidator of a company has not been regularly authorised to institute an action, must be pleaded by an exception to the form, and not by a plea to the merits. *Engineering Contract Co.* v. *Midland Ry. Co.*, 8 Que. P. R. 293.

Action by liquidator in his own name without leave—General authority to take proceedings. *Stavert* v. *Lovett* (1906), 1 E. L. R. 233.

Action for calls—*Counterclaim for rescission—Leave to proceed refused—Leave to appeal.*]—Previous to an order for the winding-up of the company under the Dominion Winding-up Act, an action had been brought by the company against a shareholder for unpaid calls, and the shareholder had delivered a defence and counterclaim praying that his application for shares should be cancelled on the ground of misrepresentation and of false and fraudulent statements in the prospectus: —*Held*, that the shareholder could have in the winding-up proceedings all the relief that he claimed by his defence and counterclaim; and his application for leave to proceed in the action notwithstanding the winding-up order, was refused, but leave to apply again was reserved. Dictum of Strong, C.J., in *In re Hess Manufacturing Co.*, 23 S. C. R. 644, at pp. 665-6, explained. Leave to appeal from the order of a Judge in Court affirming the dismissal by the referee of the application for leave to proceed, was refused. *In re Pakenham Pork Packing Co.*, 24 C. L. T. 18, 6 O. L. R. 582, 2 O. W. R. 951, 983, 4 O. W. R. 22.

Action to set aside subscription for shares — *Continuation after order.*] — If, before a winding-up order, under R. S. C. c. 129, is made, a suit is brought against a company by a shareholder to have his subscription set aside for fraud, he will be authorised on motion to continue his proceedings after the order has been obtained. *Johnston* v. *Ewart Co.*, 31 Que. S. C. 336.

Action to set aside subscription for shares — *Misrepresentation—Power to purchase shares in other companies.*]—Plaintiffs sought to set aside their subscriptions for unpaid stock in the Distributors Co., Ltd., on the ground of misrepresentation by the company and defendant Carpenter, against whom they sought damages. The defendant Barber counterclaimed to have both plaintiffs declared liable to be placed on the list of contributories of the company which was being wound up. Plaintiff Foley set up the defence to the counterclaim that his company could not purchase shares in any other company in the absence of a by-law expressly authorising it, and relied upon R. S. M. 1902, c. 30, s. 68:—*Held*, upon the evidence that the plaintiffs had failed to prove any misrepresentations against the company or defendant Carpenter.—*Held*, also, that as the Foley Company were given the special power to purchase shares in other companies in their letters patent of incorporation, their vice-president and manager had acted within his wide general powers of management and his company was bound by his act. *Royal Bank* v. *Turquand* (1856), 6 E. & B. 327, followed. Both plaintiffs were placed on the list of contributories, Foley for $7,500, and Montreuil for $1,500, with costs of the counterclaims to be paid by plaintiffs. *Foley* v. *Barber and Montreuil* v. *Barber* (1909)., 14 O. W. R. 669, 1 O. W. N. 40.

Court of Appeal affirmed above judgment of Magee, J. *Foley* v. *Barber* (1910), 16 O. W. R. 607, 1 O. W. N. 1029.

Agreement between liquidator and claimant—*Creditors — Setting aside—Mala fides—Meetings of creditors.*]—An arrangement entered into between the liquidator of a company in liquidation and a claimant under s. 61 of R. S. C. c. 129, and authorised by the Court, is binding on the creditors of the company, and others interested; it can only be attacked on the ground of *mala fides*. The purpose of 62 & 63 V. c. 43, which permits meetings of and consultations of creditors in certain cases, is not to repeal or modify s. 61, but to amplify it. *Ward* v. *Mullin*, 14 Que. K. B. 49.

Agreement with company after subscription for shares — *Payment otherwise than in cash — Manitoba Joint Stock Companies Act, ss. 56, 57, 61—Set-off of debts in winding-up.*]—1. After a person has subscribed in the ordinary manner for shares in a company incorporated by letters patent under the Manitoba Joint Stock Companies Act, R. S. M. 1902 c. 30, and they have been allotted to him, it is not competent for the company to release him from his liability to pay for the shares in cash, by entering into an agreement, even under seal, to issue to him fully paid and non-assessable shares in consideration of his covenants to do something in the future.—When such an agreement included, with such covenants, a transfer of assets of doubtful value, but the circumstances surrounding the agreement were such as to make it a fraud upon the company, it was held void, and it was ordered that the subscribers for the shares should be settled upon the list of contributories in the winding-up of the company for the full amount of their shares.—*Elkington's Case*, L. R. 2 Ch. 511, and *Pellatt's Case*, R. L. 2 Ch. 527, followed.—*Chapman's Case*, [1895] 1 Ch. 771. *Hood* v. *Eden*, 26 S. C. R. 476, *Re Hess*, 23 S. C. R. 644, and *Re Wragg*, [1897]

1 Ch. 796, distinguished.—3. The validity of such an agreement may be inquired into on the application before the Judge to settle the list. It is not necessary to bring an independent suit to set it aside. *Re Eddystone Marine Insurance Co.*, [1893] 3 Ch. 9, and *Re Wragg, supra*, followed.—4. Subscribers for shares in the company are not entitled in the winding-up to set off, against their liability to pay up the shares, claims for goods supplied to the company under such an agreement.—*In re London Celluloid Co.*, 39 Ch. D. 190, *Maritime Bank* v. *Troop*, 16 S. C. R. 456, *McNeil's Case*, 10 O. L. R. 219, and *In re Paraguassu Steam Tramroad Co., Black & Co.'s Case*, L. R. 8 Ch. 254, followed. *In re Jones and Moore Electric Co., Jones and Moore's Case*, 18 Man. L. R. 549, 10 W. L. R. 210.

Application by unpaid vendor of machinery for leave to bring action against company to recover possession—Winding-up Act, s. 133—Summary remedy—Rights of mortgagee. *Re Kurtz and McLean Limited*, 11 O. W. R. 437.

Application for—*Pending appeal from judgment against company — Insolvency — "Demand in writing under ss. 3 and 4, c. 149, R. S. C. 1906.*]—*Held*, that a company may be insolvent where none of the conditions in section 3 above exist, that is if the first condition set out in sub-sec. (*a*) is to be restricted to the meaning given to it in sec. 4. The present company is found to be insolvent as it cannot meet claims against it as they mature. To determine the question of insolvency it must be assumed that the judgment now outstanding will be sustained, although in appeal, when beyond question it will not have sufficient assets to meet its liabilities. See here a translation of *Mackay* v. *L'Association Coloniale*, 13 R. L. 383, that a petitioning creditor is not bound to make a demand for payment under sec. 4 above, when insolvency is alleged. *In re Dominion Antimony Co.*, 6 E. L. R. 177.

Application for leave to add company as party to an action against directors for misfeasance in office. *Re Farmers' Loan and Savings Co., Ex p. Toogood* (1906), 8 O. W. R. 12.

Application for shares — *Attempted withdrawal — Allotment — Acceptance — Collateral condition—Representation of agent —Set-off—Claim for fire loss—Saskatchewan Company's Winding-up Ordinance, 1901, c. 20, s. 44, s.-s. 2.*]—Application by liquidator to settle list of contributories. J. signed an application for ten shares on 1st May. On 2nd May, he wrote to the canvasser, withdrawing his application. On 4th May, J.'s application was accepted by board of directors, and ten shares allotted to him, and notice thereof sent him on 16th May. On the 9th May, J. received a letter from the canvasser to the effect that before getting his letter of withdrawal, the application had been sent in to the head office and J.'s notes had been discounted:—*Held*, that the canvasser had no authority to receive a notice of withdrawal, and as J. had not brought home to the company knowledge of the receipt of his letter of withdrawal before allotment or at any time, he was entered on the list of contributories. R. applied for fifty shares which were allotted to him, and accepted by his agent. The certificate sent to him was returned by him for correction. He was placed on the list. G. applied for twenty shares. The company owed him $2,000 for fire losses which had been adjusted.—*Held*, under above sub-section, that G. has a right of set-off. There is no authority in winding-up proceedings giving costs to a contributory. *Re Globe Fire Assurance Company, Robertson's Case* (1909), 11 W. L. R. 45, affirmed, 11 W. L. R. 293.

Application for shares on unusual terms—*Allotment on different terms — No notice given — No agreement completed.*] — Boyd, C., allowed defendants' appeal from order of Official Referee placing their names on list of contributories. Costs to be borne by liquidator and paid out of assets. *Re Canadian Mail Orders* (1911), 18 O. W. R. 834, 2 O. W. N. 882.

Appointment of liquidator—Manager of business of principal creditor—Notice to shareholders—Sale of assets—Completion — Removal of liquidator. *Re Guelph Linseed Oil Co.*, 2 O. W. R. 1151.

Appointment of permanent liquidator—*List of contributories.*]—The appointment of a liquidator, under the Winding-up Act, may be made even where the list of contributories has not yet been prepared: this list need not necessarily be made by the provisional liquidator. *In re Villeneuve Co. and Price Bros.*, 10 Q. P. R. 307.

Assets covered by debentures—Rights of unsecured creditor—Right to winding-up order. *Re Alexander Dunbar & Sons Co.* (N. B. 1910), 9 E. L. R. 217.

Assignment for creditors — *Officers —Wages—Priority.*]—Claims for arrears of salary, made by persons occupying the positions of president and vice-president of a company, such salary being made payable under resolutions duly passed therefor, are valid, and upon the liquidation of the company are payable in priority to the claims of the general body of creditors. *Fane* v. *Langley. Lavinder* v. *Langley*, 20 C. L. T. 9, 31 O. R. 254.

Bank — *Insolvency of — Winding-up — Dividends paid impairing capital — Connivance of directors in wrong-doing of bank's officers—Action against directors by bank's curator—Liability.*]—The bank of Y., having suspended payment, plaintiff, who was appointed curator, brought an action under the Winding-up Act, R. S. C. c. 129, against defendants, the former directors of the bank, alleging misfeasance and neglect of duty. The acts chiefly complained of were the advancing of large sums of money to one of the customers of the bank, practically exhausting the capital and reserve of the bank, upon the security of paper drawn upon people who were insolvent, or who had no existence, and, when the paper was returned unpaid or unaccepted, retaining it and treating it as assets. Also issuing improper balance sheets, and paying dividends out of

capital. The evidence shewed that, down to a certain date, the directors were misled by their cashier, in whom they had the fullest confidence, but that, after the date referred to, when they became aware that they had been deceived by the cashier, and that he had disobeyed instructions and that the resources of the bank were seriously involved, they still continued him in his former position without change: — *Held*, that the directors, in accepting that position, impliedly undertook that they had reasonable skill and ordinary ability for the discharge of the business in which they engaged, but that, in order to hold them accountable for the acts of their officer, gross negligence must be shewn, such negligence being a question of fact to be determined upon the evidence, and that the findings of the trial Judge in relation thereto, founded more or less upon conflict of fact and inferences from the evidence, should not be disturbed.—*Held*, also, that the directors were not obliged to examine the books of the bank, but that, if they became aware of anything reasonably suggesting the need of enquiry, it was their duty to seek for full information and explanation.—*Held*, also, that, in retaining the cashier in office, after they became aware of his conduct and the manner in which he had involved the resources of the bank, they were guilty of indefensible misconduct, and were personally responsible for all losses sustained as the result of his subsequent acts.—*Held*, also, that the payment of a dividend, after the directors became aware that the bank was wrecked, and that it could not reasonably hope to continue business, was *ultra vires*, and that they were personally liable in relation thereto. *Per* Russell, J. (concurring), that in view of the evidence of negligence on the part of the directors in the performance of their duties, their personal liability for losses incurred should commence at an earlier date, and that in this connection it was not unreasonable to attribute to them knowledge of the statements of the affairs of the bank prepared for the information of shareholders and the general public. *Per* Longley, J. (also concurring), that the principle which relieves directors from liability where they have relied upon the representations of their officials, is not to be extended to cases where facts are brought to their attention leading them to suspect the integrity, skill and competence of such officials. *Starrett* v. *Lovitt*, 42 N. S. R. 449, 5 E. L. R. 33.

Bank—*Motion for order — Winding-up Act, R. S. C. 1906, c. 144, ss. 13 (2), 17— Four days' notice—Curator's right to insist upon notice—Costs.*]—Petition by a creditor for an order winding up The Farmers' Bank of Canada.—Riddell, J., *held*, that the provisions of the Winding-up Act, R. S. C. 1906, c. 144, s. 13 (2) that "four days' notice shall be given to the company before the making of" an application for a winding-up order, cannot be waived by the company; and where the full four days' notice has not been given, a Judge has no power to make the order. The Consolidated Rules of Practice are not by any of the provisions of the Winding-up Act made applicable so as to authorise the Court to shorten the time. Where a curator has been appointed for a bank, under the Bank Act, R. S. C. 1906, c. 29, he is by ss. 117 and 121 vested with all the powers which directors and solicitor had before his appointment; and after the appointment of a curator, the board of directors have no power to give a solicitor authority to consent to a winding-up order or to anything which may have any effect upon the rights and interests of creditors; and a solicitor has no such authority derivable from his former retainer by the bank; and in this case the consent, admission and waiver of a solicitor, purporting to act on behalf of the bank, though made in good faith, after the appointment of the curator, had no validity.—An application for the winding-up of a bank was refused, the curator objecting to the notice. The Judge might have adjourned the hearing under s. 14 of the Winding-up Act, but as there were other applications pending, he considered that the first applicant who was wholly regular should not be deprived of any advantage to which his adherence to the rules, statutes, and practice, entitled him.—The applicant was ordered to pay costs to the curator, who opposed the application, but not to creditors and others who appeared upon the hearing.—*Re McLean & Brodie* (1910), 17 O. W. R. 579, 2 O. W. N. 294, specially referred to. *In re Farmers' Bank* (1910), 17 O. W. R. 964, 2 O. W. N. 623, 22 O. L. R. 556.

Bank—*Provisional directors—Powers of— Payment of commission on sales of shares— Shares issued at a premium — Bank never began business — Winding-up of bank—Liability of provisional directors under Winding-up Act, s. 123—Impairment of capital— Bank Act, ss. 12, 13.*]—McAndrew, K.C., Special Referee, found that the provisional directors of The Monarch Bank were liable to the liquidator for breach of trust or misfeasance under s. 123 of the Winding-up Act. The acts for which the Referee found them liable were the payments of money returned by them by or on behalf of the bank without any statutory or other authority for such payments. On appeal, Teetzel, J., *held*, that the powers of the bank, and of the provisional directors acting for it, depended entirely upon the provisions of the Bank Act, and the provisional directors had no power to authorise payment out of the funds of the bank of commissions to persons who obtained subscriptions for shares of the capital stock; and, in the winding-up of the bank, under the ground of breach of trust or misfeasance, to pay to the liquidator the sums which had improperly been paid under their authority. —Provisions of the Bank Act considered.— *Quære*, whether even shareholders' directors would have authority under the Bank Act to pay commissions for obtaining subscriptions for stock.—One of the provisional directors did not authorise or direct to be paid any money for commission, except in one instance, when he, with the others, signed a cheque for $700 "on account of commissions;" at most he was aware of other payments being made by his co-directors:—*Held*, following *Young* v. *Naval Military and Civil Service Co-operative Society of South Africa*, [1905] 1 K. B. 687, that he was liable for the $700 only. *Re Monarch Bank* (1910), 17 O. W. R. 991, 2 O. W. N. 436, 22 O. L. R. 516.

Bank Act—Bills of the bank—Deposit receipts—Not negotiable securities—Only assignable choses in action—Claims disallowed. *Re Central Bank, Ex p. Morton* (1889), 36 C. L. T. 424.

Bank deposits against double liability.] — A contributory under the Dom. Winding-up Act is entitled to set off a deposit account against claim against him under the double liability clause of the Bank Act. *Re Central Bank, Ex p. Harrison & Standing* (1888), 30 C. L. T. 271.

Before an order for sale of an insolvent railway is made under Exchequer Court Act, R. S. C. (1906), c. 140, s. 26, an enquiry before a referee into the validity and priority of the claims of creditors may be ordered. *Royal Trust Co.* v. *Baie de Chaleurs Ry. Co.* (1907), 13 Ex. C. R. 1.

Bonus stock—*Issue of shares as paid up to persons already shareholders—Absence of subscription and allotment — Acceptance — Stock certificates—No money paid or value given — Statutory liability.*] — Promoters of a company finding difficulty in getting stock subscribed agreed that when the company obtained a bonus of $15,000 from the town, that $15,000 of paid-up stock would be allotted and distributed *pro rata* among the subscribers. This was done. Stock was allotted and certificates issued and received by these subscribers:—*Held*, in winding-up proceedings, that the holders of this bonus stock were liable to be placed on the list of contributories. Judgment of Britton, J., 14 O. W. R. 352, affirmed. *In re Cornwall Furniture Co.* (1910), 15 O. W. R. 614, 20 O. L. R. 520.

Building society — Incorporation under Ontario Act — Objects of incorporation — Validity of shares issued outside of province —Constitutional law—B. N. A. Act, s. 92, cl. 11—Carrying on business in Nova Scotia —Laws of Nova Scotia—License—Loan Corporations Act — By-laws — Failure of consideration—Position of shareholders as creditors. *Re York County Loan and Savings Co.*, 11 O. W. R. 507.

Building society — Shares — Holders of permanent stock—Liability as contributories—Right to rank as claimants—By-laws of company—Subscription — Permanent shares partly paid-up—Acceptance of shares and of dividends thereon—Building Societies Act—Loan Corporations Act—Power to issue permanent shares — Inherent right — Terminating shares — Conversion into permanent shares — *De facto shares* — Invalidity of objection to, after winding-up order—63 V. c. 27, s. 4 (O.)—Non-applicability—Contribution between shareholders *inter se*—Debiting holders of permanent shares not fully paid up with amount due—Personal judgment. *Re York County Loan and Savings Co., Permanent Shareholders' Claim*, 11 O. W. R. 624.

Building society—Shareholders in arrears—Shares not lapsed—Shares lapsed but subject to revival—Right to rank on assets of company for dividend *pari passu* with shareholders not in arrears—Rights of suspension and revival, whether exerciseable after winding-up order — Statutes — By-laws—Applications for shares — Share certificates — Forfeiture — Terminating shares —Loan Corporations Act — Amendment — Amounts owing on shares — Adjustment among shareholders *inter se*—Contribution. *Re York County Loan and Savings Co., Case of Shareholders in Arrears*, 11 O. W. R. 701.

Building society — Matured shares — Withdrawable shares — By-laws — Share certificates — Preferential payment — Effect of insolvency—Loan Corporations Act—Finding as to date of insolvency—Losses of company—Debiting against shareholders—Shareholders' rights against assets—Distribution *pari passu*. *Re York County Loan and Savings Co., Claim of Holders of Matured and Withdrawable Shares*, 11 O. W. R. 888.

Calling meeting to approve of arrangement with bondholders. *In re Port Hood Coal Co.*, 1 E. L. R. 81.

Calling the liquidator into the case — *Procedure — C. P. 117, 525; R. S. Q. 7064.*]—It is not by motion, but by an ordinary writ of summons that the liquidator of a company may be called into a pending suit. *Standard Mutual Fire Ins. Co.* v. *Dom. Mutual Fire Ins. Co.* (1910), 11 Que. P. R. 392.

Calls—*Action for—Petition by liquidator to continue action — Opposition to.*] — A shareholder, sued for calls by a company which has gone into liquidation after action brought, cannot oppose the petition of the liquidator for permission to prosecute the action in the name of the company, by alleging that the obligation of the defendant to contribute to the assets of the company can only be worked out by virtue of a fresh call made by the liquidator, which must be based upon the amount necessary to discharge the debts of the company and the costs of liquidation, which would render useless the former calls, but the shareholder will be permitted to plead these grounds in the action continued by the liquidator. *Victoria Mutual Fire Ins. Co.* v. *Derome*, 21 Que. S. C. 319.

Charter members—*Mention in the letters patent of their subscription to the capital — Winding-up — Contributories—Lack of organisation of the company.*]—A person joining others in asking for incorporation by letters patent as a joint stock company, and is described in these letters as the subscriber of a specified number of shares, is a shareholder, and in case of a winding up can not avoid the position of a contributory on the pretext that the company has not been definitely organised and he has not approved the contracts that caused the winding up. *Lafleur* v. *St. Armour*, 18 Que. K. B. 400, 6 E. L. R. 53.

Claim against assets—*Solicitors' bill—Services in procuring incorporation—Services after incorporation—Taking benefit of—Assessment to pay for services—Reserve fund — Appropriation of payments — Marshalling of assets.*]—1. A company incorporated by a special Act are not liable for the expense of procuring incorporation, in the ab-

sence of a provision in the Act that the company shall be so liable, unless after incorporation they agree to pay such expenses; and solicitors have no equitable claim against a company for the costs of procuring such an Act, on the ground that the company have taken the benefit of their services.—*In re English and Colonial Produce Co.*, [1906] 2 Ch. 435, followed.—2. Where, however, the company have made a payment on account to their solicitors, the solicitors may be permitted to appropriate such payment to their claim for pre-incorporation costs, as was done in the above cited case.—The company in process of winding-up was a mutual hail insurance company, and the Act permitted the directors to make assessments annually to cover only losses by hail during the crop season and the expenses for the year, and no assessment could be made to pay any part of the solicitors' bill, part of which was for work done for the company after incorporation. There was, however, a reserve fund accumulated under the Act which might "be applied by the directors to pay off such liabilities of the company as may not be provided for out of the ordinary receipts for the same or any succeeding year:"—*Held*, that those creditors for the payment of whose claims an assessment could be made should be compelled, in the first place, to have recourse to that method of payment, so as to leave the reserve fund available, as far as possible, to pay such portion of the solicitors' bill as the company were liable for; that the assessment already made should stand, the proceeds to be applied first in payment of the claims against the company other than the costs in question; and that any remaining debts, including the amount found due on taxation to the solicitors for services subsequent to the incorporation, should rank *pro rata* on the reserve fund, after payment of the receiver's costs. *Re Crown Mutual Hail Insurance Co.*, 8 W. L. R. 580, 18 Man. L. R. 51.

Claim for repossession of goods—*Sale to company under conditional contract — Contract before incorporation — Acceptance of goods—Payment of part of price—Power to contract without seal—Judgment—Validity of contract—Estoppel—Liquidator — Fixtures — Failure to register contract — Title to goods — Effect of judgment — Extinguishment of condition.*] — It is not necessary to the validity of a contract by an incorporated company that it should be under seal, when the contract is for goods of a character likely to be required in the business the company are authorised to carry on.—In the absence of evidence that a company have adopted a special seal, if seals are placed after the signatures of the president and secretary, accompanied by a testimonium clause indicating that the parties have set their hands and seals to the document, the agreement is to be deemed as being under the company's seal.—An incorporated company, against whom judgment has been entered in an action founded upon an agreement for the sale of goods, are estopped by the judgment from setting up the alleged invalidity of the contract, and such estoppel will also extend to the liquidators of the company in case of winding-up proceedings. —A chattel sold under the condition that the title shall remain in the seller until payment of the price, does not lose its character as a chattel by being so annexed to the soil as otherwise to be a fixture, except as against a *bona fide* purchaser for value without notice.—It is not essential to the validity of a conditional sale as between the parties that it should be registered.—The recovery of judgment in an action by the seller against the buyer does not extinguish the condition that the title shall remain in the buyer.—*Semble*, that a company, having accepted goods purporting to be sold by an agreement made in the name of the company prior to incorporation, and having paid promissory notes for a portion of the price, are estopped as against the seller of the goods from denying that the agreement is as valid and binding on the company as if formally executed under the seal of the company subsequent to incorporation. — *Re Northumberland Avenue Hotel Co.*, 33 Ch. D. 16, distinguished. —*Howard* v. *Patent Ivory Manufacturers Co.*, 38 Ch. D. 156, followed. *Re Red Deer Milling and Elevator Co., Stratford Mill Building Co.'s Claim*, 7 W. L. R. 284, 1 Alta. L. R. 237.

Claim of bank on securities assigned by company—*Notice of assignment to persons liable on securities—Absence of—Status of liquidator to object.*]—*Held*, that the Ontario Bank was entitled to certain securities assigned to them by the insolvent company notwithstanding notice of the assignment had not been given to those liable on the securities. *Re William Hamilton Manufacturing Co.* (1909), 1 O. W. N. 61, 14 O. W. R. 1285.

Above judgment of Meredith, C.J., affirmed by Divisional Court. *Re Wm. Hamilton Mfg. Co.* (1910), 1 O. W. N. 421.

Claims of creditors — *Lien on goods sold—Right of liquidator—Conditional Sales Act—Bills of Sale Act.*]—The claimants sold the company a machine upon an order signed by the company, the conditions of which were that the company should pay a part of the price in cash and the balance in instalments, with interest on such instalments payable with the last of them, and that the title should not pass to the company until the moneys payable by them under the order, as well as under any other orders which might be given by the company to the claimants, should be paid. At the time of the commencement of the winding-up of the company, one instalment, the interest, and a further sum for goods ordered after the first order, remained unpaid. The liquidator came into possession of the machine, and sold it to H., subject to an alleged lien in favour of the claimants for the amount of the unpaid instalment only:—*Held*, that the rights of the claimants under the contract still existed, and were not affected by the Bills of Sale and Chattel Mortgage Act, nor by the Act respecting Conditional Sales of Chattels, nor by the liquidator's sale to H., and they were entitled to recover the full amount due under the terms of the order out of the estate. *In re Canadian Camera and Optical Co., A. R. Williams Co.'s Claim*, 22 Occ. N. 677, 2 O. L. R. 677.

Claims of creditors—*Secured creditors — Withdrawal.*] — Creditors holding fully secured claims and content to rely thereon,

without seeking to share in the distribution of the other assets, cannot be compelled to file their claims in the winding-up proceedings under the Dominion Winding-up Act, R. S. C. c. 129, and have them adjudicated upon therein; and where such creditors, without any intention to submit to such adjudication, had filed with the liquidator affidavits proving their claims, leave was given them to withdraw such claims, leave also being given to one of such creditors, who had an unsecured debt, to file a claim limited thereto. *In re Brampton Gas Co.*, 22 C. L. T. 370, 4 O. L. R. 509, 1 O. W. R. 543.

Claims of creditors—*Set-off.*]—Against a claim of a person upon the assets of a company in liquidation, based upon a lease, the company cannot set-off damages which it alleges it has suffered by reason of the claimant; and allegations of such damages will be struck out upon demurrer. *In re Montreal Cold Storage and Freezing Co., Mullin's Claim*, 4 Que. P. R. 341.

Claim for money lent—*Power to borrow—Delegation of powers—Manager—Seal of company.*] — The vice-president and the manager of a loan and savings company instructed a broker to buy shares of the company's stock "to keep it up." He did so, paying a ten per cent. margin upon the purchase with the funds of the company paid to him by cheque, and the balance by a loan obtained on the shares bought, which were transferred to the lender. This was without the knowledge or sanction of the board of directors. Just before proceedings were taken to wind up the company the manager signed his name as manager and affixed the seal of the company to a writing addressed to the lender acknowledging the indebtedness of the company to the lender:—*Held*, that the manager and vice-president had no power by delegation or otherwise to borrow money for the company, and that the affixing of the seal to the document referred to was an unauthorised act of the manager; and, therefore, the claim of the lender to prove as a creditor of the company for the amount advanced upon the stock could not be allowed. *In re Farmers' L. & S. Co., Ex p. Home S. & L. Co.*, 21 Occ. N. 383.

Claims of creditors — *Contestation — Particulars—Time.*]—In a contestation of the claim of a creditor against an insolvent company in liquidation, it is too late for the contestant to demand particulars a month after the filing of the contestation of the claim. *In re Montreal Cold Storage and Freezing Co., Mullin's Claim*, 4 Que. P. R. 340.

Claims of creditors — *Delay in presenting—Excuse — Merits—Leave to renew application—Statute.*]—In the winding-up of a life insurance company, the liquidator's list of claimants was filed in the Master's office on 5th June, 1900, and a proper advertisement was published requiring claims to be delivered to the liquidator on or before the 7th May, 1900. On the 19th April, 1901, the claimant applied to the Master to amend the list of claimants by increasing the amount for which he was entitled to rank:—*Held*, that the claimant, coming in after the time allowed for filing claims, was bound to shew upon affidavit some *prima facie* case of merit, and to explain the reasons for his delay in coming in with his claim. The claims of creditors should not be shut out so long as there remains unadministered a portion of the fund applicable for their payment. Even where an application is dismissed for want of an affidavit shewing merits and explaining delay, the dismissal may well be without prejudice to a further application upon proper material; but in this case the rights of the claimant had been entirely cut off by an enactment of the Legislature, to which a retrospective effect had been given, and it would, therefore, be of no assistance to the claimant to permit him to renew his application. *In re Merchants' Life Association of Toronto, Hoover's Claim*, 22 C. L. T. 21.

"Clerks or other persons"—*Includes commercial travellers—Wages and expenses—Assignment of claim—Rights of assignor and assignee.*]—Riddell, J., *held*, that commercial travellers are within the meaning of "clerks and other persons" mentioned in s. 70 of the Dom. Winding-up Act, and as such are entitled to be collocated by special privilege over other creditors for their salary, including sums paid for expenses.—*Re Ritchie Hearn* (1905), 6 O. W. R. 474, approved and explained.—*Held*, further, that a "dummy" director, who is in fact a commercial traveller, is excluded from the above class of preferred creditors, as it would not do to allow a director to better his position by asserting that he had not done his duty as a director. —*Held*, also, that for the purposes of above enactment an assignee stands in the shoes of his assignor.—*Lee* v. *Freidman* (1909), 14 O. W. R. 1139, 20 O. L. R. 49; *Birney* v. *Toronto Milk Co.* (1902), 1 O. W. R. 736, 5 O. L. R. 1; *Benor* v. *Can. Mail Order Co.* (1907), 10 O. W. R. 1091, and *Beaudry* v. *Reid* (1907), 10 O. W. R. 622, followed; *Mackenzie* v. *Maple Mountain* (1909), 14 O. W. R. 1266, 15 O. W. R. 228, 20 O. L. R. 170, 615, specially referred to. *Re Morlock & Cline, Ltd., Ex p. Sarvis and Canning* (1911), 18 O. W. R. 545, 2 O. W. N. 706, O. L. R.

Company holding shares as pledgee.]—When a company has no power under its charter to become owner of bank shares, or to acquire any other title than that of pledgee, such company in winding-up proceedings cannot be treated as an ordinary holder or purchaser of such shares so as to be made subject to the double liability clause in the Bank Act. Where a company having authority to borrow money from other companies, or individuals, pledges its own shares as a security for a loan, the company making the loan thereon cannot be made a contributory in the proceedings for the winding-up of such borrowing company. Therefore where an insurance company loaned money to a bank, and took as security for such loan a transfer of certain shares of the bank, which loan was repaid before the insolvency of the bank, but the shares though re-transferred by the insurance company were not accepted in the books of the bank, as required by the Bank Act, the insurance company was held not liable to contribute in the winding-up of the bank in respect of such shares. *Re Central Bank, N. A. Life Ins. Co.'s Case* (1890), 30 C. L. T. 275.

Companies Winding-up Ordinance, 1903, s. 4, s.-s. (3)—*Companies Ordinance, ss. 43, 118 — Contributories—Conclusiveness of list of contributories — Res judicata—Alleged insolvency of company—Constitutional law—Necessity for meeting of directors to call general meeting of shareholders to pass winding-up resolution—Irregularities—Shares payable in cash—Time for filing agreement under s. 43—Shares subscribed for by memorandum of association—When deemed issued.*]—Shares in the capital stock of a company, registered under the Companies Ordinance, which have been subscribed for by the memorandum of association, are deemed to be issued at the date of the registration of the company (*Dalton Time Lock Co.* v. *Dalton*, 66 L. T. R. 704, followed); consequently an agreement filed with the Registrar of Joint Stock Companies subsequent to such date, although the share certificates were not issued until after such filing, cannot be relied on to relieve the shareholder from his liability to pay for the shares in cash, under the Companies Ordinance, s. 43 (x).—*Semble*, that the decision of the Judge in settling the list of contributories in winding-up proceedings, is, as to all questions involved, *res judicata*. — *Semble*, that the mere fact that a company have liabilities, and have decided that in view of them they are unable to carry on their business, is not proof of "insolvency."—Where no regular meeting of directors was held to proceed to convene the extraordinary meeting of the company to consider a resolution for winding up, but it was shewn that the requisite number of shareholders had joined in the requisition pursuant to s. 118 of the Companies Ordinance, among them being all the directors, all of whom subsequently signed an endorsement directing the secretary — himself a director—to call the meeting:—*Held*, that the want of a regular meeting of the directors was a mere irregularity, and did not invalidate the meeting of shareholders subsequently held, in pursuance of notice given by the secretary, at which the winding-up resolution was passed. *Re Haycraft Gold Reduction Co.*, 69 L. J. Ch. 497, and *Re State of Wyoming Syndicate*, [1901] 2 Ch. 431, distinguished. *Southern Counties Deposit Bank* v. *Rider*, 73 L. T. R. 374, followed. *Red Deer Mill and Elevator Co.* v. *Hall*, 1 Alta. L. R. 530.

Companies Winding-up Ordinance, 1903—*Companies Ordinance, ss. 43, 110, s.-s. (6), as amended by 7 Edw. VII. c. 5, s. 13, s.-s. (6) — Contributories — Shares payable in cash—Time for signing agreement under s 43—Shares subscribed for by memorandum of association, when deemed issued —Time for filing agreement—Granting relief — "Just and equitable" — Special circumstances.*]—Shares in the capital stock of the company, registered under the Companies Ordinance, which have been subscribed for by the memorandum of association, are deemed to be issued at the date of the registration of the company. *Red Deer Mill and Elevator Co.* v. *Hall*, 1 Alta. L. R. 530, followed.—Consequently an agreement filed with the Registrar of Joint Stock Companies, subsequent to such date, although the share certificates were not issued until after such filing, cannot be relied on to relieve the shareholder from a liability to pay for the shares in question under the Companies Ordinance, s. 43. The repeal of s. 43 by 7 Edw. VII. c. 5, s. 13, s.-s. 4, has not altered the liability of the shareholder in the above respect so far as the liability existed at the date of the repeal of the section. Section 43, read with s. 47 of the Companies Ordinance, fixes the liability in such case. The effect of the new sub-section substituted for s.-s. (6) of s. 110 of the Companies Ordinance by 7 Edw. VII. c. 5, s. 13, s.-s. (6), is to continue the liability to pay in cash, in the absence of a contract of sale or for services or other consideration in respect of which such allotment was made, but to permit of the contract being filed subsequent to the issue of the shares, within the time specified. The consideration, however, for which the shares were issued must be a valuable consideration, and must have been something existing at the time and not something subsequently accruing. The provision that "the Court, if satisfied that the omission to file the contract or a sufficient contract was accidental or due to inadvertence, or that for any other reason it is just and equitable to grant relief," has no application where there was no contract at all in existence at the time of the issue of the shares. In any case, before granting relief, the applicant must satisfy the Court that creditors will not be injuriously affected by the order. — Consideration of the circumstances in this case which rendered it not "just and equitable" to grant relief. — *Quære*, whether it is possible for a subscriber to a memorandum of association to escape liability for payment in cash for the shares subscribed for, and if so, under what consideration. Discussion of cases. *In re Red Deer Mill and Elevator Co., Macdonald's Case*, 1 Alta. L. R. 538.

Composition with creditors—*Approval by Court—Termination of winding-up—Resumption of business—Action against company—Position of liquidator.*]—Where a company in liquidation have made a composition with the majority of their creditors (in this case more than four-fifths), and such transaction has been declared valid and proper to be carried out, by a judgment of the Superior Court, the company will be regarded as having resumed the direction of their affairs, and the powers of the liquidator have ceased. If an action is brought against the company, they cannot by exception to the form allege that the action has not been authorized by the Court, and that the liquidator has not been made a party. *Beauchemin* v. *Canadian Navigation of the St. Lawrence Co.*, 10 Que. P. R. 41.

Compromise of claim by liquidator—Approval of referee—Application by debenture holders for leave to appeal as a class—Previous appointment of solicitors—Special purpose—Costs. *Re Farmers' Loan and Savings Co.*, 2 O. W. R. 854, 3 O. W. R. 837.

Conditional application for shares.]—Defendant Davis applied for shares on condition that no further calls would be made thereon, and the shares were allotted him on said condition. He gave his cheque in payment, and proxy to vote on said shares, but objection was raised as to his right to vote on the shares, as they had been sold at a

very large discount. When defendant was informed of the objection being raised he at once stopped payment of his cheque and informed the president that he would have nothing to do with the shares:—*Held*, under the circumstances, that defendant's name should be removed from the list of contributories. *In re Railway Time Tables Pub. Co., Ex p. Sandys* (1889), 42 Ch. D. 98, distinguished. The president having been placed on the list of contributories, for the amount of defendant Davis' cheque, for misfeasance for acquiescing in the stopping of payment of same, it was held that as Davis had the right to stop payment, there was no duty imposed upon the defendant president to endeavour to collect the money to which the company was not entitled, and his name should be removed from the list of contributories. Judgment of Teetzel, J., 18 O. L. R. 354, 13 O. W. R. 1032, 1037, reversed. *In re Lake Ont. Nav. Co.* (1910), 15 O. W. R. 23, 20 O. L. R. 191.

Conditional subscription for shares.]—The project of the establishment of a company for the purpose of carrying on building operations, involved the acquisition of the works of an existing company, and the extension of the business by providing additional capital, buildings and machinery, the holders of stock in the existing company to surrender the same and accept stock in the new concern, the capital stock of which was fixed at $100,000 and the paid up capital at $50,000. A subscription list was opened, and was signed by a number of persons for an amount something less than the paid up capital. A committee of subscribers to the new stock was appointed to act with the directors of the company with a view to the immediate commencement of operations and a call of 25 per cent. on the stock was made and was paid by 27 out of 49 subscribers. After certain liabilities had been incurred for machinery, materials, &c., the project was abandoned, and a petition was filed to have the persons who paid the call made upon the stock made contributories in winding-up proceedings:—*Held*, refusing the application with costs (1) that the stock subscriptions being conditional upon an arrangement for the union of the two bodies going through as a whole, and the project having fallen through, there was a failure of consideration, and there was nothing to prevent the subscribers who paid the call from recovering back the amounts paid by them. (2) The payment of the call, under the circumstances, did not waive the condition. Drysdale, J., dissenting:—*Held*, that the subscribers by their conduct ratified the action of the committee and were estopped from disputing their liability. *In re Victor Wood Works*, 43 N. S. R. 368, 7 E. L. R. 55.

Conditional subscription for shares —*Allotment—Notices of calls — Absence of by-laws or resolution of directors.*]—G. agreed with a director to take $2,000 stock and to pay for same by a rebate of 10 per cent. from each month's account. This was in writing signed by a director, but never signed by the company. No allotment of stock was ever made. He never attended meetings as a stockholder:—*Held*, he is not a contributory. *Re Canadian McVicker Engine Company. Geiss's Case*, 13 O. W. R. 916.

Confirmation of scheme of rearrangement—Opposition by shareholders. *In re Port Hood Coal Co.*, 1 E. L. R. 199.

Constitutionality of Act incorporating loan company—Refusal of company to accept payment of shares — Effect of. *Re Atlas Loan Co.* (1903), 30 C. L. T. 366.

Contestation of claim by liquidator —Stay of proceedings until after determination—Discretion of Official Referee—Appeal dismissed with costs. *Re Standard Cobalt Mines* (1911), 18 O. W. R. 555, 2 O. W. N. 725.

Contestation of claims—*Security.*] — The security required by the Winding-up Act, R. S. C. c. 129, applies only to contestations of claims filed or admitted by the dividend sheet, and not to a contestation of the whole dividend sheet. *In re Union Brewery and Hyde*, 6 Que. P. R. 395.

Contributory—Agreement by solicitor to pay for shares by services—Trustee—Dismissal of solicitor—Discharge from liability. *Re Union Fire Ins. Co., Caston's and Cornell's Cases*, 6 O. W. R. 430.

Contributory — *Application for shares — Withdrawal — Absence of allotment and notice — Notice of call.*]—An agent of the company canvassed the respondents to subscribe for shares and took them to the company's office, where they signed and handed to the manager an application, not under seal, by which they subscribed for 25 shares of the common stock of the company, at the par value of $100 per share, for which they agreed to pay upon the delivery of the regular stock certificate. In the stock ledger of the company, under the names of the respondents and the heading "common stock" of the same date as the application, an entry was made, "allotted bought Dr. 25 shares, amount $2,500, balance 25 shares, Dr. $2,500." On the same day the respondents gave the canvassing agent a cheque for $100 on account of the payment for the shares, but on the following morning they determined to withdraw from the application, and stopped payment of the cheque, which had been already presented and payment refused for want of funds. On the same day they told the agent that they would have nothing more to do with the stock they had applied for, but they gave no written or other notice of withdrawal. The company's minute book contained no note or entry nor was any evidence given of any resolution of the directors allotting stock to the respondents or directing notice of allotment to be sent to them, and a formal notice of allotment was not sent. No attempt was made to enforce payment of their cheque, and they received no further communication on the subject of the shares until three months later, when the company's manager sent them notice of a call and demanded payment. There were two subsequent calls, of which notices were also sent to the respondents, and all three were authorised by resolutions of the directors:—*Held*, that neither of the respondents ever became a shareholder of the company, and that they were therefore properly struck off the list of contributories in a winding-up.—*Per* Osler, J.A., that there had been no al-

lotment or appropriation of specific shares to the respondents; the entry of their names in the stock ledger was not conclusive; the resolutions authorising the calls dealing with stock which had been already allotted, could not be regarded as equivalent to an allotment; the fact that notices of calls were sent to the respondents amounted to nothing, if the stock had not been already allotted to them by the directors.—*Quære*, per Osler, J.A., whether notice of a call can be regarded as equivalent to notice of allotment.—Semble, also, *per* Osler, J.A., that, on the evidence, the respondents, as they had a right to do, withdrew their application, and that this came to the notice of the company on the day after the application was signed, which would be another answer to the liquidator's demand. —*Per* Meredith, J.A.:—The real question is not whether there was or was not a formal allotment of stock, but is whether there was a concluded bargain for the sale of the shares; the onus of proof of the company's binding acceptance of the offer to buy was upon the liquidator, and that was not clearly proved. Upon the whole evidence it ought to be found that there was no acceptance binding upon the company, at the time of the withdrawal of the offer to buy.—Order of Falconbridge, C. J.K.B., affirmed. *Re Canadian Tin Plate Decorating Co., Morton's Case*, 12 O. L. R. 594, 8 O. W. R. 531.

Contributory — *Bonus shares — Transfer of, before winding-up—Winding-up Act—Director—Breach of Trust—Compensation.*] —*Held*, that a former holder of bonus shares, which he had before winding-up transferred to persons entitled to hold them as fully paid up, is not liable to be placed on the list of contributories in respect to them, unless subjected to such liability by the Act under which the company was created or some Act relating thereto.—*Semble*, however, that such a shareholder, if a director, commits a breach of trust in being a party to the allotment of the shares as fully paid up, as well as in putting them off on his transferees to the prejudice of the company as fully paid-up shares; and such a case is a proper one for an order under s. 83 of the Winding-up Act for contribution by him by way of compensation in respect of such breach of trust. *In re Wiarton Beet Sugar Co., Freeman's Case*, 12 O. L. R. 149, 7 O. W. R. 613.

Contributory—*Calls—Increase of burden on shareholders.*]—Section 49 of the Winding-up Act provides that no calls shall compel payment before maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in the section contained:—*Held*, that, under the above section, the liquidator of a company in liquidation cannot, with or without the authorisation of the Court, make calls of such a nature as to make the obligations of the contributory more onerous than provided by the charter incorporating the company. *In re Victoria and Montreal Fire Ins. Co. and Brown and Hyde*, 36 Que. S. C. 282.

Contributory — *Consideration for shares —Appeal—Reversal of judgments below.*]—H. and others, interested as creditors and otherwise in a struggling firm, agreed to purchase the latter's assets and form a company to carry on its business, and they severally subscribed for stock in the proposed company to an amount representing the value of the business after receiving financial aid which they undertook to furnish. A power of attorney was given to one of the parties to purchase the assets, which was done, payment being made by the discount of a note for $2,000 made by H., and indorsed by another of the parties. The company having been formed, the assets were transferred, and the note was retired by a note of the company for $4,000, indorsed by H., which he afterwards had to pay. H. also, or the company in Buffalo of which he was manager, advanced money to a considerable amount for the company, which eventually went into liquidation. After the company was formed in pursuance of the original agreement between the parties, stock was issued to each of them as fully paid up according to the amounts for which they respectively subscribed, and in the winding-up proceedings they were respectively placed on the list of contributories for the total amount of said stock. The ruling of a referee in this respect was affirmed by a Judge of the High Court (3 O. W. R. 190), and by the Court of Appeal (4 O. W. R. 579, *sub nom. Re Baden Machinery Manufacturing Co.*):—*Held*, reversing the judgment of the Court of Appeal, Davies and Nesbitt, JJ., dissenting, that, as all the proceedings were in good faith, and there was no misrepresentation of material facts, and as H. and S. had paid full value for their shares, the agreement by which they received them as fully paid up was valid, and the order making them contributories should be rescinded:—*Held, per* Davies and Nesbitt, JJ., that, as H. and S. did not pay cash or its equivalent for any portion of the shares as such, the order should stand:—*Held*, also, that it is the duty of the Supreme Court, if satisfied that the judgment in appeal is erroneous, to reverse it even when it represents the concurring view of three or any number of successive Courts before whom the case has been heard. *Hood* v. *Eden*, 25 C. L. T. 115, 36 S. C. R. 476.

Contributory — *Defence — Fraud — Liquidator representing creditors.*] — Subscribers for shares in a company, although they may maintain actions against the company to cancel their subscriptions, upon the ground of fraud, have not the same right against the liquidator of the company under a winding-up order, seeking to have them placed upon the list of contributories, for he is then acting not in exercise of the rights of the company, but representing its creditors. *Brownlee* v. *Hyde* (1906), Que. R. 15 K. B. 221.

Contributory — *Defence — Organisation of company.*]—In proceedings to put an alleged shareholder on the list of contributories and to obtain payment of the balance of stock subscribed by him, he is not entitled to plead that conditions precedent to the organisation of the company were not fulfilled, and that the company never validly existed. *Common* v. *McArthur*, 29 S. C. R. 239, followed. *In re Victoria Montreal Fire Ins. Co.*, 6 Que. P. R. 302.

Contributory — Director — Entries in register—Resolution of directors—Attempt

to get rid of liability. *Re Cement Stone and Building Co., Egan's Case* (1906), 8 O. W. R. 260, 320.

Contributory — Payment for shares — Conditional agreement—Condition subsequent. *Re Wiarton Beet Sugar Co., Jarvis's Case*, 5 O. W. R. 542, 637.

Contributory — Payment for shares — Consideration—President of company—Liability for shrinkage in assets. *Re North Bay Supply Co.*, 6 O. W. R. 85.

Contributory—Petitioner for incorporation—Subscription for shares—Memorandum of association—Director and president of company. *Re Cement Stone and Building Co., McBean's Case* (1906), 8 O. W. R. 264.

Contributory—*Preference shares—Common shares—By-law — Directors—Allotment of shares—Delegation—Terms — Ratification —Acceptance—Estoppel.*] — Shareholders of the company passed a resolution in favour of creation of preference stock, with a direction to directors to pass a by-law, which directors failed to do:—*Held*, that sec. 22 of the Ont. Companies Act not having been complied with, there was no valid creation of preference stock, and G., a person who had signed an application for 16 shares of preference stock, could not be held liable as a contributory in respect of these shares, there being no acquiescence, delay, or conduct on his part to estop him from alleging and shewing that, at time when he made his application, and thenceforth until the liquidation proceedings, the company were not in a position to give him that for which he applied.—G. also applied in writing for 8 shares of common stock, and undertook to accept same or any less amount, paying therefor $60 per share according to terms named in prospectus. But, in lieu of those terms, it was arranged between G. and an agent of the company that he should give a promissory note at twelve months for the whole amount, which was done. The application was never brought before or dealt with by the directors, but the secretary notified G. that the directors had allotted him the shares in accordance with his application. They had not, however, passed a by-law or otherwise ordained, as required by s. 26; they had merely passed a resolution that "the secretary be instructed to allot all stock as applications are passed in;"—*Held*, that the directors could not delegate their duty to a subordinate officer, and there never was any valid acceptance of G.'s application, and he was, therefore, not liable as a contributory in respect of the 8 shares.—*Held*, also, upon evidence, that, at the time of G.'s application, the company held no shares of common stock which they could validly allot to him.—In case of R., another person charged as a contributory:—*Held*, that it was covered by decision in G.'s case, the additional circumstances set out in the report making no difference.—In case of H., another person charged as a contributory, the allotment of shares was professed to be made by secretary, and notice thereof was given in same manner, and under same circumstances and authority as in the other cases. But at the time of H.'s application there were shares of common stock which could have been allotted. H. gave his promissory note for the price of shares for which he applied, and afterwards made payments thereon, and he attended meetings of shareholders and moved resolutions thereat. He had no notice, however, until after the liquidation, of any irregularities in the creation of preference stock, and was not aware of the irregularities in connection with the allotment of shares:—*Held*, that, as there was no contract in fact, both by reason of there being no preferred stock in existence and want of allotment, making payments in ignorance of these facts was not a conclusive act, and attendance and conduct at meeting was not such an active participation in the affairs and business as to debar any question as to the status of an alleged shareholder. If there was any holding of himself out as a shareholder by H., it was not under circumstances which could affect creditors or create any change of position to their prejudice.—Orders of Anglin, J., affirmed. *Re Pakenham Pork Packing Co., Galloway's Case, Rudman's Case, Higginbotham's Case* (1906), 12 O. L. R. 100, 7 O. W. R. 658.

Contributories—Subscription for shares —Agreement with company for issue of paid-up shares — Consideration — Accord and satisfaction — Invalidity of agreement — *Ultra vires*. *Re Jones and Moore Electric Co. of Manitoba*, 7 W. L. R. 527.

Contributories—*Subscription for shares —Contract under seal — Offer — Acceptance — Allotment — Notice.*] — Respondent by a writing under seal dated 29th July, 1903, subscribed for one share of the company, and agreed to pay $100 for it, 10 per cent. on application, 15 per cent. on allotment, 25 per cent. two months thereafter, and balance as directors might deem advisable. It was arranged that the company should draw upon respondent for amount payable on application. On the next day, and before anything had been done by the company, respondent wrote to the company cancelling his subscription. The company drew on respondent for the 10 per cent., but he refused to accept the draft, and, being pressed by the company by letter of the 16th September, 1906, to accept the draft, again declined to do so. On the 8th September, 1903, a resolution was passed by the directors "that the stock now subscribed be allotted and notice sent to each subscriber that we are drawing on them for their second payment." The company did not draw on the respondent for the second payment, and he was not notified of the allotment, but his name was recorded in the book required by s. 71 of the Ontario Companies Act to be kept by the company as a shareholder holding one share. He was not afterwards in any way treated or dealt with as a shareholder. In a proceeding for the winding-up of the company, it was sought to make him liable as a contributory:—*Held*, following *Nelson Coke and Gas Co.* v. *Pellatt*, 4 O. L. R. 481, that the instrument signed by the respondent was not a mere offer which he could withdraw before acceptance; but that the company never accepted or intended to accept him as a shareholder unless the down payment of 10 per cent. was made, and, after the refusal to make that payment, they made it evident that they had not accepted

him; and, even if they had accepted him, it was not shewn that the acceptance was communicated to him; and he was not, therefore, liable as a contributory. *Re Provincial Grocers Limited, Calderwood's Case*, 10 O. L. R. 705, 6 O. W. R. 744.

Contributories — Shares—Payment — Evidence of. *Re Baden Machinery Manufacturing Co.*, 3 O. W. R. 190, 4 O. W. R. 379.

Contributories—Subscriptions for shares —Payment—Transfer of property—Defective organisation of company. *Re Wakefield Mica Co.*, 4 O. W. R. 535, 5 O. W. R. 34, 7 O. W. R. 104, 108.

Contributories—Subscription for shares —Payments on—Appropriation — Statute— Making shareholder incorporator of a new company—Powers of Dominion Parliament—Acquiescence. *Re Atlas Loan Co., Green's Case*, 3 O. W. R. 604.

Contributory — *Allotment — By-law — "Otherwise ordain"—Winding-up.*] — Hill signed application for 1 share of The Provincial Grocers Limited. On receipt of the application the secretary of the company placed Hill's name on the "shareholders' list" of the company, notified him of the receipt of his application and drew on him for $10, the first payment, which he paid:—*Held*, all these acts must be regarded as evidence that the directors, instead of passing a by-law, had "otherwise ordained" the allotment of the 1 share of stock to Hill, and the respondent was therefore placed on the list of contributories in the winding-up of the company, to the amount of $90. *Re Provincial Grocers Limited, Hill's Case*, 6 O. W. R. 606, 10 O. L. R. 501.

Contributory—Holder of shares as collateral security for accommodation paper—Ontario Companies Act, s. 39. *Re Perrin Plow Co., Allan's Case*, 11 O. W. R. 186, 12 O. W. R. 387.

Contributories—Subscription for shares —Payment by set-off against price of property purchased for company—*Bona fides*—Agreement. *Re C. B. C. Corset Co.*, 12 O. W. R. 185.

Contributory — Shares—Allotment: *Re Publishers' Syndicate, Hart's Case*, 1 O. W. R. 508.

Contributory — Shareholder — Bonus shares — Liability on. *Re Wiarton Beet Sugar Co., Kydd's Case*, 6 O. W. R. 491, 590.

Contributory — Shareholder—Subscription—Transfer—"Entry duly made"—Allotment—Books of company — Liability. *Re Sprouted Food Co., Hudson's Case*, 6 O. W. R. 514.

Contributory — *Shares issued as fully paid — Company winding-up.*] — Appeal by Alexander McNeil from a portion of an order of J. A. McAndrew, Official Referee, made in proceedings for the winding-up of the company, setting the appellant upon the list of contributories for $1,675, a balance due upon 238 shares; and an appeal by the liquidator of the company from a portion of the same order, which allowed a set-off of $1,500 for advances made by McNeil for the benefit of the company, *pro tanto*, against the $1,675:—*Held*, McNeil had no defence to the application of the liquidator to put him on the list of contributories for the amount actually unpaid in respect of the shares:—*Held*, the right of set-off did not exist, on the broad ground of absence of mutuality between the claim of the liquidator against McNeil and McNeil's claim as a creditor of the company. Liquidator's appeal allowed with costs. *Re Wiarton Beet Sugar Manufacturing Co., McNeil's Case*, 5 O. W. R. 637, 10 O. L. R. 219.

Contributory—Shares issued as paid—Jurisdiction of Master to enquire as to actual payment — Book-keeping entries—Credit of company's own moneys — Audit—Estoppel. *Re Harris, Campbell, and Boyden Furniture Co. of Ottawa, Douglas's Case*, 5 O. W. R. 514, 649.

Contributory — Subscription for shares —Extrinsic evidence—Placing shares—Commission—Payment for shares — Contract—Consideration—Transfer of assets. *Re Co-operative Cycle and Motor Co.*, 1 O. W. R. 778.

Contributory — Subscription for shares —Allotment—Shares previously allotted to another—Making the other a contributory—Agreement to repossess and resell — Rights against creditors after winding-up order. *Re Henderson Roller Bearing Manufacturing Co., Prout's Case*, 11 O. W. R. 526.

Costs of company appearing on petition. *Re Wiarton Beet Sugar Co.*, 3 O. W. R. 393.

Costs of second petition. *Re Algoma Commercial Co., Re Algoma Steel Co., Re Lake Superior Power Co.*, 3 O. W. R. 140.

Creditors' claim — Banking company — — Liquidators' accounts — Guarantee premiums paid by liquidator. *Re Central Bank of Canada*, 6 O. W. R. 372-3.

Creditors' claims—*Breach of contract—Damages.*] — On payment of a subscription fee of $10.50 to a publishing company, certificates were issued by the company to the subscribers, guaranteeing to such purchasers the privilege for five years of purchasing all books, magazines, periodicals, and other printed matter, at the prices quoted in the company's catalogue and bulletins, but subject to ordinary trade fluctuations, and undertaking to act for such subscribers as agents for the purchase, at lowest possible prices, of the books, etc., not contained in such catalogue. The certificates were not transferable and were only available to subscribers for their personal and family use and benefit. Before the expiry of the above period, an order was obtained for the winding-up of the company, whereupon certain subscribers claimed to rank on the assets as creditors in respect of damages alleged to have been sustained by them through the company's failure to supply them with books, etc., during the residue of the term:—*Held*, that only nominal damages

were recoverable, for beyond this the damages were of too speculative or conjectural a nature to be maintained nor could any part of the subscriptions be recovered back on the ground of it being unearned. Decision of Falconbridge, C.J., 1 O. W. R. 725, reversed. *In re Publishers' Syndicate*, 24 C. L. T. 122, 7 O. L. R. 223, 3 O. W. R. 114.

Creditors' claims — *Jurisdiction — Action in Circuit Court—Transfer to Superior Court.*]—The Winding-up Act has established a special tribunal of exclusive jurisdiction, to wit, the Superior Court, for the disposal of claims against a company in liquidation; an action brought in the Circuit Court will therefore be referred to the Superior Court. *Baxter* v. *International Steel Co.*, 10 Que. P. R. 27.

Creditors' claims — *Loan company — Priorities—Debenture holders.*] — Appeal by the Elgin Loan Co. from the disallowance by the Master in Ordinary of their claim, in the proceedings to wind up the Atlas Loan Co., to rank upon the estate of the latter in respect of a debenture of that Co. for $55,000, dated 31st May, 1902, payable to the Elgin Loan Co., or order, on 2nd January, 1907, with interest at 5 per cent. per annum, payable half-yearly, the whole being collaterally secured by 375 shares of the capital stock of the Dominion Loan Co. Finding of the Master reversed, and a reference back, with directions to allow the claim of the Elgin Loan Co. to the extent of the amount of the loan and interest upon it, and with leave to the Elgin Loan Co., if they so desired, to amend the proof by making an alternative claim in respect of the moneys on deposit with the Atlas Loan Co., and the Elgin Loan Co. must value their security and give credit accordingly. *Re Atlas Loan Co., Elgin Loan Co.'s Claim*, 3 O. W. R. 794, 5 O. W. R. 24, 9 O. L. R. 250.

Creditors' claims — *Shareholders contributing to reserve fund.*]—By s. 17, s.-s. 6 of the Loan Corporations Act, R. S. O. 1897, c. 205, "it shall be lawful for any such corporation to constitute and maintain a reserve fund out of the earnings or other income of the corporation not required for the present liabilities of the corporation." By a by-law of the above named company it was provided that "a reserve fund shall be maintained consisting of the sums already set apart and forming such fund, together with such sums as may be contributed and added thereto, or as the directors shall, from time to time, deduct or retain from the undivided profits, and together with the profits and increase of such sum." An amount equal to 26 per cent. of the amount of the capital stock of the company having been previously set apart as a reserve fund, the shareholders of the company were, in 1901, invited by the directors to make it up to 100 per cent. by contributions to the reserve fund. No further by-law was passed. Many of the shareholders paid to the company sums which were credited to the reserve fund, and upon which they received interest at dividend rates:—*Held*, that in the winding-up of the company the creditors who had so contributed were not entitled to rank as creditors upon the assets of the company in respect of the sums so contributed. *In re Atlas Loan Co. (Claims on Reserve Fund)*, 24 C. L. T. 321, 3 O. W. R. 604, 688, 794, 5 O. W. R. 452, 7 O. L. R. 706, 9 O. L. R. 468.

Creditors' claims—Salaries of directors —Resolution of board not confirmed by shareholders. *Re Ontario Express Co., Directors' Claims*, 6 O. W. R. 431.

Creditors' claims—Valuing security — Guaranty. *Re Patent Cloth Board Co., Ex p. Bank of Ottawa and Worthington*, 3 O. W. R. 373, 595.

Creditor—*Compromise with liquidator—Account—Jurisdiction of Master.*] — An appeal by a bank from an order of the Master in Ordinary, in proceedings under the Winding-up Act, directing the bank to furnish the liquidator with an account of all moneys received from the proceeds of the insurance moneys referred to in an agreement between the bank and the liquidator, and an account of all expenditures, and directing the bank to credit and allow the liquidator the amount of the counsel fees taxed in the bills of costs in certain actions brought for the recovery of insurance moneys. The agreement provided that the bank should pay over to the liquidator ten per cent. of the net proceeds from all insurance policies; that the liquidator was not to question the validity of the assignment of the policies to the bank; and that the liquidator was to instruct counsel to appear for the bank and as formally representing the bank, but in the interest of the creditors, and assist to the fullest extent possible the recovery of the claims:—*Held*, that the agreement was a mere compromise between two persons at arms' length. The bank was simply an outsider compromising with the liquidator, and upon the facts nothing had occurred to confer any jurisdiction upon the Master. *In re John Eaton Co.*, 21 C. L. T. 586.

Creditors—Preferred claim — Trust — Moneys collected and deposited in a bank. *Re International Mercantile Agency, Limited*, 7 O. W. R. 795.

Creditors' claim — Right to prove loan on stock really owned by insolvent company —Trading in its own shares—Acknowledgment by officers of company under seal of company—Claim not allowed. *Re Farmers Loan & Savings Co.* (1901), 30 C. L. T. 357.

Creditors' claims—Shareholders contributing to reserve fund—Loan Corporations Act, R. S. O. (1897), c. 205. *Re Atlas Loan Co.* (Claims on Reserve Fund) (1904), 39 C. L. T. 371, reversed, 24 C. L. T. 321, 3 O. W. R. 688, 5 O. W. R. 452, 7 O. L. R. 706, 9 O. L. R. 468.

Creditors opposing petition—*Neglect to enter appearance — Costs.*]—*Held*, that creditors and debenture holders who neglected to enter an appearance to a winding-up petition, as required by Rule 56 of the Winding-up Rules passed by the Judges on the 1st October, 1896, but who appeared by the counsel on the return of the petition, which was dismissed with costs, were not entitled to costs. The fact that their counsel was

heard without objection by the petitioner's counsel makes no difference. *In re Albion Ironworks Co.*, 10 B. C. R. 351.

Debenture-holders — *Mortgage — Receiver.*]—In a suit to enforce a mortgage to secure debentures issued by the defendant company, a receiver was appointed. Subsequently a winding-up order was made against the company, and official liquidators were appointed. The liquidators disputed the validity of the mortgage and the extent of the property covered by it:—*Held*, that the receiver should not be discharged. An order appointing a receiver on behalf of debenture-holders secured by the mortgage was varied to be limited to property described in the mortgage. *Bank of Montreal* v. *Maritime Sulphide Fibre Co.*, 22 C. L. T. 37, 2 N. B. Eq. Reps. 328.

Debenture holders—Relative rights of depositors and debenture holders. *Re Atlas Loan Co.* (1904), 30 C. L. T. 420.

Debenture-holder — Preferred shareholder. *In re Tonquoy Gold Mining Co.*, 1 E. L. R. 142.

Discretion — *Assignment for the benefit of creditors.*]—When an assignment for the benefit of its creditors has been made by a company, a creditor of the company is not entitled as of course to a winding-up order. A discretion to grant or refuse the order exists notwithstanding the making of the assignment. *Wakefield Rattan Co.* v. *Hamilton Whip Co.*, 24 O. R. 107, and *Re Maple Leaf Dairy Co.*, 2 O. L. R. 590, approved. *Re William Lamb Manufacturing Co.*, 32 O. R. 243, considered. Where an assignment for the benefit of its creditors had been made by a company, and its assets had been sold with the approval of the great majority of its creditors and shareholders, an application to wind up the company made by a creditor and shareholder who had taken part in all the proceedings, and had himself tried to purchase the assets, was refused. Judgment of Teetzel, J., 2 O. W. R. 834, 1031, affirmed. *In re Strathy Wire Fence Co.*, 24 C. L. T. 307, 8 O. L. R. 186, 3 O. W. R. 889.

Distress for rent — *Sale — Leave of Court.*]—A distress for rent is not avoided by proceedings taken under the Winding-up Act, R. S. C. c. 129, to put a company into liquidation, if the distress be made before the winding-up order. *Quære*, whether a sale may be made under the distress without the leave of the Court. *In re Colwell (E. C.) Candy Co.*, 35 N. B. Reps. 613.

Distribution and collocation — *Privileged claim — Expenses for preservation of estate—Fire insurance premiums—Practice —Ex parte inscription—Notice.*]—M. acquired the factory and plant of an insolvent company, which had been sold under execution by the sheriff, and, pending litigation during the winding-up of the company, operated and maintained the factory as a going concern. The sheriff's sale was set aside, and M. then abandoned the property to the curator of the estate, and filed a claim as a privileged creditor, for necessary and useful expenses incurred by him in preserving the property for the general benefit of the mass of creditors, including therein charges for moneys paid as premiums on policies of fire insurance effected in his own name during the time he had held possession:—*Held*, that, in the absence of evidence to shew that such insurance had been so effected otherwise than for his own exclusive interest, he could not be collocated by special privilege on the distribution of the proceeds of the estate for the amounts of the premiums.—When the appeal first came on for hearing upon inscription *ex parte*, on suggestion by one of the creditors not made a party to the appeal, the Court ordered the postponement of the hearing in order that all interested parties might be notified of the appeal. *McDougall* v. *La Banque D'Hochelaga*, 27 C. L. T. 780, 39 S. C. R. 318.

Distribution of surplus — *Shareholders — By-laws — Resolutions.*] — A municipal water company, incorporated under the Ontario Joint Stock Companies Act, sold their undertaking and franchise to the municipality, and passed a resolution providing for payment at par value to the shareholders of the stock allotted to them in proportion to the amounts paid on their respective shares and for payment of the liabilities and the costs of winding-up, &c., and directed that the surplus should be distributed amongst the members according to their interest. By by-law of the company, holders of second preference shares were to be paid dividends at 6 per cent., and for a period of five years were not to participate further in the profits of the company. In case of default in payment of any dividend, the deficiency was to be paid out of the net profits of succeeding years, and no dividend was to be paid on the ordinary stock until such deficiency should be fully paid. Second preference shareholders also had the right, under the by-law, upon foregoing their secured dividend of 6 per cent., to surrender their shares and receive the par value thereof, or a corresponding number of ordinary shares, in which case they would have the same rights and privileges as the ordinary shareholders; but none of them exercised this option. The by-law also provided that, in the event of the company being wound up, if any surplus of the capital assets of the company was to be returned to shareholders, the holders of second preference shares were to be paid the full amount of their shares and all dividends before the return of the capital of any ordinary shares, "and, subject thereto and to the first preference stock, the holders of the ordinary shares shall be entitled to such surplus of the capital assets:"—*Held*, that the second preference shareholders were not entitled to share in the surplus assets:—*Held*, also, that the surplus was divisible among the ordinary shareholders in proportion to the amount of their shares, not to the amounts paid on their shares. *Birch* v. *Cropper*, 14 App. Cas. 525, followed. *Morrow* v. *Peterborough Water Co.*, 22 C. L. T. 326, 4 O. L. R. 324, 1 O. W. R. 512.

Distribution of treasury stock as fully paid-up stock — *Nothing paid therefor—Liability to be placed upon list of contributories.*]—Directors made a ratable distribution of treasury stock among the existing shareholders (for which nothing was given to the company), and issued share certificates

as fully paid-up stock:—*Held*, that the issue of the stock was in violation of the statute and *ultra vires*, and all who shared in the distribution were alike liable to be placed on the list of contributories, as far as necessary, upon and under the liquidation. *Re Clinton Thresher Co.* (1910), 15 O. W. R. 645, 20 O. L. R. 555.

Dominion company — *Head office — Jurisdiction.*]—A petition for a winding-up order in respect of a company incorporated by Dominion letters patent must be presented in the province where the company have their head office. *Wetzel (E. W.) Co.* v. *Oriental Silk Co.*, 9 Que. P. R. 280.

Dominion Winding-up Act—*Applicability to companies incorporated under provincial legislation—Insolvency—Evidence of.*]—An application was made under the Dominion Winding-up Act to wind up a company incorporated under the provisions of the North-West Territories Companies Ordinance, c. 20 of 1901. Evidence was adduced for the purpose of shewing that the company were insolvent, but this was largely dependent upon hearsay:—*Held*, that the Dominion Winding-up Act (c. 144, R. S. C. 1906), applies only to corporations incorporated under provincial legislation when it is shewn that such corporations are insolvent, in liquidation, or in process of being wound up, and as it was not shewn that the corporation in question were in liquidation or being wound up, and as there was no sufficient evidence to establish insolvency, the Dominion Act did not apply. *In re Nelson Ford Lumber Co.*, 1 Sask. L. R. 503, 9 W. L. R. 438.

Dominion Winding-up Act—*Application to provincial corporation—Insolvency.*]—The provisions of the Dominion Winding-up Act (R. S. C. 1906 c. 144) do not apply to a company incorporated under the Ontario Companies Act, unless such company are shewn to be insolvent. *Re Cramp Steel Co.*, 16 O. L. R. 230, 11 O. W. R. 133.

Dominion Winding-up Act, s. 6—Construction—Trading company incorporated under Territorial Companies Ordinance—Application of Act—Failure to shew insolvency. *Re Nelson Ford Lumber Co.*, 9 W. L. R. 438.

Estoppel.]—Defendant originally agreed to subscribe for four shares of $50 each. He informed the secretary that his liability was to be limited to $200. The company tendered him eight shares and he accepted them, paying his $200 therefor. The stock certificate stated that the shares were fully paid up. Defendant received a dividend on the eight shares:—*Held*, that the company could not issue shares at a discount under the Ont. Companies Act, and the defendant having accepted the eight shares and the dividend thereon, he was liable to be placed on the list of contributories. *Re Niagara Falls H. & S. Co.* (1910), 15 O. W. R. 326.

Execution — *Opposition — Costs.*] — A party attempting to execute a judgment against the property of a company in liquidation will be adjudged to pay the costs incurred by an opposition made to such execution by the liquidator. *Great North-Western Telegraph Co.* v. *Le Monde Journal Co.*, 5 Que. P. R. 379.

Execution — *Seizure of goods after notice of petition — Lien of execution creditor — Winding-up Act—Change in wording by R. S. C. 1906.*]—Sub-section 1 of s. 84 of the Winding-up Act, R. S. C. 1906, c. 144, so far as applicable to the rights of an execution creditor under a writ of execution against the goods of a company placed in the sheriff's hands after the commencement of the winding-up, is not different in effect from s. 66 of the Winding-up Act as it stood in the former Revised Statutes of 1886, and the execution creditor cannot proceed to realise his judgment out of the goods of the company.—*Quære*, what would be the result in a case where the sheriff had sold the goods and had the proceeds of the sale in his hands when notice of the petition was served?—Under the Act as it stood before the last revision the money would have gone to the liquidator; but, to obtain that result under the present Act, s.-s. 2 of s. 84 would have to be read into s.-s. 1. *Re Ideal Furnishing Co., Stewart-McDonald Co.'s Case*, 7 W. L. R. 558, 17 Man. L. R. 576.

Federal companies — *Appointment of liquidator—Notice of appointment to contributories, shareholders and members—List of contributories fixed by the Court.*]—Notwithstanding the provision of s. 27, c. 144 R. S. C. 1906, regarding the necessary notice to be given to creditors, contributories, shareholders and members for the appointment of a liquidator for a company in liquidation, it is not necessary that the list of contributories has been fixed by the Court, because the statute provides for this in a subsequent section (48). Moreover, it follows from the context of the two sections that this list must be prepared by the liquidator appointed. *La Cie Villeneuve* v. *Price Bros.*, 1909, 36 Que. S. C. 395.

Fees of the liquidator — *Right to retain chattels.*]—Under section 1713 C. C., the liquidator of an insolvent company has no right to retain the books, papers, or chattels of the company for the amount he has advanced or for his salary. *Ross* v. *Walker* (1909), 10 Que. P. R. 428.

Filing exception to the form—*Authorisation of Court.*]—An exception to the form filed by a company in liquidation without the authorisation of the Court or Judge will be dismissed with costs. *Desjardins* v. *Lauric Engine Co.*, 7 Que. P. R. 228.

Final order—*Appealable order — Order dissolving company—Order rescinding.*]—On the 24th March, 1902, a County Court Judge made an order upon an affidavit of one of the liquidators, declaring that the association should be and was dissolved. On the 21st June, 1902, upon the application of a certain dissatisfied shareholder, an order was made by the Judge revoking his former order, and also another order which had been made by him on the 7th April, 1902, that no action should be proceeded with against the association except by leave of the Court:—*Held*, that the order of the 21st June, 1902, was an appealable order, for, even if the appeal to the Court of Appeal given by s. 27 of the Winding-up Act was to be restricted in its construction to appeals from final orders, yet the order of the 21st June, 1902,

might be properly described as a final order, since it put an end to the order of dissolution theretofore made:—*Held*, also, Maclennan, J.A., *dissentiente*, that the County Court Judge had no authority to make an order such as the one of the 21st June, 1902, inasmuch as he had no other material before him when making the order than he had when making that of the 24th March, and there was no reason for saying that he had been misled in making the former order or that any fact had been suppressed and that, therefore, the proper way to have attacked the order of the 24th March was by appeal, and not by application to the Judge to rescind it after it had been acted upon and become effective. *In re Equitable Savings, Loan, and Building Association*, 23 C. L. T. 182, 6 O. L. R. 26, 1 O. W. R. 571, 2 O. W. R. 366.

Final order — *Appeal — Security — Waiver.*] — A winding-up order is a final order. The respondent in an appeal from a winding-up order, after the time limited by s.-s. 3 of s. 27 of the Companies Winding-up Act, 1898, for furnishing security had expired, demanded security for the costs of the appeal:—*Held*, that the respondent had waived his right to have the appeal dismissed on the ground that the security was not originally furnished in time. *In re Florida Mining Co.*, 22 C. L. T. 244, 8 B. C. R. 388.

Fire insurance — *Policy — Interest of bank—Bank Act — Oral agreement — Advances.*]—Where a company is being wound up under the New Brunswick Winding-up Act, a bank is entitled to an order for the payment to it of the proceeds of policies of fire insurance effected by the company on their property, and made payable, in case of loss, to the bank, as interest may appear, under a verbal agreement between the bank and the company that the policies should be so effected as security for advances which the bank from time to time might make, the bank having no interest in the property insured.—Such a transaction is not prohibited by s. 64 of the Bank Act, 1890. *In re Shediac Boot and Shoe Co.*, 37 N. B. R. 98.

Foreign company — *Conflict of laws—Assets in Manitoba—Garnishment—Jurisdiction.*]—A debt owing by a resident of this Province to a foreign corporation, though payable at its place of business in a foreign state, is nevertheless an asset of such corporation in Manitoba within the meaning of Rule 196 (*h*) of the Queen's Bench Act, 1895, as added to by 61 V. c. 13, so as to give the Court jurisdiction to entertain an action which could not otherwise be brought in this Province.—*Blackwood* v. *The Queen*, 8 App. Cas. 82, *Commissioner of Stamps* v. *Hope*, [1891] A. C. 476, and *In re Maudslay*, [1900] 1 Ch. 602, followed. — But when proceedings in bankruptcy had been commenced against the foreign corporation and a temporary receiver of all its assets appointed before the commencement of the action here, in which a garnishing order had been made attaching such debt, it was held that such debt had ceased to be an asset in Manitoba such as would confer jurisdiction on the Court in the action under the above mentioned Rule, and that the action should be dismissed with costs.—It is an established principle of English law that the attachment or assignment by involuntary proceedings under the bankruptcy laws of a foreign country in which a bankrupt is domiciled affects or transfers the title to his purely personal property in England, unless the rights of citizens under some special statute are prejudicially affected; and such principle should be adopted here.—*In re Oriental Inland Steam Co.*, L. R. 9 Ch. 557, and *Sill* v. *Worswick*, 1 H. Bl. 665, followed:—*Held*, also, that, at the commencement of the action, the company had no assets in Manitoba which might be rendered liable to any judgment to be recovered, because the debt attached was not one which the defendant could properly at that time, and without violating the rights of others, deal with. *Roberts* v. *Death*, 8 Que. B. D. 319; *Radeley* v. *Consolidated Bank*, 38 Ch. D. 238, and *Bertrand* v. *Heaman*, 11 Man. L. R. at p. 208, followed. *Brand* v. *Green*, 20 C. L. T. 279, 13 Man. L. R. 101.

Foreign company — Jurisdiction of Superior Court of Quebec. *Scott* v. *Hyde*, 5 E. L. R. 573.

Forfeiture of shares.]—Liquidators of a company in course of being wound up have not nor have creditors of the company a right to take advantages of any irregularities in proceedings for forefeiture of shares; and, shareholders whose shares have been forfeited to the company cannot be placed on the list of contributories merely because there have been irregularities in the proceedings prior to forfeiture. *In re D. Wade Co.* (1909), 2 Alta. L. R. 117, 10 W. L. R. 527.

Gas company — *Dominion Act, s. 2 — Forum—Judge in Chambers—Service of petition.*]—The manufacture and sale of gas for lighting is a commercial operation, within the meaning of the Winding-up Act, R. S. C. 1906 c. 144, s. 2, and that statute applies to companies formed for that purpose.—2. The powers given to the Superior Court by the Winding-up Act can be exercised by a Judge in Chambers.—3. The service of a petition for a winding-up order is validly made at the office of the company, by the delivery of a copy to an employee in charge of the office. *De Lorimier* v. *Canadian Gas and Oil Co.*, 34 Que. S. C. 381.

Granted on petition by company — Sutherland, J., refused to vacate order on application of creditor—Conduct of proceeding to be at London not Toronto, as asked by creditor—Better have independent solicitor—Present solicitor acting for both company and liquidators. *Re International Electric Co.* (1911), 18 O. W. R. 476, 2 O. W. N. 665.

Holder of certificate of shares as security only.]—The appellant, who agreed to take one share in a company, received and accepted a certificate for five shares, expressed to be fully paid up, four of which the managing director of the company informed him were intended only as security for certain paper to which he had become a party for the accommodation of the company. No stock was subscribed for by or allotted to him, but a dividend on the one share was paid to him:—*Held*, that he was a contributory in respect to the one share only. *Bloomenthal* v. *Ford*, [1897] A. C. 156, followed;

Re Perrin Plow Co., 12 O. W. R. 387, distinguished. *In re Charles H. Davies Limited, McNichol's Case*, 18 O. L. R. 240, 13 O. W. R. 579.

Holder of unpaid shares in Ins. Co. upon acknowledged trust — Liability to be placed on list of contributories—Ont. Ins. Act. *Standard Mutual Fire Ins. Co.; Re Musson's Case* (1910), 1 O. W. N. 974.

Insolvency — Denial—Proof — Petition —Amendment—Refusal — Motion to commit secretary of company. *Re Cobalt Development Co.*, 12 O. W. R. 83.

Interest on creditors' claims—Right to, after winding-up proceedings begun. *Re Union Fire Ins. Co.*, 8 O. W. R. 9.

Intervention of creditor — *Costs.*] — The creditor of a bank in liquidation may intervene in an action begun by the liquidator against one of the debtors of such bank, even where such creditor does no more than support, for the same reasons, the position taken by the liquidator, and alleges no new facts, leaving it to the trial Court to mulct the intervenant in costs if his intervention has been inopportunely made. *Community of Sisters of Charity of Providence* v. *Bastien*, 11 Que. K. B. 64

Joint liquidators—*Resignation of one of them—Liquidation continued by the other —Preliminary requirements—R. S. C. c. 144, ss. 24, 27, 31, 32.*]—A liquidator who is about to leave the country may resign his office.—If a joint liquidator relinquishes his office, the other liquidator cannot obtain permission to continue to act alone unless previous notice of such petition has been given to the creditors, the contributories, the shareholders and all others interested in the company. *Re Woodburn, Duggan & Desautels* (1910), 11 Que. P. R. 393.

Judge may grant leave to liquidator, appointed in Canada, of a foreign company, against which a winding-up order has been made in Canada, to maintain action against a shareholder, who has withdrawn assets from the company to the prejudice of its creditors. *Hyde* v. *Thibaudeau* (1910), 11 Que. P. R. 419.

Judge of Superior Court — *Right of appeal to Court in Review—Winding-up Act.*] —There is no appeal to the Superior Court in review from a judgment rendered by a Judge of the Superior Court exercising the powers given by the Winding-up Act. *Re Compagnies des Théatres and Turgeon*, 10 Que. P. R. 215.

Jurisdiction of Court *in winding-up proceedings under Dom. Winding-up Act, s. 39—Liens.*]—It is the intention of the Act that one Court should control all the estate of an insolvent company; to settle all claims of debt, privilege, mortgage, lien or right of property upon, in or to any effects or property of such company in the simplest and least expensive way and to distribute its assets among its creditors in the most expeditious manner, and not to have proceedings delayed or impeded by or dependent upon outside or expensive litigation in other Courts. *Re Toronto Wood & Shingle Co.* (1894), 30 C. L. T. 353.

Landlord and tenant — Sub-tenancy—Damages to premises—Action against liquidator of company — Status of liquidator — Right to sue. *Glickman* v. *Stevenson, Stevenson* v. *McPhail*, 4 E. L. R. 128.

Leave to proceed with action—*Judgment against company.*]—The fact that prior to a winding-up order judgments against the company being wound up were registered, will not deprive a mortgagee or a debenture holder of his right to obtain leave to proceed with an action to enforce his security. *In re Giant Mining Co.*, 10 B. C. R. 327.

Leave to bring action—*Secured creditors—Proving claims.*]—A secured creditor has a right to apply for and obtain leave to bring an action to enforce his security, but it is not optional for him to either prove his claim in a winding-up or else proceed with an action to enforce it, and if he does commence an action it is still compulsory on him to proceed before the liquidator under ss. 63 *et seq.* of the Act. *In re Lenora Mount Sicker Copper Mining Co.*, 23 C. L. T. 162, 9 B. C. R. 471.

Lien of bank on assets—Discounts—Collateral securities—Agreement—Advances. *Re P. R. Cumming Manufacturing Co., Bank of Ottawa's Claim*, 6 O. W. R. 578.

Lien of former solicitor on documents—Delivery to liquidator "without prejudice"—Payment for services — Preference over ordinary creditors. *Re Boston Wood Rim Co.*, 5 O. W. R. 149.

Limitation of one year, applicable to revocatory actions, provided in C. C. by art. 1032 and following, does not extinguish the right of creditors of an insolvent company to have a shareholder ordered to restore assets, withdrawn from the company to the prejudice of its creditors. *Hyde* v. *Thibaudeau* (1910), 11 Que. P. R. 419.

List settled by order of Judge in Chambers—*Jurisdiction — Forum.*] — Persons placed on list of contributories by order of a Judge applied to have the judgment set aside and to be allowed to shew why they should not be placed on said list:—*Held*, that under s. 21 of the Ordinance that the application must be made to the Judge who made the order, and to him in Court. *Re D. Wade Company, Limited*, 10 W. L. R. 527, 2 Alta. L. R. 117.

Liquidation.]—Plaintiff's name appeared on the demand for incorporation, and in the letters patent. There never was a regular meeting of the company; no election of president and officers; the provisional directors were never replaced. He maintained he was only a *prête-nom.*—*Held*, that as company legally in existence he is a contributory. *Lafleur* v. *St. Armour*, 6 E. L. R. 53.

Liquidator—*Action against — Leave.*]—An action cannot be brought against the liquidators of a company without leave of the Court. *Robillard* v. *Blanchet*, 19 Que. S. C. 383.

Liquidator—*Appointment — Notice.*] — The appointment of a liquidator for a company will be set aside if some one interested succeeds in shewing that such appointment has been made without notice to the creditors, contributories, and shareholders of the company. *Stimson* v. *North-West Cattle Co.*, 5 Q. P. R. 181.

Liquidator—*Appointment of—Notice to creditors and others—Necessity for.*]—The appointment of a liquidator under the Winding-up Act, R. S. C. c. 129, without a previous notice to the creditors, contributories, shareholders, or members of the company, in the manner and form prescribed by the Court, is null and void. The power given to the Court by s. 11 of 52 V. c. 32, to dispense with notices, etc., does not extend to that required for the appointment of a liquidator under s. 20 of the former Act. *Stimson* v. *North-West Cattle Co.*, 14 Que. K. B. 279.

Liquidator—*Bond of—Money received as assignee—Appeal—Finality of certificate.*] — After the assignee for the benefit of creditors of an incorporated company had sold part of the assets and received the proceeds, he was appointed liquidator under the Winding-up Act and gave security by a bond which recited all the proceedings and orders, and was conditioned to be void if the liquidator should duly account for what he should receive or become liable to pay as liquidator:—*Held*, that the funds and property in the hands of the assignee became vested in him as liquidator upon his appointment as such, and that the sureties were responsible for his subsequent misappropriation thereof. The bond provided that the certificate of the Master in Ordinary of the amount for which the liquidator was liable should be sufficient evidence of liability as against the sureties, and should form a valid and binding charge against them:—*Held*, that the sureties had the right to appeal from the certificate in accordance with the usual practice of the Court. *In re Army and Navy Clothing Co. of Toronto*, 22 C. L. T. 11, 3 O. L. R. 37.

Liquidator—*Claim accruing before winding-up—Bank — Use of name—Amendment.*] —Under the Dominion Winding-up Act, 1886, ss. 15 and 31, a company in liquidation retains its corporate powers, including the power to sue, although such powers must be exercised through the liquidator under the authority of the Court. The liquidator must sue in his own name or in that of the company, according to the nature of the action; in his own name where he acts as representative of creditors and contributories; in that of the company to recover either its debts or its property. Where liquidators sued in their own name to recover a debt due to the company:—*Held*, that the error was one of form, which the Court had power to amend under ss. 516 and 521, C. C. P. The defendant having admitted the debt and pleaded set-off, and not having excepted to the form of the action, leave to amend should have been given in the sound exercise of judicial discretion. Judgment in 12 Que. K. B. 120, affirming judgment in 19 Que. S. C. 556, reversed. *Kent* v. *Community of Sisters of Charity of Providence*, [1903] A. C. 220.

Liquidator—*Partnership—Action against interrogatories.*]—A company in liquidation owed $642.74 for business taxes to the corporation of the City of Montreal, who sued the liquidators, G. and C., for recovery of that amount. G. and C. were made parties, not as joint liquidators, but as carrying on business together as liquidators under the firm name of G. & C. Upon default of the liquidators to answer interrogatories, the Superior Court ordered the interrogatories to be taken *pro confessis* and gave judgment in favour of the plaintiffs. The defendants appealed:—*Held*, that a liquidator appointed for a company in liquidation possessing only the powers of a judicial sequestrator, has no status to represent in an action the members of the company, who still have the free exercise of their rights, and must sue or defend themselves before the courts. 2. Besides, in this case, the joining of the liquidators as members of a partnership of liquidators was irregular and illegal. 3. The service upon the liquidators by serving one of them at their place of business was also irregular and illegal. 4. A partnership of liquidators is a distinct entity; its members are joint liquidators as individuals and not as partners; and therefore the firm cannot be required to answer interrogatories in the name of the company of which they are liquidators. 5. The interrogatories served upon the liquidators could not affect the rights of the members of the company and could not be regarded as proof of default, because the admission which resulted from default of an answer could not be made by the liquidators, and exceeded their powers. *City of Montreal* v. *Gagnon*, 25 Que. S. C. 178, 6 Que. P. R. 197.

Liquidator—*Powers of—Amount in controversy.*]—The Judge may allow the liquidator of an insolvent company to exercise his powers under the Winding-up Act without further authorisation, in all cases where the amount involved is under $100. *In re Victoria-Montreal Fire Ins. Co.*, 4 Q. P. R. 315.

Liquidator—*Powers of — Remission of debt.*]—The liquidator of an insolvent company has no power to remit debts due by debtors of an insolvent company, except upon a compromise. *In re Laurie Engine Co. and Mackie*, 7 Que. P. R. 431.

Liquidator — *Remuneration and costs—Taxation—Creditors—Security for costs—Dividend sheet.*]—The remuneration and costs of the liquidator and his advocates acting under the Winding-up Act will be taxed adversely at the instance of interested parties or their attorneys, if creditors object to the dividend sheet as prepared.—Clause 7 of s. 67 of the Winding-up Act, requiring security for costs, does not apply to an objection made by a creditor to the amount of the costs of the liquidator and his advocates, nor to the homologation of a dividend sheet based upon such amounts. *Re Laurie Engine Co. and Mackie*, 8 Que. P. R. 59.

Liquidator — *Salary and advances — Lien.*]—Under art. 1713, C. C., the liquidator of an insolvent company has no right of lien upon the books, papers, or chattels of the company for the amount of his advances and salary. *Ross* v. *Walker*, 8 Que. P. R. 156.

Liquidator not party to a suit — *Should his absence be invoked by exception to the form?—Does failure to answer an exception to the form constitute an admission thereof?—C. P. 111, 174, 177, 521.*]—When the liquidator is not a party to a suit, the defendant should formulate his objection by a dilatory exception and not by an exception to the form.—Failure to answer an exception to the form does not constitute an admission of the allegations thereof; a party should establish the validity of his exception. *Royal Bank* v. *Canada Mutual Fire Ins. Co.* (1910), 11 Que. P. R. 265.

Liquidator of defendant company is an interested person in moneys attached under Alta. Rule 386, and may move to set aside a garnishee summons. *Hartt* v. *Edmonton Laundry & Colonial Assurance Co.* (1909), 2 Alta. L. R. 130.

Made after contestation by company —*Right of shareholder to attack—Want of jurisdiction—Petition not served—Fraudulent abuse of process—Foreign company—Business in Canada discontinued—Unsatisfied obligations—Liquidation proceedings at domicile of company — Construction of Winding-up Act.*]—The general rule that a winding-up order made against a company, after appearance and contestation by it, is conclusive against the shareholders, does not apply where the ground taken is that the company was not subject to the Winding-up Act, or that the petition for the order had not been served upon it, and was a fraudulent abuse of the process of the Court.—2. The Winding-up Act, R. S. C. 1906 c. 144, applies to a foreign company which has done business in Canada, although the same has been discontinued for a period of five or six years, if there be unsatisfied obligations arising therefrom.—3. A foreign company doing business in Canada is subject to the Winding-up Act, and the Superior Court has jurisdiction and power to make a winding-up order against it thereunder, although no liquidation proceedings are taken against it at its domicile; and the correct view is that, in its application, the Act is to be construed, not strictly, but liberally.—Judgment in *In re Great Northern Construction Co., Hyde* v. *Scott*, 34 Que. S. C. 432, affirmed. *Scott* v. *Hyde*, 18 Que. K. B. 138, 10 Que. P. R. 164.

Mechanics' liens—*Priority — Jurisdiction to order — Notice.* —The holders of mechanics' liens filed against mineral claims owned by a company, which was subsequently ordered to be wound up, recovered judgment thereon in a County Court on the day on which the winding-up order was made. In the list of creditors made up by the liquidator the lien claimants did not appear as secured creditors, but as judgment creditors. The winding-up order was made on the petition of H., a surveyor, who held the field notes of the survey made by him, and who afterwards proposed that he advance the moneys necessary to obtain Crown grants of the claims, and retain a lien on them until he was paid; the liquidator applied to the Court for leave to accept the proposal, and an order was made, without notice to the lien holders, giving H. a first charge on the claims for his debt and the amount advanced by him; afterwards on H.'s application, an order was made, on notice to the liquidator, but without notice to the lien-holders, that the claims be sold to pay his charge. The lien-holders did not appeal from either of the last orders, but applied for leave to enforce their security, and that they be declared to have priority over H.: —*Held*, that the order giving H. priority over the lien-holders was made without jurisdiction, and the lien-holders were not bound by it. *In re Ibex Mining and Development Co. of Slocan*, 23 C. L. T. 301, 9 B. C. R. 557.

Meeting of creditors — Winding-up Act, R. S. C. c. 129, s. 19—Notices—Form of—Time for issuing—Objections—Waiver—Stay of proceedings—Costs. *Re Sun Lithographing Co.*, 5 O. W. R. 509, 510.

Misfeasance of directors—Allotment of shares as fully paid-up—Necessity for proof of damage to company—Contributory—Value of shares. *Re Manes Tailoring Co.*, 11 O. W. R. 498.

Money in hands of liquidator—Right of creditors to compel retention of, until claims disposed of, as against liquidator's costs. *Re Sun Lithographing Co.*, 6 O. W. R. 358.

Mortgagees proceeding to sell property mortgaged by company—Power of Court to restrain mortgagees—"Proceeding" —Winding-up Act, ss. 22, 23—Costs. *Re British Columbia Tie Co.*, 9 W. L. R. 495.

Mortgage by company—Summary foreclosure—Winding-up Act, s. 39—Other incumbrancers—Leave to bring action—Costs. *Re Canada Cabinet Co.*, 9 O. W. R. 818.

Mortgage of assets — Debenture holders—Priority as against creditors' claims and liquidator's commission and disbursements. *In re Touquoy Gold Mining Co.*, 2 E. L. R. 39.

Motion by creditors to set order aside—*Fraud and prejudice — Receiver — Jurisdiction of Court to appoint—Application for leave to intervene.*] — One creditor obtained a winding-up order. Other creditors applied to have the order set aside on the grounds of fraud and prejudice. Middleton, J., refused the application, holding that the order was in effect a judgment of the Court directing the company's assets to be realised and applied *pro rata* in discharge of its obligations and no other creditor could have any greater or higher right; that the order could not defraud any creditor nor in any way prejudice him; that the application was without precedent and unwarranted by the practice; that the Court had no power on this application to appoint a receiver; that application for leave to intervene should be made to the Referee. Motion dismissed with costs. *Re Standard Cobalt Co.* (1910), 16 O. W. R. 501, 1 O. W. N. 875.

Motion to make the liquidator a party to the action—*Summons—C. P. 117, 525; R. S. C., c. 107, ss. 34, 107.*]—If, since the institution of the action, an insurance company, defendant, has been put into liqui-

dation, a motion by plaintiff to make the liquidator a party to the suit will be granted, but the liquidator must be summoned in the ordinary way. *Comet Motor Co.* v. *Dominion Mutual Fire Ins. Co.* (1910), 11 Que. P. R. 314.

Mutual fire insurance company — *Sequestrator—C. P. 863, 974; C. C. 371; 8 Edw. VII. c. 69, s. 228.*]—All the provisions of the Civil Code and of the Code of Civil Procedure respecting abandonment of property which are not incompatible with 8 Edw. VII. (Que.), c. 69, apply to the winding-up of mutual fire insurance companies.—When a mutual fire insurance company has appealed to the Supreme Court from a judgment of the Court of Review ordering its winding-up, its property will be administered by a sequestrator pending the appeal, unless security has been given by the company that the company will abide by the judgment of the Supreme Court. *Dostaler* v. *Canada Mutual Fire Ins. Co.* (1909), 11 Que. P. R. 303.

No allotment or notice—*Application for shares.*]—Application to have defendants placed on the list of contributories:—*Held*, that the letters signed by defendants were most improper and were only intended to be used to induce others to subscribe for stock on the supposition that they had subscribed for a large amount of stock; that there had been no allotment of stock to defendants, therefore application should be dismissed, but under the circumstances without costs. *Re Nutter Brewery* (1910), 15 O. W. R. 265.

Nominal applicant for purposes of securing letter patent—*Dismissal of action by company to recover on call—Estoppel from contending applicant was a shareholder.*]—A company brought action to recover calls on shares. Defendant pleaded that he was not a shareholder, that he only became a nominal applicant, at the request of a third party, for the purpose of the issue of the letters patent, and that it had been agreed by the provisional directors that defendant should not become a shareholder. The action was dismissed by consent. Later, when the company was being wound up, the liquidator sought to place defendant's name on the list of contributories. — Meredith, C.J.C.P., *held*, that the previous judgment estopped the liquidator from setting up that defendant was a shareholder.—Middleton, J., granted leave to appeal to Divisional Court from above order. Costs in the appeal. 17 O. W. R. 1038, 2 O. W. N. 496. *Re Ontario Sugar Co., McKinnon's Case* (1910), 17 O. W. R. 1038, 2 O. W. N. 496, 22 O. L. R. 621.

Notice to contributories — *Requisites of.*]—A notice that the Court will proceed to fix the list of contributories on a certain day at the Court House, without indicating the hour at and the room in which such operation will take place, is insufficient, and the same should be in the form usually followed for notices of proceedings before the Superior Court. *In re Citizens Ins. Co.*, 6 Que. P. R. 275.

Occupation of premises by liquidator —*Winnipeg Charter, 1 & 2 Edw. VII. c. 77, ss. 228 B, 313, 369, 378, 382—Business tax—Charge on goods on premises—Distress—Liquidator—Assessment when taken to be made—Taxes, when due—Mistake in name of party assessed.*] — 1. A liquidator appointed to wind up a company under c. 144 of the R. S. C. 1906, is not an assignee for the benefit of creditors within the meaning of s. 382 of the Winnipeg Charter, 1 & 2 Edw. VII. c. 77, so that there is no priority under that section in favour of the city for the business tax imposed upon the company as against other debts. — 2. Notwithstanding s. 378 of the charter, taxes imposed by the city are not due and payable so as to entitle the city to sue for them until after the preparation of the tax roll. *Chamberlain* v. *Turner*, 31 C. P. 460, followed.—3. The assessment of the business tax can be deemed to be made only after notice thereof has been given. *Devanney* v. *Dorr*, 4 O. R. 206; and if, at that time, the company assessed is no longer in possession of the premises, and the goods, though still on the premises, are in the hands of a purchaser from the liquidator, there is nothing in the charter which preserves to the city the lien on the goods for the taxes created by s. 313, for that section only gives the city a first charge during the occupancy on all goods in the premises for which the occupant has been assessed.—4. The statutory right given to the city by s. 369 to distrain for such taxes upon any goods and chattels found on the premises in respect of which the taxes have been levied, although such goods and chattels may be the property and in the possession of any other occupant of the premises, is not equivalent to a lien or charge on the goods for such taxes; and where the liquidator of a company assessed for business tax had, prior to the assessment, given up the occupancy of the premises and sold the goods therein, it was held that the city had no right to be paid the taxes in full out of the funds in the hands of the liquidator, but had the right to rank with other creditors of the company for the same under s. 228 B., added to the charter by the Act of 1907.—5. Taxes imposed before the winding-up of a company has commenced can only rank as ordinary debts, in the absence of statutory lien or charge, but taxes imposed after the commencement of the winding-up must be paid in full, as part of the expenses of the winding-up, if the liquidator has remained in possession and such possession has been "a beneficial occupation;" *In re National Arms Co.*, 28 Ch. D. 474.—6. The assessment of the company under the name "Ideal Furniture Company," instead of "Ideal House Furnishers Limited," was sufficient in the circumstances. *In re Ideal House Furnishers Limited, City of Winnipeg's Claim*, 18 Man. L. R. 650, 10 W. L. R. 717.

Ontario Companies Act, secs. 177, 190, 191—Party to action—Addition of parties—Directors. *Allen* v. *Hamilton* (1910), 1 O. W. N. 659.

Option in lease—*Liquidator — Sale by — Disregard of option — Damages.*]—The defendant company leased a house to the plaintiff, the lease containing a clause, "Provided that if the lessors obtain during the said term an offer to purchase the said premises, before accepting the same the lessee shall be given the option of purchasing on same

terms as in said offer." Subsequently an order for the winding-up of the defendant company was made, and the liquidator sold the premises without giving the plaintiff an opportunity to exercise his option:—*Held*, that the winding-up order did not in any way cut down the rights of the plaintiff or change his position; that the liquidator was authorised to sell the premises, but only subject to the terms and conditions of the lease; and that he was bound to submit to the plaintiff, who had not waived his rights, the offer received, and, not having done so, the defendant company were liable in damages, notwithstanding that the plaintiff was aware that the liquidator was making efforts to sell the premises. *McCarter v. York County Loan Co.*, 10 O. W. R. 165, 14 O. L. R. 420.

Order — *Form of — Appeal — Grounds — Notice — Petitioner — Status — Bondholder — Secured creditor — Insolvency — Proof of—Discretion.*]—An order made under Winding-up Act, R. S. C. c. 129, directing winding-up of a company, instead of the business of a company, is good.—The Court refused to dismiss an appeal taken under s. 74 of the Act, where an order had been made settling and allowing the appeal, on ground that appellants had not complied with the practice governing in similar cases of appeal by serving or filing a notice of grounds of appeal.—A company issued bonds payable to bearer, payment of which was secured by a trust mortgage, by which the company purported to assign certain of its property to trustees, in trust, for benefit of bondholders, and covenanted with trustees for payment of principal and interest on the bonds to shareholders: — *Held per* Barker, McLeod, and Gregory, JJ., that holder of some of the bonds, interest on which was overdue, was entitled to petition for winding-up of the company:—*Held, per* Tuck, C.J., and Hanington, J., that the bonds and trust mortgage must be read together, and that under the terms of the trust mortgage a bondholder was not a creditor within the meaning of the Act, and was not entitled to petition for a winding-up order.—*Per* Tuck, C.J., Barker, McLeod, and Gregory, JJ., that a secured creditor can make a demand under s. 6, and petition for winding-up of the company, and is not bound to value in his petition his security under s. 62; that where a demand is made under s. 6, and time for payment has elapsed, and demand has not been complied with, and no reason is given why payment is not made, the company must be deemed insolvent within meaning of the Act; that where the Judge has exercised his discretion under s. 19 and refused to regard the request of a majority of the creditors and shareholders opposed to the petition, who did not offer or propose to continue business, but intended to allow the trust mortgage to be foreclosed, it should not be reviewed on appeal.—*Per* Hanington, J., that the refusal to regard the wishes of all unsecured creditors and the great majority of secured creditors and shareholders was not a reasonable exercise of judicial discretion under s. 19, and the appeal should be allowed on that ground; that petitioner's claim being amply secured, he had no right to petition and force the company into liquidation. *In re Cushing Sulphite Fibre Co.* (1906), 37 N. B. R. 254.

Order — *Practice — Variation — Mistake —Leave to appeal.*] — A company, against which a winding-up order had been made, obtained, at instance of the large majority of its shareholders and holders of its bonds, an order in an action by it against C. granting leave to appeal to Supreme Court of Canada from a judgment of Supreme Court of N. B., confirming a judgment of the Supreme Court in Equity, and entrusting the conduct of the appeal to the company's solicitors. Subsequently the liquidators of the company moved to vary order by adding a direction that the case on appeal should not be settled until an appeal to the Supreme Court of Canada from the judgment of the Supreme Court of New Brunswick refusing to set aside the winding-up order was determined, and that the company's solicitors on the company's appeal in the action against C. should act therein only on instructions of the liquidators, or their solicitor: — *Held*, that, as there was no error or omission in the order resulting from mistake or inadvertence, and the order expressed the intention of the Judge who made it, motion should be refused. Principles upon which applications by shareholders of a company in liquidation for leave to appeal are to be dealt with, considered. *In re Cushing Sulphite Fibre Co.* (1906), 26 C. L. T. 467, 2 N. B. Eq. 231.

Order made to wind up company, it having acknowledged its insolvency. *Re The Peterborough Shovel and Tool Co., Limited* (1900), 14 O. W. R. 821, 1 O. W. N. 134.

Order for — *Discretion to refuse—Absence of assets — Examination of officers — Time for.*]—The Court has a discretion to grant or withhold a winding-up order under s. 9 of R. S. C. c. 129. *Re Maple Leaf Dairy Co.*, 2 O. L. R. 590, followed. A company will not be compulsorily wound up at the instance of unsecured creditors, where it is shewn that nothing can be gained by a winding-up, as, for example, where there would not be any assets to pay liquidation expenses. On the hearing of a winding-up petition, which was dismissed, the petitioner did not avail himself of an opportunity to examine the officers of the company:—*Held*, on appeal, that it was too late then to grant an enquiry. *In re Okell and Morris Fruit Preserving Co.*, 9 B. C. R. 153.

Order for — *"Just and equitable" — Shareholder's petition—Contributory.*] — An order for compulsory winding-up may be made under s. 5 of the Companies Winding-up Act, 1898 (B.C.), notwithstanding the winding-up is opposed by the company. In winding-up proceedings instituted by a shareholder it appeared that shares had been unlawfully issued at a discount and at different percentages of their face value to different purchasers; that the substratum was gone and that the company was unable to carry on business; that there was a question as to the liability of the company to the principal shareholder, who had always been in practical control of the company:—*Held*, that it was just and equitable that the company should be wound up. *In re Florida Mining Co.*, 22 C. L. T. 273, 9 B. C. R. 108.

Order for sale of assets—*Appeal from —Leave.*]—An order authorising the liqui-

dator of a company in liquidation under the provisions of the Winding-up Act to sell the assets of such company, under certain conditions, is not an order subject to appeal under s. 74 of the Act. Leave to appeal refused. *In re Montreal Cold Storage and Freezing Co.*, 3 Que. P. R. 371.

Petition — Affidavits—Insufficient facts—Leave to supplement. *Re Redpath Motor Vehicle Co.*, 4 O. W. R. 515.

Petition— *Appearance—Costs—Waiver.*]—A shareholder in the company applied for a winding-up order; the petition, which was dismissed with costs, was opposed by the company, and also by certain debenture holders and creditors, who appeared by separate counsel. Rule 56 of the Winding-up Rules, passed by the Judges on the 1st October, 1896, provided that "no contributory or creditor shall be entitled to attend any proceedings before the Court, unless he is entered in a book called the 'appearance book.'" The debenture holders and creditors had not entered an appearance: — *Held*, that the Rule applied to proceedings before the petition had been dealt with, as well as to proceedings subsequent to a winding-up order, and so the creditors who had not entered an appearance were not entitled to costs. The fact that their counsel was heard, without objection by the petitioner's counsel, made no difference. *In re Albion Ironworks Co.*, 24 C. L. T. 300.

Petition—*Insolvency — Consent of company.*]—To enable a company to be wound up under the Winding-up Act, R. S. C. c. 129, it is not sufficient for the company to appear by counsel and admit insolvency and consent to be wound up, but the fact of such insolvency must be disclosed on the material on which the petition is based. *In re Grundy Stove Co.*, 24 C. L. T. 132, 7 O. L. R. 252, 3 O. W. R. 175.

Petition—*Insufficient allegations — Evidence—Affidavits — Amendment — Terms.*]—Petition for the winding-up of the company, under the Dominion Winding-up Act, R. S. C. c. 129. The petition alleged that the company were unable to pay their debts as they became due, within the meaning of s. 5 (*a*) of the Act, but gave no evidence of demand in writing and neglect by the company to pay within 60 days thereafter, as required by s. 6:—*Held*, that s. 6 specifies the only way of proving a case under clause (*a*) of s. 5, and the petition must be dismissed, unless amended, and additional evidence offered, within 14 days. *In re Ewart Carriage Works Limited*, 24 C. L. T. 374, 8 O. L. R. 527, 4 O. W. R. 149.

Petition — *Notice — Time — Proof of facts.*]—Under s. 8 of the Winding-up Act (R. S. C. c. 129), which directs that a creditor may, after four days' notice of the application to the company, apply by petition for a winding-up order, a notice given on the 1st of the month for a hearing on the 5th is sufficient. The facts alleged in the petition may be proved on the hearing, and the petition need not be sworn to or verified by affidavit. *In re Maritime Wrapper Co.*, 35 N. B. Reps. 682.

Petition — Preliminary objections—Irregularity—Failure to endorse petition with solicitor's name and address—Endorsement of notice of motion served with petition—Sufficiency—Status of petitioners — Foreign company not registered in jurisdiction—No agent or office in jurisdiction—"Proceeding in respect of a contract"—"Proceeding in the Court"—Dominion Winding-up Act. *Re Nelson Ford Lumber Co.* (Sask.), 8 W. L. R. 546.

Petition — Second petition — Duty to inform Court of first—Order—Conduct of proceedings—Costs. *Re Enterprise Hosiery Co.*, 4 O. W. R. 56.

Petition—*Several petitions — Conduct of proceedings—Costs.*]—When there were two petitions for an order for the winding-up of a company, the order was made under both petitions, but the conduct of the proceedings was given to the later petitioner, a creditor for money paid, in preference to the earlier one, who was shewn to be an employee of and in close touch with the company, and the belief was expressed that he would not take the same interest in the prosecution of the winding-up as the other. The costs of both petitioners and of the company were ordered to be paid out of the estate. *In re Estates Limited*, 24 C. L. T. 400, 8 O. L. R. 564, 4 O. W. R. 199.

Petition — *Service on assignee for creditors—Agent of company.*] — Service of a petition for a winding-up order on an assignee for creditors of a company is not service upon the company, as required by s. 8 of Winding-up Act, R. S. C. 1886, c. 129, such assignee not being an agent of the company for purposes of such service within Con. Rule 159, at any rate when president and directors are readily accessible, and have given no express authority to assignee to accept such service. *In re Rodney Casket Co.* (1906), 12 O. L. R. 409, 8 O. W. R. 293.

Petition of creditors—Status of petitioners — Indebtedness of company—*Ultra vires*—Assignment of claims to make up statutory amount—Building society having no capital stock—Non-applicability of Winding-up Act—Costs. *Re People's Loan and Deposit Co.* (1906), 7 O. W. R. 253.

Petition—*Status of petitioners — Extra-provincial corporation, unregistered—Foreign Companies Ordinance.*]—*Held*, that a foreign corporation, not registered under the provisions of the Foreign Companies Ordinance, cannot maintain an action or institute proceedings unless it be shewn by such corporation that the contract in respect of which such action is brought or proceedings taken arose by an order given to a traveller in the province or by correspondence, and that the corporation have not in the province any place of business. *Re Nelson Ford Lumber Co.*, 8 W. L. R. 79, 1 Sask. L. R. 108.

Petition by shareholder—*Liabilities—Statement—Balance sheet.*]—By s. 5 (*c*) of the Winding-up Act (Dominion) a company is deemed insolvent "if it exhibits a statement shewing its inability to meet its liabilities:" — *Held*, that the inability to meet liabilities means liabilities to creditors

as distinguished from liabilities to shareholders. On the hearing of a petition based on such a statement the statement must be accepted as correct. Remarks as to company balance sheets. *In re United Canneries of British Columbia, Limited* (1903), 9 B. C. R. 528, 23 C. L. T. 254.

Petition by shareholder for order—*Nova Scotia Act—Refusal of order—Insolvency—Sale of assets—Illegality.*]—A company incorporated under the Nova Scotia Companies Act, R. S. N. S. 1900, c. 128, for the purpose of carrying on mining operations, after operating their property for a time at a loss, disposed of it to another company, the consideration for the transfer being shares in the latter company. Application was made by one of the shareholders for a winding-up order under the provisions of the Companies Winding-up Act, R. S. N. S. 1900, c. 129, s. 5, the grounds being: (1) that the substratum of the company had gone; (2) that it was not possible for the company to carry on the business for which created; and (3) that the sale of their property for shares in another company was illegal and unauthorised. The application was opposed by the company, and it did not appear that either the creditors or the shareholders generally desired a winding-up:—*Held*, that the Judge to whom the application was made was right, in these circumstances, in refusing an order; also, that before giving effect to the application and taking the matter out of the hands of the directors and of the company, the Judge was right in requiring the shareholder to bring himself within the principle of the cases by shewing, *inter alia*, that the company were in such a state of solvency that there was a reasonable probability of sufficient assets being left for the shareholders to give him a tangible interest in having the company wound up.—*Semble*, that the petitioner could attack the sale without as well as under winding-up proceedings. *In re Tangier Amalgamated Mining Co.*, 39 N. S. R. 373.

Petition for — *Acknowledgment of company.*]—Petition to wind up a company:—*Held*, that English Rules as to winding-up not binding; that the affidavit did not verify the facts in the petition; that additional affidavits should not be allowed owing to the imperfections of the verification affidavit; that there was no proper evidence of insolvency, and that verbal admissions by officers not sufficient evidence of insolvency. Petition dismissed. *Re Outlook Hotel Co.*, 12 W. L. R. 181.

Petition for—*Conspiracy — Scheme to wreck company and transfer valuable contracts—Party to proceedings — President—Shareholder — Liability of contributory — Manager—Motion to set aside order for cross-examination upon affidavit refused—If petitioners were parties to conspiracy no winding-up order would be granted—Postponement of motions until after investigation of alleged conspiracy—Costs in cause.*]—Rimouski Fire Ins. Co. moved for order to wind up McLean, Stinson & Brodie Co., on ground that the latter company was indebted to petitioners for $10,000 and were hopelessly insolvent. Stinson, the president, set up as a defence, that while absent in England, his fellow directors had conspired to ruin the company and intended to transfer valuable contracts to one of the directors. Stinson took out an order to examine one Audet, the manager of the Rimouski Co., but he refused to answer certain questions. Stinson moved to commit Audet for refusing to answer, and the Rimouski Co. moved to set aside the motion to commit Audet, and the order for his examination.—Riddell, J., *held*, that the motion to set aside the appointment for examination should be refused with costs. Witness to pay costs of this motion forthwith. Other motions stayed until Dec. 9th. No order made staying examination. Costs in cause except as above ordered. *Re McLean, Stinson & Brodie, Ltd.* (1910), 17 O. W. R. 579, 2 O. W. N. 294.

Petition for — Grounds — "Just and equitable"—Ontario Companies Act, 7 Edw. VII. c. 34, s. 199, s.-s. 3—Meeting of shareholders — Proxies — Enlargement — Mismanagement of company — Substratum — Dissension. *Re Harris Maxwell Larder Lake Gold Mining Co.* (1910), 1 O. W. N. 984.

Petition for incorporation — *Memorandum of agreement — Subscription to previous memorandum — Withdrawal of subscription—Attending shareholders' meeting.*]—A company was incorporated under the Ontario Companies Act, R. S. O. 1897, c. 191, on the 4th April, 1907. One R. did not sign the memorandum accompanying the petition, as prescribed by s. 10, s.-s. 2, of that Act, but he had signed a memorandum in the same form subscribing for $500 of stock in the proposed company, and alleged that this subscription was not meant to bind him unless the company attempted to buy out a certain rival business, and, this not being done, he notified the company before it was organised that he would not take the shares. In 1907 the company drew on him for calls, but he refused to accept the drafts. In January, 1908, for the first time, the company allotted stock to R., and he attended a meeting of the shareholders on the 6th April, 1908, but only to protest against his being considered to be one. No stock certificate was issued to him:—*Held*, that, since the memorandum which accompanied the petition for incorporation, he did not become a shareholder by virtue of the statute, and he was not liable as a contributory on the winding-up of the company. *Re Provincial Grocers Limited, Calderwood's Case*, 10 O. L. R. 705, distinguished. *In re Nipissing Planing Mills Limited, Rankin's Case*, 18 O. L. R. 80, 13 O. W. R. 360.

Petition for order—Discretion—Opposition of majority of creditors — Rights of minority—Costs. *Re Charles H. Davis Co. Limited*, 9 O. W. R. 993.

Petition for order—*Previous demand—Service of writ of summons—Notice of application.*]—Service of the specially endorsed writ of summons in an action against the company to recover the amount of a creditor's claim is not a sufficient demand in writing, within the meaning of s. 6 of the Winding-up Act, R. S. C. c. 129, to serve as the foundation for a petition by the creditor for a winding-up order: — *Semble*, that, as s. 8 of the Act requires the petitioner to give

four days' notice of his application, effect could not be given to a ground of which the company had not that notice. *In re Abbott-Mitchell Iron and Steel Co.*, 21 C. L. T. 438, 2 O. L. R. 143.

Petition for order—*Service of—Time.*]—By s. 8 of the Winding-up Act, R. S. C. c. 129, "a creditor . . . may, after four days' notice of the application to the company, apply by petition . . . for a winding-up order:"—*Held*, that the petition was properly lodged when notice of the application was served on the 4th for the 8th November. *In re Arnold Chemical Co.*, 21 C. L. T. 594, 2 O. L. R. 671.

Petition for order—*Voluntary assignment—Compulsory order — Appeal from — Notice to liquidator — Security for costs — Waiver.*]—The Court will not interfere with a voluntary winding-up of a company by its shareholders and order a compulsory liquidation unless it is shewn that the rights of the petitioner will be prejudiced by the voluntary winding-up. Service on the liquidator of a notice of appeal on behalf of the company from a compulsory winding-up order is not necessary. A respondent by applying to increase the amount of security for costs waives his right to object that the security was not originally furnished in time. *In re Oro Fino Mines, Limited*, 7 B. C. R. 388.

Petition for order—*Voluntary assignment—Discretion.*]—Where the insolvency of the company is admitted, the Court has no discretion under s. 9 of the Winding-up Act, R. S. C. c. 129, to refuse to grant a winding-up order on the petition of a creditor who has a substantial interest in the estate, although the company has made a voluntary assignment for the benefit of its creditors, and most of them are willing that the winding-up should be under such assignment. *Wakefield Rattan Co.* v. *Hamilton Whip Co.*, 24 O. R. 107, not followed. *In re William Lamb Manufacturing Co. of Ottawa*, 21 C. L. T. 35, 32 O. R. 243.

Petition for order—*Voluntary assignment—Discretion.*]—The Court has a discretion to grant or withhold a winding-up order under s. 9 of R. S. C. c. 129. *Re William Lamb Manufacturing Co. of Ottawa*, 32 O. R. 243, dissented from. Where the assets of the company were small and the creditors had almost unanimously entered upon a voluntary liquidation under the Ontario Assignments Act, a petition for a compulsory winding-up order was refused. *In re Maple Leaf Dairy Co.*, 21 C. L. T. 596, 2 O. L. R. 590.

Petitions for under s. 104 of the Winding-up Act—*Affidavit not filed before service—Application of Con. Rule 524, by s. 135 of Winding-up Act — Order granted on regular petition—Leave to appeal refused—Stay of proceedings under order granted—Proceedings to be under Ontario Assignments and Preferences Act — Discretion of Court under s. 19 of Winding-up Act — Wish of majority of creditors.*]—Sutherland, J., *held*, that s. 135 of the Winding-up Act, R. S. C. (1906), c. 144, was wide enough to make Con. Rule 524 applicable to winding-up proceedings, therefore dismissed a petition for winding up where the affidavit in support of that petition was not filed before the service of the petition as required by above rule.—On another petition, the proceedings appearing regular, a winding-up order was granted.—Boyd, C., agreed with above holdings and refused leave to appeal.—Teetzel, J., granted order staying proceedings under the winding-up order, holding this to be a case for exercise of discretion of the Court under s. 19, and that liquidation proceedings could be more expeditiously and inexpensively proceeded with under the Ontario Assignments and Preferences Act. It appeared to be the wish of the majority of the creditors of the company that this should be done. *Re Belding Lumber Co.* (1911), 18 O. W. R. 668, 2 O. W. N. 739, 775.

Power to withdraw deposit from Court.]—Upon a petition to that effect, a liquidator of an insolvent company will not be permitted to withdraw a deposit made by a garnishee in the office of the Court in a case in which the company was plaintiff. *Imperial Breweries, Reinhardt* v. *Prevost*, 11 Que. P. R. 150.

Preferred claim — "Clerk or other person in employ"—Sales agent. *Re American Tire Co., Dingman's Case*, 2 O. W. R. 29.

Preferred claim for costs—Fi. fa. in sheriff's hands before winding-up — Instructions not to seize. *Re Saw Bill Lake Gold Mining Co.*, 2 O. W. R. 1143.

Preferred creditor — Claim for salary —Managing director. *Re Ritchie-Hearn Co., Ritchie's Claim*, 6 O. W. R. 474.

Promoters of a company finding difficulty in getting stock subscribed said that when the company got a bonus of $15,000 from the town, that $15,000 of paid-up stock should be allotted and distributed pro rata among the subscribers. This was done. Stock was allotted and certificates issued to and received by these subscribers:—*Held*, in winding-up proceedings, that holders of this bonus stock must be placed on the list of contributories. *Re Cornwall Furniture Co.* (1909), 14 O. W. R. 352.

Provincial Winding-up Act — Company and majority of creditors desiring liquidation to take place under — Insolvency — Boom company — Shareholders—Double liability. *In re Fredericton Boom Co.*, 2 E. L. R. 451.

Provincial Winding-up Act — *Order under — Appeal to Court of Appeal — High Court—Jurisdiction of—Action to set aside order—Fraud or mistake.*]—Where a winding-up order under the Ontario Winding-up Act is made in violation of the provisions of the statute, or is obtained by fraud or misrepresentation, or is otherwise open to attack, any shareholder prejudicially affected may obtain redress, either by direct application to the County Court Judge if the order has been made by him *ex parte*, or, it made by him after notice, then by way of appeal to the Court of Appeal.—The High Court of Justice for Ontario has no jurisdiction to in-

tervene and set aside or vacate or declare invalid what has been done by the County Court Judge under the Ontario Winding-up Act, R. S. O. 1897 c. 222. *Deacon* v. *Kemp Manure Spreader Co.*, 9 O. W. R. 965, 10 O. W. R. 577, 15 O. L. R. 149.

Provisional liquidators — *Voluntary liquidators already named.*]—R. S. C. c. 144, s. 29. In the absence of special reasons to the contrary, a person who has entered upon his duties as voluntary liquidator, should be appointed provisional liquidator under a petition for the winding up of a company. *Price* v. *La Cie Villeneuve* (1909), 10 Q. P. R. 338.

Purchase by inspector—*Fiduciary capacity—Liquidator — Referee—Sale—Jurisdiction.*]—An inspector appointed in a liquidation under the Winding-up Act, R. S. C. c. 29, cannot be allowed to purchase property of the insolvent. Such a sale set aside, and an account of profits ordered. It rests with the liquidator in such a winding-up to dispose of the estate with the sanction of the Court; but the Court cannot dispose of the estate without the sanction of the liquidator. *In re Canada Woolen Mills, Limited*, 24 C. L. T. 396, 4 O. W. R. 265, 5 O. W. R. 220, 455, 8 O. L. R. 581, 9 O. L. R. 367.

Reference to officer of Supreme Court — *Settling list of contributories — Certificates declaring stock paid up in full—Right of officer to inquire whether payments made.*]—Where, under an order of a High Court Judge, a reference has been directed to an officer of the Supreme Court of Judicature to take all necessary proceedings for the due winding-up of a company, and delegating to him for such purpose the powers conferred on the Court therefor by the Winding-up Act, such officer has jurisdiction, in settling the list of contributories, to inquire into and decide as to whether stockholders, holding certificates declaring the stock to have been duly paid up, have in fact paid anything thereon. *Re Harris Campbell and Boyden Furniture Co. of Ottawa*, 5 O. W. R. 649, and *Re Hess Manufacturing Co.*, 23 S. C. R. 644, considered and explained. *Re Cornwall Furniture Co., Limited*, 18 O. L. R. 101, 13 O. W. R. 137.

Registry Act—*Crown debt—Priority.*]—The Elmsdale Company was being wound up under the provisions of the Dominion statute. The Crown made a claim for unpaid freight due for transportation upon the Intercolonial Railway. Before the winding-up order was granted, judgments were rendered against the company and recorded. Under the provisions of the Nova Scotia Registry Act, a judgment duly recorded binds the lands of the debtor as effectually as a mortgage. A question arose as to whether the Crown was entitled to be paid in priority to the judgment creditors.—*Held*, that the claim of the Crown must prevail. The case was not distinguishable from *The Queen* v. *Bank of Nova Scotia*, 11 S. C. R. 1; *Almon* v. *Paley*, Russ. Eq. Dec. 6, referred to. *In re Elmsdale Co.*, 24 C. L. T. 341.

Remuneration of liquidator.] — The liquidator of a company was allowed $4,800 as remuneration for his services in the winding-up of the company, in the course of which he received and disbursed more than $300,000. *In re Yarmouth S. S. Co.*, 24 C. L. T. 184.

Remuneration of liquidator.] — Fixing allowance — Special circumstances. *Re Farmers' Loan and Savings Co.*, 2 O. W. R. 854, 3 O. W. R. 837.

Sale of assets—Disposition of purchase money—Payment into Court of sum to secure payment of mortgage on part of company's lands—Action on mortgage—Judgment for redemption or foreclosure—Application for payment out to mortgagees of sum in Court—Objection by unsecured creditor of company—Mortgagees not entitled to payment in full—Meeting of creditors — Undertaking—Costs. *Town of Gananoque* v. *Wright*, 11 O. W. R. 194, 672.

Sale of goods before winding-up order—Draft for price discounted with bank—Acceptance of goods refused and draft dishonoured — Goods taken possession of by bank. *In re Shediac Boot and Shoe Co.* (1906), 2 E. L. R. 166.

Sale of chattels unopposed — *Claim for possession.*]—When an execution has been effected before the order for winding up a company, and the sale of the chattels seized after the winding-up order has been made, the sale will be valid if no objection was made and no notice of the order for winding up given to the execution creditor. *Re the Canada News Syndicate Co.* (1909), 10 Que. P. R. 407.

Sale of land by liquidator—Reference—Approval of referee—Application to Court to confirm sale — Unnecessary proceeding—Winding-up Act, R. S. C. 1906, c. 144, s. 34—*McCann-Knox Milling Co., Re* (1910), 1 O. W. N. 579.

Sale of property and assets—*Vendor and purchaser — Action for unpaid purchase money—Premature — Banking transaction—Guarantors—Collateral security—Findings of facts—Reference—Vesting order — Costs.*]—The first action was brought by the liquidator of the J. E. Murphy Lumber Co. (in course of being wound-up) against Siemen Bros. to recover $3,207.56, balance of unpaid purchase money for the property and assets of said company. Defendants counterclaimed for a conveyance of the land of the company free from incumbrances, stating their readiness to pay sum claimed upon delivery of such a conveyance, or for a conveyance of the land, subject to a lien of one Murphy for $3,207.56 without further payment.—The second action was brought by J. E. Murphy against the Traders Bank for a declaration that all the moneys due or payable to defendants by the J. E. Murphy Lumber Company, for which he became surety, had been paid, and that he was entitled to delivery, transfer or assignment of all securities held by defendants, and given as collateral to said indebtedness. — Middleton, J., *held*, that the first action was premature, as there was no agreement to pay before conveyance. Action treated as one for specific performance. Upon payment a vesting order to issue, vesting in

purchasers the title of the liquidator, the bank and Murphy. — *Held*, in the second action, that plaintiffs' allegations did not represent the true statement of accounts; that the true statement of accounts was as submitted by defendants. Findings as to accounts, lien, payment, rights of liquidator, etc., set out: Findings to be accepted or to have a reference. No costs to any of the parties. *Scott v. Siemen; Murphy* v. *Traders Bank of Canada* (1911), 18 O. W. R. 538, 2 O. W. N. 697.

Security for costs of contestation.] —A claimant in a winding-up proceeding who demands security for costs from a contesting creditor, should make it appear that he is liable to lose the costs which he will incur in the contestation. *In re Montreal Cold Storage and Freezing Co.*, 4 Que. P. R. 294.

Security taken bona fide—*Inquiry as to regularity of proceedings — Liquidator suing in his own name — Liability for costs.*]—A person who *bonâ fide* takes a security in the ordinary course of business from an incorporated company, is not bound to inquire into the regularity of the directors' proceedings leading up to the giving of the security; he is entitled to assume that everything has been done regularly. In this respect a shareholder stands on the same footing as a stranger. Where an action is brought by the liquidator of a company in liquidation, in his own name, he is personally liable for costs; the fact that he obtained leave from the Court to sue will not relieve him of his liability in this respect. *Jackson* v. *Cannon*, 23 C. L. T. 300, 10 B. C. R. 73.

Seizure of company's goods *before winding-up order made — Companies Winding-up Ordinance, N. W. T. 1903—Application to compel sheriff to deliver goods to liquidator.*]—The sheriff had seized certain goods of the company before winding-up order made under above ordinance:—*Held*, that the sheriff was right in refusing to hand over said goods to the liquidator, there being no provision for his so doing under above ordinance. If the insolvent estate can be better administered with these goods they may be handed to the liquidator if he will guarantee the sheriff the amount for which he holds them with costs. *Re Regina Windmill and Pump Co.*, 10 W. L. R. 65, 2 Sask. L. R. 32.

Seizure of goods in province of Quebec—*Leave of Courts of Province wherein winding-up pending.*]—The liquidator of an extra-provincial company, which is being wound up in another province, can by petition ask that the seizure of the goods of the company in this province be quashed, as made without leave of the Courts of that province. *Phillips* v. *Canada Cork Co.*, 7 Que. P. R. 223.

Service of complete list—*Procedure — Exceptions.*]—Every contributory in a winding-up has a right to a complete list of all the contributories; for each one is interested and has a right to require that all the contributories shall be from the first upon the list of contributories, in order that the Court may determine what amount each should be called upon to pay as his contribution. A dilatory exception asking that proceedings be stayed until this list be furnished will be maintained.—An exception to the form demanding the dismissal of the petition of the liquidator, for the same reasons, will be dismissed, because there is no ground for declaring the proceedings void, but only for amending them. *In re Banque de St. Jean, Bienvenu* v. *Marchand*, 10 Que. P. R. 223.

Service of writ of summons—*Corporate character—Law stamps—Alias writ.*] — Service upon a company in liquidation is validly made at the office which it occupied, upon its secretary, who has continued to act as such in spite of the liquidation, and still has in his possession some of the books of the company. 2. The corporate character of a company continues notwithstanding that it has gone into liquidation. 3. It is not necessary to put law stamps upon the return of an alias writ of summons. *Soucy* v. *Industrial Printing Co.*, 5 Que. P. R. 195.

Shares appearing to be paid in part *—Onus on shareholders to shew payment in full—Transfer of goodwill assets—Agreement to release from liability — Power of company—Promotion shares—Dividend paid when company insolvent—Application to payment of shares — Illegality.*]—Certain parties held to be contributories. The transfer of paid-up stock after the incorporation of the company held to be simply the transfer of promotion stock under another name. The transferees of the stock who took knowing all the circumstances, are liable. Holders of stock alleged to be paid up when paid by dividends declared when company insolvent are liable to be placed on list of contributories. *Re Northern Constructions Ltd.*, 12 W. L. R. 618.

Affirmed on appeal (1910), 14 W. L. R. 308.

Shares — *Application on condition that no further call be made — Acceptance — Allotment—Right to repudiate—Conduct approbating contract—Estoppel — Director — Misfeasance—Loss to company.*]—Defendant Davis applied for shares on condition that no further calls would be made thereon, and the shares were allotted him on said condition. He gave his cheque in payment, and proxy to vote on said shares, but objection was raised as to his right to vote on the shares, as they had been sold at a very large discount. When defendant was informed of the objection being raised he at once stopped payment of his cheque and informed the president that he would have nothing to do with the shares:—*Held*, under the circumstances, that defendant's name should be removed from the list of contributories. The president having been placed on the list of contributories, for the amount of defendant Davis' cheque, for misfeasance for acquiescing in the stopping of payment of same, it was held that as Davis had the right to stop payment there was no duty imposed upon the defendant president to endeavour to collect the money to which the company was not entitled, and his name should be removed from the list of contributories. Judgment of Teetzel, J., 13 O. W. R. 1032, 1037; 18 O. L. R. 354, reversed. *In re Lake Ontario Navigation Co.* (1910), 15 O. W. R. 23, 1 O. W. N. 308.

Shares held by trustee — *Liability beyond amount of trust funds in hand of trustee.*]—Trustee of funds of a minor resident in Nova Scotia purchased shares in company which was later wound up. On application to place trustee on list of contributories it was contended that only the trust estate in hands of trustee was liable as declared in R. S. O. (1897), c. 191, s. 38, and R. S. C. c. 118. Hodgins, Master in Ordinary, *held*, that trustee had no right to purchase shares and in doing so had committed a breach of trust, and to give effect to trustee's contention would be to give judicial sanction to a breach of trust. Trustee placed on list of contributories for amount claimed by liquidator. *Re Farmers Loan Co., Ex p. Dickie* (1891), 30 C. L. T. 348.

Shares held by trustee—Transfer of shares — Consideration — Transaction a compromise — Knowledge of parties — Entries in books of company—Treated as living shares—Transfer not a surrender—Liability of trustee. *Re Ontario Ex. Co.* (1893), 30 C. L. T. 350, 351.

Shares issued as fully paid—*Certificate given, as security—Misrepresentations—Estoppel.*]—M. agreed to take one share in D. company. For the company an agent borrowed from M. $400, giving a certificate for 5 fully paid shares, saying 4 shares were as security for the loan. There was no application or subscription for or allotment of stock:—*Held*, on winding-up of D. company that M. is not liable to be placed on list of contributories. *Re Charles H. Davies, Ltd.*, 13 O. W. R. 579.

Status of creditor — Requirements of Winding-up Act—Demand—Proceedings dehors the statute—Competency of—Similarity of English and Quebec law. *Moore Carpet Co.* v. *Mitchell*, 5 E. L. R. 248.

Stay of actions against — *Decree of foreclosure — Leave to proceed — Right of mortgagee—Powers of Judge—Discretion of Judge—Review—Leave to appeal — Right to grant—Liquidators—Conduct of sale.*]—By s. 16 of the Winding-up Act, R. S. C. 1886 c. 129, proceedings by a mortgagee under a decree of foreclosure of the company's premises are stayed, but the mortgagee has the absolute right to have leave to proceed unless special circumstances make it inequitable for him to do so.—The exercise of discretion in granting or refusing leave by the Judge having charge of the winding-up proceedings may be reviewed on appeal: *per* Hanington, Barker, and Gregory, JJ.—The power given by s. 13 to order a stay, and the stay provided by s. 16, of any suit or action, does not apply to proceedings under a decree of foreclosure: *per* Tuck, C.J.—The liquidators have no equity to have the conduct of the sale under foreclosure proceedings, and an order made at their instance by the Judge directing the winding-up proceedings, postponing the sale and directing the referee as to the advertising, and fixing a subsequent date for the sale, is bad: *per* Tuck, C.J., Hanington, Barker and Gregory, JJ.—The order, though wrong in point of form, was in substance an order for leave to proceed under s. 16, and should not be interfered with on appeal: *per* McLeod, J.—A Judge other than the Judge directing the winding-up proceedings may grant leave to appeal from his order, and any Judge has the abstract right to make orders in a winding-up proceeding, but ought not to do so unless specially requested by the Judge in charge, or under exceptional circumstances; *per* Tuck, C.J., Hanington, Barker, and Gregory, JJ.—No Judge other than the Judge having charge of the winding-up proceedings has authority to make any order in reference thereto, unless such Judge is unable to act; *per* McLeod, J.—The appeal from the order of a Judge in charge of winding-up proceedings is to the Court, and the order can not be varied or rescinded by an order of a single Judge, though made in excess of his jurisdiction under the Winding-up Act; *per* Barker, McLeod, and Gregory, JJ.—As the Judge, under the winding-up proceedings, had no jurisdiction to make an order interfering with the foreclosure proceedings, an order of another Judge having jurisdiction, staying that order, and giving directions as to foreclosure proceedings, is good: *per* Tuck, C.J., and Hanington, J. *In re Cushing Sulphite Fibre Co.*, 38 N. B. R. 581.

Staying proceedings in another province — *Setting aside sale of foreign land—Summary proceedings.*]—There is jurisdiction under s. 13 of the Dominion Winding-up Act, R. S. C. c. 129, to restrain proceedings in any action, suit, or proceeding against the company, even in actions or suits beyond the ordinary territorial jurisdiction of the Court; and the enforcing of an execution is a proceeding within this section; and therefore there was jurisdiction for the Court in this province to make an order staying proceedings under an execution in the hands of the sheriff of the county of Victoria, in the province of New Brunswick, as had been done in this case. But the sheriff having, notwithstanding, proceeded with the sale under the execution against lands of the company, and executed a deed of the same to the purchaser:—*Held*, that there was no jurisdiction in the Court under the Winding-up Act to make an order summarily declaring the sale void, such a case not coming within the classes of cases which, under the Act, may be dealt with in a summary manner by a Judge in the winding-up proceedings. *In re Tobique Gypsum Co.*, 23 C. L. T. 303, 6 O. L. R. 515, 2 O. W. R. 868.

Subsription for shares — Transfer of shares by old subscriber to new—Relief—Illegal payment to director. *Re Publishers' Syndicate, Paton's Case*, 2 O. W. R. 65, 5 O. L. R. 392.

Subscription for shares by firm — *Allotment—Notice—Liability of special partner—Knowledge.*]—T. was a "special partner of the firm M. Co." He was to bear an equal share with other partners in firm's losses. The firm subscribed for stock in D. Co. now being wound up. T. knew of this subscription, and stock was allotted:—*Held*, that the several partners are liable to be placed on the list of contributories for unpaid balance of stock subscribed for by the firm. *Re Distributors Company, Thurston's Case*, 13 O. W. R. 735.

Taxes — Assessment — Notice of after winding-up order. *Re Patent Clothboard Co.* (1904), 30 C. L. T. 378.

Taxes — Right of distress — Effect of winding-up on conditions precedent to distress. *Re Diamond Machine Screw Co.* (1902), 30 C. L. T. 365.

Terms of order — Execution creditor — Priorities. *Re Prescott Elevator Co.*, 1 O. W. R. 161.

Trust money loaned.]—McKay, trustee for Spence estate, loaned funds of that estate in his own name, to a company which was later wound-up. Hodgins, Master in Ordinary, *held*, that the beneficiaries of the Spence estate should be allowed the amount of the loan. *Re Ont. Ex Co. Ex. p. Spence* (1894), 30 C. L. T. 352.

Trustee invested trust money as capital—*Withdrew same on eve of insolvency.*]—A trustee invested money in a company of which he was president. On the eve of the company being wound up, the president withdrew $1,969.61 from the company, to protect his *cestuis que trust*, and give them a preference:—*Held*, that s. 99 of the Winding-up Act applied, and that the plaintiff company was entitled to recover from defendant the amount withdrawn. *Re Stubbins* (1881), 17 Ch D. 58, and *Ex p. Taylor* (1886), 18 Q. B. D. 295, distinguished. Judgment of Boyd, C., at trial, 16 Fed., 1909, affirmed. *Trusts & Guarantee Co.* v. *Munro* (1909), 14 O. W. R. 699, 1 O. W. N. 52.

Unauthorised acts of committee — Ratification — Contributories. *Re Victor Woodworks Limited*, 4 E. L. R. 142.

Unpaid vendor of goods—*Taking possession—Liquidator.*]—A creditor of a company in liquidation, who has sold to the company on credit, several months before they were put into liquidation, goods which were shipped at the expense of the company, and were afterwards left in the custom house until the liquidator took possession of them, cannot replevy these goods against the liquidator in the thirty days which follow this taking of possession. *In re William Drysdale Co.*, 3 Que. P. R. 353.

Use of company's name in litigation —*Liquidator — Creditors.*] — A joint stock company incorporated by a charter from the Dominion government continues to exist after an order for winding-up has been made and a liquidator appointed until the final winding-up of its affairs. Its legal remedies, actions and defences, must, in the interval, be exercised in its name. But when it is a question of attacking or defending its acts, in the interest of creditors, the proceeding must be in the name of the liquidator, representing the creditors. *Stevenson* v. *MacPhail, Glickman* v. *Stevenson* 17 Que. K. B. 119.

Validity of debentures—Lien on land —Necessity for compliance with requirements of statute of incorporation—Two-thirds vote required—Proxies—Validity of by-law—*Bona fide* purchaser of debentures — Notice of informality—Right of creditors to dispute validity of debentures—Estoppel. *In re Summerside Electric Co.*, 5 E. L. R. 129.

Voluntary liquidation — *Manitoba Winding-up Act, ss. 19, 23—Liquidator—Direction to — Proceeding against directors for fraud—Jurisdiction.*]—The company being in process of voluntary winding-up under the Manitoba Winding-up Act, R. S. M. 1902 c. 175, the liquidator applied, under s. 23 of the Act, for a direction as to whether or not he should take proceedings against a number of former directors of the company to cancel certain shares in the stock which they had issued to themselves as fully paid up, but without payment of any kind, and to recover the dividends which, to the extent of over $62,000, they had afterwards paid to themselves on said shares:—*Held*, that this was not "a question arising in the matter of the winding-up" for the determination of which an application may be made to the Court under s. 23, and that no order could be made, as the liquidator in such a proceeding is not an officer of the Court or under its control, except to the extent stated in s.-s. (*f*) of s. 19 of the Act.—The Judge, however, expressed the opinion that it was the liquidator's duty, in the circumstances, to take the suggested proceedings, and that, if he refused, the Court would have jurisdiction, under s.-s. (*f*) of s. 19, to compel him to do so. *Re Great Prairie Investment Co.*, 8 W. L. R. 6, 17 Man. L. R. 554.

Voluntary winding-up — *Meeting of shareholders—Notice of—Powers of attorney —Appointment of liquidator.*]—A notice sent by post to all the shareholders of a company summoning them to a special general meeting with the object of placing the company which is not insolvent, in voluntary liquidation, and accompanied by powers of attorney by which the shareholders may authorize their representation at such meeting, is sufficient, and if a resolution is passed authorising the placing of the company in liquidation, there is no necessity for a further notice to the shareholders of the presentation of the petition to the Court. 2. The intention to name a certain person as liquidator sufficiently appears by the mentioning of his name upon the blank forms of power of attorney sent in order that anyone interested may not allege that he is taken by surprise if such person is subsequently appointed liquidator. *In re North-West Cattle Co.*, 5 Que. P. R. 30.

Wages — *Subrogation.*]—Defendants carried on mining business at L., where S. & C. were their agents. It was the custom for defendants to give their workmen orders for their wages on S. & Co., who having paid these orders, had them endorsed by the respective workmen. S. & Co. then drew on the defendants for the amount of the orders so paid. Defendants being in default to their bondholders, a winding-up order was made, and S. & Co., having obtained assignments from the various workmen whom they had paid, sought to establish their claim to preferential lien:—*Held*, that they had no right of subrogation legal, conventional or equitable. *Eastern Trust Co.* v. *Boston-Richardson Mining Co.*, 5 E. L. R. 538.

Who are contributories?—Rules as to settlement of list of contributories. *Re Atlas Loan Co.* (1904), 30 C. L. T. 368.

Winding-up — *Assignment — Discretion.*]—Where the insolvency of the company is admitted, the Court has no discretion under s. 9 of the Winding-up Act, R. S. C. c. 129, to refuse to grant a winding-up order on the petition of a creditor who has a substantial interest in the estate, although the company has made a voluntary assignment for the benefit of its creditors, and most of them are willing that the winding-up should be under such assignment. *Wakefield Rattan Co.* v. *Hamilton Whip Co.*, 24 O. R. 107, not followed. *In re William Lamb Manufacturing Co. of Ottawa*, 32 O. R. 243.

Winding-up — *Calls — Enforcement of order of Court of another province—Married woman—Collection Act.*]—Application for a *certiorari* to remove proceedings of commissioners under the Collection Act, 1894.—Under a Rule of Court in respect to the winding-up of insolvent companies, it was prescribed that an order for the payment of calls should have the same effect as a judgment for the payment of money, and should be entered as a judgment by the prothonotary.—In this case the order of the High Court of Ontario had been simply filed with the prothonotary:—*Held*, that this would not have been sufficient even if the order had been an order of the Supreme Court of Nova Scotia.—*Semble*, that, as this order was against a married woman, the Court would not have power to enforce it except against her separate estate. —*Quære*, whether the Collection Act applied to such a case. *In re Cunningham*, 20 C. L. T. 47.

Winding-up — *Mortgage to creditor — Setting aside — Insolvency — Knowledge — "May be set aside"—Presumption—Rebuttal.*]—A mortgage of land made by an incorporated company in favour of a creditor within thirty days prior to the beginning of winding-up proceedings was attacked by the liquidator as being void under some of the provisions of ss. 68 to 71, inclusive, of the Winding-up Act, R. S. C. c. 129:—*Held*, notwithstanding the fact that the mortgage was given upon demand of the mortgagee, that the transaction must be avoided under s. 69, the mortgage being a conveyance for consideration respecting real property, by which creditors were injured or obstructed, made by a company unable to meet its engagements; and it was not material under this section whether the mortgagee was or was not ignorant of such inability; but the transaction, being within the thirty days, was avoidable, and should therefore be set aside, that being the effect of the words "may be set aside."—*Held*, also, that the words of s. 69, "upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the Court orders," were not applicable to the giving of a mortgage as security for a past debt.—*Held*, also, that none of the other sections relied on applied so as to avoid the mortgage; and, following *Lawson* v. *McGeoch*, 22 O. R. 474, 20 A. R. 464, and distinguishing *Webster* v. *Crickmore*, 25 A. R. 97, that the presumption referred to in s. 71 is rebuttable. *Kirby* v. *Rathbun Co.*, 20 C. L. T. 333, 32 O. R. 9.

Winding-up — *Taxes and water rates—Claim on estate—Distress.*]—The company owned its business premises, subject to a mortgage to A., who commenced an action for foreclosure. Upon a winding-up order being made, A. filed his claim, and the liquidators, under s. 62 of the Winding-up Act, with the approval of the Court, consented to his taking the property, and also consented to judgment for immediate foreclosure in the action. —Subsequently the city corporation filed with the liquidators a claim for arrears of taxes and water rates:—*Held*, as to the taxes, that the only remedy which the corporation had was to apply to the Court under s. 16 of the Act for leave to distrain. Upon such an application the Court would have determined whether the circumstances were such as to induce it to grant such leave.—If the distress in this case had been levied before the beginning of the winding-up, the Court would, there being no right of action for the taxes, have preserved to the company the right of distress, on the principle that where there is not a right of action, and therefore no privity between the parties, the distrainor may pursue his only remedy (distress) as if no liquidation existed; but where a right of action exists, even though there is also a right to distrain, then the creditor is within the Act, and must prove as an ordinary creditor.—The provisions of the final clause of s.-s. 1 of s. 135 of the Assessment Act with regard to goods in the hands of a liquidator apply only to proceedings under the Joint Stock Companies Winding-up Act.—By 35 V. c. 80, s. 11, power is given to fix rates which an owner shall pay, and such rates, if unpaid, are to be alien or charge upon the real estate, but by s. 13 a personal liability to pay the rates is created against the owner. The city corporation, by by-law passed in 1890, fixed the insolvent company's water rates, and had assessed it by name from year to year since:—*Held*, that a liability to pay was thereby imposed, and this liability is a sufficient foundation for a valid claim by the corporation to rank on the estate in the hands of the liquidator for the amount of the water rates. The corporation are not bound to prove as secured creditors, notwithstanding their lien upon the property arising under s. 11, because the lien is upon property in which the insolvent company is not interested, having already surrendered it to a prior mortgagee, and the liquidator could not give it up to the claimant as required by s. 62 of the Winding-up Act. *In re Ottawa Porcelain and Carbon Co.*, 20 C. L. T. 179, 31 O. R. 679.

Writ of execution—Seizure by sheriff of goods of company—Fees and possession money. *Re Oshawa Heat, Light and Power Co., Ex p. Sheriff of Ontario*, 8 O. W. R. 415.

COMPENSATION.

See EXPROPRIATION — NEGLIGENCE—SET-OFF.

COMPOSITION DEED.

See ACCORD AND SATISFACTION — BANKRUPTCY AND INSOLVENCY—COMPANY.

COMPOUNDING.

See CRIMINAL LAW—PENALTIES.

COMPROMISE.

See TRUSTS AND TRUSTEES.

CONCEALMENT OF BIRTH.

See CRIMINAL LAW.

CONCILIATION.

Action for agricultural service—*Summary procedure — Motion—Preliminary exception — Time for filing.*] — There is no necessity for a preliminary citation to conciliation in the case of an action by a farmer to recover the price of a service by his bull. 2. An action of that kind may properly be the subject of a summary proceeding. 3. A motion for default of conciliation is in the nature of a preliminary exception. An exception of this sort must be filed within three days after the entry of the cause. *Charbonneau* v. *Alarie*, 5 Que. P. R. 89.

CONCILIATION BOARDS.

See TRADE UNION.

CONCUBINAGE.

See GIFT.

CONDEMNATION.

See SHIP.

CONDITIONAL APPEARANCE.

See PROCESS.

CONDITIONAL SALE.

See DEED—LIEN NOTES ACT—SALE OF GOODS.

CONDONATION.

See HUSBAND AND WIFE.

CONDUCT MONEY.

See DISCOVERY.

CONFEDERATION.

See CROWN.

CONFESSION.

See CRIMINAL LAW—JUDGMENT.

CONFESSION OF JUDGMENT.

See BANKRUPTCY AND INSOLVENCY — BILLS OF EXCHANGE AND PROMISSORY NOTES.

CONFISCATION.

See INTOXICATING LIQUORS — MUNICIPAL CORPORATIONS.

CONFLICT OF LAWS.

Contract—*Lex loci—Lex fori.*]—The *lex fori* must be presumed to be the law governing a contract, unless the *lex loci* be proved to be different. *Can. Fire Ins. Co.* v. *Robinson* (1902), 22 C. L. T. 8, 31 S. C. R. 488.

Contract—*Life insurance—Revocation by will—Application of foreign law—Lien for premiums.*] — A contract of life insurance entered into by a company whose head office is in Ontario, the policy having issued from the head office and providing for payment of the insurance money there, is an Ontario contract, and must be interpreted and carried out in accordance with Ontario law, although the assured lived in Manitoba and made application there to a local agent for the insurance, but an assignment of or dealing with the benefits of the policy made by the assured in Manitoba will be governed by the law of this province relating thereto. The deceased, who was a resident in Manitoba, insured his life with a company whose head office was in Ontario, and by the policy the insurance money was appropriated in favour of his wife, but by his will he absolutely revoked this appropriation and directed that the money should become part of his estate and should be paid to his executor. Section 12 of the Life Assurance, R. S. M. c. 88, as re-enacted by 62 & 63 V. c. 17, permits such a revocation and new disposition of the insurance money, but the corresponding statutory provision in Ontario (R. S. O. 1897, c. 203, s. 160) forbids it:—*Held*, that the law of Manitoba must be applied to the determination of the question as to the right of the assured to make such new disposition, and that the insurance money must be paid to the executor as part of the deceased's estate. *Toronto General Trust Co.* v. *Sewell*, 17 O. R. 442, and *Lee* v. *Adby*, 17 Q. B. D. 309, followed: — *Held*, also, that a will is an instrument in writing within the meaning of the Manitoba statute above referred to. The widow was held entitled to a charge in her favour for insurance premiums paid by her to keep the policy in force. *National Trust Co.* v. *Hughes*, 22 C. L. T. 101, 14 Man. L. R. 41.

Foreign law — *Proof of —Onus.*]—The onus of establishing that a rule of law on a given subject different from that in force in this province, prevails in a foreign country, is upon the party who relies on it. In default of proof of its existence, the law of this province will be applied. *Gogo* v. *Kouri*, 29 Que. S. C. 47.

Sale of goods — *Trade custom—Foreign law — Goods sent on approval — Loss by theft.*]—A buyer who orders goods on approval in a foreign country, whence they are sent to him here, is bound, as to his liability to return them, by the law and custom of trade of such country. So, when by law and the custom of the philatelical trade in England, customers are bound to return stamps sent on approval within six days, and, failing to do so, are held to be purchasers, a party here who holds goods so ordered from that country for ten days, when they are lost by theft, is liable for their price. *Ginn* v. *Laurin*, 32 Que. S. C. 521.

Sale of goods—*Trade custom — Foreign law — Goods sent on approval — Loss by theft.*]—The sale on trial of goods ordered from a vendor abroad is governed, in the absence of special agreement, by the law of the province, and not by that of the country of the vendor. Therefore, when the article is lost during the trial and before manifestation of the willingness to buy, the loss falls on the vendor.—Judgment in *Ginn* v. *Laurin*, 32 Que. S. C. 521, reversed. *Laurin* v. *Ginn*, 18 Que. K. B. 116.

See COMPANY—CONSTITUTIONAL LAW—EVIDENCE—FRAUDULENT CONVEYANCE.

CONSEIL JUDICIAIRE.

See ACTION.

CONSENT.

See EVIDENCE—PARTIES—TRIAL.

CONSERVATORY ATTACHMENT.

Affidavit for.—*See* AFFIDAVIT.

See ATTACHMENT OF GOODS—EXECUTION—SAISIE-CONSERVATOIRE—SAISIE-GAGERIE.

CONSIGNOR AND CONSIGNEE.

See CARRIERS.

CONSOLIDATION OF ACTIONS.

See ACTIONS.

CONSPIRACY.

Combination—*Injury to business—Restraint of trade — Rights of individuals.*]—The plaintiff and defendants were members of a corporation known as "The Winnipeg Grain and Produce Exchange," and dealt in grain both on their own account and for others on commission. The defendants and other members of the Exchange, having come to the conclusion that the plaintiff was using his position as a member to assist other dealers not members to carry on dealings in grain with members in violation of the rules of the Exchange as to commission, agreed amongst themselves that they would neither sell to nor buy grain from the plaintiff; and the defendants afterwards carried out this agreement, thereby causing loss and damage to the plaintiff in his business as a grain dealer. The defendants in so combining were not actuated by any malicious feeling towards the plaintiff, but solely by the desire to serve the business interests of themselves and the members of the Exchange generally, and in the protection of the market created under the rules of the Exchange. They had not attempted to coerce the plaintiff by violence or threats or to induce him or others to break any contract, nor had they tried to induce others to refrain from dealing with the plaintiff:—*Held*, that the acts of the defendants were no more than a lawful exercise of their rights, and that there was no conspiracy to do any illegal act or for any illegal object or to use any means that would be unlawful if used by an individual, and that, in absence of any evidence of malicious or improper motive, the combination and pursuit of its object did not affect any legal right of plaintiff or operate to do him any legal injury. A combination such as defendants had entered into, although resulting in damage to some person or persons, is actionable only in cases where its object is unlawful, or where, if lawful, such object is attained by unlawful means. *Mogul Steamship Co.* v. *McGregor*, [1892] A. C. 25, and *Allen* v. *Flood*, [1898] A. C. 1, followed. *Gibbins* v. *Metcalfe* (1906), 15 Man. L. R. 560, 1 W. L. R. 139, 23 C. L. T. 308.

Criminal conspiracy. *See* CRIMINAL LAW.

Trade competition—Procuring incorporation of company to compete with plaintiffs—Inducing plaintiffs' servants to leave employment — Using information obtained in plaintiffs' employment — Appropriation of plaintiffs' documents and chattels — Master and servant—Breach of confidence—Injunction—Damages—Appeal — Costs—Evidence. *Copeland-Chatterson Co.* v. *Business Systems Limited* (1906), 8 O. W. R. 888, 10 O. W. R. 819.

See *Metallic Roofing Co.* v. *Jose*, C. R. [1909] A. C. 1, digested under TRADE UNION.

See BILLS AND NOTES — CONTRACT—EXTRADITION — FRAUDULENT CONVEYANCES — PARTIES — PARTICULARS — PLEADING — TRADE UNION.

CONSTABLE.

See ASSAULT—COSTS — CRIMINAL LAW—GUARANTIES—MALICIOUS PROSECUTION—MUNICIPAL CORPORATIONS—POLICE—PLEADING—TRADE UNION.

CONSTITUTIONAL LAW.

Act of province of Canada—*Bridge—Dedication to Crown—Right of province of Quebec—B. N. A. Act, s. 109.*]—A bridge constructed by a private person in the province of Quebec, before the confederation of the provinces of British North America, by virtue of an Act of the Parliament of the province of Canada, upon condition that at the expiration of 50 years it will belong to the Crown, becomes at the end of the term, in 1895, the property of the province of Quebec, by virtue of s. 109 of the British North America Act. *Montreal Light Heat and Power Co.* v. *Archambault*, 16 Que. K. B. 110.

Administration of justice—*Inter-provincial jurisdiction — Residence — Foreign judgment.*] — No province can pass laws to operate outside its own territory; and no tribunal established by a province can extend its process beyond the province so as to subject persons or property elsewhere to its decisions; and consequently a judgment obtained in one province by service of process out of the jurisdiction against a domiciled resident of another province, who has not in any way attorned to the jurisdiction, has no extra-territorial validity, even though regularly obtained under the procedure of the former province. *Aliter*, where the rule or judgment in such other province has been obtained upon the non-resident's own application. *Deacon* v. *Chadwick*, 21 C. L. T. 204, 1 O. L. R. 346.

Animals Contagious Diseases Act — *Powers of Dominion Parliament.*]—The Animals Contagious Diseases Act, 1903, is *intra vires* of the Dominion Parliament. *Brooks* v. *Moore* (1906), 13 B. C. R. 91, 4 W. L. R. 110.

Annexation of Cape Breton Island to Nova Scotia—*Treaty of Paris, 1763.*]—By the treaty of Paris, of the 10th February, 1763, the Island of Cape Breton (which had been invaded and taken by the British forces), was ceded by France to the King and Crown of Great Britain. By a proclamation, issued by the King in October, 1763, the Islands of Cape Breton and St. John's were annexed to the Government of Nova Scotia, and the proclamation authorized the Governor to call General Assemblies, in the said Governments respectively, as soon as the circumstances of the colonies would admit. In the year 1784, the Crown, by a commission to the Governor-in-Chief of Nova Scotia, and the Islands of St. John's and Cape Breton, granted a constitution of the Island of Cape Breton, to consist of a Lieutenant-Governor, Council and Assembly, distinct from that of Nova Scotia. The government of the Island continued, however, to be regulated by a Lieutenant-Governor and Council, but no General Assembly was convened, as directed by the commission of 1784. In the year 1820, the Crown, in the commission to the Governor-in-Chief of Nova Scotia, annexed Cape Breton to Nova Scotia. The inhabitants of Cape Breton petitioned the Crown, complaining of the illegality of the re-annexation by the act of the Crown alone, without their consent, or by an Act of the Imperial Parliament, as contrary to the proclamation of 1763 and the commission of 1784:—*Held*, by the Judicial Committee of the Privy Council, that such re-annexation was legal, and that the petitioners were not entitled to a separate constitution under the commission of 1784. *In re Cape Breton* (1846), C. R. 1 A. C. 275.

Appeal — *Jurisdiction — Abandonment.*] —Where a motion to quash an appeal has been refused on the ground that a decision upon a constitutional question is involved, the subsequent abandonment of that question cannot affect the jurisdiction of the Supreme Court of Canada to entertain the appeal. *Pharmaceutical Association of Quebec* v. *Livernois*, 31 S. C. R. 43, 21 C. L. T. 8.

Appeal — *Jurisdiction — Yukon Territorial Court.*]—The Supreme Court of Canada has jurisdiction to hear appeals from the judgments of the Territorial Court of the Yukon Territory, sitting as the Court of Appeal constituted by the Ordinance of the Governor-in-Council of the 18th of March, in respect to the hearing and decision of disputes affecting mineral lands in the Yukon Territory. The Governor-in-Council has no jurisdiction to take away the right of appeal to the Supreme Court of Canada provided by 62 & 63 Vict. c. 11 of the Statutes of Canada. *Hartley* v. *Matson*, 32 S. C. R. 575, 23 C. L. T. 39.

Appeal per saltum — *Ontario — Divisional Court judgment.*]—Under the provisions of s. 26, s.-s. 3 of the Supreme and Exchequer Courts Act, leave to appeal direct from the final judgment of a Divisional Court of the High Court of Justice for Ontario may be granted in cases where there is a right of appeal to the Court of Appeal for Ontario, and the fact that an important question of constitutional law is involved and that neither party would be satisfied with the judgment of the Court of Appeal, is sufficient ground for granting such leave. *Ontario Mining Co.* v. *Seybold*, 31 S. C. R. 125.

Appeal from a summary conviction under the Criminal Code is, in Ontario, to be taken to the Court of General Sessions of the Peace sitting without a jury; and Code, s. 881, constituting such Court the absolute judge as well of the facts as of the law in respect of the conviction or decision appealed against, is *intra vires* of the Dominion Parliament. A statutory provision that the Appellate Court shall try the appeal without a jury is one relating to the procedure and not to the constitution of the Court. *R.* v. *Malloy*, 4 Can. Cr. Cas. 116.

Appeal to Supreme Court of Canada —*Statute giving right of appeal.*]—A motion was made to quash an appeal from the Court of Review, on the ground that the Act 54 & 55 V. c. 25, authorizing such appeals, was *ultra vires*, s. 101 of the B. N. A. Act only providing for the establishment of a Court of Appeal for the Dominion for the better administration of the laws of Canada, and that the right of appeal was a civil right with which the Parliament of Canada could not interfere:—*Held*, refusing the motion, that the power to establish a Court of

Appeal for the Dominion was not so restricted; that the reference to the "better administration of the laws of Canada" in s. 101 of the B. N. A. Act had regard to the establishment of federal Courts other than a general Court of Appeal; and that 54 & 55 V. c. 25 was *intra vires*. The appeal was then heard on the merits and dismissed, following the decision in a previous appeal; 30 S. C. R. 598, 21 C. L. T. 5. *L'Association St. Jean Baptiste de Montreal* v. *Brault*, 21 C. L. T. 253, 31 S. C. R. 172.

Assignments Act, New Brunswick—Validity—Priority of assignee over judgment creditor—Bankruptcy and insolvency. *Tooke Bros. Limited* v. *Brock & Patterson Limited*, 3 E. L. R. 270.

British Columbia Crown Procedure Act, s. 4—*Statutory duty to submit petition of right—Damages for breach—Cause of action—Jury.*] — Under the British Columbia Crown Procedure Act, s. 4, it is the duty of the Provincial Secretary to submit to the Lieutenant-Governor a petition left with him as therein directed for that purpose. His definite refusal to do so gave the petitioner a cause of action involving damages which must be submitted to a jury.—Judgment in 39 S. C. R. 262, 27 C. L. T. 667, affirmed, judgment in 12 B. C. R. 476, 5 W. L. R. 203 set aside. *Fulton* v. *Norton*, C. R., [1908] A. C. 416, 78 L. J. P. C. 29, [1908] A. C. 451, 99 L. T. R. 455, 24 T. L. R. 794.

British Columbia Health Act—*Regulations, s. 20—Sale of milk, etc.—Ultra vires—Field occupied by federal legislation—Dominion Adulteration Act.*]—Section 20 of the provincial government regulations governing the sale of milk and the management of dairies, cow sheds, and milk shops, is *ultra vires*, as being repugnant to the Dominion legislation on the same subject. *Rex* v. *Garvin*, 7 W. L. R. 783, 13 B. C. R. 331.

British Columbia Immigration Act, 1908—*Ultra vires—Dominion Act, 1907, respecting treaty with Japan—Legislative field occupied.*] — The provisions of the British Columbia Immigration Act, 1908, are inoperative, in so far as the subjects of the Japanese Empire are concerned, the field being occupied by Dominion legislation. *In re Nakane and Okazake*, 8 W. L. R. 19, 13 B. C. R. 370.

British Columbia Immigration Act, 1908—*Ultra vires—Legislative field occupied—Dominion Immigration Act—Costs against Crown.*] — Parliament, by the Immigration Act, R. S. C. 1906 c. 93, having provided a complete code dealing with immigration, the British Columbia Immigration Act, 1908, is inoperative. — Costs awarded against the Crown, following *Regina* v. *Little*, 6 B. C. R. 321. *Rex* v. *Narain*, 7 W. L. R. 781, 8 W. L. R. 790; *In re Narain Singh*, 13 B. C. R. 477.

British Columbia Liquor License Act—*Brewer—Dominion license.*]—A brewer, although holding a license under the Dominion Inland Revenue Act to carry on business as such, may not sell beer within the province unless he has first obtained a license under the Provincial Liquor License Act. *R.* v. *Neiderstadt* (1906), 11 B. C. R. 347, 2 W. L. R. 272.

British Columbia Provincial Elections Act — *Powers of Provincial Legislature—B. N. A. Act.*]—Section 91, s.-s. 25, of the British North America Act reserves to the exclusive jurisdiction of the Dominion Parliament the subject of naturalization—that is, the right to determine how it shall be constituted. The Provincial Legislature has the right to determine, under s. 92, s.-s. 1, what privileges as distinguished from necessary consequences, shall be attached to it. Accordingly, the British Columbia Provincial Elections Act (1897, c. 67), s. 8, which provides that no Japanese, whether naturalised or not, shall be entitled to vote, is not *ultra vires*. Judgment in 21 C. L. T. 424, 8 B. C. R. 76, reversed. *Cunningham* v. *Tomey Homma*, [1903] A. C. 151.

Civil servants — *Taxation of.*] — The members of the civil service are not subject as such to an additional personal tax of $2 imposed by the corporation of Quebec under 40 Vict. (Q.), c. 52, s. 3. *Desjardins* v. *City of Quebec* (1900), 18 Que. S. C. 434.

Coal Mines Regulation Act, B.C.—*Employment of Chinamen—Rule prohibiting—Naturalization and aliens.*]—Rule 34 of s. 82 of the Coal Mines Regulation Act as enacted by the Legislature in 1903, which prohibits Chinamen from employment below ground and also in certain other positions in and around coal mines, is in that respect *ultra vires*. *Union Colliery Co.* v. *Bryden*, [1899] A. C. 580, applied and distinguished from *Cunningham* v. *Tomey Homma*, [1903] A. C. 151. *Per* Irving, J.—The calling of the enactment in question a rule or regulation cannot affect its constitutionality, nor can the enactment derive any greater validity by reason of its insertion in the middle of a rule which in other respects may be *intra vires*. *In re Coal Mines Regulation Act*, 24 C. L. T. 342, 10 B. C. R. 408.

Common school fund—*Lands in Ontario—Rights of Quebec—Submission of questions in dispute to arbitration—Jurisdiction of arbitrators to entertain certain claims by Quebec.*]—*Held*, that the arbitrators appointed by the provinces of Ontario and Quebec for the ascertainment and determination of the principal of the Common School Fund and the amount for which Ontario was liable had no jurisdiction to entertain claims by Quebec against Ontario in respect of deductions and remissions allowed by Ontario to the purchasers of certain of the common school lands. — Decision of the Supreme Court of Canada (42 Can. S. C. R. 161), affirmed by P. C. *Atty.-Gen. for Que.* v. *Atty.-Gen. for Ont.* (1910), 30 C. L. T. 825. [1910] A. C. 627.

Concurrent statutes—*Legislative powers of Dominion and provinces—Prohibition and regulation of liquor traffic.*]—The Temperance Act of 1864, commonly known as the Dunkin Act, has never been repealed and is still in force. Its operation, however, is not incompatible with that of the Quebec License Law, 63 Vict. c. 12 (Que.), and both statutes take effect concurrently. A conviction, therefore, under the latter for selling liquor without a license, in a municipality in which a by-law has been passed under the

former, to prohibit the sale of intoxicating liquor, is valid, although the offence is also a breach of, and punishable under the Temperance Act, 1864. *Ex p. O'Neill* (1905), 28 Que. S. C. 304.

Conflict of laws—*Dominion and provincial legislation—Trap-net and justification.*] —In an action for damages for taking plaintiff's trap-net, defendant pleaded justification under R. S. C., 1906, c. 45, s. 47 (7), alleging that plaintiff had no license, although previously warned to procure one, and that s. 8 of said chapter provides for issuing of such license, and that in default of obtaining such license, plaintiff's net was liable to confiscation (s. 92). At trial it was contended on behalf of plaintiff that as the net was set in waters (not being a public harbour) within three miles of shore, the land belonging to the province, the Dominion Statute was *ultra vires* or inapplicable in respect to fisheries in such waters. *Held*, that the legislation in question was legislation to regulate and protect fisheries for benefit of the general public, and that as the Privy Council in *Atty.-Gen. for Can.* v. *Atty.-Gen. for N. S.*, [1898] A. C. 712, has expressed opinion that "it is impossible to exclude [from Dominion Parliament] as not within its power the provision imposing a tax by way of license as a condition of the right to fish," the statute under which defendant justified was *intra vires*, and plaintiff's action must be dismissed. *Miller* v. *Webber* (1910), 8 E. L. R. 460.

Conflict of laws—*Dominion and provincial legislation.*]—Defendant company was incorporated by a special Act of the Dominion Parliament, with powers to supply, sell and dispose of gas and electricity with other powers. Plaintiff company was incorporated by a provincial statute, and were given the exclusive right of supplying electricity within a certain radius. The plaintiff company brought action to restrain defendant company from supplying electricity within the certain radius covered by their charter: —*Held*, that where a field of legislation is within the competence of both the Dominion Parliament and a Provincial Legislature, and both have legislated, in case of conflict, the enactment of the Dominion Parliament shall prevail. Judgment of the Court of King's Bench for Quebec, 16 Que. K. B. 1, 406, and of the Superior Court at Arthabaska, affirmed. *St. Francois* v. *Continental H. & L. Co.*, C. R., [1909] A. C. 49, 78 L. J. P. C. 60, [1909] A. C. 194, 99 L. T. R. 786, 18 Que. K. B. 193.

Construction of statute—*B. N. A. Act, ss. 91, 92, 101—Supreme Court Act, R. S. C. (1906), c. 139, ss. 3, 60—References by Governor-General in Council—Opinions and advice—Jurisdiction of Parliament — Independence of Judges—Judicial functions — Constitution of Courts—Administration of the laws of Canada—Provincial legislative jurisdiction.*]—*Per* Fitzpatrick, C.J., and Davies, Duff and Anglin, JJ.—The provisions of s. 60 of the Supreme Court Act, R. S. C. (1906), c. 139, are within the legislative jurisdiction of the Parliament of Canada.—*Per* Girouard and Idington, JJ.—The provisions of that section assuming to authorise references by the Governor-General in Council to the Judges of the Supreme Court of Canada for their opinions in respect to matters within provincial legislative jurisdiction are *ultra vires* of the Parliament of Canada; but, if the Governments of the Dominion and of a province unite in the submission of the questions so referred, the Judges of the Supreme Court of Canada should entertain the reference.—*Per* Idington, J.—The administration of justice in each province having been assigned exclusively to it the power of Parliament in regard to the same is limited to creating a Court of Appeal and Courts for the administration of the laws of Canada.—*Per* Idington, J.—Parliament has no power to authorise the interrogation of the Supreme Court of Canada except where the question submitted relates to some subject or matter respecting which it is competent for Parliament to legislate and respecting which it has legislated and competently constituted judicial authority in that Court to administer or aid in administering the laws so enacted.—*Per* Idington, J.—*Quære*, as to the constitutionality of adopting a system of interrogations of the judiciary even when the questions are confined to subjects of the kind thus indicated. *In re Reference by the Governor-General in Council*, 43 S. C. R. 536.

Contempt committed out of legislature—*Power of arrest.*]—The House of Assembly of the Island of Newfoundland does not possess, as a legal incident, the power of arrest, with a view of adjudication on a contempt committed out of the House; but only such powers as are reasonably necessary for the proper exercise of its functions and duties as a local legislature. *Semble*, the House of Commons possesses this power only by virtue of ancient usage and prescription; the *lex et consuetudo parliamenti*. *Semble*, the Crown, by its prerogative, can create a Legislative Assembly in a settled colony, subordinate to Parliament, but with supreme power within the limits of the colony for the government of its inhabitants; but *quære*, whether it can bestow upon it an authority, viz., that of committing for contempt, not incidental to it by law. The principles of *Beaumont* v. *Barrett* (1 Moore's P. C. Cases, 59), and *Burdett* v. *Abbott* (14 East. 137), examined. *Kielley* v. *Carson* (1843), C. R. 1 A. C. 169.

Contract — *Hydro-Electric Power Commission.*]—14 O. W. R. 1262, 20 O. L. R. 165, 1 O. W. N. 278, affirmed by D. C. C. A. *Beardmore* v. *Toronto* (1910), 16 O. W. R. 604, 21 O. L. R. 505, 1 O. W. N. 419, 1030.

Controverted Elections Ordinance, N. W. T.—Application to first election of members of the new legislative assembly of the Prov. of Sask.—Law of Parliament—Dismissal of petition on summary application. *Re Prince Albert City Provincial Election, Strachan* v. *Lamont* (N.W.T.), (1906), 3 W. L. R. 571, 4 W. L. R. 411.

Copyright—*Foreign reprints—Notice to English Commissioners of Customs—Entry at Stationers' Hall — Encyclopædia—Prima facie evidence—Imperial Acts—Agreement—License—Assignment—Registration.*] — Section 152 of the Imperial Customs Act, 1876,

39 & 40 Vict. c. 36, requiring notice to be given to the Commissioners of Customs, of copyright and of the date of its expiration, is not in force in this country, notwithstanding the statement to the contrary in the note to table IV. of the appendix to vol. 3 of R. S. O. 1897. That statement is no part of the enactment of the legislature, but is intended merely as a reference, so that the Imperial Copyright Act of 1842, 5 & 6 V. c. 45, is left to its full operation; Garrow and MacLaren, JJ.A., dissenting. *Smiles* v. *Belford*, 1 A. R. 436, followed. A certified cop of the entry at Stationers' Hall of an encyclopædia is *prima facie* evidence of ownership under ss. 18 and 19 of the Act of 1842, and it is not necessary in making a *prima facie* case to prove the facts whereby such sections are made conditions precedent to the vesting of the copyright in one who is not the author. An agreement in writing whereby the plaintiffs, for value, gave certain other persons the right to print and sell a work at not less than certain fixed prices for the remainder of the term of the copyright, except the last 4 years thereof, and under which the plates used in printing were delivered over, which, with all unsold copies, were to be redelivered on the expiry of the agreement, and in which it was agreed not to announce the publication of another edition before such last mentioned period, expressly reserving the copyright to the plaintiffs:—*Held*, to be a license, and not an assignment and so not to require registration under s. 19 of 5 & 6 V. c. 45 (Imp.). Judgment in 5 O. L. R. 184, 23 C. L. T. 68, 1 O. W. R. 743, 2 O. W. R. 117, affirmed. *Black* v. *Imperial Book Co.*, 8 O. L. R. 9, 3 O. W. R. 467, affirmed. The Court, however, declining to decide whether or not *Smiles* v. *Belford*, 1 A. R. 436, was rightly decided. *Imperial Book Co.* v. *Black*, 35 S. C. R. 488.

Copyright—*Works of fine art—Imperial statute.*]—The Imperial Fine Arts Copyright Act, 1862, confers on British subjects and persons resident in British dominions copyright in pictures, drawings and photographs. It extends to the whole of the United Kingdom, but does not extend to any part of the British dominions outside of the United Kingdom. *Tuck & Sons* v. *Priester*, 19 Que. B. D. 629, approved. There is nothing in the Canadian Copyright Act, 1875, or in the International Copyright Acts, which conflicts with this view. Judgment in 22 C. L. T. 172, 3 O. L. R. 697, 1 O. W. R. 259, affirmed. *Graves* v. *Gorrie*, [1903] A. C. 496.

County Court Act, Nova Scotia — *Amendment, 1901, c. 22, s. 12—Intra vires—Appointment of Judge of another district to fill temporary vacancy — Imprisonment — Place of detention—Criminal charge—Lock-up—Presumption.*]—The Provincial Acts of 1901, c. 22, s. 12, amended the County Court Act by providing that "in case of a vacancy in the office of Judge for any district, the Governor in council may designate and appoint the Judge of any other district to act during the whole or any part of such vacancy." Under this provision the Governor in council appointed the Judge of the County Court for district No. 6 to act in district No. 5 during a temporary vacancy in the office of Judge for that district:—*Held*, following *In re County Courts of British Columbia*, 21 S. C. R. 464, that the Act authorizing the appointment was *intra vires* of the provincial legislature, and that the appointment thereunder was a mere extension of the district for which the Judge who had been duly appointed was authorised to act, and that it was not open to the objection of being an encroachment upon the power of appointment vested in the government of Canada under the provisions of the British North America Act, s. 92, s.-s. 14.—The defendant, who was confined in the lock-up of the town of Springhill, on a charge of unlawfully stealing or receiving stolen goods, was tried and convicted before the Judge so appointed, under the Criminal Code, s. 161, of the offence of breaking prison. The evidence shewed that the lock-up was situated in the same building with the office of the police magistrate of the town, and had been used for years as a place of detention for persons charged with the commission of criminal offences, and that there was no other place in the town used for such purpose:—*Held*, that the defendant was a person confined on a criminal charge within the meaning of the Code, tit. I., pt. 1, s. 3 (*u*), and that, with respect to the place of detention, the maxim *omnia præsumuntur rite esse acta* applied, and that the regularity of all proceedings necessary to constitute the lock-up a place of confinement in such cases was to be assumed. *Rex* v. *Brown*, 41 N. S. R. 293.

Creation of new provinces — *Alberta Act — Saskatchewan Act — Ordinances of North-West Territories continued in force—Independent provincial laws—Bills of Sale Ordinance.*]—The Ordinances of the North-West Territories continued in force by the Alberta Act and the Saskatchewan Act, respectively, in each of these provinces, have no different or any more extensive effect than if they were Acts of the legislature of each province respectively. — Consequently the Bills of Sale Ordinance (C. O. c. 43), as a law of one province, is effective only within the limits of that province, and cannot affect the rights or title of persons to goods in the other province, to any greater extent than if it were actually the law of a foreign state. *Jones* v. *Twohey*, 8 W. L. R. 295, 1 Alta. L. R. 267.

Criminal Code, s. 534—Intra vires — Civil action for same cause as criminal prosecution—Motion to stay action. *Moneypenny* v. *Goodman* (1906), 7 O. W. R. 209.

Criminal procedure—*Summoning grand and petit jurors—Constitution of Courts—Ont. Legislature — Dom. Parliament—Criminal Code — Jurors Act.*] — A provincial legislature has power to determine number of grand jurors to serve at Courts of oyer and terminer and general sessions, this being a matter relating to the constitution of the Courts; but the selection and summoning of jurors, including talesmen, and fixing the number of grand jurors by whom a bill may be found, relate to procedure in criminal matters, in respect of which the Dom. Parliament alone has power to legislate. The Dom. Parliament can exercise its power by adopting the provincial law, and has done so by s. 662 of the

Criminal Code. *R.* v. *Cox*, 31 N. S. R. 311, 2 Can. Crim. Cas. 207, approved. *R.* v. *Walton* (1906), 12 O. L. R. 1, 7 O. W. R. 312.

Crown lands — *Transfer to province — Construction of statute—Order in Council.*]—By s. 1 of 48 & 49 V. c. 50 (D.), subsequently re-enacted by R. S. C. c. 47, s. 4, it was provided that all Crown lands which may be shewn to the satisfaction of the Dominion Government to be swamp lands shall be transferred to the province and enure wholly to its benefit and uses:—*Held*, that by its true construction the section did not operate an immediate transfer to the province of any swamp lands or of the profits arising therefrom, but only from the date of the order in council, made after survey and selection as prescribed by the Act directing that the selected lands be vested in the province. Down to that date the profits resulting from the transferred lands belonged to the Dominion. Judgment in 8 Ex. C. R. 337, 24 C. L. T. 163, 34 S. C. R. 287, affirmed. *Attorney-General for Manitoba* v. *Attorney-General for Canada*, [1904] A. C. 799.

Customs legislation—*Conflict with imperial enactment — Duty upon foreign-built ship — Construction of Statutes — Crown—Interest—Tort—Servant of Crown.*] — The Parliament of Canada has legislative authority to impose customs duty upon a foreign-built ship to be paid upon application by her in Canada for registration as a British ship. 2. The provisions in item 409 of the Customs Tariff Act of 1897, which purports to impose a duty upon a foreign-built ship upon application by her for a Canadian register, is not a clear and unambiguous imposition of the duty, such as would support the right of the Crown to exact the payment of such duty. 3. Interest can only be recovered against the Crown by contract or under statute. 4. In the absence of statutory provision, the Crown is not liable to answer for the wrongful act of its officer or servant. *Algoma Central Rw. Co.* v. *Rex*, 22 C. L. T. 85, 7 Ex. C. R. 239.

Deportation of immigrants—*Constitutional law—Powers of Dominion Parliament—Alien Labour Act.*]—*Held*, that *s.* 6 of Dom. statute 60 & 61 V. c. 11, as amended by 1 Edw. VII. c. 13, s. 13, is *intra vires* of Dom. Parliament. The Crown undoubtedly possessed power to expel an alien from the Dom. or to deport him to the country whence he entered it. The above Act, assented to by the Crown, delegated that power to the Dom. Gov., which includes and authorises them to impose such extra-territorial constraint as is necessary to execute the power. Judgment of Anglin, J., *Re Cain, Re Gilhula*, 10 O. L. R. 469, 6 O. W. R. 124, 41 C. L. J. 573, reversed. *Atty.-Genl. for Can.* v. *Cain, Atty.-Genl. for Can.* v. *Gilhula*, [1906] A. C. 542.

Dominion and provincial lands — *Military reserve—Title of the Dom.—Transfer by Imperial Government—B. N. A. Act, 1867, ss. 108, 117.*]—The land in suit, called Deadman's Island, was *de facto* a "reserve" by the Gov. of B. C. under par. 3 of the Proclamation of 1859, and according to evidence a military reserve:—*Held*, that it remained Imperial property at the time of the B. N. A. Act, 1867, and was transferred to the Dom. by special grant dated the 27th March, 1884. It did not, therefore, fall to the colony in virtue of s. 117 of the Act, nor to the Dominion in virtue of s. 108. Judgment in *Attorney-General* v. *Ludgate*, 11 B. C. R. 258, affirmed. *Attorney-General for British Columbia* v. *Attorney-General for Canada*, [1906], A. C. 552.

Dominion civil servants — *Judgment debtors — Salaries—Payment of judgments out of, by instalments—Ultra vires—Discretion.*]—K., M., and W. were officers of the Government of Canada and were in receipt of annual salaries amounting to $1,800, $400 and $700 respectively. K., upon being examined before the Judge of a County Court, was, under 59 V. c. 28, s. 53, ordered to pay the amount of the judgment against him by instalments at the rate of $5 per month. M. and W., being examined before the Judge of another County Court, were, under the same section, ordered to pay the amounts of the judgments against them by instalments at the rate of $5 and $10 per month respectively:—*Held*, Landry, J., dissenting, that the provisions of 59 V. c. 28, s. 53 (N.B.), authorising the Judge or other officer before whom the examination is held, upon it being made to appear to him that the judgment debtor is unable to pay the whole of the debt in one sum, but is able to pay the same by instalments, to make an order that the debtor shall pay the amount of the judgment debt by instalments, in so far as it is sought to apply the same to salary or income derived from office or employment under the Government of Canada, is *ultra vires* of the Provincial Legislature, and, therefore, that orders against K., M., and W. should be quashed. 2. That in the cases of M. and W., there being no evidence or charge of fraudulent conduct on their part, the circumstances shewed such an improper exercise of discretion on the part of the Judge that the orders made by him should be quashed on that ground as well. *Ex p. Killam, Ex p. McLeod, Ex p. Wilkins*, 34 N. B. R. 530.

Dominion Immigration Act, 1907, s. 30—*Order in council—Ultra vires—Immigration—Delegation of duty to Minister—Aliens.*]—The power conferred upon the Governor-General in Council by s. 30 of the Dominion Immigration Act, 1907, to prohibit the landing of immigrants of a specified class, cannot be delegated to the Minister of the Interior; an order in council to that effect was held *ultra vires;* and aliens who had been detained on landing were discharged. *Re Behari Lal*, 8 W. L. R. 129, 13 B. C. R. 415.

Dominion Railway Act, 1888, ss. 187, 188—*Intra vires—British North America Act, 1867, s. 91, s.-s. 29; s. 92, s.-s. 10 (a)—Interpretation Act, R. S. C. 1886, c. 1, s. 7, s.-s. 2 — Construction — "Person" — Railway—Protection of public at highway crossing—Liability of municipality.*] — The Railway Committee of the Privy Council of Canada, by order made under ss. 187 and 188 of the Dominion Railway Act, 51 V. c. 29, directed certain measures to be taken for safeguarding the respondents' railway, which is a through railway, and for the protection of the public in traversing it at certain level crossings where it passes across public streets

at points within or immediately adjoining the boundary of the city of Toronto, and directed the costs thereof to be borne in equal proportions by the railway company and the city corporation. In a suit by the railway company, after the execution of works as directed, to recover the apportioned amount from the corporation:—*Held*, that ss. 187 and 188 were *intra vires* of the Dominion Legislature by force of the British North America Act, 1867, s. 91, s.-s. 29, and s. 92, s.-s. 10 (a).—*Held*, also, that, having regard to s. 7, s.-s. 2, of the Interpretation Act, R. S. C. 1886, c. 1, "person" in s. 188 includes a municipality.—Judgment of Court of Appeal in *Canadian Pacific Rw. Co.* v. *City of Toronto*, 9 O. W. R. 785, affirmed. *City of Toronto* v. *Canadian Pacific Rw. Co.*, [1908] A. C. 54.

Early closing by-laws are within the exclusive jurisdiction of Provincial Legislatures. *Beauvais* v. *Montreal*, 42 S. C. R. 211, affirmed, 17 Que. K. B. 420, 4 E. L. R. 551, and 30 Que. S. C. 427, set aside. *Beauvais* v. *Montreal*, C. R., [1909] A. C. 459.

Elections Act, British Columbia — *Right to vote—Naturalized foreigner—Leave to appeal.*]—The judgment in 7 B. C. R. 368, 21 C. L. T. 62, in which it was held that s. 8 of the Provincial Elections Act, which purports to prohibit the registration of Japanese as provincial voters, is *ultra vires*, was affirmed. Leave to appeal to the Judicial Committee of the Privy Council was granted, the Court being of the opinion that, if it were now before the Privy Council, leave would be granted. *In re Tomey Homma*, 21 C. L. T. 424, 8 B. C. R. 76.

Exemptions from taxation—*Land subsidies of the Canadian Pacific Railway — Extension of the boundaries of Manitoba—Statutes — Contract—Grant in præsenti — Cause of action—Jurisdiction—Waiver.*] — The land subsidy of the Canadian Pacific Railway Company authorised by 44 V. c. 1 (D.), is not a grant *in præsenti*, and, consequently, the period of 20 years of exemption from taxation of such lands provided by clause 16 of the contract for the construction of the Canadian Pacific Railway begins from the date of the actual letters patent of grant from the Crown, after they have been from time to time earned, selected, surveyed, allotted, and accepted by the Canadian Pacific Railway Company. The exemption was from taxation "by the Dominion, or any province hereafter to be established, or any municipal corporation therein:"—*Held*, that when, in 1881, a portion of the North-West Territories in which this exemption attached was added to Manitoba, the latter was a province "thereafter established," and such added territory continued to be subject to the said exemption from taxation. The limitation in respect of legislation affecting the territory so added to Manitoba, by virtue of the Dominion Act, 44 V. c. 14, upon the terms and conditions assented to by the Manitoba Acts 44 V. (3rd sess.), cc. 1 and 6, are constitutional limitations of the powers of the legislature of Manitoba in respect to such added territory, and embrace the previous legislation of the Parliament of Canada relating to the Canadian Pacific Railway and the land subsidy in aid of this construction. Taxation of any kind attempted to be laid upon any part of such land subsidy by the North-West Council, the North-West Legislative Assembly, or any municipal or school corporation therein, is Dominion taxation within the meaning of clause 16 of the Canadian Pacific Railway contract providing for exemption from taxation. Per Taschereau, C.J.C.:—In the case of the Springdale School District, as the whole cause of action arose in the North-West Territories, the Court of King's Bench for Manitoba had no jurisdiction to entertain the action or to render the judgment appealed from in that case, and such want of jurisdiction could not be waived. Judgment in 14 Man. L. R. 382, 23 C. L. T. 159, varied. *Rural Municipality of North Cypress* v. *Canadian Pacific Rw. Co., Rural Municipality of Argyle* v. *Canadian Pacific Rw. Co., Springdale School District* v. *Canadian Pacific Rw. Co.*, 25 C. L. T. 102, 35 S. C. R. 550.

Expenses of criminal justice—*Powers of Provincial Legislatures — Imposing on municipalities expenses of criminal justice—57 V. c. 19, s. 1 (N.B.)—Intra vires.*]—See *McLeod* v. *Municipality of Kings*, *Morison* v. *Municipality of Kings*, 35 N. B. R. 163.

Explosives — *Statute — Construction — Ejusdem generis rule — Constitutional law —Petroleum Inspection Act.*]—The defendant was convicted for a breach of a city by-law, which enacted that no larger quantity than three barrels of rock oil, coal oil, or other similar oils, nor any larger quantity than one barrel of crude oil, burning fluid, naphtha, benzole, benzine, or "other combustible or dangerous materials," should be kept at any one time in a house or shop in the city, except under certain limitations. The by-law was passed under s.-s. 17 of s. 542 of the Municipal Act, R. S. O. c. 223, such section being headed, "Storing and Transportation of Gunpowder," and providing "for regulating the keeping and storing of gunpowder and other combustible or dangerous materials," and being one of a group of sections under division VI. of the Act, headed, "Protection of Life and Property," sub-division 3 of the said division, which included s. 542, being under the heading "Prevention of Fires:"—*Held*, that s.-s. 17 authorised the passing of the by-law, and that the conviction could be supported thereunder, for that the words "other combustible or dangerous materials" were not limited by the *ejusdem generis* rule to gunpowder or other similar substances, but would include the substances set out in the by-law; and that such legislation was not superseded by Dominion legislation, for the Petroleum Inspection Act, 1899, 62 & 63 V. c. 27 (D.), dealing with the subject, was expressly made conformable thereto. *Rex* v. *McGregor*, 22 C. L. T. 290, 1 O. W. R. 358, 4 O. L. R. 198, 5 Can. Cr. Cas. 485.

Extra-provincial corporations — *Act respecting licensing of — Intra vires—Company carrying on business in Ontario.*]—The plaintiffs, a company incorporated in the State of Pennsylvania, to carry on a printing, publishing and bookbinding business, with the head office in that State, had, as one of its departments, under a special charter therefor, procured in the same State, and with the same head office, what was

called "The International Correspondence School," the object being to give, by correspondence through the mails, instruction to applicants for enrollment as students, the company having representatives throughout the province for procuring such applications, all of which were submitted to the head office for approval, and, if accepted, the certificates of enrollment were sent direct to the students with the lesson and instruction papers, followed at stated intervals by further instruction and lesson papers, pamphlets, etc., and, when the contract so provided, lesson books in bound form, drawing materials, photographic and other outfits, were lent to the students. The company had an office in Toronto, over which their name was affixed, with a superintendent, cashier, and a number of stenographers, to which all moneys collected in this province were forwarded, and from there remitted to the head office; while the bound lesson books, etc., for convenience of passage through the customs, were sent from the head office to Toronto, and after the payment of the duties were forwarded by the postmaster to the students. Salaries were paid by the cashier at Toronto out of the moneys in his hands:—*Held*, that the Act 63 V. c. 24 (O.), for licensing of extra-provincial corporations, was *intra vires* the Provincial Legislature, as coming within s. 92, s.-s. 2, of the B. N. A. Act, being a mode of direct taxation within the province, or as relating to the issuing of licenses in order to the raising of a revenue; and that the plaintiffs were carrying on business in Ontario within the meaning of the Act, so as to necessitate their taking out a license, and their omission to do so precluded them from maintaining an action for the recovery of moneys claimed to be due from one of the enrolled students. *International Text Book Co.* v. *Brown*, 8 O. W. R. 835, 9 O. W. R. 369, 13 O. L. R. 644.

Extradition—*Establishment of federal Court—Provincial Courts — Prohibition — Refusal—Appeal to Court of King's Bench.*]—The refusal of a Judge of the Superior Court to grant leave to issue a writ of summons in a demand for prohibition is a judgment from which an appeal lies to the Court of King's Bench.—2. The right of supervision and control of the Superior Court and its Judges given by Art. 50, C. P. C., does not extend to a Federal Court established to administer the extradition laws, and the remedy by Art. 1003, C. P. C., is not open against the latter Court.—3. The Federal Government has power by the constitution to establish a Court presided over by a commissioner appointed for that purpose to administer the extradition laws. *Gaynor* v. *Lafontaine*, 14 Que. K. B. 99.

See 36 S. C. R. 247.

Ferry—*Creation and license—Jura regalia —Dominion or province—Public harbour—River improvements.*]—The right to create and license a ferry, having been one of the *jura regalia* or royalties which belonged to the provinces of the Union, so continued after Confederation, as declared by s. 109 of the B. N. A. Act; and therefore the lease of a ferry between the town of Sault Ste. Marie, in the province of Ontario, and the town of Sault Ste. Marie, in the State of Michigan, granted by the Dominion Government in 1897, was invalid. The exclusive legislative authority over ferries given to the Dominion Parliament by s.-s. 13 of s. 91, does not carry with it any right to grant ferries. Even if the St. Mary's river at the point in question were a public harbour which passed under s. 108 to the Dominion, this would not give the Dominion Government the right to grant an exclusive ferry privilege. But it is not a public harbour; something more is necessary to convert an open river front into a public harbour than the erection along it of four or five wharves projecting beyond the shallows of the shore. The existence of improvements in the river bed in front of the town, belonging to the Dominion Government, afforded no reason for the entire control of the ferry across the river being held to be in the Dominion Government. The Dominion Parliament or Government have a right to regulate such ferries as the ferry in question, for the purpose of preventing them from interfering with public harbours and river improvements of the Dominion. *Perry* v. *Clergue*, 23 C. L. T. 91, 5 O. L. R. 357, 2 O. W. R. 89.

Ferry—*Exclusive privilege — North-west Territories Legislative Assembly — Municipal institutions—Property and civil rights—Delegation of powers—License—Tolls—Highway —By-law—Private ferry.*]—The Legislative Assembly of the Territories has power to pass an Ordinance providing for the issue of an exclusive license to ferry over a navigable river, and for the imposition of tolls. Such power is conferred upon the Assembly by one, if not both, of the following provisions of the Dominion Order in Council of 26th June, 1803—made under the authority of the North-West Territories Act—which authorises the passing of Ordinances in relation to:—3. Municipal institutions in the Territories — subject to any legislation by the Parliament of Canada as heretofore or hereafter enacted. (See B. N. A. Act, s. 92, s.-s. 8).—8. Property and civil rights in the Territories—Subject to any legislation of the Parliament of Canada on these subjects. (See B. N. A. Act, s. 92, s.-s. 16.)—The power of the Legislative Assembly to delegate its powers discussed. The question of the extent of the jurisdiction of the Legislative Assembly over surveyed highways, the control of which has been given by Parliament to the Legislative Assembly, discussed. A municipality having by Ordinance been given, with respect to a certain portion of a navigable river, all the powers of the various officers named in the Territorial Ordinance respecting ferries:—*Held*, that it was not necessary for the municipality to exercise its powers by by-law; and that an agreement with, and a license to, the licensee, both under the corporate seal of the municipality, were sufficient. The plaintiff held an exclusive license for a ferry. Another ferry was operated within the plaintiff's territory by an unincorporated association of persons, which issued tickets to its members to the amount of their respective "shares" in the association:—*Held*, that this latter ferry was not a private ferry, and that the plaintiff's right was thereby infringed. *Humberstone* v. *Dinner*, 2 Terr. L. R. 106.

Affirmed, 26 S. C. R. 252, 16 C. L. T. 258, R. 213.

Ferries Act—*Interprovincial and international ferries—Establishment or creation—License—Franchise — Exclusive right.*]—An Act respecting Ferries, R. S. C. c. 97, as amended by 51 V. c. 23, is *intra vires* of the Parliament of Canada. The Parliament of Canada has authority to, or to authorize the Governor-General in Council to, establish or create ferries between a province and any British or foreign country, or between two provinces. The Governor-General in Council, if authorized by Parliament, may confer, by license or otherwise, an exclusive right to any such ferry. *In re Jurisdiction as to Ferries*, 25 C. L. T. 106; *In re International and Interprovincial Ferries*, 36 S. C. R. 206.

Fisheries Act—*Powers of Dominion Parliament—Exclusive rights of fishery over provincial property—Ultra vires—License fees—Illegality—Damages.*]—In an action for damages for an alleged invasion of the plaintiff's rights by the defendant (both being licensees under the Fisheries Act, R. S. C. c. 95, s. 4, authorized to use trap nets having leaders of 10 fathoms, for the purpose of taking deep sea fish, other than salmon, in the public waters of St. Margaret's Bay, in the province of Nova Scotia), in setting his net within the distance prohibited by the general fishery regulations of Nova Scotia, under penalty provided by the Act, it was *held*, following Attorney-General of Canada v. Attorney-General of Ontario, [1898] A. C. 701, that the Act, so far as it empowered the granting of exclusive rights of fishery over provincial property, was *ultra vires;* and the fact that the plaintiff had a leader of 25 fathoms length attached to his trap, whereas he had only paid license fees in respect to one of 10 fathoms, was not an illegality relevant to the plaintiff's case, and was too remote to prevent recovery of damages. *Young* v. *Harnish*, 37 N. S. R. 213.

Foreshore of harbour — *British North America Act, 1867, ss. 91, 92, 108—Power of the Dominion to legislate for provincial Crown property—Dominion Act, 4½ V. c. 1, s. 18 (a)—Provincial foreshore.*]—Section 108 of the British North America Act, 1867, empowers the Dominion Parliament to legislate for any land, including foreshore, which is proved to form part of a public harbour. Sections 91 and 92, read together, empower the Dominion to dispose of provincial Crown lands, and therefore of a provincial foreshore, for the purposes of the respondents' railway, which is a trans-continental railway connecting several provinces:—*Held*, that s. 18 (*a*) of the respondents' incorporating Dominion Act (44 V. c. 1), is not controlled by the Consolidated Railway Act, 1879, and applies to provincial as well as Dominion Crown lands.—Power given thereunder to appropriate the foreshore in question includes a power to obstruct any rights of passage previously existing across it.—Judgment in 11 B. C. R. 289, 1 W. L. R. 299, affirmed. *Attorney-General for British Columbia* v. *Canadian Pacific Rw. Co.*, [1906] A. C. 204.

Franchise before confederation — *Debts of province of Canada.*]—A toll bridge with its necessary buildings and approaches was built and maintained by Y. at Chambly, in the province of Quebec, in 1845, under a franchise granted to him by an Act, 8 Vict. c. 90, of the late province of Canada, in 1845, on the condition therein expressed that on the expiration of the term of fifty years the works should vest in the Crown as a free bridge for public use, and that Y., or his representatives, should then be compensated therefor by the Crown, provision being also made for ascertaining the value of the works by arbitration and award:—*Held*, affirming the judgment of the Exchequer Court of Canada, 6 Ex. C. R. 103, that the claim of the suppliants for the value of the works at the time they vested in the Crown on the expiration of the fifty years franchise was a liability of the late province of Canada coming within the operation of the 111th section of the British North America Act, 1867, and thereby imposed on the Dominion; that there was no lien or right of retention charged upon the property; and that the fact that the liability was not presently payable at the date of the passing of the British North America Act, 1867, was immaterial. *The Attorney-General of Canada* v. *The Attorney-General of Ontario*, [1897] A. C. 199, 25 Can. S. C. R. 434, followed.—*Held*, also, that the arbitration provided for by the third section of the Act, 8 V. c. 90, did not impose the necessity of obtaining an award as a condition precedent, but merely afforded a remedy for the recovery of the value of the works at a time when the parties interested could not have resorted to the present remedy by petition of right, and that the suppliants' claim for compensation under the provisions of that Act, 8 V. c. 90, was a proper subject for petition of right within the jurisdiction of the Exchequer Court of Canada. *Yule* v. *Regina*, 30 S. C. R. 24, 19 C. L. T. 371.

Fraudulent entry of horses at exhibitions.]—The Act to Prevent the Fraudulent Entry of Horses at Exhibitions, R. S. O. 1897 c. 254, is within the powers of the Ontario Legislature. A conviction of the defendant for an offence against that Act, with an adjudication of a fine and imprisonment in default of payment, was affirmed. *Rex* v. *Horning*, 24 C. L. T. 384, 8 O. L. R. 215, 3 O. W. R. 740, 8 Can. Cr. Cas. 268.

Gambling—*Legislative powers of Territories.* — R. O. (1888), c. 38, s. 5, enacts that "every description of gaming and all playing of faro, cards, dice, or other games of chance with betting or wagers for or stakes of money, or other things of value, and all betting and wagering on any such games of chance, is strictly forbidden in the Territories, and any person convicted before a justice of the peace, in a summary way, of playing at, or allowing to be played at, on his premises, or assisting, or being engaged in any way, in any description of gaming as aforesaid, shall be liable to a fine for every such offence, not exceeding one hundred dollars, with costs of prosecution, and, on nonpayment of such fine and costs forthwith after conviction, to be imprisoned for any term not exceeding three months:"—*Held*, that the evident purpose was to create an offence, subjecting the offender to criminal procedure, in the interest of public morals, and not for the protection of civil rights; and that the enactment therefore came within the decision

in *Russell* v. *The Queen*, 7 App. Cas. 829, and consequently was *ultra vires*. *Regina* v. *Keefe*, 1 Terr. L. R. 280.

Government railway — *Negligence of fellow-servant—Common employment — Lord Campbell's Act—Widow and children—Action—Bar—Damages.*]—Art. 1056, C. C., embodies the action previously given by a statute of the province of Canada re-enacting Lord Campbell's Act.—*Robinson* v. *Canadian Pacific Rw. Co.*, [1892] A. C. 481, distinguished.—A workman may so contract with his employer as to exonerate the latter from liability for negligence, and such renunciation would be an answer to an action under Lord Campbell's Act.—*Griffiths* v. *Earl Dudley*, 9 Que. B. D. 357, followed.—In s. 50 of the Government Railways Act, R. S. C. c. 38, the words "notice, condition, or declaration" do not include a contract or agreement by which an employee has renounced his right to claim damages from the Crown for injury from negligence of his fellow-servants.—*Vogel* v. *Grand Trunk Rw. Co.*, 11 S. C. R. 612, disapproved.—An employee of the Intercolonial Railway became a member of the Intercolonial Railway Relief and Assurance Association, to the funds of which the Government contributed annually $6,000. In consequence of such contribution, a rule of the association provided that the members renounced all claims against the Crown arising from injury or death in the course of their employment. The employee having been killed in the discharge of his duty by negligence of a fellow-servant:—*Held*, reversing the judgment of the Exchequer Court, 6 Ex. C. R. 276, 19 C. L. T. 202, that the rule of the association was an answer to an action by his widow under Art. 1056, C. C., to recover compensation for his death.—The doctrine of common employment does not prevail in the province of Quebec. *Grenier* v. *Regina*, 19 C. L. T. 378, 30 S. C. R. 42.

Illegal fishing—*Three-mile limit—Legislative jurisdiction—Continuous chase—Capture on high seas.*]—The Dominion cruiser "Kestrel" sighted the American schooner "North" on the fishing grounds in Quatsino Sound, within the three-mile limit off the coast of British Columbia, having four dories out and evidently engaged in fishing for halibut, contrary to the provisions of R. S. C. c. 94. On being chased by the cruiser, the schooner picked up two of her dories, and stood out to sea. The cruiser kept up a continuous chase (picking up one of the dories on the way), overhauled and seized the schooner on the high seas, some distance outside the three-mile limit, and towed her into port at Winter Harbour, B.C., where she was properly attached and libelled in the Exchequer Court of Canada. At the time of seizure, freshly caught halibut were lying upon the deck of the schooner, and there were other evidences that she had been recently engaged in fishing:—*Held*, affirming the judgment of Martin, Loc. J., *Rex* v. *The "North,"* 11 B. C. R. 473, 2 W. L. R. 74, Girouard, J., dissenting, that the Parliament of Canada, under the provisions of the British North America Act, 1867, has exclusive jurisdiction to legislate with respect to fisheries within the three-mile limit off the coasts of Canada; that the cruiser had the right to immediately pursue the schooner sighted within the three-mile limit beyond that limit on to the high seas for the infraction of a municipal regulation of Canada; and that the seizure there made was justified by the rules of international law. *The "North"* v. *Rex*, 26 C. L. T. 380, 37 S. C. R. 385.

Incorporation of railway company by provincial statute—*Work for general advantage of Canada — Declaration of, by Dominion statute—Application of provincial Crown Franchises Regulation Act.*]—The defendants were originally incorporated in 1897 by a Provincial Act. In 1898, by a Dominion Act, their objects were declared to be works for the general advantage of Canada and thereafter to be subject to the legislative authority of the Parliament of Canada and the provisions of the Railway Act:—*Held*, setting aside an order allowing the Provincial Attorney-General to bring an action at the instance of a relator under the Crown Franchises Regulation Act, that the said Act did not apply to the company. *Attorney-General for British Columbia* v. *Vancouver, Victoria, and Eastern Rw. and Navigation Co.*, 9 B. C. R. 338.

Indian lands—*Extinguishment of Indian title—Payment by Dominion — Liability of province—Exchequer Court Act, s. 32—Dispute between Dominion and province.*] — Where a dispute between the Dominion and a province of Canada, or between two provinces, comes before the Exchequer Court as provided by s. 32 of R. S. C. 1906 c. 140, it should be decided on a rule or principle of law, and not merely on what the Judge of the Court considers fair and just between the parties.—In 1873 a treaty was entered into between the government of Canada and the Salteaux tribe of Ojibeway Indians inhabiting land acquired by the former from the Hudson Bay Co. By that treaty the Salteaux agreed to surrender to the government all their right, title, and interest in and to said lands, and the government agreed to provide reserves, maintain schools, and prohibit the sale of liquor therein, and allow the Indians to hunt and fish, to make a present of $12 for each man, woman, and child in the bands, and pay each Indian $5 per year, and salaries and clothing to each chief and sub-chief; also to furnish farming implements and stock to those cultivating land. At the time the treaty was made, the boundary between Ontario and Manitoba had not been defined. When it finally was determined in 1884, it was found that 30,500 square miles of the territory affected by it was in Ontario, and in 1903 the Dominion government brought before the Exchequer Court a claim to be reimbursed for a proportionate part of the outlay incurred in extinguishing the Indian title. The province disputed liability, and, by counterclaim, asked for an account of the revenues received by the Dominion while administering the lands in the province under a provisional agreement pending the adjustment of the boundary.—Privy Council *held*, that the Dominion Government, in concluding the treaty with the Indians, was not acting for, on behalf of, nor as trustee for Ontario, but for the benefit of the whole Canadian nation, and, therefore, was not entitled to any contribution. Dictum of Lord Watson in *St. Catharines Milling and Lumber Co.* v. *Regina*, 17 A. C. 46, 58 L. J. P.

C. 64, disapproved.—Judgment of Supreme Court of Canada, 42 S. C. R. 1, affirmed. Judgment of Exchequer Court of Canada, 10 Ex. C. R. 445, 27 C. L. T. 318, set aside. *Dominion of Canada* v. *Province of Ontario*, C. R., [1910] A. C. 301, 30 C. L. T. 832, [1910] A. C. 637, 80 L. J. P. C. 32, 103 L. T. R. 331, 26 T. L. R. 681.

Indian lands—*Surrender — Proprietary right—Power of disposition—B. N. A. Act, s. 91—Leave to appeal.*]—Lands in Ontario surrendered by the Indians by the treaty of 1873, belong in full beneficial interest to the Crown as representing the province, subject only to certain privileges of the Indians reserved by the treaty. The Crown can only dispose thereof on the advice of the Ministers and under the seal of the province. *St. Catharines Milling Co.* v. *The Queen*, 14 App. Cas. 46, followed. The Dominion Government having purported, without the consent of the province, to appropriate part of the surrendered lands under its own seal as a reserve for the Indians in accordance with the said treaty:—*Held*, that this was *ultra vires* the Dominion, which had, by s. 91 of the British North America Act, exclusive legislative authority over the lands in question, but had no proprietary rights therein. The consent of the province having been subsequently provided for by a statutory agreement between the two governments, the special leave to appeal granted upon the representation of the general public importance of the question involved would probably have been rescinded if a petition to that effect had been made. Judgment in 32 S. C. R. 1, and 32 O. R. 295, affirmed. *Ontario Mining Co.* v. *Seybold*, [1903] A. C. 73.

Indians—*Treaties with — Contingent annuities — Debts of the province of Canada —Res judicata.*] — The award complained of by the province of Quebec determined that certain payments made by the Dominion of Canada in virtue of the Huron and Superior Treaties with the Ojibeway Indians for arrears of augmented annuities and interest from 1867 to 1873, and for increased annuities in excess of the fixed annuities with interest paid subsequently should be taken into account and included in the debt of the late province of Canada mentioned in the 12th section of the British North America Act, 1867:—*Held*, affirming the decision of the arbitrators, that the question of these contingent annuities had been considered and decided by Her Majesty's Privy Council in the case of *The Attorney-General of Canada* v. *The Attorney-General of Ontario* (1897), A. C. 199, and that the payments so made by the Dominion were recoverable from the provinces of Ontario and Quebec conjointly in the same manner as the original annuities. *Province of Quebec* v. *Dominion of Canada Arbitration, In re Indian Claims*, 30 S. C. R. 151.

Interest—*Rate of—Mortgage — Redemption—British company lending money in Canada—Contract—Application of law of Canada —Tender of mortgage money—Agents in Canada—Bill of exchange.*]—In an action to compel the defendants, mortgagees in Great Britain, to accept the principal money and interest due on a ten-year mortgage, which had run for six and one-half years, under the provisions of R. S. C. c. 127, s. 7, in which it was contended that that section was *ultra vires* of the Dominion Parliament, and that the tender was not made to the proper agents:—*Held*, that the section was *intra vires* of the Dominion Parliament, and it was not restricted in its application to such mortgages as are mentioned in s. 3 of the Act, but applies to every mortgage on real estate executed after the 1st July, 1880, where the money secured "is not under the terms of the mortgage payable till a time more than five years after the date of the mortgage." 2. That the words of s. 25 of R. S. O. 1897 c. 205, are wide enough to apply to mortgages executed prior to the passing of that Act. 3. That the defendants' Imperial Act of incorporation gave them the right to lend money in Canada in the same way as an individual could do, but gave them no higher or other rights. 4. That the loan being made, the property situated, and the mortgage giving the option of payment in Canada, the law of Canada must govern in relation to the contract and its incidents. 5. That the agency of the persons to whom the tender was made was established and that the tender of a bill of exchange was sufficient under the terms of the mortgage. *Bradburn* v. *Edinburgh Life Assurance Co.*, 23 C. L. T. 199, 5 O. L. R. 657, 2 O. W. R. 253.

Insurance company—*License for British Columbia—Insurance Act of Canada.*]—H. was the authorised agent at Vancouver of an insurance company incorporated in Ontario but which was not registered or licensed under the provisions of any British Columbia statute or of the Insurance Act of Canada. H. was convicted by the police magistrate for Vancouver, under the provisions of the Insurance Act, for carrying on an insurance business without a license:—*Held*, that the Act is *intra vires* of the Parliament of Canada. *Regina* v. *Holland*, 20 C. L. T. 343, 7 B. C. R. 281.

Jurisdiction of Parliament of Canada on matters exclusively within its legislative powers is of paramount authority, and is not subject to restrictions and formalities imposed by law relating to property and civil rights in the provinces. *Veilleux* v. *Atlantic & Lake Superior Rw. Co.* (1910), 39 Que. S. C. 127.

Jurisdiction of the Supreme Court of British Columbia.] — The Supreme Court of British Columbia has jurisdiction to grant a decree of divorce between persons domiciled in that province and such jurisdiction may be exercised by a single Judge of that Court. *Sharpe* v. *Sharpe* (1877), 1 B. C. R. 25, and *Sheppard* v. *Sheppard* (1908), 13 B. C. R. 486, approved. Judgment of Mr. Justice Clement, at trial, 7 W. L. R. 29, 13 B. C. R. 281, reversed. *Watts* v. *Watts*, C. R., [1908] A. C. 511, 77 L. J. P. C. 121, [1908] A. C. 281, 24 T. L. R. 911, 99 L. T. R. 764, 51 Can. Gaz. (London) 487, 44 C. L. J. 46, 780.

Jury Ordinance, N. W. T.—*Continuance in Alberta—Alberta Act—North-West Territories Act.*]—The Ordinance respecting Juries was not brought into force in the province of Alberta by reason of the repeal of the North-West Territories Act by R. S. C.

1906, schedule "A" (R. S. C. vol. 3, p. 2941).—The effect of 6 & 7 Edw. VII. c. 44 (D.) considered. Independently of the North-West Territories Act, 1905 (4 & 5 Edw. VII. c. 27 (D.), the effect of the Alberta Act was not to repeal the former North-West Territories Act but to prevent its remaining in force *proprio vigore;* and (s. 16) to continue in force the law therein contained as a body of law, in the same manner as the common and statute law of England, as it stood on the 15th July, 1870, was introduced into the Territories. *Toll* v. *Canadian Pacific Rw. Co.*, 8 W. L. R. 795, 1 Alta. L. R. 318, 8 Can. Ry. Cas. 294.

Jury Ordinance. N. W. T.—*North-West Territories Act — Repeal — Restoration.*]—The effect of c. 44 of 6 Edw. VII. (D.), was to annul the repeal of the North-West Territories Act, so far as Alberta and Saskatchewan were concerned, and the Ordinance respecting juries is in consequence not in force. *Hansen* v. *Canadian Pacific Rw. Co.*, 6 Terr. L. R. 420.

Law Society Act, R. S. M. 1902, c. 95, s. 65—*Intra vires—Bargain between solicitor and client—Contract to share fruits of litigation — Champerty and maintenance — Criminal Code, s. 12—Obsolete criminal laws —Property and civil rights.*]—Section 65 of the Law Society Act, R. S. M. 1902, c. 95, which permits a solicitor to contract with any person as to the remuneration to be paid him for services, and to receive a portion of the proceeds of the subject-matter of the action in which he is employed, and to receive remuneration by way of commission on the amount recovered, etc., is *intra vires* of the Manitoba legislature. By s. 12 of the Criminal Code,, R. S. C. 1906 c. 146 (taken from 51 Vict. c. 33, s. 1 (D.), it is declared that the criminal law of England as it existed on the 15th July, 1870, in so far as it is applicable to the Province of Manitoba, and so far as not repealed, varied, etc., shall be the criminal law of Manitoba:—*Held*, that, by this enactment, Parliament did not intend to introduce into the province of Manitoba obsolete criminal laws or any law inapplicable to the then existing conditions of society in that province; and though maintenance, including champerty, is still technically an offence, it is not now treated as a crime, and is only invoked for the purpose of raising a defence that an agreement is illegal; and to remove this illegality in a contract and make it enforceable would belong to the legislative authority which has exclusive jurisdiction over property and civil rights. If maintenance and champerty had been declared by Dominion statute to be criminal offences throughout Canada, s. 65 of the Law Society Act would be *ultra vires*, but, as the legislation stands, they have not been introduced as actual criminal offences applicable to Manitoba. *Meloche* v. *Deguire*, 34 S. C. R. 24, *Hopkins* v. *Smith*, 1 O. L. R. 659, and *Briggs* v. *Fleutot*, 10 B. C. R. 309, do not apply to the condition of the law of Manitoba. Judgment of the County Court of Winnipeg in favour of the plaintiffs, solicitors, in an action to recover a portion of the amount received by the defendant as the fruits of litigation carried on by the plaintiffs for the defendant, pursuant to a contract for payment of half the amount recovered, affirmed. *Thomson* v. *Wishart* (1910), 13 W. L. R. 445.

Legislative Assembly — *Powers of speaker — Precincts of house — Expulsion from.*]—The public have access to the legislative chambers and precincts of the House of Assembly, as a matter of privilege only, under license either tacit or express, which can be revoked whenever necessary in the interest of order and decorum. The power of the Speaker and officers of the House to preserve order may be exercised during the intervals of adjournment between sessions as well as when the House is sitting. A staircase leading from the street entrance up to the corridor of the House is a part of the precincts of the House, and a member of the public who conducts himself thereon so as to interfere with the discharge by members of their public duties may lawfully be removed. Judgment in 36 N. S. R. 211, reversed, and a new trial ordered. *Payson* v. *Hubert*, 24 C. L. T. 168, 34 S. C. R. 400.

Legislative Assembly—*Power to punish for contempt—Court of record — Limited jurisdiction—Warrant—Seal.*] — A provincial House of Assembly is not a general Court of Record, but only one for the purposes specified in R. S. N. S., 5th ser., c. 30. 2. A warrant under the hand and seal of the Speaker of the Nova Scotia House of Assembly, reciting that T. was by resolution of the House adjudged guilty of a contempt thereof, committed in the face of the House, and was adjudged to be committed to gaol, commanded the Sergeant-at-Arms to convey T. to gaol and the gaoler to receive him:—*Held*, that the commitment was not under the Act; that the House can only proceed for contempt in the way pointed out by the Act and not by a general warrant. 3. Assuming that the House had the right to punish for a contempt committed in its face while acting as a Court of Record inquiring into a libel, the warrant should shew that the House was sitting as a Court of Record, which it did not shew. *Van Sandatt* v. *Turner*, 6 Q. B. 783, followed. If the House was a Court of Record, the warrant was bad because not under seal and not running in the name of Her Majesty. 5. Even if the House had power to commit for contempt in excess of that specially conferred by the statute, it could not commit to the common gaol, but only to the custody of an officer of the House. *In re Thomas*, 21 C. L. T. 503.

Legislative jurisdiction—*Crown lands —Terms of union of British Columbia, Art. 11—Railway aid — Provincial grant to Dominion — Intrusion — Provincial legislation — Water-records within "railway belt" — Construction of statute—B. N. A. Act, 1867, ss. 19, 109, 117, 146 — Imperial order in Council, 16th May, 1871 — "Water Clauses Consolidation Act, 1897," R. S. B. C. c. 190.*] — While lands within the "railway belt" of B. C. remain vested in the Government of Can. in virtue of the grant made to it by the Government of B. C. pursuant to 11th article of the "Terms of Union" of that province with the Dominion, the Water Commissioners of the province of B. C. are not competent to make grants of water-records, under provisions of "Water

Clauses Consolidation Act, 1897," R. S. B. C. c. 190, which would, in operation of the powers thereby conferred, interfere with the proprietary rights of the Dominion therein. *R.* v. *Farwell*, 14 S. C. R. 392, followed.—Judgment appealed from 12 Ex. C. R. 295, 29 C. L. T. 713, affirmed. *Burrard Power Co.* v. *R.* (1910), 30 C. L. T. 525, 43 S. C. R. 27.

Affirmed by P. C. 31 C. L. T. 48, 27 T. L. R. 57, [1911] A. C. 87.

Liabilities of province at Confederation—*Special funds — Rate of interest — Trust funds or debt—Award of 1870—B. N. A. Act, 1867, ss. 111, 142.*]—Among the assets of the province of Ontario at confederation were certain special funds, namely, U. C. Grammar School Fund, U. C. Building Fund, and U. C. Improvement Fund, and the province was a debtor in respect thereto and liable for interest thereon. By s. 111 of the B. N. A. Act, 1867, the Dominion of Canada succeeded to such liability, and paid the province interest at 5 per cent. up to 1904. In the award made in 1870 and finally established in 1878, on the arbitration under s. 142 of the Act to adjust the debts and assets of Upper and Lower Canada, it was adjudged that these funds were the property of Ontario. On appeal from the judgment of the Exchequer Court in an action for a declaration as to the rights of the province in respect to these funds: — *Held*, affirming the judgment, 10 Ex. C. R. 292, Idington, J., dissenting, that though before the award the Dominion was obliged to hold the funds and pay the interest thereon to Ontario, after the award the Dominion had a right to pay over the same with any accrued interest to the province, and thereafter be free from liability in respect thereof.—*Held*, also, that until the principal sum was paid over, the Dominion was liable for interest thereon at the rate of 5 per cent. per annum. *Province of Ontario* v. *Dominion of Canada*, 27 C. L. T. 483; *Attorney-General for Ontario* v. *Attorney-General for Canada*, 39 S. C. R. 14.

Liquor Act of Manitoba—*Powers of Provincial Legislature.*] — The Manitoba Liquor Act of 1900, for the suppression of the liquor traffic in that province, is within the powers of the Provincial Legislature, its subject being and having been dealt with as a matter of a merely local nature in the province, within the meaning of the British North America Act, 1867, s. 92, s.-s. 16, notwithstanding that in its practical working it must interfere with Dominion revenue, and indirectly at least with business operations outside the province. *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A. C. 348, followed. Judgment in 21 C. L. T. 212, 13 Man. L. R. 239, reversed. *Attorney-General for Manitoba* v. *Manitoba License Holders' Association*, [1902] A. C. 73.

Liquor Act of Ontario, 1902—*Intra vires—Voting on by electors—Delegation of legislative power — Corrupt practices—Appointment of Judge to conduct trial.*]—The subject matter of the Ontario Liquor Act, 1902, is one with regard to which the Legislature is competent to enact a law or laws. *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A. 348, and *Attorney-General of Manitoba* v. *Manitoba License Holders' Association*, [1902] A. C. 73 followed. The Legislature, in enacting the Liquor Act, did not exceed, or fail to properly exercise its powers. Legislation which provides a law, but leaves the time and manner of its taking effect to be determined by the vote of the electors, is not a delegation of legislative power to them. *Russell* v. *The Queen*, 7 App. Cas. 829, *The Queen* v. *Burah*, 3 App. Cas. 889, and *City of Fredericton* v. *The Queen*, 3 S. C. R. 505, followed. By s. 91 (4), providing that the president of the High Court shall designate a County or District Judge to conduct the trial of persons accused of corrupt practices at the taking of the vote under part I., the Legislature did not assume the power of appointing Judges, and did not exceed its powers in providing that a County or District Judge designated should exercise jurisdiction outside of his own county or district; and a Judge so designated may try the accused without a jury. *Rex* v. *Carlisle*, 23 C. L. T. 321, 6 O. L. R. 718, 2 O. W. R. 905, 39 C. L. J. 757, 7 Can. Cr. Cas. 470.

Liquor Act of Ontario, 1902—*Referendum — Power of Legislature—Trial of offenders — Constitution of Court—"To conduct the trial"—County Judge — Issue of summons—Adjournment for sentence.*]—On a motion to quash a conviction for attempting to put a paper other than a ballot paper authorised by law into a ballot box, contrary to the provisions of s. 191 of the Ontario Election Act and s. 91 of the Liquor Act, 1902:—*Held*, that the reference by the Legislature of such a question as that mentioned in s. 2 of the Liquor Act, 1902, to the vote of electors, instead of the Legislature itself deciding it, is unusual, but well within the powers of the Legislature:—*Held*, also, that the intention of the Legislature under s.-s. 4 of s. 91 was to create a tribunal with authority to try certain specific offences; that the Court so created had power under the words "to conduct the trial" to bring the party charged before the Court, try him for the offence, and sentence him if found guilty; that the County Judge appointed to conduct the trial does not act as a County Judge, but as a Court specially created; that it was intended that he should act out of his own county in holding the actual trial; that he may issue his summonses in his own county or elsewhere; and has power, after finding the accused guilty, to adjourn the Court to a subsequent day for the purpose of passing sentence. Section 191 of R. S. O. 1897 c. 9 is wide enough not only to meet the case of an offending returning officer or deputy returning officer, but that of any other person. *Rex* v. *Walsh*, 23 C. L. T. 186, 5 O. L. R. 527, 2 O. W. R. 222, 3 O. W. R. 31.

Liquor License Act, Nova Scotia — *Provision requiring wholesale licenses—Intra vires—Sale without license—Action for price.*]—In an action to recover the price of a quantity of liquor sold by the plaintiff to J., payment for which was guaranteed by the defendant M., it appeared that at the time of the sale the plaintiff carried on business in Truro, where no licenses for the sale of liquor were issued. By the Liquor License Act of 1895, s. 56, no person shall sell by

wholesale or by retail any liquors without having first obtained a license. It was contended on behalf of the plaintiff that this section was *ultra vires* the Provincial Legislature, so far as it related to wholesale licenses: — *Held*, that the Legislature had power to enact laws requiring dealers in intoxicating liquors, whether wholesale or retail, to take out licenses, and that this not having been done in the present case, the sale was illegal and the plaintiff could not recover. *Brown* v. *Moore*, 33 N. S. Reps. 381.

Liquor License Act, Ontario—Keeping liquor for sale—Club—R. S. O. c. 245, s. 53 —*Intra vires*. See *Regina* v. *Lightbourne*, 21 C. L. T. 241.

Loan Corporations Act—*Intra vires—Penalty — Prohibition — Conviction.*]—Appeal by defendants, under s.-s. 4 of s. 117 of the Loan Corporations Act, R. S. O. 1897 c. 205, from their conviction by the police magistrate for the city of Toronto, of the offence of having, acting as agents for the Preferred Mercantile Company of Boston (incorporated), entered into a contract contrary to the provisions of s. 117:—*Held*, confirming the conviction, that there was no right of appeal. *Rex* v. *Pierce*, 25 C. L. T. 70, 4 O. W. R. 411, 5 O. W. R. 464, 9 O. L. R. 374.

Lottery — *Contract — Illegal consideration.*]—The Provincial Legislatures have no jurisdiction to permit the operation of lotteries forbidden by the criminal statutes of Canada. A contract in connection with a scheme for the operation of a lottery forbidden by the criminal statutes of Canada is unlawful, and cannot be enforced in a court of justice. The illegality which vitiates such a contract cannot be waived or condoned by the conduct or pleas of the party against whom it is asserted, and it is the duty of the Courts, *ex mero motu*, to notice the nullity of such contracts at any stage of the case and without pleadings. Per Girouard, J., dissenting. In Canada, before the Criminal Code, 1892, lotteries were mere offences or contraventions, and not crimes, and consequently the Act of the Quebec Legislature is constitutional. *L'Association St. Jean Baptiste de Montreal* v. *Brault*, 21 C. L. T. 5, 30 S. C. R. 598, 4 Can. Cr. Cas. 284.

Magistrates' Courts—*Jurisdiction—Delegation of powers — Powers of police magistrate — Summary trials — Criminal Code, s.* 785.]—By section 785 of the Criminal Code, any person charged before a police magistrate in Ontario with an offence which might be tried at the General Sessions of the Peace, may, with his own consent, be tried by the magistrate and sentenced, if convicted, to the same punishment as if tried at the General Sessions. By an amendment in 1900, 63 Vict. c. 46, the provisions of said section were extended to police and stipendiary magistrates of cities and towns in other parts of Canada:—*Held*, that though there are no Courts of General Sessions except in Ontario, the amending Act is not, therefore, inoperative, but gives to a magistrate in any other province the jurisdiction created for Ontario by section 785. Though the organisation of Courts of criminal jurisdiction is within the exclusive powers of the Provincial Legislatures, the Parliament of Canada may impose upon existing Courts or individuals the duty of administering the criminal law and its action to that end need not be supplemented by provincial legislation. Judgment appealed from 36 N. B. R. 456, affirmed. *In re Vancini*, 34 S. C. R. 621, 8 Can. Cr. Cas. 228.

Masters and Servants Ordinance—*B. N. A. Act—Constitution of Courts—Appointment of Judges — Property and civil rights—Justices of the peace—Conviction— N. W. T. Act — Orders in Council.*]—The Masters and Servants Ordinances, R. O. 1888, c. 36, enacted that it should be lawful for any justice of the peace, on complaint . . . by any . . servant of . . nonpayment of wages . . by his master . . to order such master to pay such complainant one month's wages in addition to the amount of wages then actually due him . . together with the costs of prosecution, the same to be levied by distress . . and in default of sufficient distress, to be imprisoned . . —*Held*, Rouleau, J., dissenting, and Scott, J., expressing no opinion—against the contention that the provision was *ultra vires* of the Territorial Legislature on the grounds that it assumed (1) to impose a penalty with imprisonment to enforce it, and (2) to provide for the appointment of judicial officers—that the provision was within the powers conferred upon the Territorial Legislature by the orders in council promulgated under the N. W. T. Act, R. S. C. c. 50, s. 13, of 11th May, 1877, and 26th June, 1883. — The former order in council gave power to pass Ordinances in relation to: 6. The administration of justice, including the constitution, organisation, and maintenance of Territorial Courts of civil jurisdiction. 7. The imposition of punishment by fine, penalty, or imprisonment for enforcing any Territorial Ordinances. 8. Property and civil rights in the Territories, subject to any legislation by the Parliament of Canada on these subjects. The latter order in council contained clauses in the same words. Per Wetmore and McGuire, JJ.: The provision in question of the Masters and Servants Ordinance did not purport to constitute a criminal offence, but was designed to give enlarged rights, and a more effective and speedy remedy with respect to a civil contract; the remedy by imprisonment is a competent exercise of the power to legislate under the above cited paragraphs of the order in council, and paragraph 6 does not exclude the power of appointing judicial officers. The Dominion Statute 54 & 55 V. c. 22, s. 6, substituting a new section for s. 13 of the N. W. T. Act, R. S. C. c. 50, is more restrictive than the terms of paragraph 6 of the order in council, paragraph 10 of the section reading as follows: "10. The administration of justice in the Territories, including the constitution, organisation, and maintenance of Territorial Courts of civil jurisdiction, including procedure therein, but not including the power of appointing any judicial officers." *Per* Richardson, Wetmore, and McGuire, JJ.: The legislature having power to pass the provision in question of the Masters and Ser-

vants Ordinance at the time it was passed, the provision did not cease to be valid by reason of the subsequent restriction placed upon the power of the legislature. *Gower* v. *Joyner*, 2 Terr. L. R. 387.

Mechanics' lien—*Time for filing—Completion of contract—R. S. M. c. 110, s. 36, limiting appeal to Supreme Court, ultra vires—B. N. A. Act, 1867, ss. 92 and 101.*]—The plaintiff quit work on an elevator, it being understood that he should return and finish his contract when the elevator was far enough advanced to allow him to test the machinery which he had placed in it. When the plaintiff's men returned to finish the contract they were stopped by the company. Then the plaintiff registered a mechanics' lien within thirty days from the attempt to finish his contract, but more than thirty days after his last work had been done on the elevator:—*Held*, upon the evidence, that the lien was registered in time and could be enforced:—*Held*, upon appeal, that the time limited for registration of liens under R. M. S. 1902, c. 110, s. 20, does not commence to run until there has been such completion of the contract as would entitle the contractor to maintain an action for the whole amount due him:—*Held*, also, that R. S. M. 1902, c. 110, s. 36, which enacted that the judgment of the Court of King's Bench of Manitoba should be final, in suits relating to liens, and no appeal should lie therefrom, is *ultra vires;* the right of appeal to the Supreme Court of Canada, being a matter within the jurisdiction of the Parliament of Canada under the B. N. A. Act, 1867, s. 101, is regulated by the R. S. C. c. 139, ss. 35 and 36, even in matters placed by s. 92 of that Act, within the exclusive jurisdiction of the provincial legislature. Judgment of the Supreme Court of Canada, 39 S. C. R. 258, affirmed; judgment of the Court of King's Bench for Manitoba, 16 Man. L. R. 336, 3 W. L. R. 545, discharged; judgment of Richards, J., 2 W. L. R. 142, at trial, restored. *Day* v. *Crown Grain Co.*, C. R., [1908] A. C. 150, [1908] A. C. 504, 78 L. J. P. C. 19, 24 T. L. R. 504.

Mechanics' Lien Act—*Railway—Dominion Act.*]—The Mechanics' and Wage Earners' Lien Act, R. S. O. 1897 c. 153, does not apply to a railway company incorporated under a Dominion Act and declared thereby to be a company incorporated for the general advantage of Canada. *Crawford* v. *Tilden*, 8 O. W. R. 548, 13 O. L. R. 169; affirmed by the Court of Appeal, 9 O. W. R. 781, 14 O. L. R. 572.

Medical profession—*Alberta Act, 4 & 5 Edw. VII. c. 3 (D.)—Legislative jurisdiction Con. Ord. N. W. T. c. 52—6 Edw. VII. c. 28 (Alta.)—Practising without license.*]—The Medical Profession Act, 6 Edw. VII. c. 28 (Alta.), is *intra vires* of the legislature of Alberta, and a member of the College of Physicians and Surgeons of the North-West Territories may be validly convicted thereunder for the offence of practising medicine, surgery, etc., for gain and reward, in the province of Alberta, without complying with its requirements as to registration and license, notwithstanding that the College of Physicians and Surgeons of the North-West Territories had not been previously dissolved and abolished by order of the Governor in Council, in conformity with the provisions of s. 16 (3) of the Alberta Act.—*Dobie* v. *Temporalities Board*, 7 App. Cas. 136, distinguished.—Judgment in *Rex* v. *Lincoln*, 5 W. L. R. 301, reversed. *Lafferty* v. *Lincoln*, 27 C. L. T. 487, 38 S. C. R. 620.

Militia Act — *Expense of calling out militia — Imposition on municipality—Harbour—Preservation of peace in.*]—Sub-sections 5 and 6 of s. 34 of the Militia Act of Canada, R. S. C. c. 41, by which the cost of militia corps called out in aid of the civil power, is imposed on the municipality in which their services are required, are *intra vires* of the Parliament of Canada. 2. The harbour of Montreal being within the municipality of the city of Montreal, the city is liable for the cost of militia corps called out for the preservation of peace in the harbour, although the harbour commissioners and the federal government are vested with certain rights in such harbour. *Gordon* v. *City of Montreal*, 24 Que. S. C. 465.

Motor vehicle—Provincial statute prohibiting use of on highway—Validity of Act—B. N. A. Act, 1867, ss. 91, 92—Criminal law—Local works and undertakings. *Re Rogers* (P. E. I. 1909), 7 E. L. R. 212.

Municipal corporations — *By-law licensing insurance agents.*]—The Ordinance incorporating the city of Calgary (No. 33 of 1893, s. 117, s.-s. 41), empowering the city to pass by-laws "for controlling, regulating, and licensing . . . insurance companies, offices and agents . . . and collecting license fees for the same:"—*Held*, that the provision was *intra vires* of the Legislative Assembly of the Territories. *English* v. *O'Neill*, 4 Terr. L. R. 14.

Municipal corporations—*By-law regulating hours for closing shops—Sale of intoxicating liquors — Operation of by-law—Discrimination — Penalty — Statutes — License.*]—Provincial legislatures have power by virtue of s. 92 of the British North America Act, to authorize municipalities to make by-laws for the closing at prescribed hours on certain days, or during certain hours, of shops for the sale of intoxicating liquors licensed by the government. — A by-law passed under such authorisation is valid, although it affects only one class of citizens, although it fixes different hours for closing on different days, and although a double penalty may be imposed under it for the same act.—A license for the sale of liquors, granted by the government, is subject to the statutes and by-laws in force when it is issued, as well as to those which come into force during its continuance; it is in no sense a contract which makes the licensee independent of the statutes and by-laws. Judgment in *De Varennes* v. *City of Quebec*, 31 Que. S. C. 444, affirmed. *De Varennes* v. *Attorney-General*, 16 Que. K. B. 571.

Municipal taxation — *Official of Dominion Government—Taxation on income—B. N. A. Act, 1867, ss. 91 and 92.*]—Sub-section 2 of s. 92, B. N. A. Act, 1867, giving a provincial legislature exclusive powers of legislation in respect to "direct taxation within the province," etc., is not in conflict with s.-s. 8 of s. 91, which provides that Parliament shall have exclusive legislative authority over "the fixing of and providing for the

salaries and allowances of civil and other officers of the Government of Canada;" Girouard, J., *contra:* — *Held*, therefore, Girouard, J., dissenting, that a civil or other officer of the government of Canada may be lawfully taxed in respect to his income as such by the municipality in which he resides. *Abbott* v. *City of St. John*, 40 S. C. R. 597.

Municipal institutions — *Prohibition of "trading stamps" — Provincial statute — Interference with trade.*]—By s. 2 of c. 57 of 62 V. (N.S.), amending the charter of the city of Halifax, "no person . . . shall give, sell, or dispose of trading stamps, tickets or cards to any person . . . doing business in the city of Halifax. Nor shall such person so doing business in the city of Halifax take or have in his possession any such trading stamp . . . Nor shall any vendor give, sell, or dispose of any such trading stamp . . . to any of his customers whereby such customer shall be entitled to receive for such trading stamp . . . any money, personal property, . . . The Trading Stamp Company, so called, is prohibited from doing business in the city . . . Any person violating this section shall be imprisoned in the city prison for nine months with hard labour:"—*Held*, that the Act was *intra vires* the Provincial Legislature, coming within the head "Property and Civil Rights" or "Matters of a merely Local or Private Nature within the Province," and not a criminal law. *Montreal Trading Stamp Co.* v. *City of Halifax*, 20 C. L. T. 355.

Municipal institutions—*Provincial legislatures — Powers of — By-law — Street railways — Monopoly — Status of plaintiff.*]—*Held*, affirming the judgment in 15 Que. S. C. 580, that the Provincial Legislatures have sovereign powers within the range of subjects falling within the scope of provincial jurisdiction, including the governance of municipal institutions, and the Courts cannot set aside legislation relating to such matters on the ground that constitutional principles have been violated.—2. A by-law granting an exclusive privilege to a particular company to operate electric tramways for a term of years within a municipality comes within the scope of the authority of a town corporation which has been vested by the legislature with the right to authorise the construction and operation of tramways upon such terms as it shall see fit. Such privilege is not a monopoly in the strict meaning of the word, and is not forbidden by law.—3. The contract in question in this case having been confirmed by 57 V. (Q.) c. 73, the appellants were without interest to contest the validity of the by-law on which it was based. *Bell* v. *Town of Westmount*, 9 Que. Q. B. 34.

Municipal corporations—*Shops—Early closing by-law — Shops Regulation Act — Winnipeg charter — Discrimination—Oppression — Powers of Provincial Legislature — Interference with trade and commerce.*]—Rule *nisi* to quash the conviction of the defendant for breach of a by-law of the city of Winnipeg requiring all shops with certain exceptions to be closed after 6 o'clock p.m., except on certain days. The by-law in question was passed in July, 1900, under the Shops Regulation Act, R. S. M. 1892 c. 140 (c. 156 of R. S. M. 1902, which came into force on 6th March, 1903.) In March, 1902, the Winnipeg charter being c. 77 of the statutes of that year, came into force, and the new Municipal Act, c. 116 of R. S. M. 1902, contains a clause (2*a*), providing that the city of Winnipeg is not included in the expression "municipality," when the same occurs in the Act:—*Held*, without deciding whether the present Shops Regulation Act applies to the city or not, that the joint effect of s. 931 of the Winnipeg charter and s. 527 of the Municipal Act, and of s.-s. 14 and 16 of the Interpretation Act, R. S. M. 1902 c. 89, is to retain and keep in force the by-law in question:—*Held*, also, that, as the by-law in question was in strict accordance with the powers conferred by the legislature in the Act under which it was passed, its provisions could not be held to be unreasonable, uncertain, or oppressive, so as to render it invalid or unenforcible. *Bryden* v. *Union Colliery Co.*, [1899] A. C. 580; *Re Hoplan*, 15 O. R. 13, and *Simmons* v. *Mallings*, 13 Times L. R. 447, followed:—*Held*, also, that the provisions of the Shops Regulation Act are *intra vires* of the provincial legislature, under s. 92 of the British North America Act, 1867, as dealing with a matter of a merely local and private nature in the province, and not interfering with the regulation of trade and commerce, assigned to the Dominion Parliament by s. 91, to as great an extent as the legislation in question in *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1896] A. C. 348, and *Attorney-General for Manitoba* v. *Manitoba License Holders' Association*, [1902] A. C. 77. *Stark* v. *Schuster*, 24 C. L. T. 187, 14 Man. L. R. 672.

North-West Territories Act — *English statutes passed subsequent to 15th July, 1870, when "applicable" — Infants Relief Act, 1870 (Imp.)*]—The word "applicable" where it first occurs in s. 11 of the North-West Territories Act means "suitable," or "properly adapted to the conditions of the country;" where it occurs the second time, it has the same meaning as in the Colonial Laws Validity Act, and means, "applicable by the express words or necessary intendment of any Act of Parliament."—The Infants' Relief Act, 1874, not being applicable by express words or necessary intendment, was not in force in the Territories, and is not in force in Alberta. *Brand* v. *Griffin*, 1 Alta. L. R. 519, 9 W. L. R. 427.

Ontario Act, 9 Edw. VII., *c. 19, s. 8— Stay of action attacking validity of contract between municipal corporations and Hydro-Electric Power Commission—Intra vires—B. N. A. Act, s. 92—Magna Charta.*]—Action for a declaration that a certain contract between defendants and above commission was invalid:—*Held*, that s. 8 above is *intra vires* and action was stayed. *Smith* v. *London*, 13 O. W. R. 1148. See 14 O. W. R. 148, 1248.

Ontario Liquor License Act, s. 10— *Selling liquor on vessel—Territorial limits of province—Offence committed on great lakes— Jurisdiction—Admiralty—International law— Foreign vessel — Conviction — Police magistrate—Place where offence committed — Unlawfully allowing liquor to be sold—Master of ship—"Occupant" — Amendment of conviction—Criminal Code, s. 889.*]—The province of Ontario extends to the middle line of Lake

Huron as defined in the treaties of Paris and Ghent; and the British North America Act, in fixing the electoral divisions of the province, recognises the territorial sub-divisions provided for by the statute which is now R. S. O. 1897 c. 3, by which the limits of the counties and townships bordering on Lake Huron extend to the boundary of the province; within the territorial limits of the province, as to the subjects of legislation assigned by the British North America Act to the provinces, the legislative authority of the province is as plenary and as ample as the Imperial Parliament in the plenitude of its power possessed and could bestow; the regulation of traffic in intoxicating liquors within the limits of the provinces by a license law is assigned by the British North America Act to the provincial legislatures; and therefore the Ontario legislature had authority to enact s. 10 of the Liquor License Act, which provides that no license shall be issued for the sale of liquor nor shall liquor be sold or kept for sale in any room or place on any vessel navigating any of the great lakes, etc.; notwithstanding the contention that the only jurisdiction over the great lakes is in the Admiralty Courts.—*Regina* v. *Keyn*, 13 Cox C. C. 403, and *Regina* v. *Sharp*, 5 P. R. 135, distinguished. —The defendant, the master of the steamer "Greyhound," was convicted before a police magistrate having jurisdiction over the whole county of Huron, for that he (the defendant), on Canadian waters adjacent to the harbour of the town of Goderich, in said county of Huron, did "unlawfully allow liquors to be sold" on the steamer "Greyhound," of the city of Detroit, in the State of Michigan, "without a license therefor by law required:"—*Held*, upon the evidence, that the vessel, although a foreign vessel, was not when the offence was committed proceeding from one foreign port to another, but was being used for an excursion which went out from the port of Goderich for a few miles and returned to that port, and therefore the rule of international law forbidding interference with persons on board a foreign vessel navigating the high seas or the great lakes was not applicable.—*Semble*, that where it is plain that the legislature has intended to disregard or interfere with a rule of international law, the Courts are bound to give effect to its enactments:—*Held*, that the conviction was not invalid merely because the place in the county where the offence was committed was not stated with more particularity than as above recited:—*Held*, that the conviction disclosed no offence, unlawfully allowing liquor to be sold not being an offence created by the Liquor License Act; but the conviction should be amended so as to make it for an offence under s.-s. 1 of s. 49 of the Act, viz., the selling or bartering of liquors without the license required by law; Meredith, C.J., doubting whether the defendant was an "occupant" within the meaning of s. 111, whether the words "house, shop, room, or other place," included a vessel, and whether the offence of selling liquor without a license was of the nature of the offence alleged in the conviction: Criminal Code, s. 889. *Rex* v. *Meikleham* (1906), 11 O. L. R. 366, 6 O. W. R. 945.

Power company—*Construction of statute —Legislative jurisdiction — Parliament of Canada — Local works and undertakings — Recital in preamble — Enactment clause — General advantage of Canada — Subject matter—Presumption—Practice — Motion to refer case for further evidence.*]—In construing an Act of the Parliament of Canada, there is a presumption in law that the jurisdiction has not been exceeded. Where the subject matter of legislation by the Parliament of Canada, although situate wholly within a province, is obviously beyond the powers of the local legislature, there is no necessity for an enacting clause specially declaring the works to be for the general advantage of Canada or for the advantage of two or more or the provinces.—*Semble, per* Davies, J. (Idington, J., *contra*), that a recital in the preamble to a special private Act enacted by the Parliament of Canada, is not such a declaration as that contemplated by s.-s. 10 (c) of s. 92 of the British North America Act, 1867, in order to bring the subject matter of the legislation within the jurisdiction of Parliament. Judgments in 6 O. L. R. 11, 2 O. W. R. 419, 23 C. L. T. 227, and 8 O. L. R. 88, 3 O. W. R. 865, 24 C. L. T. 332, affirmed. A motion, made while the case was standing for judgment, to have the case remitted back to the Court below for the purpose of the adduction of newly discovered evidence as to the refusal of Parliament to make the above mentioned declaration, was refused with costs. *Hewson* v. *Ontario Power Co. of Niagara Falls*, 25 C. L. T. 137, 36 S. C. R. 596.

Powers of provincial legislature—Act to prevent profanation of Lord's Day—Work—Necessity—Conveying travellers. *Re Lord's Day Act of Ontario*, 1 O. W. R. 312, 2 O. W. R. 672. *Atty.-Gen.* v. *Hamilton Street Rw. Co.* (1903), A. C. 524.

Powers of provincial legislature—*Prohibition of sale of medicine—Interference with trade and commerce — License under Dominion Proprietary and Patent Medicine Act—Conviction under Saskatchewan Medical Profession Act.*]—The sole jurisdiction to regulate trade and commerce being vested in the Dominion Parliament, it is not competent for a provincial legislature to prohibit the sale of that which the Dominion Parliament has given license to sell.—*Russell* v. *The Queen*, 7 App. Cas. 829, 838, and *Grand Trunk Rw. Co.* v. *Attorney-General for Canada*, [1907] A. C. 68, specially referred to. — Section 64 of c. 28 of the statutes of Saskatchewan, 1906, is *ultra vires*, in so far as it provides that "if any person not registered . . . shall . . . for hire, gain, or hope of reward . . . furnish medicine," he shall be guilty of an offence, etc.—The defendant, being the representative of a company licensed under the Dominion Proprietary or Patent Medicine Act, 7 & 8 Edw. VII. c. 56, to sell certain specified medicines, could not be convicted under the Provincial Act for so selling. *R.* v. *Ferris* (1910), 15 W. L. R. 331, Sask. L. R.

Powers of provincial legislature—*British North America Act, 1867, s. 92, s-s. 2—Ontario Succession Duty Act, R. S. O. 1897, c. 24—Provincial taxation of property not within the province ultra vires.*]—It is *ultra vires* the legislature of Ontario to tax property not within the province: see British

North America Act, 1867, s. 92, s.-s. 2:—*Held*, accordingly, that the Succession Duty Act, R. S. O. 1897, c. 24, does not include within its scope movable properties locally situated outside the province of Ontario which it was alleged that the testator, a domiciled inhabitant of the province, had transferred in his lifetime with intent that the transfers should only take effect after his death. *Blackwood* v. *The Queen*, 8 App. Cas. 82, followed. Judgment of the Court of Appeal, in *Attorney-General for Ontario* v. *Woodruff*, 11 O. W. R. 82, 15 O. L. R. 416, reversed. *Woodruff* v. *Attorney-General for Ontario*, C. R., [1908] A. C. 352, [1908] A. C. 508, 12 O. W. R. 611, 78 L. J. P. C. 10, 99 L. T. R. 750, 24 T. L. R. 912.

Powers of provincial legislature—*Criminal offence—Field occupied by Dominion legislation — Jurisdiction — Recorder's Court—Justices of the peace.*]—When the Parliament of Canada has declared an act criminal, has laid down the procedure to be followed for punishing the act, and named the tribunal which shall have jurisdiction over it, a provincial legislature has no right to make a statute to punish the same act and to name the tribunal which shall take cognizance of it, as well as the procedure to be followed in order to punish it.—2. The Quebec Recorder's Court cannot take cognizance of an infraction of the Criminal Code, while the Code itself gives jurisdiction to two justices of the peace. *Dallaire* v. *City of Quebec and Attorney-General for Quebec*, 32 Que. S. C. 118.

Powers of provincial legislature—*Criminal offence — Habitual drunkenness — Exclusive power of Parliament.* —The legislature of Quebec has not the power to add to a statute passed by the Parliament of Canada before confederation making a contravention thereof punishable by a fine of $20, that "in the case of habitual and incorrigible drunkenness" the magistrate shall have power to sentence the accused to imprisonment for six months at least and a year at most. Such a provision, the effect of which is to make drunkenness in itself a punishable offence, is within the exclusive power of the Parliament of the Dominion. *Beaulieu* v. *City of Montreal*, 32 Que. S. C. 97.

Prairie Fires Ordinance, C.O. 1898, c. 87, s. 2—*Railway—Legislative jurisdiction —Application of statute—Works controlled by Parliament—Operation of Dominion railway.*]—The provisions of s. 2, s.-s. (2), of c. 87, Con. Ord. N. W. T. 1898, as amended by the N. W. T. Ordinances, c. 25 (1st sess.) and c. 30 (2nd sess.) of 1903, in so far as they relate to fires caused by the escape of sparks, etc., from railway locomotives, constitute "railway legislation," strictly so-called, and, as such, are beyond the competence of the legislature of the North-West Territories.—*Canadian Pacific Rw. Co.* v. *Parish of Notre Dame de Bonsecours*, [1899] A. C. 367, and *Madden* v. *Nelson and Fort Sheppard Rw. Co.*, *ib.* 626, referred to.—The judgment appealed from, *Rex* v. *Canadian Pacific Rw. Co.*, 1 W. L. R. 89, 6 W. L. R. 126, reversed. Idington, J., dissenting. *Canadian Pacific Rw. Co.* v. *Rex*, 39 S. C. R. 476, 13 Can. Cr. Cas. 160.

P. E. I. Insolvent Debtors Act, 1879. *McKinnon* v. *McDougall*, 3 E. L. R. 573.

P. E. I. Prohibition Act. *Matthews* v. *Jenkins*, 3 E. L. R. 577.

P. E. I. Prohibition Act, 1900—Denial of right of appeal—Criminal law. *McMurrer* v. *Jenkins*, 3 E. L. R. 149.

Prohibition of trading stamps — *Municipal by-law—Statutes—Construction.*]—The Quebec statute, 3 Edw. VII. c. 39, is within the powers of the legislature, and gives to every municipal council in the province power to pass by-laws to prohibit the giving, selling, exchanging, distributing, or receiving trading stamps, coupons, or other like things, and prohibiting every person from giving, selling, or exchanging them; such matter being one concerning property and civil rights in the province.—2. A statute, however obscure its terms, should not be treated as void—a meaning must be found for it and applied. *Wilder* v. *City of Quebec*, 25 Que. S. C. 128.

Property and civil rights — *Mining lands — Rights of discoverers of minerals — Order in Council — Withdrawing lands from prospecting—Act of legislature approving — Action by assignees of discoverer — Stakes.*]—The plaintiffs claimed as assignees of G. that the latter had discovered valuable ore or mineral in place under part of Cobalt Lake, that the proper Mining Recorder had refused to record G.'s claim, that the Crown had then sold the property where G. had made the discovery to defendants, to whom letters patent had been improvidently issued, and therefore plaintiffs were entitled to these lands and minerals, and to have the letters patent declared void and for other relief. The Crown was not a party to the action, but was represented, the constitutionality of an Act confirming an order in council withdrawing the lands in question from exploration being attacked.—*Held*, that as G. had not fulfilled the requirements of the Mines Act and the regulations thereunder, and the property having been withdrawn for exploration before his recovery by order in council confirmed by an Act of the legislature, the plaintiffs as assignees of G. have no status to impeach the sale or the letters patent issued to defendants. — *Held*, further, that said Act was not *ultra vires*, *Florence Mining Co.* v. *Cobalt*, 12 O. W. R. 297, 13 O. W. R. 837, 18 O. L. R. 275.

See 14 O. W. R. 507, 19 O. L. R. 342.

Provincial companies' powers—*Operations beyond province—Insurance against fire—Property insured — Standing timber—Return of premiums—B. N. A. Act, 1867, s. 92 (11).*]—*Held, per* Idington, Maclennan, and Duff, JJ., Fitzpatrick, C.J.C., and Davies, J., *contra*, that a company incorporated under the authority of a provincial legislature to carry on the business of fire insurance is not inherently incapable of entering, outside the boundaries of its province of origin, into a valid contract of insurance relating to property also outside of those limits.—*Per* Fitzpatrick, C.J.C., and Davies, J., that s.-s. 11 of s. 92, B. N. A. Act, 1867, empowering a legislature to incorporate "companies for provincial objects," not only creates limitation as to the objects of a com-

pany so incorporated, but confines its operations within the geographical area of the province creating it. And the possession by the company of a license from the Dominion Government under 51 V. c. 28 (R. S. C. 1906, c. 34, s. 4), authorizing it to do business throughout Canada, is of no avail for the purpose. — Girouard, J., expressed no opinion on this question.—An insurance company incorporated under the laws of Ontario insured a railway company, a part of whose line ran through the State of Maine, "against loss or damage caused by locomotives to property located in the State of Maine, not including that of the assured." By a statute in that State the railway company is made liable for injury so caused, and is given an insurable interest in property along its line for which it is so responsible:—*Held*, affirming the judgment of the Court of Appeal, 11 O. L. R. 465, which maintained the judgment at the trial, 9 O. L. R. 493, that the policy did not cover standing timber along the line of railway, which the charter of the insurance company did not permit it to insure.—*Held*, also, Fitzpatrick, C.J.C., and Davies, J., dissenting, that the policy was not on that account of no effect, as there was other property covered by it in which the railway company had an insurable interest; therefore the latter was not entitled to recover back the premiums it had paid. *Canadian Pacific Rw. Co.* v. *Ottawa Fire Insurance Co.*, 39 S. C. R. 405.

Railway—*Farm crossings—Duty to provide—Statutes—Railway Act of Canada — Jurisdiction of Provincial Legislatures.*] — An owner whose lands adjoin a railway subject to the Railway Act of Canada, upon one side only, is not entitled to have a crossing over such railway under the provisions of that Act; and the special statutes in respect to the Grand Trunk Railway of Canada do not impose any greater liability in respect to crossings than the Railway Act of Canada. The Provincial Legislatures in Canada have no jurisdiction to make regulations in respect to crossings or the structural condition of the roadbed of a railway subject to the provisions of the Railway Act of Canada. *Canadian Pacific Rw. Co.* v. *Corporation of Parish of Notre Dame de Bonsecours*, [1899] A. C. 367, followed. *Therrien* v. *Grand Trunk Rw. Co.*, 20 C. L. T. 431, 30 S. C. R. 485.

Railway Act, 1888, ss. 187, 188—*Protection of crossings—Party interested—Rw. Committee.*]—Sections 187 and 188 of the Rw. Act, 1888, empowering the Rw. Committee of the P. C. to order any crossing over a highway of a rw. subject to its jurisdiction to be protected by gates, or otherwise, are *intra vires* of the Parliament of Canada; Idington, J., dissenting. (Sections 186 and 187 of the Rw. Act, 1903, confer similar powers on the Board of Rw. Commissioners.)—Section 188 of the Act of 1888 also authorizes the Committee to apportion cost of providing and maintaining such protection between the rw. co. and "any person interested:"—*Held*, Idington, J., dissenting, that the municipality in which the highway crossed by the rw. is situate is a "person interested" under the section. — Judgment of the Court of Appeal in *Grand Trunk Rw. Co.* v. *Toronto*, 6 O. W. R. 27, affirming judgment of Boyd, C., 4 O. W. R. 450, affirmed. *Toronto* v. *Grand Trunk Rw. Co.* (1906), 26 C. L. T. 247, 37 S. C. R. 232.

Railway company—*Negligence—Agreements for exemption from liability—Power of Dominion Parliament to prohibit — 4 Edw. VII. c. 31 (D.)*]—*Held*, that the Dominion Parliament is competent to enact s. 1 of the Canadian statute 4 Edw. VII. c. 31, which prohibits "contracting out" on the part of railway companies within the jurisdiction of the Dominion Parliament from the liability to pay damages for personal injury to their servants.—That section is *intra vires* the Dominion, as being a law ancillary to through railway legislation, notwithstanding that it affects civil rights which, under the British North America Act, 1867, s. 92, s.s. 13, are the subject of provincial legislation. Judgment in *In re Railway Amendment Act*, 36 S. C. R. 136, 25 C. L. T. 105, affirmed. *Grand Trunk Rw. Co. of Canada* v. *Attorney-General for Canada*, [1907] A. C. 65.

Railways — *Consolidated Railway Act, 1879, s. 19, s.-s. 16 (D.)—Prohibited contract —Directors.*]—The appellant was a director and the president of the Temiscouata Rw. Company at the time he entered into certain agreements with the contractors for the construction of the road, which agreements gave him an interest in their contracts:—*Held*, that the provisions of the Consolidated Railway Act, 1879, s. 18, s.-s. 16, are constitutional. The Dominion Parliament having the right to legislate on matters concerning railways, it has also the power to legislate on all incidents which may be required to carry out the object it had in view, provided such incidents are essentially and strictly connected with the principal object, and are primarily intended to assist in carrying out such principal object; and the capacity or incapacity of directors is a matter essentially connected with the internal economy of a railway company.—2. Where a contract is prohibited by statute, such contract is void, although the statute itself does not state that it is so, and only imposes a penalty on the offender.—3. Consequently, where the president of a railway company entered into a secret partnership with the contractors for the construction of the road, no action can be maintained by him against his partners to enforce such contract. *Macdonald* v. *Riordan*, 8 Que. Q. B. 555. Affirmed 30 S. C. R. 619.

Railways—*Municipal corporations—Construction of highway across railway—Railway Committee of Privy Council.*]—Upon the application of the defendants under s. 14 of the Railway Act of Canada for an order authorising the extension of a street in their city across the tracks of the plaintiffs, the Railway Committee for Canada of the Privy Council ordered and directed that the defendants "may have a temporary crossing, at rail level, for foot passengers only, over the said tracks," upon certain conditions.—*Held*, that the Provincial Legislature alone had power to confer upon the defendants legal capacity to acquire and make the street in question.—2. It has conferred such capacity.—3. In virtue of its power over property and civil rights in the Province, the Provincial Legislature has power to authorise a municipality to acquire and make such a street, and to provide how and upon what terms it may be acquired and made.—4. But that power is

subject to the supervention of federal legislation respecting works and undertakings such as the railway in question.—5. The manner and terms of acquiring and making such street, and also the prevention of the making or acquiring of such a street, are proper subjects of such supervening legislation.—6. Such legislation may rightly confer upon any person or body the power to determine in what circumstances, and how and upon what terms, such a street may be acquired and made, or to prevent the acquiring and making of it altogether, and therefore s. 14 of the Railway Act is not *ultra vires*.—7. Such legislation, in virtue of its power over such railway corporations, as well as such works and undertakings, may confer power to impose such terms as have in this case been imposed upon the plaintiffs, and to deprive such corporations of any right to compensation for lands so taken or injuriously affected; and has conferred such power on the Railway Committee, under s. 14, in such a case as this; which power has here been exercised to some extent.—8. Such legislation has not conferred upon the Committee power to give the temporary foot-way in question.—9. Nor any authority to delegate its powers.—10. The work it directs must be constructed under the supervision of an official appointed for that purpose by the Committee.—11. The railway company may, if they choose, construct the works directed, under such supervision, instead of permitting the municipality to do so. *Grand Trunk Rw. Co.* v. *City of Toronto*, 20 C. L. T. 384, 32 O. R. 135.

Registration of lis pendens—*Imperial Acts in force in Yukon Territory—2 & 3 V. c. 11 (Imp.)—R. S. C. c. 50—Transfer of land—Fraud—Land Titles Act, 1894—Pleading—Rules of Court — Yukon Ordinances, 1902, c. 17—Rules 113, 115, 117—Estoppel.*] —The provisions of the Imperial Act, 2 & 3 V. c. 11, in respect to the registration of notices of lis pendens and for the protection of *bona fide* purchasers *pendente lite*, are of purely local character, and do not extend their application to the Yukon Territory by the introduction of the English law generally as it existed on the 15th July, 1870, under s. 11 of the North-West Territories Act, R. S. C. c. 50. Under the provisions of the Land Titles Act, 1894, s. 126, a *bona fide* purchaser from the registered owner of land, subject to the operation of that statute, is not bound nor affected by notice of *lis pendens* which has been improperly filed and noted upon the folio of the register containing the certificate of title as an incumbrance or charge upon the land. The exception as to fraud referred to in s. 126 of the Act means actual fraudulent transactions in which the purchaser had participated, and does not include constructive or equitable frauds. *Assets Co.* v. *Mere Roihi*, 21 Times L. R. 311, referred to and approved. In an action to set aside a conveyance as made in fraud of creditors, the defendant, desiring to meet the action by setting up that there was no debt due, and, consequently, that no such fraud could exist, must allege these objections in his pleading. In the present case the defendant, having failed to plead such defence, was allowed to amend on terms. Taschereau, C.J.C., dissenting. *Syndicat Lyonnais du Klondyke* v. *McCrade*, 25 C. L. T. 126, 36 S. C. R. 251.

Representation of Provinces in House of Commons—*British North America Act, s. 51—Readjustment of representation —Construction — "Aggregate population of Canada."*] — Section 51 of the B. N. A. Act, 1867, directs after each decennial census a readjustment of the representation in the Dominion House of Commons of the four provinces constituted by that Act. It provides as the rule of readjustment that Quebec shall have the fixed number of 65 representatives, and that each of the other provinces shall have that number which bears the same proportion to its population as 65 bears to that of Quebec. But its s.-s. 4 prohibits a reduction of the number of the representatives in the case of any province, unless the proportion which the number of its population bore to the number of the aggregate population of Canada at the last preceding readjustment is ascertained at the then latest census to have been diminished by one-twentieth part or upwards:—*Held*, on a case submitted to the Supreme Court of Canada as to whether New Brunswick was protected from reduction of its members, that on the true construction of s.-s. 4 the expression "aggregate population of Canada" relates to the whole of Canada as constituted by the Act, and therefore includes, not merely the four provinces constituted by proclamation issued under s. 3, but also all the provinces subsequently incorporated and admitted into the Union by order in council under s. 146:—*Held*, also, with regard to the province of Prince Edward Island, which had under s. 146 been admitted into the Union by order in council directing that it should have six members, its representation to be readjusted from time to time under the provisions of the Act of 1867, that s.-s. 4, on its true construction, did not protect that number from reduction until an increase thereof had been previously effected. Judgment in *In re Representation in House of Commons*, 23 C. L. T. 209, 33 S. C. R. 475, 594, affirmed. *Attorney-General for Prince Edward Island* v. *Attorney-General for Canada; Attorney-General for New Brunswick* v. *Attorney-General for Canada*, [1905] A. C. 37.

Royalties — *Dominion Lands Act — Publication of regulations — Renewal of license—Voluntary payment.*]—The Dominion Government, by regulations made under the Dominion Lands Act, may validly reserve a royalty on gold produced by a placer mining in the Yukon, though the miner, by his license, has the "exclusive right" to all the gold mines—that is, exclusive only against quartz or hydraulic licenses or owners of surface rights, and not against the Crown. The provision of s. 91 of the Dominion Lands Act as to publication of regulations, means that the regulations do not come into force on publication in the last of four successive weeks in the *Gazette*, but only on the expiration of one week therefrom. Where regulations provided that failure to pay royalties would forfeit the claim, and a notice to that effect was posted on the claim and served on the licensee, payment by the latter under protest was not a voluntary payment. One of the regulations of 1889 was, that "the entry of every holder of a grant for placer mining had to be renewed and his receipt relinquished and replaced every year:—*Held*, reversing the judgment in 7 Ex. C. R. 414,

that the new entry and receipt did not entitle the holder to mine on the terms and conditions in his original grant only, but he was subject to the terms of any regulations made since such grant was issued. The new entry cannot be made and new receipt given until the term of the grant has expired. Therefore, where a grant for one year was issued in December, 1896, and in August, 1897, the renewal license was given to the miner, such renewal only took effect in December, 1897, and was subject to regulations made in September of that year. Regulations in force when a license issued, were shortly afterwards cancelled by new regulations imposing a smaller royalty:—*Held*, that the new regulations were substituted for the others and applied to said license. *Rex* v. *Chappelle*, *Rex* v. *Carmack*, *Rex* v. *Tweed*, 23 C. L. T. 34, 32 S. C. R. 586. Leave to appeal granted by the Judicial Committee, 23 C. L. T. 163.

Seamen's Act—*Intra vires—Foreign ship—Harbouring deserters—Conviction—Consent of consular officer.*]—The Seamen's Act (R. S. C. c. 74) is not *ultra vires* the Canadian Parliament; and a conviction under s. 104 for harbouring seamen, knowing them to be deserters, engaged to serve on a foreign ship, then in a Canadian port, made against a resident of Canada on the information of person also a resident, the party charged or the informant not being in any way connected with the foreign ship, is good. It is not necessary that the prosecutor should obtain the consent of the consular officer representing the nationality of the ship under s. 129. *Rex* v. *Martin*, 36 N. B. R. 448.

Service of process out of jurisdiction—*Powers of Territorial Legislature—Judicature Ordinance—Small Debt Procedure.*]—A colony having authority to establish Courts of civil jurisdiction and to provide for procedure therein has also the power necessarily incident thereto of providing for service of process upon defendants residing out of its jurisdiction. The legislature of the Territories has authority under the powers conferred by the N. W. T. Act to make such provisions. Section 32 of Ordinance 5 of 1894 (amending J. O. 1898), relating to small debt procedure, provides: "The summons shall be returnable: (*c*) Where the defendant resides in any place in Canada outside the Territories, or in the United States of America, at the expiration of 20 days from the service thereof; (*d*) Where the defendant resides in any part of the United Kingdom, at the expiration of 30 days from the service thereof; (*e*) In any of the above cases it shall not be necessary to obtain an order for service out of the jurisdiction:"—*Held*, that neither an order for leave to issue a writ for service out of the jurisdiction, nor an order for leave to serve such a writ, is necessary under this procedure. Nor it is necessary that a proper case for service out of the jurisdiction should be shewn by the statement of claim; but *semble*, if a defendant served out of the jurisdiction can shew affirmatively that the action is not one in which service out of the jurisdiction would be allowed under the ordinary practice of the Court, he would be entitled to an order setting aside the service. *McCarthy* v. *Brener*, 2 Terr. L. R. 230.

Statute authorising monopoly—*Municipal corporation — Resolution — By-law—Contracts with electric companies.*]—On the 4th April, 1887, the council of the city of H. had, by a simple resolution, permitted the grantors of the appellant company to erect in that city poles for the purpose of electric lighting, under the same restrictions and rules as in the city of O., and under the control of the committee of roads as regards the position of the poles. By virtue of this resolution the grantors placed poles and wires in the city and furnished electric light to the city and citizens. On the 7th May, 1894, by by-law, the city of H. accorded to the grantor of the respondent company for 35 years the exclusive privilege of building and operating an electric railway, and of establishing in the city a system of heating and lighting, either by electricity or natural gas or otherwise. It was stipulated that the city granted these exclusive rights in so far as they possessed them and had the right to grant them. This by-law was confirmed by statute 58 V. c. 69 (Q.), the Act of incorporation of the respondent company, which enumerated, among the privileges granted, the exclusive right of furnishing and distributing electric light to the city, to its inhabitants and all industries or manufactories which were or should be established there:—*Held*, that the statute in question, relating to a purely local undertaking, was within the competence of the legislature, in spite of the fact that it had the effect of excluding for a limited time the competition of rival undertakings. 2. That by the by-law of the 7th May, 1894, the city had not revoked the permission which it had granted by the former resolution, and had not delegated the power of revoking it, and that the respondent company could exercise the powers authorised by the resolution, until revoked by the city. Judgment in 10 Que. K. B. 35, affirmed. *Hull Electric Co.* v. *Ottawa Electric Co.*, 12 Que. K. B. 549, [1902] A. C. 237.

Succession duties—*Powers of provincial legislatures — Succession tax upon property situate outside a province.*] — A provincial statute which levies a tax, proportionate to the value of the estate, upon the transmission by succession of property situated outside the province, is unconstitutional and *ultra vires* in virtue of par. 2 of s. 92 of B. N. A. Act, 1867. *Rex* v. *Cotton* (1910), 20 Que. K. B. 164.

Sunday closing by-laws regarding music halls, moving picture shows, etc., under penalty of a fine, come within the by-laws authorised by the charter of such municipality by the following clause: "The city council may adopt by-laws upon the following subjects, for the good order, peace, security and local government of the city of , and for the prevention and suppression of all nuisances and of every act, matter and thing in the city opposed, contrary or likely to cause a prejudice to good order, peace, security and good morals . . in the interior economy and local government of the said city." Until revoked, this legislative enactment of the former province of Canada is in force.—Dominion Statute respecting Sunday Observance, 6 Edw. VII., c. 27, now R. S. C. 1906, c. 153, did not revoke or affect the foregoing provision and by-laws authorised thereunder.

and since enacted, are valid and *intra vires*. *Tremblay* v. *Quebec*, [1910] 37 Que. S. C. 375, 38 Que. S. C. 82, 16 Can. Cr. Cas. 253, 487.

Sunday observance.] — *Held*, that an Act to prevent the Profanation of the Lord's Day, Revised Statutes of Ontario, 1897, c. 246, treated as a whole is *ultra vires* of the Ontario Legislature.—The Criminal Law in it widest sense is reserved by s. 91, s.-s. 27, of the British North America Act, 1867, for the exclusive authority of the Dominion Parliament and an infraction of the above Act is an offence against criminal law.—It is not the practice of their Lordships to give speculative opinions on hypothetical questions submitted.—The questions must arise in concrete cases and involve private rights. *Attorney-General for Ontario* v. *The Hamilton Street Railway Company*, [1903] A. C. 524.

Sunday observance—*Powers of provincial legislatures—Police regulations.*] — Section 1 of 62 V. c. 11, whereby the sale of real or personal property or the exercise of any worldly business or work on Sunday is prohibited, is within the authority of the Legislature of New Brunswick. Therefore, where G. was convicted under the above section of selling cigars on Sunday a rule *nisi* for a *certiorari* to bring up the conviction was discharged. The fact that the Parliament of Canada can make the doing of such an act on Sunday a crime, and prohibit it under the general criminal law, does not necessarily shew that a local legislature has no jurisdiction to deal with it under its powers to make regulations of a police or municipal nature. A subject matter of legislation, though falling within some of the classes intrusted to the federal Parliament by s. 91 of the British North America Act, may likewise, when looked at from another point of view, come within some of the classes over which, by s. 92 of the same Act, the Provincial Legislatures have exclusive jurisdiction. *Ex p. Green*, 35 N. B. Reps. 137, 4 Can. Cr. Cas. 182.

Sunday observance—*Powers of provincial legislature—Theatres—Prohibition of — Interference with criminal law—Municipal by-law.*]—Under the provisions of cl. 16 of s. 92 of the B. N. A. Act, the provincial legislature had power to enact cl. 5 of s. 123 of the charter of the city of Montreal, 37 V. c. 51, and to confer, as it has done, upon the council the power to pass by-law No. 103 of the council of the city; and such by-law does not exceed the powers conferred upon the council. 2. Neither the statute nor the by-law has the effect of modifying or abrogating the criminal law. 3. The statute and by-law are limited to the city of Montreal. 4. The imposition of imprisonment provided for by the by-law, under the authority of s. 124 of the statute, is legal. 5. Under the provisions of cl. 15 of s. 92 of the B. N. A. Act, and of cl. 8 of the same section, the provincial legislature could, as it has done by ss. 123 and 124 of the above statute, delegate to the council of the city of Montreal the power to pass a by-law prohibiting the opening of theatres on Sunday under penalty of imprisonment. 6. The opening of theatres on Sunday is prohibited by the statute, and is a contravention of the by-law. *McLaughlin* v. *Recorder's Court of the City of Montreal*, 4 Que. P. R. 304.

Sunday observance—*Reference to Supreme Court — Legislative jurisdiction.*] — The statute 54 & 55 V. c. 25, s. 4, does not empower the Governor-General in council to refer to the Supreme Court of Canada, for hearing and consideration, supposed or hypothetical legislation which the legislature of a province might enact in the future; Sedgewick, J., dissenting.—The said section provides that the Governor in council may refer "important questions of law or fact touching specified subjects," "or touching any other matter with reference to which he sees fit to exercise this power:"—*Held*. Sedgewick, J., dissenting, that such "other matter" must be *ejusdem generis* with the subjects specified. Legislation to prohibit on Sunday the performance of work and labour, transaction of business, engaging in sport for gain, or keeping open places of entertainment, is within the jurisdiction of the Parliament of Canada. *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.*, [1903] A. C. 524, followed. *In re Sunday Laws*, 25 C. L. T. 77, 35 S. C. R. 581.

Sunday Observance Act, Quebec — *Legislative powers of provincial legislatures —Penalty for offences—Proceedings for recovery—Affidavit — Authority of Attorney-General—Information—Prosecutor a British subject—Conviction.*]—The Act of the Quebec legislature, 7 Edw. VII. c. 42, "respecting the observance of Sunday," is not a law in a criminal matter, but is within the legislative powers of provincial legislatures, and is constitutional.—2. The authority of the Attorney-General for the province, and the affidavit for *qui tam* actions, are neither of them required in proceedings for the recovery of the fine imposed by the above statute, in the manner therein provided.—3. A conviction under the statute will not be quashed, because no mention is made, in the information or complaint, that the prosecutor is a British subject, if that fact is proved at the trial. *Couture* v. *Panos*, 17 Que. K. B. 560, 5 E. L. R. 525. *Rex* v. *Panos*, 14 Can. Crim. Cas. 291.

Tax titles—*Powers of Territorial legislature—Tax titles—Land Titles Act, 1894—Redemption — Statute — Retro-activity.*]—The provisions of the N. W. T. Ordinance c. 2 of 1896, vesting titles of lands sold for taxes in the purchaser forthwith upon the execution of the transfer thereof, free of all charges and incumbrances other than liens for existing taxes and Crown dues, are inconsistent with the provisions of the 54th, 59th, and 97th sections of the Land Titles Act, 1894, and, consequently, *pro tanto*, *ultra vires* of the legislature of the North-West Territories; Sedgewick, and Killam, JJ., *contra*. The second section of the N. W. T. Ordinance, c. 12 of 1901, providing for an extension of the time for redemption of lands sold for taxes, deals with procedure only, and is retrospective, and saves the rights of mortgagees prior to the tax sale so as to permit them to come in as interested persons and redeem the lands; Sedgewick and Killam, JJ., contra. *The Ydun*, 15 Times L. R. 361, referred to. *In re Kerr*, 5 Terr. L. R. 297,

overruled. Per Sedgewick and Killam, JJ.: The provisions of s. 2 cannot operate retrospectively so as to affect cases in which the transfers had issued and the right of redemption was gone as in the present case. *North British Canadian Investment Co.* v. *Trustees of St. John School District No. 16, N. W. T.*, 35 S. C. R. 461.

Telegraph companies—*Tax on—Application to interprovincial company—Action to recover tax—Parties—Collector of revenue—Attorney-General — Intervention—Appeal — Formal objections not taken below.*]—The statute of the legislature of Quebec imposing an annual tax of $2,000 upon every telegraph company having a paid-up capital exceeding $50,000, and maintaining a line of telegraph for the use of the public in the province, is *intra vires* of the legislature. 2. The appellant telegraph company, although incorporated by Parliament and carrying on an interprovincial line of telegraph, that is to say, in all the provinces of Canada, except British Columbia and Prince Edward Island, having a paid-up capital exceeding $50,000, must pay this annual tax of $2,000, inasmuch as it carries on business in the province of Quebec by reason of its there using a part of its lines for messages from one point to another within the province. 3. An action brought by a collector of revenue in that capacity for the recovery of this tax is to be regarded as brought under the direction of the Attorney-General, who is *dominus litis*, and therefore the intervention of the Attorney-General to sustain the constitutionality of the statute, is an unnecessary and useless proceeding, for which he could not, under the circumstances, be allowed costs. 4. The Court of Appeal will not take into consideration objections which have regard rather to the form than to the substance, if they have not been taken in the Court below. *Great North Western Telegraph Co.* v. *Fortier*, 12 Que. K. B. 405.

Telephone company—*Work or undertaking connecting provinces—British North America Act, 1867, ss. 91, 92, s.-s. 10 (a)—Dominion Act, 43 V. c. 67—Ontario Act, 45 V. c. 71—Powers of Dominion Parliament—Powers of local legislature.*] — *Held*, that under their Dominion Incorporating Act, 43 V. c. 67, the respondent telephone company were entitled, without the consent of the municipal corporation, to enter upon the streets and highways of the city of Toronto, and to construct conduits or lay cables thereunder, or to erect poles with wires affixed thereto upon or along such streets or highways. The scope of the respondents' business contemplated by the Act, and involving its extension beyond the limits of any one province, was within the express exception made by s. 92, s.-s. 10 (a), of the British North America Act, 1867, from the class of local works and undertakings assigned thereby to provincial legislatures. Accordingly, 43 V. c. 67 was within the exclusive competence of the Dominion Parliament, under s. 91. The Ontario Act, 45 V. c. 71, passed to authorise the exercise of the above powers within the province, subject to the consent of the corporation, was held to be *ultra vires;* and could not by reason of having been passed on the application of the respondent company be validated as a legislative bargain. Judgment in 23 C. L. T. 277, 6 O. L. R. 335, affirmed. *City of Toronto* v. *Bell Telephone Co. of Canada*, [1905] A. C. 52.

Territorial legislature—*Powers of — Foreign Companies Ordinance—Extra provincial corporation—Dominion incorporation.*]—The Foreign Companies Ordinance is *intra vires* of the Territorial legislature, and extends to companies incorporated by the Dominion to carry on throughout Canada a business which the Territorial legislature might have authorised it to carry on in the Territories. *Rex* v. *Massey-Harris Co.*, 6 Terr. L. R. 126, 1 W. L. R. 45.

Tolls—*Yukon Territory — Franchise — Dominion lands.*] — The Executive Government of the Yukon Territory may lawfully authorise the construction of a toll tramway or waggon road over Dominion lands in the territory, and private persons using such road cannot refuse to pay the tolls exacted under such authority. *O'Brien* v. *Allen*, 20 C. L. T. 295, 30 S. C. R. 340.

Trading stamps — *Statute prohibiting trade—Method of trade—Stamps or coupons —Municipal by-law — Ultra vires — Injunction.*]—An interlocutory injunction is a most efficacious remedy, and is therefore open to persons interested, to restrain promulgation of a municipal by-law, alleged to be *ultra vires*, which prohibits a certain trade, when such prohibition will cause persons interested a serious wrong or irreparable loss.—2. A provincial legislature has no power to pass a statute permitting municipalities to prohibit by by-law the exercise of a trade which is not in itself contrary either to good morals or public order.—3. A business consisting in furnishing advertising matter to merchants, who engage themselves in turn to distribute to their customers, upon their cash sales, coupons or stamps giving the right to draw premiums, is not contrary to good morals or public order. A statute passed by provincial legislature which permits municipalities to prohibit such trade is unconstitutional. *Wilder* v. *Montreal*, 26 Que. S. C. 504, affirmed (1906), 14 Que. K. B. 139.

Treaties with Indians—*Contingent annuities—B. N. A. Act, s. 112—Res judicata.*] —The award complained of by the Province of Quebec determined that certain payments made by the Dominion of Canada in virtue of the Huron and Superior Treaties with the Ojibeway Indians for arrears of augmented annuities and interest from 1867 to 1873, and for increased annuities in excess of the fixed annuities with interest paid subsequently, should be taken into account and included in the debt of the late Province of Canada mentioned in s. 112 of the B. N. A. Act:—*Held*, that the question of these contingent annuities had been considered and decided in *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1897] A. C. 199, and that the payments so made by the Dominion were recoverable from the Provinces of Ontario and Quebec conjointly in the same manner as the original annuities. *Province of Quebec* v. *Dominion of Canada*, 30 S. C. R. 151.

Treaties with Indians — *Lands—Surrender—Precious metals — Crown—Acquiescence.*]—A treaty of surrender of Indian

territory to the Dominion in 1873 provided that certain lesser reserves in the lands surrendered were to be defined and set apart, and thereafter to be administered and dealt with for the benefit of the Indians. Part of one of these lesser reserves, in Ontario, was in 1886 surrendered to the Queen under the Indian Act of 1880 in trust to sell upon such terms as the Dominion Government might deem most conducive to the welfare of the Indians; and of this, certain lands were granted by the Dominion Government to the plaintiffs, with the precious metals therein. The defendants asserted title in fee to the same lands under an Ontario patent of 1899. It appeared that in negotiating the treaty of 1873 the Dominion commissioners represented to the Indians that they would be entitled to the benefit of any minerals that might be discovered on any of the lesser reserves:—*Held*, that, after the surrender in 1886, title to the land and to the precious metals therein could be obtained only from the Crown as represented by the Province of Ontario. With the royal mines and minerals the Indians had no concern; nor could the Dominion make any valid stipulation with them which could affect the rights of Ontario.—*Semble*, that a Province is not to be held bound by alleged acts of acquiescence of departmental officers which are not brought home to or authorised by the proper executive or administrative organs of the Provincial Government, and are not manifested by any order in council or other authentic testimony. *Ontario Mining Co.* v. *Seybold*, 20 C. L. T. 10, 31 O. R. 386.

Vancouver Island—*Settlers' Rights Act, 1904* — *Crown* — *Provincial Government* — *Grant of land*—*Validity*—*Grant of minerals and timber by Dominion Government*—*Locus standi of plaintiffs to attack grant to defendant*—*Absence of assent by Crown.*]—Appeal from judgment, 7 W. L. R. 778, allowed. *Esquimalt* v. *Fiddick*, 11 W. L. R. 509.

Vancouver Island Settlers' Rights Act, 1904—*Construction*—*Powers of local legislature*—*British North America Act, s. 92, s-s. 10.*]—The British Columbia Vancouver Island Settlers' Rights Act, 1904, directed that a grant in fee simple without any reservations as to mines and minerals should be issued to settlers therein defined, and thereunder a grant was made to the appellant of the lot in suit. By an Act of the same legislature in 1883, land which included the said lot had been granted with its mines and minerals to the Dominion government in aid of the construction of the respondents' railway, and in 1887, had been by it granted to the respondents under the provisions of a Dominion Act, passed in 1884:—*Held*, that the Act of 1904, on its true construction, legalized the grant thereunder to the appellant, and superseded the respondents' title.—*Held*, also, that the Act of 1904 was *intra vires* of the local legislature. It has the exclusive power of amending or repealing its own Act of 1883. The Act, moreover, related to land which had become the property of the respondents, and affected a work and undertaking purely local, within the meaning of s. 92, s.-s. 10, of the British North America Act. Judgment in 12 B. C. R. 257 reversed. *McGregor* v. *Esquimalt and Nanaimo Ry. Co.*, [1907] A. C. 462.

Water and watercourses — Navigable river—Water lot—Power of provincial government. *Chauret* v. *Pilon*, 3 E. L. R. 9.

Waters of navigable rivers—*Concession of the right to take and sell the ice of a navigable river.*]—Waters of navigable and floatable rivers, when frozen during winter, or in their natural state, are part of the public domain, may be used by every one and are not objects of commerce. Hence, a concession by provincial government of "the right to cut, take and sell ice" from a determinate part of a navigable river, is null and void as not having any object. *Dupuis* v. *St. Jean* (1910), 38 Que. S. C. 204.

Watercourses — *Navigable waters*—*Cutting ice*—*Trespass on water lots.*]—An ice company in harvesting ice from navigable waters at a distance from the shore may use any reasonable means of conveying it to their ice houses, and for that purpose may cut a channel through private water lots, through which to float the ice.—Judgment of the Court of Appeal, 26 Ont. App. R. 411, reversed, and that of MacMahon, J., at the trial, 29 O. R. 247, restored, Strong, C.J., and Taschereau, J., dissenting. *Lake Simcoe Ice Co.* v. *McDonald* (1900), 31 S. C. R. 130.

Yukon Territory—Order in council of Dominion government providing for enforcement of miners' liens—*Intra vires*—Dominion mining lands—Procedure—Lien on detached machinery and chattels—*Ultra vires*—Lien for wood supplied—Time for registration—Form of lien—Lien of miners' cook for wages — Affidavit of agent — Proofs of claims—Contract of mine owner with layman—Waiver of lien—Rights of sub-contractors—Costs. *Re Steinberger* (Y.T.), 5 W. L. R. 93.

Yukon Territory—Ordinance of council relating to the decision of constitutional and other territorial questions—Power of council—Placer mining regulations — Locations—Exceptions—Government reservations for town-sites—Lands within the boundaries of city, town, or village—Powers of commissioners—Lands Act—Orders in council. *Re Klondike City Town-site* (Y.T.), 5 W. L. R. 526.

See APPEAL—ASSESSMENT AND TAXES—CONTRACT—COPYRIGHT — CRIMINAL LAW — CROWN — INTOXICATING LIQUORS — LAND TITLES ACT—MINES AND MINERALS—MUNICIPAL CORPORATIONS—SCHOOLS.

CONSTRUCTION OF STATUTES.

See STATUTES.

CONSTRUCTION OF WILLS.

See WILLS.

CONSUL.

See USE AND OCCUPATION.

CONTAGIOUS DISEASES.

See PUBLIC HEALTH.

CONTEMPT OF COURT.

Breach of injunction—Deliberate act—Punishment — Imprisonment—Costs. *Todd* v. *Pearlstein*, 10 O. W. R. 471.

Breach of injunction—Infringement of design for manufactured article—Similarity—Colourable imitation—Comparison by Judge — Wilful breach—Company—Sequestration—Relief on terms. *Buck Stove Co.* v. *Guelph Foundry Co.*, 6 O. W. R. 116.

Breach of injunction—*Motion to commit—Costs.*]—Where in a suit for a declaration that the plaintiff and defendant were partners, the defendant, in breach of an interim injunction order, collected debts due the firm, but which, subsequently to the service of a notice of motion for his committment, he paid to the receiver in the suit, he was ordered to pay the costs of the motion. *Burden* v. *Howard*, 24 C. L. T. 242, 2 N. B. Eq. R. 531.

Breach of injunction improvidently granted.]—Where an injunction is erroneously or improvidently granted, although only voidable, while it is in force nothing should be done in contravention of its reasonable import. *McLeod* v. *Noble*, 28 O. R. 528, distinguished. *Dunn* v. *Toronto Board of Education*, 24 C. L. T. 223, 7 O. L. R. 451, 3 O. W. R. 311, 393.

Committal of defendant for non-production of book—*Application for discharge—Destruction of book—Purging contempt—Payment of costs.*]—A prisoner committed to gaol for contempt of Court in not producing a book which he had been ordered to produce cannot purge his contempt by shewing either that the book had been burnt by some other person without his knowledge or connivance, or that he left it in a certain place and was afterwards unable to find or trace it.—In such circumstances a prisoner should not be released unless he pays all the costs occasioned by his misconduct in connection with the lost book, although an application for release without such payment might be entertained if it were shewn that, by reason of poverty, such costs could not be paid. *In re M.*, 46 L. J. Ch. 24, followed. *Monkman* v. *Sinnott*, 3 Man. L. R. 170, distinguished. *Cotter* v. *Osborne*, 7 W. L. R. 90, 17 Man. L. R. 248.

Corporation of company, can it be guilty of?—*Publishing in a newspaper the judgment condemning it—C. P. 18, 834.*]—Corporations are subject to the penalties provided for contempt of Court.—When a publishing company refuses to obey an order of the Court directing it to publish the judgment condemning it to pay damages for libel, it is in contempt of Court. *Garneau* v. "*La Vigie*" *Company* (1910), 11 Que. P. R. 404.

Disobedience of injunction—Reasonable efforts to comply. *Leahy* v. *North Sydney*, 1 E. L. R. 431.

Disobedience of injunction.]—Plaintiffs applied to commit defendant for disobeying an injunction order directing him not to interfere with the cutting or removal of a certain crop. Defendant had been served with a copy of the interim order and summons to appear, and his counsel was present when the injunction was continued until the trial:—*Held*, that Sask. Rule 330 does not apply to a restraining order. Defendant should have been shewn the original order, but this omission will not avail when a copy was served and he had acted thereon. Even if the plaintiffs were dilatory in serving the order continuing the injunction the defendant was aware of the restraining clause in the interim injunction. Order for committal. *Moose Mountain* v. *Paradis*, 12 W. L. R. 310.—Above order of Wetmore, C.J., was reversed; Newlands, J., dissenting and agreeing with Wetmore, C.J.—*Held*, *per* Johnstone, J., that where the liberty of the subject is in question, the utmost strictness in procedure is required; and the motion to commit should have been refused, because: (1) the affidavit of service of notice of that motion did not state that the defendant was served within the province of Saskatchewan: (2) the affidavits and other papers used on the motion were not filed until after the hearing of the motion (although no objection was taken); and (3) the copy of the injunction order served on the defendant was endorsed with a notice that, if the defendant neglected to obey the order, he would be subject to "process of execution," instead of "arrest." *Per* Lamont, J., that the defendant was not in contempt because: (1) the injunction order was not served until after the acts complained of were committed, and there was no evidence, and it was not to be inferred that the defendant had notice of it; and (2) the injunction order was confined to the crop raised on the defendant's land in the year 1909, and there was no evidence that the flax removed by the defendant, in alleged disobedience to the order, formed part of the crop raised on the premises in 1909. *Moose Mountain Lumber and Hardware Co.* v. *Paradis* (1910), 14 W. L. R. 20, 3 Sask. L. R. 312.

Disobedience of order for interim alimony — Order for payment of money. *Galley* v. *Galley* (N.W.T.), 1 W. L. R. 155.

Disobedience of subpoena—*Service—Necessity for shewing original.*]—To bring a person into contempt for disobedience of a subpœna, it must be proved that the original writ was shewn at the time of service, as well as that a copy was delivered to and left with the person. *Woods* v. *Fader*, 10 O. L. R. 643, 6 O. W. R. 369.

Habeas corpus — *Disobedience — Peace officer—Return.*]—A peace officer upon whom a writ of *habeas corpus* has been served, directing him to produce a prisoner who is in his custody, is not guilty of contempt of Court in neglecting to produce the prisoner, when, in good faith and for reasons which he believes to be valid, he does not do so. 2. A return setting forth all these reasons is sufficient return to such a writ. *Greene* v. *Carpenter*, 22 Que. S. C. 104.

Husband and wife — *Wife leaving conjugal domicil—Disobedience to judgment.*]—A wife who has been ordered by a judgment to return to the conjugal domicil, and who leaves it after having returned to it, cannot for so doing be imprisoned for contempt of Court. *Tessier* v. *Guay*, 23 Que. S. C. 75.

Injunction — *Disobedience of — Jurisdiction of Judge in Chambers in vacation—Enforcement of order for contempt—Appeal—Fine and imprisonment—Reduction—Procedure—Affidavits — Discretion.*]—A Judge in Chambers may during long vacation assume jurisdiction to proceed upon a rule *nisi* for disobedience of an injunction.—2. A Judge may proceed to enforce a judgment which he has given, although the unsuccessful party has applied for review or appealed from it, if it is evident that the inscription in review or in appeal is not competent under the circumstances of the case.—3. In order that a court of appeal shall reduce the amount of a fine or the term of imprisonment awarded for contempt of Court, it must be shewn that the sentence is so evidently extravagant that a reasonable man could not have pronounced it.—4. When a Judge to whom a motion is made to commit for disobedience to an injunction decides to proceed upon affidavits instead of ordering a regular trial, he exercises a discretion given to him by the law, and his decision cannot be set aside by a Superior Court unless it amounts to a manifest injustice. *Ricard* v. *Grand Mère Electric Co. and Town of Grand Mère*, 32 Que. S. C. 10.

Injunction — *Disobedience of — Sequestration—Stay of proceedings—Right of appeal — Jurisdiction of appellate Court — "Criminal matter" — "Execution" and "operation" of judgment—Variance between written reasons and formal order—Reasonable construction—Practice.*]—The plaintiffs, by the judgment at this trial of this action, were awarded an injunction restraining the defendants from continuing to make binders and sheets in imitation of the plaintiffs', for disobedience of which the issue of a writ of sequestration against the property of the defendants for contempt of Court was, on the 28th March, 1907, directed by a Judge, whose order was subsequently affirmed by a Divisional Court. At the time when the order for sequestration was made, an order had been made by a Judge of the Court of Appeal, who, by his reasons in writing, delivered on the 4th March, 1907, directed that "execution of the injunction be stayed" pending the disposition of an appeal by the defendants from the judgment at the trial, but the formal order thereupon merely directed that "the operation of the judgment appealed from" should be stayed:—*Held*, that the Court had power to entertain the appeal, and that the order directing the issue of the writ of sequestration should be set aside, on the ground that it was made at a time when there was a stay of execution of the judgment by virtue of the order of the 4th March, 1907.—Per Moss, C.J.O., and Meredith, J.A.:—The subject matter of the appeal was not a "criminal matter" within the meaning of the British North America Act, 1867, s. 91, s.-s. 27, and was not excluded from the operation of the Judicature Act and the Consolidated Rules (see Rule 4), as being matter of "practice or procedure in criminal matters." *O'Shea* v. *OShea*, 15 P. D. 59, and *Ellis* v. *The Queen*, 22 S. C. R. 7, distinguished. — Judgment of a Divisional Court, 10 O. W. R. 92, reversed. *Copeland-Chatterson Co.* v. *Business Systems Limited*, 16 O. L. R. 481, 11 O. W. R. 762.

Injunction restraining landlord from interfering with tenant's possession—Disobedience of order—Motion to commit—Landlord fined $50 and costs—See 17 O. W. R. 102, 2 O. W. N. 125. *Broom* v. *Godwin* (1909), 17 O. W. R. 629, 2 O. W. N. 321.

Interlocutory judgment — *Appeal — Stay.*]—Proceedings for contempt of Court will not be stopped by reason of the fact that an appeal has been taken from an interlocutory judgment in the same case. *Morganthaler Linotype Co.* v. *Toronto Type Foundry Co.*, 7 Que. P. R. 76.

Jurisdiction over person resident out of Province — Divisional Court held that the Court had no power to bring a person before it from outside the province—Order *nisi* for committal discharge. *Re Place, Copeland-Chatterson Co.* v. *Business Systems Limited*, 7 O. W. R. 56.

Jurisdiction to punish.]—The Superior Court, sitting in the district of Quebec, has jurisdiction over a contempt of Court consisting in injurious writings, addressed to it or to the Judges of whom it is composed, in a newspaper published outside of the district (in the present case, at Montreal). *Atty.-Gen. for Que.* v. *Fournier*, 37 Que. S. C. 68.

Affirmed (1910), 19 Que. K. B. 431, 17 Can. Crim. Cas. 108.

Libellous publications pending trial of action for slander—*Prejudice—Fair trial—Political controversy.*]—Libellous language is not necessarily a contempt of Court; the applicant for committal for contempt must shew that something has been published which either is clearly intended, or at least is calculated, to prejudice a trial which is pending.—A motion by the defendant in an action for slander to commit for contempt of Court the editor of a newspaper for publishing articles, pending the action and before trial, commenting on the matters in question in the action, was dismissed, and with costs, where it did not appear from the evidence, and it was not fairly to be inferred from the articles, that there would be an interference, or that there was any attempt to interfere, with the ordinary course of justice in the matter of a fair trial—the slanderous words alleged having been uttered and the articles published in the course of a contested parliamentary election, and the whole frame of the articles being to separate the legal aspect of the case from the political. *The Queen* v. *Payne*, [1896] 1 Q. B. 577, *Ex. p. Hooley*, 6 Mans. 44, *In re New Gold Coast Exploration Co.*, [1901] 1 Ch. 860, and *McLeod* v. *St. Aubyn*, [1899] A. C. 549, followed. *Guest* v. *Knowles. Re Robertson*, 17 O. L. R. 416, 12 O. W. R. 1201.

Mere defects of form in drafting a judgment condemning a person for contempt in refusing to obey an injunction are not of

nullity if the decision is otherwise well founded. *Bernier* v. *Que. & Levis Ferry Co.* (1910), 39 Que. S. C. 193.

Motion to commit—Attempt to procure destruction of letter—Excuse—Punishment—Payment of costs—Jurisdiction — Person in possession of letter out of province—Notice of motion—Other relief—Examination of defendants—Costs. *Copeland-Chatterson Co.* v. *Business Systems Limited*, 7 O. W. R. 319.

Motion to commit—Breach of injunction—Master and servant—Interference with servants — Incitement to commit breach — Offer of money — Proof—Picketting—Vagueness of charges—Dismissal of motion—Costs. *Canada Foundry Co.* v. *Emmett*, 2 O. W. R. 1032, 1102.

Motion to commit—*Order on—Attachment — Apology — Variation of order pronounced—Appeal—Criminal matter.*] — During the pendency of an action for libel, the defendant called a public meeting at which the subject matter of the action was discussed, and he also published articles in his newspaper commenting upon the libel. The plaintiff made application to punish the defendant for contempt. The Judge who heard the motion filed a memorandum of his reasons for granting it. He subsequently granted an order giving the plaintiff liberty to issue a writ of attachment, and he directed that the defendant should publish an apology in his newspaper. The defendant appealed, and on the appeal it was contended that the Judge had no jurisdiction to make the direction as to the apology; also that the order for the writ should not have departed in its terms from the memorandum filed by the Judge:—*Held*, that the appeal must be dismissed. The Court has no jurisdiction to rehear or alter the order after it has passed, provided it accurately expresses the intention of the Judge: *Preston Banking Co.* v. *Allsup*, [1895] 1 Ch. 141. The order as granted expressed the intention of the Judge. Besides, the proceeding was criminal, and there was no appeal open to the defendants: *O'Shea* v. *O'Shea*, 15 P. D. 59; *Ellis* v. *Regina*, 22 S. C. R. 7. *Grant* v. *Grant*, 24 C. L. T. 139, 36 N. S. R. 547.

Motion to commit defendants—Motion *strictissimi juris*—Failure to set down—Rule 364—Defendants not appearing—Motion refused without costs. *Smith* v. *Steen*, 12 O. W. R. 762.

Motion to commit local manager of express company for non-production—*Con. Mun. Act, s. 583 (39)—By-law regulating laundries.*]—Chatham passed a by-law regulating the licensing of laundries. Certain Chinese moved to quash the by-law, and swore that their profits were very small and that they could not carry on their business under the terms of the by-law. Defendants desired to shew that their profits were large, by the records of the Dominion Express Company, but their local manager refused to produce the books and records of the company. Defendants moved to commit the local manager. Latchford, J., *held* (14 O. W. R. 1161, 1 O. W. N. 238), that the evidence sought from the local manager was not material, nor relevant to the question at issue, that the true test whether the by-law was or was not valid was whether the council passed it in *bona fide* exercise of powers conferred by Municipal Act, s. 583 (39) and not the profitable or unprofitable nature of the plaintiff's business, and dismissed the motion. Divisional Court affirmed Latchford, J., and dismissed the appeal. *Pang Sing* v. *Chatham* (1910), 16 O. W. R. 338, 1 O. W. N. 1003.

Motion to stay appeal by defendants in contempt — *Disobedience to injunction—Unincorporated association — Service—Costs.*]—On a motion by the plaintiff to stay a pending appeal by the defendants from an order dismissing an application to set aside service of the writ of summons on an individual for the defendant association, on the ground that the association was not an incorporated body or a partnership and could not be served as a body, the plaintiff alleging that the defendants were in contempt for disobedience of an injunction:—*Held*, following *Metallic Roofing Co. of Canada* v. *Local Union No. 30, Amalgamated Sheet Metal Workers' International Assn.*, 23 C. L. T. 152, 5 O. L. R. 424, that the association was not a body capable of being sued or being served, and so was not capable of being enjoined or of committing a contempt, and that, as the very object of the appeal was to determine whether it could be sued and served with process, it could not be determined whether a contempt had been committed without hearing the appeal:—*Held*, also, that the rule is not universal that persons guilty of contempt can take no step in the action; a party, notwithstanding his contempt, is entitled to take the necessary steps to defend himself, and, as the defendants here were ordered to appear within ten days on pain of having judgment signed against them, they had the right to shew, if they could, that the service upon them was not permitted by the practice; and the motion was refused under the circumstances without costs. *Fry* v. *Ernest*, 9 Jur. N. S. 1151, and *Ferguson* v. *County of Elgin*, 15 P. R. 399, followed. *Small* v. *American Federation of Musicians*, 23 C. L. T. 188, 5 O. L. R. 456, 2 O. W. R. 26, 33, 99, 278, 310.

Newspaper — *Reflections on Judge of Superior Court.*]—There is contempt of Court in an article in a newspaper which falsely imputes to a Judge sitting in the Superior Court conduct or words which are of a nature to draw upon him the hatred or contempt of the public. *In re Soleil Publication Co.*, 34 Que. S. C. 72.

Newspaper comment — *Conduct of revising officer.*]—The publication of newspaper articles reflecting on the conduct of a revising officer acting under the Election Act in such a way that they might have been made the subject of proceedings for libel, but not in the circumstances calculated to obstruct or interfere with the course of justice or the due administration of the law, does not constitute a contempt of Court punishable by summary proceedings. *Skipworth's Case*, L. R. 9 Q. B. at p. 233, *Hunt* v. *Clarke*, 58 L. J. Q. B. 490, and *The Queen* v. *Payne*, [1896] 1 Q. B. 577, followed. *In re Bonnar*, 23 C. L. T. 289; *Rex* v. *Bonnar* (No. 2.), 14 Man. L. R. 481.

Newspaper criticism.] — Criticism in the newspapers of judgments and judicial orders is legitimate and beneficial. The right to do so is inherent to the liberty of the press. But it is necessary not to confound this with attacks upon the Judges, couched in injurious language, accompanied by insinuations or direct charges of dishonesty, favoritism or corruption, which have for sole object to discredit them by libelling them. Comments upon suits, contestation or trials before the Courts may constitute a contempt of Court after judgment rendered as well as before the decision is given. *Atty.-Gen. for Que.* v. *Fournier*, 37 Que. S. C. 68.

Affirmed (1910), 19 Que. K. B. 431, 17 Can. Crim. Cas. 108.

Order for imprisonment — *Appeal — Discretion.*]—Where the trial Judge has exercised his discretionary powers in a matter of procedure by ordering that a party who was in contempt of Court for refusing to produce effects unlawfully removed by her, should be imprisoned until the effects should be produced, the Court of King's Bench, or a Judge thereof, will not be disposed to allow an appeal from such exercise of discretion, and particularly where the course adopted by the Court below was apparently the only practical remedy available to enforce obedience to its orders. *St. Pierre* v. *Belisle*, 12 Que. K. B. 279, 6 Que. P. R. 418.

Pending criminal proceeding—*Information—Contemptuous design.*] — The question whether a contempt has been committed is for the sole decision of the Court; and the fact that the contemnor denies any disrespectful or contemptuous design to reflect on proceedings pending before the Court, will not justify him if such comments appear to the Court to amount to a flagrant contempt. 2. Proceedings are pending in a criminal case from the time the information has been laid and so long as any proceedings can be taken. Where the jury have disagreed and a new trial has been ordered, the cause is pending until ended by a verdict or otherwise. *Rex* v. *Charlier*, 12 Que. K. B. 385.

Preliminary inquiry by magistrate—*Refusal of witness to answer—Relevancy of question—Alteration of document.*]—1. Under s. 585 of the Criminal Code a magistrate would not be justified in committing a witness to gaol for refusal to answer a question unless it were in some way relevant to the issue, as that section only applies when the refusal is made "without offering any just excuse," and the form of the warrant of commitment referred to in that section contains the words, "now refuses to answer certain questions concerning the premises now put to him." 2. If B. is charged with making an alteration of a document received from A., the question put to A. on his examination as a witness on the trial of B. as to the person from whom he, A., had received this document, would not be material if the document is produced; but, if it cannot be found, proof of its contents would have to be given, and that might involve, as a part of the claim, information as to the source from which A. had obtained the document, and it could not be held that the question was not in some way material. *In re Ayotte*, 15 Man. L. R. 156, 1 W. L. R. 79, 9 Can. Crim. Cas. 133.

Publication of newspaper article — *Comment on pending election petition—Prejudice—Petition not prosecuted — Abuse of forms of Court.*]—Motion to make absolute an order *nisi* to commit editor of newspaper for contempt of Court in publishing in the newspaper an article commenting on matters alleged to be in question upon a petition pending against respondent to avoid his election as member for North Renfrew in the Legislative Assembly of Ontario: — *Held*, such an application should only be granted where it clearly appears that the course of justice has been, or is likely to be, restricted or impaired to the prejudice of the applicant unless summary punishment is inflicted upon the offender. If an article is merely libellous, or if it is even strictly contempt of Court, but not of such a nature as to impede the course of justice, then the applicant must resort to what other remedies, if any, the law gives him, and cannot successfully invoke the summary, and as it has been called, arbitrary, remedy now sought. The proceedings on both sides were so manifestly a sham, and a user of the forms of the Court for some purpose other than of the real trial of the charges, that contempt of Court is not predicable of anything reflecting upon the parties to them. *In scena non in fors res agitur*, and whether the play is damned or applauded, is no concern of a Court of justice. Motion dismissed with costs on these grounds only. *Re North Renfrew Provincial Election, Re Macdonald*, 4 O. W. R. 244, 9 O. L. R. 79.

Restraint upon administration of justice.]—The offence known as "contempt of Court" results from any act which tends to fetter or put restraint upon the administration of justice, or to expose the Courts or Judges to contempt. *Atty.-Gen. for Que.* v. *Fournier*, 37 Que. S. C. 68.

Affirmed (1910), 19 Que. K. B. 431, 17 Can. Crim. Cas. 108.

Same acts of disobedience to an injunction issued against a corporation, its officers and servants, may bring about a judgment for contempt of Court distinctive as to the one and the others. *Bernier* v. *Que. & Levis Ferry Co*, (1910), 39 Que. S. C. 193.

Scandalizing the Court — *Attachment for contempt—Nature of proceeding—Court sitting in one district and contempt committed in another—Power to punish inherent in the Court.*]—A rule of the Superior Court, issued at the instance of the Attorney-General, calling on a party to shew cause why he should not be attached and punished for contempt of Court by scandalizing the Court, is a proceeding in a matter of a criminal nature, and an appeal from an order declaring the rule absolute and ordering the imprisonment of the party, will lie to the Court of King's Bench, under the provisions of the Criminal Code, if the jurisdiction of the Superior Court to deal with the matter, either relatively, because of the place in which it sits, or absolutely, on the ground that the subject matter is not one of contempt, is put in issue. But the Court of King's Bench, sitting in appeal, if it finds that the Superior Court has jurisdiction from both points of view, will not further inquire into the merits of the order. Per Archambeault, J.—The order declaring the rule absolute is a final judgment of the Superior Court from which an appeal

lies to this Court under Art. 43 C. P., as well on the merits as on the question of jurisdiction.—The Superior Court, sitting at Quebec, has jurisdiction to take cognizance of, and adjudicate upon, proceedings for contempt by scandalizing the Court in newspaper articles written and published in Montreal.—The Superior Court has jurisdiction to attach and punish for contempt by comments published in newspapers on judicial proceedings, both before and after disposal of them by final judgment.—The power to punish for contempt is inherent in Courts of superior original jurisdiction, such as the Superior Court of this province, independently of enactments in the codes and statutes relating to their disciplinary powers.—All writings or publications which tend to pervert or obstruct the ordinary course of justice and to shake or destroy confidence in its due administration, are contempts of Court. *Fournier & Atty.-Gen. for Que.* (1910), 19 Que. K. B. 431, 17 Can. Crim. Cas. 108.

Witness at trial — *Refusal to produce telegrams—Permission of superior — Public documents—Costs.*]—S., a witness, was duly subpœnaed to bring with him certain telegrams which went through the office of which he was agent, which office was to some extent under the control of the federal government. He did not produce the telegrams, and stated in excuse that he had not received permission from C., who was the agent of the government in relation to a government railway, and to whom he had applied for permission.—On application to commit S. and C. for contempt, the trial Judge decided that these telegrams were not public documents, and considered that both S. and C. were guilty of contempt, but, as their disobedience appeared to be primarily due to what they considered their imperative duty, he directed that on payment of the costs of these proceedings for contempt, no attachment should issue. An appeal on behalf of S. and C. was dismissed. *McDougall* v. *Dominion Iron and Steel Co., In re Scrois*, 40 N. S. R. 333.

See APPEAL—COMPANY—COSTS—COURTS—CRIMINAL LAW—EXECUTION — EXTRADITION —JUDGMENT DEBTOR — PRACTICE—SEQUESTRATION.

CONTRACT.

1. AVOIDANCE AND RESCISSION, 824.
2. BREACH OF CONTRACT, 830.
3. BUILDING CONTRACT, 850.
4. CONDITIONS, 869.
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6. CONSTRUCTION OF CONTRACT, 871.
7. ENFORCEMENT OF CONTRACT, 895.
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Brokerage Contracts. *See* BROKER.

Company Contracts. *See* COMPANY.

Mining Contracts. *See* MINES AND MINERALS.

Oil and Gas Contracts. *See* MINES AND MINERALS.

Sale of Goods. *See* SALE OF GOODS.

Sale of Lands. *See* VENDOR AND PURCHASER.

Timber Contracts. *See* TIMBER.

1. AVOIDANCE AND RESCISSION.

Action to set aside—*Parties—Married woman—Sale of immovable—Obligation contracted for husband — Payment of wife's debts.*]—A contract will not be set aside in an action unless all the contracting parties are before the Court.—The sale of an immovable with a proviso for redemption, entered into by a married woman separate as to property, will not be set aside at her suit upon the ground that the transaction really amounts to an obligation entered into for her husband in violation of Art. 1301, C. C., when it appears that the purchase money has been used to discharge debts due by her alone. *Lachapelle* v. *Viger*, 15 Que. K. B. 257.

Action to set aside, for improvidence—Delay in bringing action—Interest in partnership—Inadequacy of price—Fraud —Bad debts—Goodwill — Counterclaim — Costs. *Van Tuyl* v. *Fairbank*, 8 O. W. R. 271.

Arbitration clause — Action—Stay of proceedings — Willingness to arbitrate. *Fernan* v. *Monitor* (B.C.), 3 W. L. R. 426.

Cancellation in part — *Construction—Municipal works — Deductions — Deferred payments—Interest — Payments in advance —Rebates—Damages.*]—Article 1691, C. C., does not give the owner of works being constructed under a contract at a fixed price the power of cancelling the contract in part and maintaining it as to another part; it must be cancelled in toto or not at all. A municipality agreed to pay for works by promissory notes, payable in two years without interest, to be delivered to the contractor on the completion of the works, and to bear a date assumed to be the *mesne* date of completion of the works as carried on in detail. The *mesne* date was settled as 15th December, 1899, and the notes for the balance due were delivered in 1900: — *Held*, on appeal from 12 Que. K. B. 490, that interest on advance payments made before 15th December, 1899, was payable only from that date; but the interest should be calculated on the basis of the actual amounts of the advance payments made, and not on the basis of the actual cost of the works. Certain of the works were not executed by orders from the municipality, and on this head a reduction was made from the plaintiffs' claim. It appeared that the plaintiffs had, at least tacitly, consented to this diminution, and made no protest in respect thereof:—*Held*, that, under the circumstances, the plaintiffs could not claim the sum in question as damages under Arts. 1065, 1691, C. C. *Town of Maisonneuve* v. *Banque Provinciale du Canada*, 33 S. C. R. 418.

Causes rendering them void—*Legal constraint — Ratification.*]—Legal constraint such as the threat of a creditor to issue execution against his debtor, is not duress which avoids the contract. Causes that avoid contracts, except those against public order and good morals, can not any longer be invoked by those who have ratified them. *Robitaille* v. *Price* (1909), 36 Que. S. C. 385.

Conduct—*Injunction—Parol agreement——Statute of Frauds — Part performance—Services — Quantum meruit—New trial.*]—Previous to 1891, a verbal agreement was entered into between the plaintiff and the defendant, under which the plaintiff was to be employed in the care and management of the defendant's business, and in return the defendant was to afford the plaintiff support and maintenance during the defendant's lifetime, and at his death was to give to him one-half of a certain island belonging to the defendant. The plaintiff entered upon his duties and continued to perform his side of the agreement until August, 1897, when, by an injunction order, issuing out of the Equity Court, made in a suit to which both the plaintiff and the defendant were parties, he was restrained from any longer interfering with the care or management of the defendant's business, and was compelled to quit the island. He accordingly handed over to one B., who was acting under a power of attorney from the defendant, all the property of the defendant in his possession, and, treating the conduct of the defendant as equivalent to a rescission of the agreement, in the same month of August brought an action against the defendant for the value of his services during the six years previous to the issuing of the injunction order. The jury found that the defendant had annulled and put an end to the agreement on the 3rd August, 1897, the day the injunction order was issued, and a verdict was found for the plaintiff. In December, 1897, some months after the commencement of the action, the defendant made a deed of the island in question to B. upon certain trusts, the nature of which did not appear in evidence: — *Held*, that, although neither the obtaining of the injunction order nor the making of the deed to B. was sufficient to sustain the finding of the jury as to the annulment of the agreement, and the plaintiff ought, therefore, in strictness, to be nonsuited, yet, as there was a point of view of the facts which had not been presented to the jury, and under which the plaintiff might be entitled to recover on a *quantum meruit*, the case should be further investigated, and there should therefore be a new trial: Tuck, C.J., and McLeod, J., dissenting. *Frye* v. *Frye*, 34 N. B. R. 569.

Contract not yet executed—*Grounds for rescission.*]—There is no ground for a demand for the rescission of a contract in course of execution, except when the debtor is actually in default as regards the fulfilment of the obligations which arise from it. Consequently, the probability of his not being able to perform it within the time agreed upon, however strong that may be, and his default in accomplishing what is required by the contract, according to the mode or in the order provided, are not grounds sufficient to give the creditor the right to exercise this remedy. *Flood* v. *Larouche*, 28 Que. S. C. 271.

Deceit and fraud—*Evidence—Concurrent findings of lower Courts — Duty of second Court of Appeal.*]—A sale of timber limits to the plaintiff was effected through a broker for a price stated in the deed to be $112,500, but the vendor signed an acknowledgment that the true price, so far as he was concerned, was $75,000. At the time of the execution of the deed a statement was made shewing how the purchase money was to be paid, and the vendor signed an agreement that out of the balance of the $112,500, viz., $46,502.02, the plaintiff was to get $37,500, *i.e.*, the amount of the difference between the true price and that mentioned in the deed. The vendor refused to pay over this $37,500, on the ground that the plaintiff and the broker had conspired together to deceive him as to the actual price to be obtained for the limits, and that the sale was not in fact to the plaintiff for $75,000, but to the plaintiff's principals, the grantees in the deed, for the full consideration of $112,500, and that the plaintiff and the broker were acting fraudulently and seeking by deceit and artifice to deprive him of the full price at which the sale had been effected. In an action to recover the $37,500 from the vendor:—*Held*, affirming the judgment appealed from, that the acknowledgments signed by the vendor settled the rights of the parties, unless there was very strong evidence to the contrary, and, as there was no such evidence, and the circumstances, as found by the Courts below, tended to shew that the plaintiff was entitled to the money in dispute as the natural result of the transactions between the parties, the case was one in which a second Court of Appeal would not be justified in disturbing the concurrent findings at the trial and of the Court appealed from. *Vellieux* v. *Orduay*, *Price* v. *Orduay*, 24 C. L. T. 109, 34 S. C. R. 145.

Division of estate—Release—Action to set aside—Delay—Statute of Limitations—Misrepresentations — Undue influence—Improvidence—Failure of proof. *Collins* v. *Bobier*, 8 O. W. R. 111.

Duration—*Right to cancel—Repugnant clauses.*]—A contract for supplying light to a hotel contained the following provisions: "This contract is to continue in force for not less than 36 consecutive calendar months from date of first burning, and thereafter until cancelled (in writing) by one of the parties hereto. . . . Special conditions if any. This contract to remain in force after the expiration of the said 36 months for the term that the party of the second part renews his lease for the Russell House." After the expiration of the 36 months the lease was renewed for five years longer:—*Held*, reversing the judgment of the Court of Appeal, 1 O. L. R. 73, 21 C. L. T. 105, that neither of the parties to the contract had a right to cancel it against the will of the other during the renewed term. *Ottawa Electric Co.* v. *St. Jacques*, 22 C. L. T. 77, 31 S. C. R. 636.

Election—*Affirmance of contract.*]—No one can treat a contract as avoided by him,

so as to resume the property which he parted with under it, and at the same time keep the money or other advantages which he has obtained under it; and therefore a company, on rescinding a contract, are bound to restore the money or security which they received under the contract. *Re Army & Navy Clothing Co.—Bouch, Coath & Co.'s Claim* (1899), 30 C. L. T. 289.

Ground for rescission—*Failure to perform—Art. 1022, C. C.—Estoppel—Exceptional cases—Art. 1065, C. C.—Performance after action brought for rescission—Condition precedent—Notice—Acceptance of work.*]—The failure of one party to a contract to perform his part or undertaking is a cause for rescission established by law (Art. 1022, C. C.), of which his co-contractor may avail himself by action.—2. Though a party to a contract may be estopped from seeking a rescission of it for non-performance, when he has himself done something that makes it impossible to restore the debtor to his former position, such impossibility, resulting from other causes, is not a bar to the action.—3. The words "in cases which admit of it," in Art 1065, C. C., refer to the exceptional cases in which specific performance of an obligation may be enforced, rather than to cases of rescission.—4. Performance after action brought to rescind a contract is not a valid ground of defence.—5. No special notice or *mise en demeure* to perform the undertakings of a contract is required, as a condition precedent to an action for rescission for non-performance.—6. The acceptance of works is no bar to an action for rescission for non-performance, when it is not clearly shewn that the works accepted were those undertaken under the contract. *Town of Grand' Mère* v. *Hydraulique de Grand' Mère*, 17 Que. K. B. 83.

Improvidence—Absence of independent advice—Setting aside. *Rogers* v. *Rogers*, 2 O. W. R. 673, 3 O. W. R. 587.

Misrepresentations — *Sale of mining areas — Evidence—Speculative property.*] — In an action to set aside a sale of gold bearing areas purchased by the plaintiffs from the defendant, who was joint owner with H., the plaintiffs relied upon evidence shewing that they were induced to make the contract by certain representations as to value contained in a report prepared by H. and handed by the defendant to L., who was acting for the plaintiffs, as a means of inducing the sale. Evidence was given on behalf of the defendant to shew that at the time the report was handed to L., he was given to understand that the defendant could not say anything as to its correctness, and that L. must verify it for himself. The trial Judge decided the action in favour of the defendant, and on appeal the Court *en banc* was divided, both as to the effect of the evidence and as to the admissibility of evidence taken (under an order) after the judgment of the trial Judge. *Leckie* v. *Stuart*, 34 N. S. R. 140.

Mistake — *Avoidance — Oral evidence to establish error—Sale of goods—Quality intended.*]—A contract tainted with error in the substance of its object, or with regard to one of its principal considerations, is void.—2. Oral testimony is admissible to establish error of the two contracting parties as to the substantial quality of the goods sold under a written agreement. Therefore, where the goods sold were thus described in the writing, "2768 barrels, assorted sizes, in the condition that they now are in," oral evidence that the contracting parties understood that they were selling and buying barrels of white oak, and not of red oak, may be given without violation of Art. 1234, C. C. *Cohen* v. *Hanley*, 32 Que. S. C. 46.

Non-fulfilment of obligations — *Parties both in default.*]—In order that the rescission of a contract may, by virtue of Art. 1065 of the Civil Code, be adjudged against a party who has not fulfilled the obligations of it, it is necessary that such rescission should put the parties as they were before the contract, and it will not be adjudged if its effect will be to enrich one party at the expense of the other. 2. If one party has failed to fulfil his obligations as much as the other, he cannot demand against the other the rescission of the contract. *Dupuis* v. *Dupuis*, 19 Que. S. C. 500.

Purchase of business—*Action for cancellation.*]—Plaintiff sued to cancel an agreement for purchase of a stock-in-trade and to recover a cash deposit on the main ground that Americans had smuggled goods from the store in question into United States:—*Held*, that if smuggling had been done it was not known to defendant, but, at any rate, it could not be taken cognizance of by Canadian Courts. The deposit being liquidated damages, the vendor is entitled to retain same. *Reid* v. *Diebel* (1900), 14 O. W. R. 77.

Purchase of mining shares—*Delay in delivery.*]—Judgment in favour of plaintiff affirmed on appeal. The action was for $340, the amount paid for 200 shares of mining stock. The defendant pleaded delay on plaintiff's part, but evidence shewed this delay was not unreasonable. *Plewman* v. *Jenks*, 12 O. W. R. 1083.

Right of some only of a number of joint contractors to rescind—*Intoxication.*]—Although a person who has been induced to enter into a contract of purchase as one of a partnership or syndicate, proves such fraud or misrepresentation on the part of the vendor that he would, if alone concerned, have been entitled to rescind the contract, yet he is not in a position to do so unless all the members of the partnership or syndicate are seeking such rescission. The only remedy such person could have, unless the other persons interested join, would be by cross-action or counterclaim for damages. *Morrison* v. *Earls*, 5 O. R. 434, followed.—Drunkenness is not a ground for setting aside a contract, unless the person was so intoxicated as not to know what he was doing. *Vivian* v. *Scoble*, 1 Man. L. R. 125, followed. *McLaren* v. *McMillan*, 5 W. L. R. 336, 16 Man. L. R. 604.

Sale of business — *Misrepresentation—Rescission — Estoppel — Counterclaim — Judgment — Appeal — Practice.*] — In an action for goods sold and for a balance due for the sale of a milk route:—*Held*, that the defendant could not rely upon alleged misrepresentations as to profits derived from the

business as a ground for rescission of the contract, he having received the property and so dealt with the business as to make restitution impossible. The defendant counterclaimed damages, and from the judgment dismissing his counterclaim there was no appeal:—*Held*, that O. 57, R. 5 (corresponding with the Eng. O. 868, R. 4), could not be so extended as to enable the Court to make the order that the Judge below should have made:—*Held*, also, that the counterclaim being an independent action, and not a mere defence to the plaintiff's claim, if the defendant was dissatisfied with the judgment dismissing his counterclaim, it was incumbent upon him to appeal, and, in the absence of such appeal, he could not ask the Court to deal with the counterclaim under the notice of appeal given by the plaintiff, which was confined to issues arising under the defence to the statement of claim. *Corbin* v. *Purcell*, 2 E. L. R. 217, 31 N. S. R. 454.

Supply of electricity—*Municipal corporation—Failure of contractor to perform contract — Remedy — Rescission — Relief against—Extension of time.*]—Defendant H. contracted with plaintiffs to supply electric light.—*Held*, that as he has failed to carry out his contract plaintiffs entitled to a rescission as against him.—*Held*, further, that it should be also rescinded, so far as defendant company is concerned, which claimed to be assignee of the contract. Mandamus should not be applied here. On appeal time given in which to supply light. *Fort Saskatchewan* v. *Higman*, 11 W. L. R. 713.

Threats—*Apprehension.*]—In order that a father may have the right to rescind a contract which he has made, on the ground of threats to his daughter, it is necessary that these threats shall have produced an apprehension in him which is the sole reason of his consenting to execute the contract. The apprehension of his daughter, if he himself did not share it, has no effect upon the contract. *Giroux* v. *Vinet*, 24 Que. S. C. 1.

Time for performance—*Implication of law — Undue delay — Notice.*]—Where no time is specified between the parties for the carrying out of a contract, the law implies that it should be carried out within a reasonable time, having regard to all the circumstances. If there be an undue delay on the part of either party, the other party has the right to notify him that unless the contract is carried out within a specified time, such time to be reasonable, the contract will be considered at an end, and where the work to be done requires a considerable period of time he may also fix a reasonable time for its commencement. *Johnson* v. *Dunn*, 11 B. C. R. 372, 2 W. L. R. 317.

Undue influence—*Life insurance—Policy payable to father and brother—Person insured married on death bed—Made policy payable to wife—Alleged agreement by wife to give hospital half—Power of attorney—Undue influence exercised over wife—Transaction set aside—Wife not a free agent.*]—Plaintiff, widow of Pashal Finn, brought action to recover $500, part of an insurance policy on the life of her husband, which plaintiff alleged was paid to defendant Botsford, and by him paid to defendant hospital through power of attorney obtained from plaintiff by undue influence of defendants and others. Defendants said that plaintiff agreed with Finn that, in consideration of his marrying her and appointing her sole beneficiary, she would on his death, pay to the hospital $500, being one-half of the said policy. Plaintiff denied such agreement, and the evidence on the point was most conflicting. At trial the action was dismissed with costs.—Divisional Court *held*, that the relations of the parties and the circumstances of the case cast the onus on the defendants of shewing that the transaction was the free act of the plaintiff. That the onus had not been discharged, but, on the contrary, the evidence shewed that an undue advantage was taken of plaintiff's situation. That, unassisted, she was unable to resist the influence of those who, on behalf of the hospital, were exercising pressure upon her. That she was not a free agent, and had not that protection to which she was entitled before parting with her rights. That under such circumstances it was the duty of the Court to afford her such protection by undoing the transactions. Judgment appealed from set aside, and judgment for plaintiff for the $500, with interest and costs of action and appeal. *Finn* v. *St. Vincent de Paul Hospital* (1910), 17 O. W. R. 673, 2 O. W. N. 343, 22 O. L. R. 381.

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2. Breach of Contract.

Abandonment — *Quantum meruit — Amendment.*]—The plaintiff agreed to build, for a fixed lump sum, a foundation for a building, the defendant supplying materials on the ground. The plaintiff, owing to non-supply of lime, abandoned the work, though it was found on the evidence that the defendant had got what he bargained for, with some shortcomings, for which damages would compensate him:—*Held*, that although the plaintiff was not entitled to succeed on his claim under the original special contract, he was entitled to recover on a *quantum meruit*, and the pleadings were directed to be amended accordingly. *Burns* v. *Ussherwood*, 4 Terr. L. R. 389.

Action for damages *for non-performance—Failure of plaintiff to perform conditions—Mutual and dependent covenants.*]—Defendant agreed to plough a certain quantity of land in consideration of receiving a portion of the crop to be grown thereon. The plaintiff on his part agreed to provide a granary for the purpose of storing the grain to be grown. Defendant failed to plough the land agreed upon, and plaintiff did not erect the granary. In an action by the plaintiff for damages for failure to plough the land, defendant pleaded that by reason of the plaintiff's failure to provide the granary he had to haul away the grain, and the time occupied in doing so prevented him completing the contract before frost prevented him doing so:—*Held*, that neither the covenant of the plaintiff to furnish the granary nor that of the defendant to plough went to the whole consideration, and the covenants were not mutual conditions the one precedent to the other, and therefore the failure of the plaintiff to furnish the granary was no defence to the plaintiff's action for damages

on the other branch of the contract. *See* v. *Branchflower* (1909), 2 Sask. L. R. 20.

Appointment of sequestrator — *Cancellation.*]—The Court has no power to appoint a sequestrator to carry out the work undertaken by a contractor, nor to authorize the owner to take possession of the works, the remedy of the owner being the cancellation of the contract. *Macdonald* v. *Hood*, 7 Que. P. R. 72.

Bank — Agreement to advance money — Authority of agent of bank—Restrictions—Knowledge of borrower — Incomplete agreement — Damages — Measure of — Proof of damage. *Cosgrave* v. *Bank of Hamilton*, 10 O. W. R. 956.

Bond for performance — *Liquidated damages—What breaches covered by bond.*]—Defendants contracted to build and complete a vessel for plaintiff by 1st of August, and agreed to pay £4 10s. for each day the vessel was detained beyond that date. At the same time they executed a bond and warrant of attorney authorising plaintiff to enter judgment against them for £700, conditioned to be void if the vessel was completed in time. The vessel was delayed one hundred and five days, which, at £4 10s. a day, would give £472 10s. Including this £472 10s., the accounts shewed £738 to be due plaintiff, and he entered judgment and issued execution for £700. Defendant moved to set aside the judgment and execution on the grounds that £4 10s. a day was a penalty and not liquidated damages, and secondly that in any case the condition of the bond did not apply to damages beyond, or to breaches not covered by the £4 10s. a day:—*Held*, Peters, J., that the £4 10s. a day were liquidated damages.—That the condition only applied to the non-delivery of the vessel and not to other damages and breaches, and the levy must be reduced. *Lefurgy* v. *McGregor & McNeill* (1808), 1 P. E. I. R. 272.

Cause of action, where arising — *Sale of goods—Place of delivery — Superior Court—District.*]—In the absence of agreement to the contrary, goods sold should be delivered and the price paid at the domicil of the purchaser. 2. Default of delivery of the goods sold and of payment of the price constitutes a cause of action. 3. An action can only be begun before the Court of the place where the cause of action arose (if such Court is not that of the domicil of the defendant), when all the causes of action arose in the same place. *Lipschitz* v. *Rittner*, 4 Que. P. R. 311.

Company—*Contract before incorporation — Agent—Authority—Consensus—Evidence.*]—In the absence of a new agreement made by a company after its incorporation, a contract made before its incorporation by a person purporting to contract for the company is not binding on the company, although the parties afterwards carry out some of the terms of the contract and act on the supposition that it is binding on the company. *In re Sully*, 33 Ch. D. 16, followed. A person who enters into a contract, expressly as agent for a principal, impliedly warrants his authority and if he has in fact no such authority he may be sued under that implied contract, and is bound to make good to the other contracting party what that party has lost or failed to obtain by reason of the non-existence of the authority. *Collen* v. *Wright*, 8 E. & B. 647, followed. In an action on an oral contract, the evidence as to its terms being contradictory, and shewing that, if each of the parties to the contract gave in evidence a truthful statement of its terms, a misunderstanding between them as to whether a certain important provision (the existence of which was the whole basis of the action) formed part of it, the trial Judge declared himself unable to ascertain the truth, and, applying the principle laid down in *Falck* v. *Williams*, [1900] A. C. 176, that it is for the plaintiff in an action for breach of contract to shew that his construction is the right one — dismissed the action. *Coit* v. *Dowling*, 4 Terr. L. R. 464.

Condition not to engage in business.]—Defendants sold their merchant tailoring business to plaintiff and agreed not to engage in said business within 8 miles thereof. Later they purchased a general store in same town and sold ready-made clothing for 3 years before plaintiff brought action for damages:—*Held*, that the defendants were not debarred from selling ready-made goods, and they had done nothing more than was necessary for that sale. *Stone* v. *Doubt* (1909), 14 O. W. R. 459.

Condition precedent — *Divisible contract.*] — The defendants agreed to buy a machine, the agreement being in the form of an order signed by the defendants and adopted and accepted by the plaintiffs, who shipped the machine ordered, and now sued for the price.—It had been a term or condition of the agreement that M., the inventor of the machine, and the plaintiffs' agents for sales of it, should personally inspect the placing of the machine in operation. This M. failed to do, but the plaintiffs sent a competent person to set the machine up, whom, however, the defendants would not allow to do so, inasmuch as M. was not present.—*Held*, that the plaintiffs, nevertheless, were entitled to judgment for the price of the machine, on the principle that unless the non-performance alleged in breach of a contract goes to the whole root and consideration of it, the part broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages. *Cowan* v. *Fisher*, 20 C. L. T. 34, 31 O. R. 426.

Condition precedent as to sub-letting—*Consent of municipal council—Pleading.*] — Where a contract with a municipal corporation provides that it shall not be sub-let without the consent of the corporation, it is incumbent on the contractor to obtain such consent before sub-letting, and if he fails to do so he cannot maintain an action against a proposed sub-contractor for not carrying on the portion of the work he agreed to do. In an action against the sub-contractor, the latter pleaded the want of assent by the council, whereupon the plaintiff replied that the assent was withheld "at the wrongful request and instigation of the defendant and in order wrongfully to benefit said defendant and enable him, if possible, to repudiate and aban-

don the contract." Issue was joined on this replication:—*Held*, that the only issue raised by the pleading was whether or not the defendant had wrongfully caused the consent to be withheld, and that the plaintiff had failed to prove his case on that issue. Judgment of the Court of Appeal, 27 A. R. 135, 20 C. L. T. 198, affirmed. *Ryan* v. *Willoughby*, 21 C. L. T. 2, 31 S. C. R. 33.

Conspiracy—*Fraud—Assessment of damages—Incidental demand.*]—Appeal from the judgment of the Court of King's Bench (Trenholme, J., dissenting), affirming the judgment of Archibald, J., in the Superior Court, 28 Que. S. C. 122, which maintained the plaintiffs' action, without costs, to the extent of a balance found to be due to them, after deducting damages assessed in favour of the defendants upon an incidental demand, which was maintained with costs. — The action was for the price of medicinal pills, called "red pills," which the plaintiffs had manufactured for the defendants according to a special formula, supplied by the defendants, under a contract with a condition that pills manufactured according to that formula should not be manufactured for or sold to any person other than the defendants. The defendants denied liability, counterclaimed for damages for breach of the condition of the contract, and charged the plaintiffs with having sold a quantity of similar pills to certain persons who had infringed their trade mark, and with having participated. The Judge maintained the plaintiffs' action in part, without costs, maintaining the incidental demand in respect to damages sustained by loss of profits through the wrongful sale of the pills and for expenses in obtaining evidence as to breach of contract, with costs, but disallowed certain other expenses incurred in the prosecution of the conspirators by the defendants, and he also found that the plaintiffs had not participated in the conspiracy. —The Court of King's Bench affirmed this judgment, and the plaintiffs appealed.—The majority of the Judges of the Supreme Court of Canada were of opinion that the appeal should be dismissed. Davies and Maclennan, JJ., dissented in respect to the damages allowed on the incidental demand for loss of profits alleged to have been sustained in consequence of the sale of the pills supplied in breach of the contract. *Wampole* v. *Simard*, 39 S. C. R. 160.

Construction — Delivery of wood to be carbonized — Claim for excessive delivery — Claim for services in unloading — Taxes — Supply of charcoal — Shortage—Damages—Waste of steam—Interest—Costs. *Rathbun Co.* v. *Standard Chemical Co.*, 2 O. W. R. 36, 385, 3 O. W. R. 698, 724, 6 O. W. R. 660.

Counterclaim — Damages. *Gibson Art. Co.* v. *Bain* (1906), 7 O. W. R. 842.

Covenant—*Restraint of trade—Agreement by employee not to engage in similar business for three years—Breach—Injunction—Damages—Costs—Appeal allowed—Action dismissed.*]—Action by a manufacturing company, carrying on a laundry business as one of their departments, for an injunction and damages on ground that defendant, a former employee of plaintiffs, had entered into a partnership with another ex-employee and was carrying on a rival laundry business, and was canvassing customers of plaintiffs with a view of inducing them to give their work to defendant, and was also trying to induce employees of plaintiffs to leave plaintiffs' employment and enter into defendant's employment, in contravention of an alleged agreement by defendant that he would not so do.—Mulock, C.J.Ex.D., *held*, that the custom laundry business entered into by the defendant was no breach of his engagement not to enter into any business of a similar kind to that carried on by the plaintiffs, and dismissed the action.—Divisional Court (17 O. W. R. 917, 2 O. W. N. 442), *held*, that the defendant having been educated in the improved methods of business in the plaintiffs' laundry and entrusted with their secrets, should not be at liberty to cut into that very profitable part of their business by a competitive laundry in the same city; That the defendant left the employment of the plaintiff on 2nd June, 1910, and should be inhibited for three years from that date from violating the terms of his engagement with plaintiffs; That the operation of the interlocutory injunction having been suspended on an undertaking to keep an account of profits, the profits should be investigated by the Master and paid over to plaintiffs, with costs of action and appeal.—Court of Appeal reversed judgment of Divisional Court and restored judgment of Mulock, C.J.Ex.D., with costs throughout. *Allen Mfg. Co.* v. *Murphy* (1911), 18 O. W. R. 572, 2 O. W. N. 877, O. L. R. .

Covenant in restraint of trade — *Lease of machinery on terms which prevent use of machines not owned by lessors — Validity of covenants.*]—Plaintiffs had practically a monopoly of the manufacture of modern shoemaking machinery in Canada. They refused to sell their machines at all, but leased them out to shoemakers on leases, containing a covenant that the lessees would not use the machines so leased in the manufacture of any boots or shoes which were not wholly made by their machines:—*Held*, that the covenant was not a covenant in restraint of trade. Judgments of the Court of King's Bench, 17 Que. K. B. 435, and of the Superior Court of Quebec set aside. *United Shoe Machine Co.* v. *Brunet*, C. R., [1909] A. C. 148, 78 L. J. P. C. 101, 100 L. T. R. 579.

Covenant not to engage in trade.]—Defendant sold plaintiffs his ice and coal business in Hamilton for $10,000, and covenanted not to be interested in or carry on business in opposition to plaintiffs within 25 miles during the next ten years. Plaintiffs alleged that defendant had broken that covenant and claimed $10,000 damages. At trial judgment was entered for plaintiffs, and referred the question of damages to the local Master, who assessed them at $5,000. Defendant appealed therefrom and Anglin, J., dismissed his appeal, but on appeal to the Divisional Court therefrom the damages were reduced to $32. The Court of Appeal varied the latter judgment and fixed the damages at $500. No costs of any of the appeals to either party. Case to be heard on further directions and as to costs unless parties agree

otherwise. Judgment of Divisional Court, 12 O. W. R. 726, varied. *Dewey* v. *Dewey* (1909), 15 O. W. R. 66.

Damages—Allowances and deductions — Accounts—Interest. *Ottawa Electric Co.* v. *City of Ottawa*, 1 O. W. R. 508, 2 O. W. R. 596, 3 O. W. R. 65, 588, 796, 4 O. W. R. 190, 6 O. W. R. 930.

Damages—*Costs — Evidence — Discretionary order by Judge at trial—Interference by Court of Appeal.*]—The trial Court condemned the defendant to pay $122.50 damages for breach of contract for the sale of goods, but, in view of unnecessary expenses caused in consequence of exaggerated demands by the plaintiffs, which were rejected, they were ordered to bear half the costs. On an appeal by the defendant, the Court of King's Bench varied the trial Court judgment by adding $100 exemplary damages to the condemnation and giving full costs against the defendant:—*Held*, reversing the judgment appealed from, that, in the absence of any evidence of bad faith or wilful default on the part of the defendant, there was no justification for the addition of exemplary damages nor for interference with the judgment of the trial Court. *Coghlin* v. *Fonderie de Joliette*, 24 C. L. T. 110, 34 S. C. R. 153.

Damages—*Future services.*]—The plaintiff agreed to give a course of lessons in the cutting work of a tailor to the defendant, who was to pay the plaintiff $100 by payments to be made at intervals during the course. The defendant took several lessons, but refused to continue them:—*Held*, that the plaintiff could recover from the defendant only the price of the lessons which he had actually given, and not the price of the whole course; his remedy in respect of the future lessons being for damages for the defendant's non-performance of his agreement. *Dulude* v. *Jutras*, 18 Que. S. C. 327.

Damages—*Measure of—Notice of special circumstances — Collateral enterprises—Loss of primary and secondary profits—Costs.*]—The plaintiffs sold the defendant a boiler to be used in a mill to be set up in connection with his lumbering operations, and guaranteed its efficiency for that purpose. When delivered it proved inefficient, and, while necessary alterations and repairs were being made, two months elapsed, during which the defendant was deprived of the use of his mill, was obliged to keep a gang of men idle and under expense for wages and board, and, in unsuccessfully attempting to carry on his operations, temporarily hired another boiler. On being sued for the price of the boiler, the defendant counterclaimed for damages, and, at the trial, was awarded $427.11, being $277.11 for wages, board and expenses incurred in consequence of the failure of the boiler to satisfy the guarantee, and also $150 for damages for the "loss of the use of the mill." By the judgment appealed from the first item for wages, etc., was rejected, and the item for "loss of the use of the mill" only allowed:—*Held*, *per* Fitzpatrick, C.J.C., and Davies and Maclennan, JJ., Idington, J., *contra*, that, as the loss of primary profits directly resulting from the breach of the contract only should have been allowed, the item of $150 for loss of anticipated profits should be rejected as being merely secondary, speculative and uncertain; but that the item assessed by the trial Judge in respect of the wages, board, and other expenses should be allowed, as they were direct and immediate results of such breach. —Duff, J., was of the opinion that the appeal should be allowed and the judgment by the trial Judge restored.—The judgment appealed from was reversed with costs, and the judgment at the trial restored to the extent of $277.11, but, in the special circumstances of the case, no costs were allowed in respect of the appeal to the Court below. *Corbin* v. *Thompson*, 39 S. C. R. 575.

Damages—*Profits—Mode of estimating.*]—In an action for damages for breach of contract plaintiff gave evidence that he estimated his profit at from 15 to 20 per cent. on the total amount of the contract, or from $75 to $80, but on cross-examination he failed to give any data by which the accuracy of his estimate could be tested, while the person who actually did the work gave evidence that his profit was about $35:—*Held*, that the burden was on the plaintiff to shew grounds which would justify the Court in adopting his estimate, and that, in the absence of such evidence the amount of damages allowed must be reduced from $70, at which it was fixed by the trial Judge, to $35; and that an allowance could not be made for the plaintiff's time, that being one of the elements forming the basis on which the profit is to be calculated, or for material provided for the purpose of carrying out such contract, except in so far as such material was shewn to be useless for any other purpose. The measure of damages is the profit which the plaintiff might reasonably look for. *Lowe* v. *Robb Engineering Co.*, 37 N. S. Reps. 326.

Damages — *Quantum — Discretion of Court.*]—When it is shewn that damages must have resulted from a breach of contract, the exact amount of which cannot be ascertained, it is in the discretion of the Court to determine the same equitably as a jury should do. *Webster* v. *International Cement Co.*, Q. R. 29 S. C. 470.

Damages — Time — Essence of waiver. *McRae* v. *Wilson Co.*, 1 O. W. R. 380.

Damages—*Work and labour — Delay — Loss of tenant—Waiver—Security.*]—In action by plaintiff on promissory note given by defendant in part payment of contract price for erection by plaintiff of a vault in building owned by defendant, the defendant counterclaimed damages on account of imperfect condition of vault, and also on account of loss of tenant who had agreed to take a five years' lease of one floor of the building, on condition that the vault was completed by specified date:—*Held*, that, in order to recover on latter part of counterclaim, defendant must shew that there was a contract by plaintiff to complete vault by specified date, and that plaintiff was so far aware of the agreement between defendant and his proposed tenant that he must be taken to have contracted to bear the loss covered by repudiation of tenancy in consequence of his failure to carry out terms of his contract; and that, in absence of evi-

dence, or of such notification of agreement between defendant and his proposed tenant as to give rise to contract on part of plaintiff to bear loss occasioned by refusal of tenant to take premises on account of non-completion of vault, defendant could not recover.—In answer to letter from defendant complaining of delay in commencement of work, and stating that on plaintiff's assurance he had promised M., the prospective tenant, that the work would be completed by 1st March, plaintiff took the ground that the contract called for security, and offered to proceed with the work as soon as satisfactory security was given. There was nothing about security in letters containing offer and acceptance, which constituted the contract, but defendant acquiesced, and furnished security asked for:—*Held*, that while defendant might have refused to give security, and have insisted upon prosecution of the work in accordance with terms of contract, he could not, after assenting to and acting upon plaintiff's requirement, contend that there was any breach of agreement on 1st March. *Sanders* v. *Sutcliffe* (1906), 38 N. S. R. 352.

Deceit — *Damages — Evidence.*]—The non-performance of a contractual obligation, when there is deceit on the part of the debtor, is ground for an action by the creditor for the recovery of all the damages which, whether they might reasonably have been in contemplation at the date of the contract or not, are the direct and immediate consequence of it.—The difficulty of determining exactly the extent of the injury suffered, and the absence of evidence upon which to fix the amount of damages, are not reasons for not allowing damages to one whose right thereto is established; it is for the Court in such a case to fix the damages. *Zurif* v. *Great Northern Telegraph Co.*, Q. R. 29 S. C. 460.

Evidence of terms of contract—Corroboration—Action for damages dismissed — Plaintiff allowed $600 for money advanced—$20 damages for chattels withheld and to have accepted drafts cancelled. *Williamson* v. *Bawden Machine & Tool Co.* (1911), 18 O. W. R. 215, 2 O. W. N. 725.

Leave to appeal granted, 18 O. W. R. 637, 2 O. W. N. 870.

Exclusive right of sale of machinery in particular territory—Breach by sale of similar machine — Substantial identity. *Tovell* v. *Delahay*, 3 O. W. R. 912.

Failure of consideration—*Repudiation — Novation — Rescission.*] — Action for damages for breach of contract. Counterclaim for rescission. Two timber booms were sold to other parties than defendants. — *Held*, this was done at defendants' request. Even if sold without defendants' consent, it was not such a breach as would entitle defendants to repudiate. Plaintiffs were willing to deliver to defendants. All circumstances must be considered. Failure did not go to the root of the contract, which was assignable, the personal element being unimportant. Judgment for defendants' counterclaim dismissed. *Paterson Timber Co.* v. *Canadian Pacific Lumber Co.* (B. C.), 10 W. L. R. 449.

Failure to properly perform—Action claiming damages for breach of a contract to saw logs — Damages. *O'Brien* v. *Crowe* (N.S., 1910), 9 E. L. R. 107.

Fraud and misrepresentation — *Sale of two creameries — Representations as to amount of output, expenses and profit—Damages — Measure of.*] — *Held*, that the measure of damages, in an action for misrepresentations, in the sale of two creameries to plaintiffs was the difference between the purchase price and their actual value at time of purchase, and that the Master erred in allowing damages for loss sustained by plaintiffs in the operation of the creameries. *Lamont* v. *Wenger* (1909), 14 O. W. R. 984, 1 O. W. N. 177. See S. C. 14 O. W. R. 1037, 1 O. W. N. 209.

Jury trial—*Right to—Sums claimed as accessory to a commercial contract—C. P. 421.*]—An action claiming a certain amount for salary due, for monies advanced and for salary until the completion of a management contract, is triable by a jury, if these monies have been so advanced incidentally and as accessory to the execution of the management contract as alleged by the plaintiff's declaration. *Clark* v. *Clark Automatic Nut-Lock Co.* (1908), 10 Que. P. R. 386.

Goods ordered to be "shipped and insured"—*Placed on deck where policy did not cover them — Purchaser not liable for price of goods lost.*] — Defendant ordered plaintiff to "insure and ship" him certain goods. Plaintiff insured the goods and shipped them, but they were placed, without his knowledge, on deck where the policy would not cover them, and they were lost. Plaintiff brought action for the price of the goods. —*Held*, that he must shew that he not only shipped but also insured the goods so as to cover them in the part of the ship where they were placed, and, not having done so, there was no insurance and he could not recover. *Room* v. *Large* (1870), 1 P. E. I. R. 310.

Liquidated damages or penalty?—*Delay in delivering boiler for steamer.*]—An action to recover $1,425, alleged to be liquidated damages at $25 per day for 57 days delay in delivering a boiler for a steamer, as per agreement. Defendants claimed that said sum was not liquidated damages but a penalty, and therefore plaintiffs could not recover:—Clute, J., *held* the above to be a penalty only and gave plaintiffs judgment with reference to a Local Master to assess the damages. Divisional Court reversed above judement and directed judgment to be entered for plaintiffs for amount of their claim, and interest with costs of the trial and appeals. Review of authorities. *Pelee Island Nav. Co.* v. *Doty Engine Works* (1911), 18 O. W. R. 599, 2 O. W. N. 890, O. L. R. .

Liquidated damages — Penalty. *Edwards* v. *Moore* (1906), 1 E. L. R. 422.

Manufacture and sale of chattels—*Damages.*]—Five days after making a contract with the plaintiffs for the manufacture by them of a large number of shells for electric light lamps, to be delivered monthly for a period of twenty months, the defendants

notified the plaintiffs that they would not carry out the contract. The plaintiffs had done nothing towards performing the contract, and had incurred no expense.—*Held*, that though they were entitled to bring an action at once to recover damages, they should not be allowed as damages the full amount of their expected profit, but that allowance should be made for the many contingencies which might have happened before the time for fulfilment.—The Court, stating the general principles and pointing out some of the contingencies, reduced the amount of damages allowed. *Ontario Lantern Co.* v. *Hamilton Brass Manufacturing Co.*, 2 C. L. T. 298, 27 A. R. 346.

Manufacture of patented articles — Defective design — Royalties — Novation—Damages — Reference. *Steep* v. *Goderich Engine Co.*, 3 O. W. R. 638, 5 O. W. R. 730.

Mining claim—*Agreement for sale—Construction—Enhanced value.*]—By an agreement in writing, signed by both parties, B. offered to convey his interest in certain mining claims to N. for a price named, with a stipulation that if the claims proved on development to be valuable and a joint stock company was formed by N. or his associates, N. might allot or cause to be allotted to B. such amount of shares as he should deem meet. By a contemporaneous agreement, N. promised and agreed that a company should have a reasonable amount of the stock according to its value. No company was formed by N., and B. brought an action for a declaration that he was entitled to an undivided half interest in the claims, or that the agreement should be specifically performed:—*Held*, reversing the judgment of the Supreme Court of British Columbia, 8 B. C. L. R. 402, that the dual agreement above mentioned was for a transfer, at a nominal price, in trust to enable N. to capitalize the properties and form a company to work them, on such terms as to allotting stock to B. as the parties should mutually agree upon; and that on breach of said trust B. was entitled to a reconveyance of his interest in the claims and an account of moneys received or that should have been received, from the working thereof in the meantime. *Briggs* v. *Newswander*, 22 C. L. T. 227, 32 S. C. R. 405.

New trial — *Verdict, material questions unanswered — Excessive damages.*] — The omission of a jury to answer material questions submitted to them under C. S., 1903, c. 111, s. 163, is a ground for a new trial. In an action for breach of contract the defendant alleged that the contract was conditional and the following question was submitted to the jury: "If such an agreement existed, was it a conditional one?" To which the jury answered: "No satisfactory proof that it was."—*Held*, that this was not an answer to the question. In an action for breach of contract to supply water power for one year and from year to year as the plaintiff required, it was proved that the water supply was cut off in the middle of the second year, and the plaintiff proved a loss of profit, up to the termination of the second year, amounting to $600. He also claimed future damage and special damage by reason of the terms of his lease, which required that water power—which could be procured only from the city—should be used on the premises, but there was no allegation of special damage in the declaration, and an application at the trial to amend by adding such allegation was refused. Under a direction to find damages up to the termination of the second year, the jury allowed $1,500. —*Held*, that the damages were excessive and ground for a new trial. *Crockett* v. *Campbellton* (1909), 39 N. B. R. 160, 6 E. L. R. 519.

Non-payment of note—Refusal to perform rescission. *Graham* v. *Bourque*, 1 O. W. R. 138, 358, 2 O. W. R. 927, 1182.

Partnership—*Abandonment — Damages —Loss of profits.*]—The plaintiff brought an action claiming damages for breach of contract. The evidence shewed that, if anything was due by the defendant, it was not due to the plaintiff individually, but to a partnership of which he was a member, and the profits of which were to be shared equally between the two partners.—*Held*, that the action, under the circumstances, could not be maintained, even for half of the amount which might be found to be due as damages, the Court not being in a position in such action to determine the respective shares of the partners in a debt due to the partnership.—2. Where contractors, after part performance of their contract, voluntarily abandon it, without notice to the supplier of material, and when there is no obstacle to the completion thereof, they are not entitled to claim from the latter damages for loss of profits on the part of the contract they failed to carry out. *Masolais* v. *Willett*, 17 Que. S. C. 262.

Patent medicine—*Agreement to sell — False representations as to curative value of medicine by manufacturer—Purchaser relying on—Rescission of contract—Return of moneys paid—Interest.*]—Plaintiffs brought action to have a certain contract made by plaintiffs with defendant Kahle for sale by defendant to plaintiffs of a large quantity of a patent medicine called "Ponso," for which plaintiffs were to have the exclusive sale agency in Toronto, Hamilton and Welland. The terms of payment were mentioned in the contract. — Sutherland, J., *held* (upon the evidence), that certain representations as to the quality of the medicine were made by defendant, which were untrue to the knowledge of defendant, that plaintiff relied upon them, and that they were the basis of contract, and gave plaintiffs judgment, declaring contract void, and for return of $1,078.81 paid by plaintiffs, without interest, but with costs of action. Plaintiff to return all unsold stock and give credit for stock sold. *Hennessey* v. *Imperial Drug Co.* (1910), 16 O. W. R. 840, 1 O. W. N. 1127.

Payment of money—Condition — Nonfulfilment—Return of money—Authority of agent. *Carter* v. *Canadian Northern Ry. Co.* (1910), 1 O. W. N. 892.

Penal clause—*Enabling contracts—Nonperformance—Exacting the penalty without loss accruing.*]—A pledge by the vendor of a franchise not to give a similar one during

its currency or within a specified radius "at least to pay the sum of" taken in the deed of sale made in consequence and in execution of a promise to sell where the contract was thus expressed: "At least to pay the sum of, *as damages*," is a contract with a penal clause and not an enabling contract. Hence, the sum fixed becomes exigible and recoverable as soon as there is a violation without proving or alleging loss. *Girard* v. *Rousseau* (1909), 36 Que. S. C. 79.

Place of performance — Foreign judgment—Action. *Canada Wood Specialty Co.* v. *Moritz*, 42 S. C. R. 237.

Practising medicine — *Damages—Injunction.*]—By an agreement under seal the defendant sold to the plaintiff a house and the good-will of his medical practice for $2,100, and the defendant "bound himself in the sum of $400 to be paid to the (plaintiff), in case the (defendant) shall set up or locate himself in the practice of medicine or surgery within the space of five years from the date hereof within a radius of five miles from the said village." — *Held*, that there was an implied agreement by the vendor not to resume practice; that the sum of $400 was payable as liquidated damages on the breach of the agreement; and that the purchaser was entitled to that sum or to an injunction, but not to both.—Judgment in 31 O. R. 91, 19 C. L. T. 317, varied. *Snider* v. *McKelvey*, 20 C. L. T. 298, 27 A. R. 339.

Practising medicine — *Residence—Non-registration — Consideration — Waiver — Repair.*]—The plaintiff, a physician in large practice at S., being about to leave the province temporarily, leased to the defendant, who was also a physician, a part of his house for two years from July then next, at an annual rental. By a covenant in the lease the defendant agreed at the expiration of the lease either to purchase the whole property for a price named, or to forthwith leave S. and not reside there, or practise thereat, or within ten miles thereof, for at least three years. The plaintiff covenanted to repair the roof of the house on or before the said first of July, and not to practise in S. during said two years. Nothing was done towards the repairs up to the 1st July, as had been agreed; in fact the roof was not put in a satisfactory condition until the autumn of 1895, when an entirely new roof was put on. This breach was not wilful on the part of the plaintiff, and the defendant made no complaints as to the non-repair during the two years he occupied the premises. At the time of the making of the agreement, 3rd May, 1894, the plaintiff was not registered under the New Brunswick Medical Act, 44 V. c. 19, but he had been registered the previous year and was entitled to be again registered at any time upon the payment of a small fee. It was admitted that except as to the repairs the plaintiff had performed all the covenants entered into by him. At the end of the two years the defendant refused either to purchase or to leave S. and refrain from practising there:—*Held*, affirming the judgment of the Court below, 1 N. B. Eq. R. 487, that the restraint sought to be enforced was not unreasonable either as to practice or residence.—2. That the non-registration of the plaintiff did not make the agreement bad for want of consideration. — 3. That whatever rights had accrued to the defendant by the breach of the covenant to repair had been waived by his entering into possession of the premises and remaining there during the term without complaint.—4. That the covenant to repair was an independent covenant, and its performance was not a condition precedent to the maintenance of this suit. *Ryan* v. *McNichol*, 34 N. B. R. 391.

Purchase of mining shares—*Breach —Action for damages—Measure of—Ascertainment as of date contract should have been performed.*]—Defendants contracted to buy from plaintiff 1,000,000 shares of mining stock for $150,000, payable in instalments. Defendants paid the first instalment but refused to carry out any other provisions of the agreement and notified plaintiff to that effect on 1st June, 1907. Plaintiff brought action on 26th June, 1907. Riddell, J., *held* defendants had broken their contract and referred it to Co.C.J., to enquire and state what damages, if any, plaintiff had sustained by reason of said breach. Co.C.J. assessed the damages at $66,106.65 with interest at 5 per cent. from 27th August, 1908.—Clute, J., *held*, that the Co.C.J. applied the right principle to the assessment of damages in holding that they must be ascertained as of the date at which the contract should have been performed by defendants. *Sharpe* v. *White* (1911), 18 O. W. R. 801, 2 O. W. N. 849.

Removal of brush and trees from land—Damages—Construction of contract—Removal of trees — Quantum of damages. *Delamatter* v. *Brown*, 9 O. W. R. 777.

Repudiation — *Jurisdiction of County Court—British Columbia County Courts Act, ss. 22, 23—Dismissal of counterclaim where action dismissed.*]—Action for damages for breach of contract and for an account. Relation of parties not being fiduciary but purely contractual, this case is not one for an account:—*Held*, there was no breach of contract, as the acts and words relied on do not shew a clear and unmistakable refusal to be bound by it. There should be an absolute and unequivocal intention of repudiating the contract. The amount of the counterclaim was beyond the jurisdiction of the Court. The action having been dismissed no order as to counterclaim. Defendant may take such steps as he may be advised. *Klemmer* v. *Birmingham*, 11 W. L. R. 9.

Restraint of trade—*Provision for liquidated damages — Construction as penalty—Actual damage for breach of covenant.*]—Defendants sold part of their stock in trade to plaintiffs and covenanting not to sell stock retained to any in the same village, but those in business. For any breach the penalty was $500 liquidated damages. The trial Judge found there were two breaches and gave judgment for $500. On appeal, *held*, that notwithstanding use of the words "liquidated damages" $500 was a penalty. Judgment for plaintiffs for $5 with County Court costs, with an injunction restraining defendant from further breach of agreement. Costs of appeal to be set off. *Townshend* v. *Rumball* (1909), 1 O. W. N. 47, 19 O. L. R. 433.

Road company—*Implied covenant—Corporate seal.*]—An agreement signed by the plaintiff and by the superintendent of the defendants' road, but not under seal, and not purporting to be made by the defendants, who were an incorporated road company, was in part as follows:—"I"—the plaintiff—"have this day agreed with" the defendants "to furnish good gravel and deliver the same on the centre of the road bed . . . and the company agree to pay me at the rate of . . . And it is further agreed that my tolls . . . shall be free during the full term . . . And . . . that in consideration of this agreement and for the sum of $ . . . I do . . . discharge all claims I hold against the company. . . . And . . . that this agreement for gravel to hold good as long as the company keep the road and as long as my gravel holds good. . . .:"—*Held*, that an agreement on the part of the defendants to take from the plaintiff all the gravel they should require for the portion of their road referred to in the writing, as long as he was able and willing to supply it, was not to be implied from the terms of the writing; and the taking of gravel from another person was not a breach of the agreement:—*Held*, also, *per* Ferguson, J., that to bind the corporation by an executory contract to purchase from the plaintiff all the gravel required for a portion of their road for an indefinite and protracted period, would require an agreement under their corporate seal. *Hill* v. *Ingersoll and Port Burwell Gravel Road Co.*, 20 C. L. T. 403, 32 O. R. 194.

Sale and delivery of mining shares—*Breach—Specific performance—Damages—Delay in completion—Reasonable time.*]—Action for specific performance for a contract by defendants to deliver mining stock to plaintiff, or for damages. On 14th July defendant telegraphed plaintiff not to send draft until he heard from him:—*Held*, that plaintiff could not consider this a breach, but that he had a right for a reasonable time to await action by defendant:—*Held*, he could not wait until 2nd November. 20th August fixed as a reasonable date, and damages estimated as of that date. *Richardson* v. *Shenk*, 13 O. W. R. 913.

Sale of business—Condition annexed to agreement for sale as part of consideration—Breach — Damages — Measure of—Scale of costs. *Dixon* v. *Craig* (Man.), 5. W. L. R. 549.

Sale of business—*Trade marks or brands—Abatement in price.*]—Sale of cigar factory with its accessories and trade marks or brands, followed by transfer of those which are registered and rights which vendor may have in a special mark, does not comprehend the latter. Default in putting vendor in possession does not entitle him to an abatement in price nor to damages for breach of contract, especially where vendee knew that there was a dispute between his vendor and a third person on subject of this special mark. *Reliance Cigar Factory* v. *Royal Bank of Can.* (1906), 14 Que. K. B. 432.

Sale of business and good-will—*Undertaking not to carry on similar business—Meaning of "good-will"—Injunction—Damages—Costs.*]—The defendant prior to the 16th November, 1898, was the owner and driver of a stage-coach running daily between two towns. The business consisted, besides the carrying of passengers, in the soliciting, calling for, carrying, and delivering of parcels for reward. The stock comprised horses and vehicle, robes, etc., used in connection with the business.—On the 16th November, 1898, the defendant sold all the stock and good-will of the business to the plaintiff for $300, and agreed not to go into the same business, or a similar business, between the same places, for three years from the 1st December, 1898. — Notwithstanding this agreement and the receipt of the $300, the defendant entered the employment of P. & Son, who, on the 1st August, 1899, started an opposition stage-coach on the same route and for the same business and purpose; and the defendant became the caller, canvasser for business, and driver of such coach:—*Held*, that the conduct of the defendant was a violation of the terms of his agreement.—Discussion as to the meaning of "good-will," and the effect of a sale of the good-will of a business. *Greer* v. *Thody*, 20 C. L. T. 43.

Sale of gas pipes and gas lines—*Dispute as to what passed under contract.*]—Action for damages for value of certain gas pipes and pipe lines purchased by plaintiff from defendants and not delivered. Plaintiff was told the leases were ordinary gas leases, but did not inquire what the exact rights of the defendants were. When he undertook to remove some fixtures the owners of the farms objected and plaintiff submitted. Action dismissed as defendants not at fault. *Smith* v. *Plymouth* (1909), 14 O. W. R. 344.

Sale of goods—*Waiver.*]—The jury found that the defendant had consented to waive the alleged warranty. There was no consideration for this consent, therefore there could be no waiver. The alleged waiver occurred after breach of contract:—*Held*, that the defendant was entitled to damages on his counterclaim. *Davidson* v. *Reid*, 6 E. L. R. 428.

Sale of horse—*Representation — Pedigree — Warranty — Damages—Evidence.*]—In April, 1907, K. sold a stallion to G. for $1,500, for which 3 lien notes were given, each of which stated on its face that it was "given for a gray Percheron stallion." One of the notes also contained a clause providing that it should be void if K. failed to provide G. "with the necessary papers (pedigree) to get a pure-bred certificate" before the end of 1907. A bank, as the assignees of K., brought an action on one of the notes, against G., and G. brought an action against K. for damages for breach of warranty and a return of the note sued on by the bank and one of the other notes, the third note having been given up when K. found it impossible to furnish the necessary pedigree:—*Held*, reversing the judgment of Beck, J., 12 W. L. R. 398, that there was no evidence to justify a finding that there was a breach of warranty that the stallion was pure-bred. *Imperial Bank* v. *Georges*; *Georges* v. *Kidd* (1910), 14 W. L. R. 654.

Sale of mineral—*Place of delivery — Warranty—Damages.*]—Under a contract the plaintiff was to deliver to the defendants

"300 tons of phosphate, from 60 to 70 per cent.," at $6 per ton, to be shipped f.o.b. cars at a named railway station, whence it was to be conveyed by rail to the works of the defendants. In a large portion of the rock delivered there was a deficiency of seven per cent. of "apatite," which is pure phosphate, but the defendants received and used it at their works. In an action to recover the balance of the contract price:—*Held*, that the plaintiff must be held to have warranted that the rock would contain the percentage of apatite called for by the contract. 2. That the defendants, having received and used the rock, were liable for the value of the apatite which it contained, to be ascertained at the station for delivery, and not where is was used; and, there being no evidence of further loss, the damages sustained by the defendants were seven per cent. of the freight paid by them for forwarding the rock by rail to their works, to be deducted from the amount of the plaintiff's claim in the action. *Foxton* v. *Hamilton Steel and Iron Co.*, 21 C. L. T. 286, 1 O. L. R. 393.

Sale of mining claim—*Representations—Good and valid claim—Knowledge of defendant that representations were untrue—Action to recover money paid—Evidence—Contractual relation between parties not established—Action dismissed.*]—This was an action by plaintiff, a civil engineer, to recover from defendant, a mining prospector, the sum of $1,100 and interest, paid by plaintiff to defendant for a certain mining claim alleged to be a good and valid claim, but which plaintiff said defendant well knew at the time of sale was not such a claim, and that defendant knew he had no right to sell said claim, which had been previously staked by another man.—At trial judgment was given in favour of plaintiff.—Divisional Court reversed above judgment, and dismissed plaintiff's action with costs. *Blair* v. *Bruce* (1910), 17 O. W. R. 719, 2 O. W. N. 381.

Sale of mining share—*Failure of plaintiffs to furnish shares—Counterclaim—Fraud — Leave to amend and have new trial in terms—Election—Costs.*]—Plaintiffs, a partnership, sued on a contract whereby defendants agreed that they would sell 16,000 shares of mining stock at par value within four months or purchase themselves any shares they could not sell. Defendants pleaded that they were not furnished with the stock, and that in any event they were induced by fraud to enter into the contract, and counterclaimed for $6,000.—Teetzel, J., at trial, dismissed plaintiffs' action with costs and gave defendants judgment for $6,000, on their counterclaim.—Divisional Court *held*, that it might be that plaintiffs have a cause of action against the defendants and the Culver Co. for not issuing the stock promised, and if so advised they might amend by adding the company and any others so advised and have a new trial upon the whole case. In which case defendants to have right to retry their counterclaim and establish fraud if possible. Plaintiffs to elect within 15 days. Unless plaintiffs elect within that time, the main appeal should be dismissed with costs and the appeal on the counterclaim allowed with costs. *Neil* v. *Woodward* (1911), 18 O. W. R. 230, 2 O. W. N. 533.

Sale of mining property—*Time—Payment on certain dates—60 days' grace by letter—Action to cancel the agreement.*]—Plaintiff Leckie entered into an agreement with defendant Marshall for sale of certain mining properties for $250,000. Marshall paid down $12,500 and entered into possession, agreeing to pay balance in certain sums at certain times, which if not then paid the agreement was to be void and Marshall was to forfeit the deposit paid. One sum of $37,500 under the agreement was to become due on 6th May, 1909, and was not then paid. The plaintiffs had by letter dated 8th May, 1908, given defendants' 60 days' grace on each payment, and the defendants tendered the $37,500 to plaintiffs on the last day of grace, by a notary public. The defendants refused to accept the money and brought action to have agreement cancelled and the deposit forfeited:—At the trial MacMahon, J., *held*, 14 O. W. R. 1071, 1 O. W. N. 222, that reading the agreement and the letter together, the defendants had fulfilled their part of the agreement and were entitled to possession so long as they continued to meet their payments, and dismissed the action.—Court of Appeal being equally divided, the appeal was dismissed with costs. *Leckie* v. *Marshall* (1910), 16 O. W. R. 481, 1 O. W. N. 899.

Sale of patterns—*Obtained by misrepresentation of agent—Action for breach of contract—Dismissed with costs.*] — Plaintiffs brought action to recover $348.02 for goods sold and delivered and $150 as liquidated damages for breach of contract. Defendant was a milliner and dealer in fancy goods and agent for sale of paper patterns by B. & Co., business rivals of plaintiffs. Agent of plaintiffs induced defendant to enter into a contract with plaintiffs, defendant believing her contract with B. & Co. expired in August, 1908. As a fact her contract with B. & Co. was in force until August, 1908, and thereafter until terminated by three months' notice in writing.—Latchford, J., *held*, that plaintiffs' agent having seen defendant's contract with B. & Co., had knowledge thereof, and had falsely represented to defendant that she was free to enter into a contract with plaintiffs and that defendant had relied upon said misrepresentation. Action dismissed with costs. *McCall* v. *Hickson* (1911), 18 O. W. R. 825, 2 O. W. N. 867.

Sale of private banking business to chartered bank—*Bank became insolvent—Action to recover money and contract of sale.*]—Defendants moved to cut down plaintiffs' judgment (16 O. W. R. 133, 1 O. W. N. 822) from $250 to $200 per annum on the ground that the average deposits did not amount to $400,000 according to a proviso contained in the contract of sale.—Teetzel, J., *held*, that the circumstances that compelled defendants to give up business at that branch before the time fixed for determining whether they should be relieved under above proviso was a misfortune which defendants must suffer. *Telford* v. *Sovereign Bank* (1911), 18 O. W. R. 506, 2 O. W. N. 833.

Security by transfer of chattels — *Condition—Breach of contract — Remedy—Revendication — Action for damages.*] — An agreement by which the maker of a note un-

dertakes, in case it is not paid at maturity, to transfer to the payee, as security, certain specified movables of which he retains the possession in the meantime, does not give the payee the right to revendicate the movables after the note falls due and remains unpaid. The proper remedy in such a case is a personal action for breach of contract. *Savard* v. *Tremblay*, 30 Que. S. C. 423.

Sale of railway.]—An agreement for sale of controlling interest in Can. Atlantic Rw. Co., provided that on default of payments of purchase money, for bonds, on a certain day, the deposit paid thereon should be forfeited as liquidated damages. The bonds were not ready for delivery on appointed day and the purchase money was not paid. In an action by assignee of purchaser:—*Held*, that the evidence shewed that purchaser or his assignee was responsible for the non-delivery and non-completion of the contract; that there had been default in payment of the price, and plaintiff could not recover. Action dismissed. Judgments of Court of Appeal for Ont., 21 O. L. R. 637, 12 O. W. R. 973, and Mabee, J., at trial, 11 O. W. R. 151, affirmed. *Sprague* v. *Booth*, C. R. [1909] A. C. 263, [1909] A. C. 576, 78 L. J. P. C. 164.

Sawing logs into lumber—Damages—Costs. *Spencer* v. *Collins*, 6 O. W. R. 290.

Service of mare—*Negligence of owner—Liability for loss of mare—Notice as to risk.*]—The owner of a stud horse on hire is bound to see that the service of mares takes place in a safe and natural manner, and, notwithstanding notice to the public that such service is at the risk and peril of owners of mares, he is liable in damages for the loss of a mare killed, while being covered, by false penetration through want of proper care by those in charge of the animals. *Robidoux* v. *McGerrigle*, 35 Que. S. C. 174.

Storage of apples—In warehouse—Advances against apples—Demand for payment—Refused—Apples sold by auction—Action for conversion dismissed with costs. *Parker* v. *Bligh* (N. S. 1910), 9 E. L. R. 94.

Subsequent letter — Satisfaction—Waiver—Evidence. *Heal* v. *Spramotor Co.*, 1 O. W. R. 175, 406.

Substituted agreement — Amends — Negligence—Injury to horse—Hay destroyed by fire—Damages—Costs—Set-off. *Drake* v. *Paulson* (N.W.P.), 5 W. L. R. 433.

Supply of charcoal — Shortage—Damages—Indemnity—Relief over—Third party procedure—Appeal—Provisions of order directing issue—Parties — Company—Assignment of rights to, pending action—Adoption of contract — Acquiescence. *Deseronto Iron Co.* v. *Rathbun Co.*, 2 O. W. R. 414, 418, 3 O. W. R. 697, 4 O. W. R. 44, 6 O. W. R. 688.

Supply of electrical energy—Implied contract to take whole supply—Breach—Construction. *Ottawa Electric Co.* v. *Birks*, 2 O. W. R. 949.

Supply of gas — *"Reservation"—Construction of contract—Damages.*]—*Held*, on appeal, that where an instrument had been reformed by the introduction into it of the "reservation" of gas in question, the defendants should have had determined by the trial Judge the meaning and effect of the reformed instrument, and the nature and extent of damages recoverable under it. If plaintiff had not been damnified that should have been shewn before reference commenced. Method of estimating damages discussed. Judgment appealed from 10 O. W. R. 1017, affirmed. *Carroll* v. *Erie County Natural Gas and Fuel Co.*, 13 O. W. R. 795.

Supply of gas—*Shutting off—Non-payment—Other premises.*]—Under 12 V. c. 183, s. 20, where a customer of the Montreal Gas Company has more than one building to which gas is being supplied, and he fails to pay for the gas supplied to any one of them, the gas company is entitled to cease supplying gas to all the buildings belonging to him. *Montreal Gas Co.* v. *Cadieux*, 11 Que. K. B. 93. (Reversed, 28 S. C. R. 382, but restored, [1899] A. C. 589.)

Supply natural gas—*To County House of Refuge—By town corporation—Breach of contract—Action for damages — Failure of gas wells—Appeal allowed—Action dismissed with costs.*]—Action by the county of Essex to recover $500 damages for an alleged breach of an agreement by defendants to supply the County House of Refuge with natural gas from defendants' natural gas system. Defendants pleaded that the agreement related only to their natural gas system as owned and operated at the time the agreement was entered into; and those wells having become exhausted they were under no obligation to supply gas obtained from another source.—Divisional Court *held* that defendants' construction of the agreement was correct. Appeal allowed and action dismissed with costs. *Essex* v. *Leamington* (1911), 18 O. W. R. 692, 2 O. W. N. 751.

Supply slop-food for cattle—*Breach—Action for damages—Accounts—Averages—Inferences — Counterclaim — Reference.*]—An action for damages for breach of contract to supply slop-food sufficient for proper nourishment of 1,200 cattle during the period in question.—Boyd, C., *held* plaintiff entitled to judgment for $666 in respect of rent, and for $7,500 as damages for failure to supply the amount of slop engaged to be furnished, which resulted in deterioration of the stock in weight and saleable value. Counterclaim dismissed with costs. If either party dissatisfied it may be referred to the Master to take accounts with further evidence. *Dean* v. *Corby Distillery Co.* (1911), 18 O. W. R. 681, 2 O. W. N. 832.

Time for performance—*Service of demand—Mise en demeure.*]—A debtor is not in default for non-performance of a contractual obligation until after a demand written or oral, according as the agreement is in the one form or the other, even when a date has been fixed for its performance, if there is not, in addition, the stipulation that the lapse of time shall constitute a *mise en demeure*. *Cardinal* v. *Lalonde*, 31 Que. S. C. 322.

Trade agreement — *Breach of covenant—Parties — Directors of association — Restraint of trade—Public policy—Damages.*]—

The defendant, with others, by a writing, covenanted separately with the plaintiffs, the board of directors of the Cheese and Butter Makers' Association of Western Ontario, that if he should at any time thereafter, within the province of Ontario, for the space of three years, violate the stipulations mentioned in the agreement, by directly or indirectly becoming bound as a cheese or butter maker to make good to his employer any sum of money lost to him by reason of the inferior quality of the cheese made by him, except so far as such inferior quality may have been caused by his gross negligence, he should pay the treasurer of the board $200 as liquidated damages, which should become part of the funds of the association.—This covenant was entered into for the purpose of preventing cheese makers from making agreements with the owners of cheese factories to become liable for the quality of the product even in the case of its inferiority being due to the character of the milk supplied.—The defendant entered into an agreement in violation of his covenant:—*Held*, that the covenant having been entered into with the plaintiffs, they had a status to sue for the breach, without joining the other covenantors, although the agreement was mutually advantageous.—2. That the evidence did not support the defendant's contention that his signature was obtained by misrepresenting or misreading the document to him, so that he did not understand what he was signing.—3. That there was a good consideration for the covenant, in the benefit to the defendant, although no consideration was mentioned in the document.—4. That the agreement was not in restraint of trade.—5. That the $200 mentioned in the agreement was to be regarded not as a penalty but as liquidated damages. *Miller* v. *Thompson*, 20 C. L. T. 77.

Transfer of interest in lands—*Action to set aside—Fraud — Misrepresentation—Reformation of contract — Terms—Costs.*]—Plaintiff brought action to set aside an agreement in writing, for the transfer of the plaintiff's interest in certain lands to the defendant, on the ground of breach thereof and deceit by defendant and for an injunction to restrain defendant from dealing with plaintiff's land and for an account of defendant's dealings.—Sutherland, J., *held*, that the agreement should be set aside and certain notes delivered up to plaintiff and defendant pay costs.—Divisional Court *held*, that the agreement should not be set aside except for fraud, and that no fraud had been shewn; that as both plaintiff and defendant believed that defendant was to assume plaintiff's liability, under the agreement, the instrument should be reformed accordingly, if so desired, and defendant consenting to the reformation, the appeal should be allowed without costs, and action dismissed without costs, otherwise, the appeal should be dismissed with costs. *Stewart* v. *Dickson* (1911), 18 O. W. R. 281, 1 O. W. N. 1038, 2 O. W. N. 614.

Trust—*Assessment of damages—Sale of mining areas—Promotion of company—Failure to deliver securities—Principal and agent—Account—Evidence — Salvage—Indemnity for necessary expenses—Laches — Estoppel.*]—The plaintiffs transferred certain mining areas to the defendant in order that they might be sold, together with other areas, to a company to be incorporated for the purpose of operating the consolidated mining properties, the defendant agreeing to give them a proportionate share of whatever bonds and certificates of stock he might receive for these consolidated properties upon the flotation of the scheme then being promoted by him and other associates. In order to hold some of the areas it became necessary to borrow money, and the lender exacted a bonus in stock and bonds, which the defendant gave him out of those he received for conveyance of the properties to the company. After deducting the ratable contribution towards this bonus, the defendant delivered to the plaintiffs the remainder of the proportion of stock and bonds to which they were entitled, but did not then inform them that such deductions had been made, and they, consequently, made no demand upon him for the balance of their shares and bonds until some time afterwards, when they brought the action to recover the securities or their value:—*Held*, affirming the judgment appealed from, *Fultz* v. *Corbett*, 1 E. L. R. 54, that whether the defendant was to be regarded as a trustee or as the agent of the plaintiffs, he was not entitled, without their consent, to make the deductions, either by way of salvage or to indemnify himself for expenses necessarily incurred in the preservation of the properties, and that, under the circumstances, the failure to demand the delivery of the remainder of the securities before action did not deprive the plaintiffs of the right to recover.—If the defendant was to be considered a trustee wrongfully withholding securities which he was bound to deliver, he was liable for damages calculated upon the assumption that they would have been disposed of at the best price obtainable. If, however, he was to be regarded as a contractor who had failed to deliver the securities according to the terms of his agreement, he was liable for damages based on the selling price of the securities at the time when his obligation to deliver then arose. *Nant-Y-Glo and Blaina Ironworks Co.* v. *Grave*, 12 Ch. D. 738. *The Steamship Carrisbrooke Co.* v. *London and Provincial and General Ins. Co.*, [1901] 2 K. B. 861, and *Michael* v. *Hart & Co.*, [1902] 1 K. B. 482, followed. *McNeil* v. *Fultz*, 27 C. L. T. 237, 38 S. C. R. 198.

Wintering cattle—Terms of contract — Redelivery — Evidence — Corroboration—Damages for detention—Counterclaim. *Still* v. *Watson*, 7 W. L. R. 466.

Work and labour—*Implied stipulation.*]—Where the respondent contracted with the Government to execute for a term of years the printing and binding of certain public documents at stipulated prices, but the Government did not expressly contract to give to the respondent all or any of the said work:—*Held*, that a stipulation to that effect could not be implied, and that there was no breach of contract by reason of orders for work being withheld. *Regina* v. *Demers*, [1900] A. C. 103.

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3. Building Contract.

Action for balance of contract price—Counterclaim—Omission to do part of work

—Failure to complete in workmanlike manner —Question of fact—Set-off of costs—Scale of costs. *Dodds* v. *Morrison* (N.W.T.), 1 W. L. R. 164.

Action for balance of contract price —Satisfaction of architect—Certificate—Refusal of—Fraud and collusion—Construction of contract—Condition precedent—Waiver—Acceptance of work—New contract for extra work—Counterclaim—Delay in completion of building—Loss of profits—Remedying defects —Evidence—Mechanic's lien—Costs. *Cyr* v. *O'Flynn*, 7 W. L. R. 452.

Action for contract price—*Completion of building — Specification—Acceptance—Occupation.*]—*Held*, that where there is a contract to erect a building according to certain specifications for a certain specified sum, such sum is not recoverable until the building is completed according to specification, unless the owner accept the work with knowledge of the defects, or has done something from which a new contract to pay can be inferred. —2. That occupation of a building by the owner who, before entering, has complained of the non-completion according to contract, is not, without other evidence, such an acceptance as will entitle the contractor to recover. *Broley* v. *Mills*, 7 W. L. R. 655, 1 Sask. L. R. 20.

Addition to cottage—*Defective workmanship — Abatement of price.*] — Plaintiff sued before justices of the peace for work done, and materials supplied in connection with the erection of an addition to a cottage. Defendant relied upon certain defects in the workmanship:—*Held*, that the implied contract that the work should be done in a workmanlike manner, was not one going to the essence of the contract, but that defendant was entitled to an abatement of price on account of defects:—*Held*, also, that if the magistrates had jurisdiction in respect to plaintiff's claim, they had jurisdiction to consider how much the price should be abated for defective workmanship. *Mattinson* v. *Hewson*, 43 N. S. R. 339, 6 E. L. R. 568.

Architect's certificate — Condition precedent to action—Counterclaim — Defective work—Acceptance—Delay—Waiver. *Waugh* v. *Grayson* (N.W.T.), 2 W. L. R. 330.

Architect's certificate — *Finality—Action — Condition precedent.*] — The written contract between the parties provided that the plaintiffs were to erect and complete a building for defendant according to certain drawings and specifications by a fixed date, and to the satisfaction of an architect named, to be certified by him under his hand forthwith after completion. It also provided for payment on the certificates of the architect of 85 per cent. on the work done from time to time, and that the balance unpaid on the completion of the work should become payable within one month after the architect should have certified. The architect gave two so-called final certificates, the first of which was in part as follows: "I hereby certify that D. Bros. are entitled to $416.36, in full for the above contract and extras, less $4.25, which amount may be held back till the items of work in the following list are done." It proceeded to specify the items covered by the $4.25, and added: "Note.—I consider the guarantee in specification will cover any leak in roof." The contractors had in the specification guaranteed the roof for five years against ordinary wear and tear. Annexed to and forming part of the certificate was a statement shewing that in arriving at the sum of $416.36 a deduction of $50 had been made for bad floor, &c." The second and last certificate of the architect was as follows: "This is to shew that by certificate given by me on 23rd January, 1900, I certified that D. Bros. were entitled to $416.36, from which the amount of $4.25 was deducted to cover some small items left undone. These have now been attended to, and I therefore certify that D. Bros. are entitled to $416.36 in full of contract and extras:"—*Held*, that the two certificates should be read together, and being so read they shewed that in respect of the floor and roof the work had not been properly completed, and did not constitute a certificate that the contract work had been completed to the satisfaction of the architect; and such a certificate was a condition precedent to the plaintiff's right to recover. *Davidson* v. *Francis*, 22 C. L. T. 328, 14 Man. L. R. 141.

Architect's certificate — *Liability of owner — Delay in completion — Penalty clause—Waiver.*] — Where, under the terms of a building contract, the work is to be done under the direction and to the satisfaction of the architect, who is given authority to grant a final certificate, and the architect certifies to its completion: — *Held*, that, in the absence of fraud or collusion, the certificate of the architect is so far binding upon the proprietor that he cannot contend that the work was not done in accordance with the plans and specifications, and it is immaterial whether the proprietor had knowledge of his intention to grant it or that he consented to or forbade its being granted; if the certificate is untrue, the remedy is against the architect. A provision in a building contract that the architect's certificate should not lessen the contractor's total or final liability, was held, as a matter of construction, to apply not to the final certificate, but only to progress certificates. A provision in a building contract for liquidated damages for non-completion within the prescribed time, subject expressly to a further reasonable length of time for delays caused by changes in the plans and specifications, is not discharged by delays caused by such changes. *Aliter*, if no provision has been made for such extensions. Where the contract gives to the architect authority to settle all disputes, matters about which no dispute had been raised when he gave his final certificate are not concluded thereby. As a matter of construction it was held that the contract gave the architect no authority to grant extensions of time on account of changes in plans, except upon a dispute arising. Where the contractor is to "pay or allow to the proprietor" a certain sum as liquidated damages, it is not necessary that it should be retained from the contract price or fixed by the final certificate. Delay in the completion of the contract caused by the proprietor's neglect to complete work which it was necessary should first be done before the contractor could continue work under the contract, does not operate to discharge the contractor from the penalties un-

less notice of the contractor's work having reached the stage at which the proprietor should do his part of the work had been received by him. Neither the proprietor's entering into occupation of the building on completion of the work, insuring it, nor making payment on the contract price, after the time for completion, and after actual completion of the work, operates as a waiver of the penalty clause. Though perhaps on the giving of his final certificate the architect became *functus officio*, his estimate of the proper allowances to be made was accepted as reasonable and allowed by the Court, in reduction of the penalties payable for delay in completion. *McLeod* v. *Wilson*, 2 Terr. L. R. 312.

Architect to superintend building—*Absence from the work—Reduction of salary agreed upon.*] — An agreement whereby an architect undertakes to prepare the plans and specifications, receive tenders and award the contracts, direct the contractors and superintend the work of erecting two houses, creates a divisible obligation which is capable of being executed by parts. It follows that the absence of the architect from the work during the course of its completion merely gives the proprietor the right to reduce the salary agreed upon in proportion to the damages he has suffered. Judgment in 36 Que. S. C. 57, reversed. *Mann* v. *Rudolph*, 37 Que. S. C. 289.

Assignment of moneys due — *Action brought in name of assignor—Assignment of chose in action—Delay in completion of contract—Penalty—Verbal extension of time by architect — Penalty or liquidated damages—Delay caused by act of owner.*]—The plaintiff entered into a contract with the defendant to erect a certain building, to be completed within a limited time, and a penalty of $25 per day was stipulated in case the building should not be completed within that time. The building was not completed within the time limited, but it appeared that the delay was due to the failure of the defendant to furnish certain material which he undertook to furnish. The contract provided that the architect might grant an extension, and required him to certify to such extension. The architect verbally extended the time, but did not certify to it. It also appeared that the plaintiff had assigned all his interest in the claim sued for to a third party. Judgment having been given for the plaintiff without any deduction for the delay, the defendant appealed:—*Held*, that, while by the provisions of c. 41 of C. O. 1898 the assignee of a chose in action may bring an action in his own name, yet, as by such Ordinance the right of the assignee to proceed as if the Ordinance had not been passed is expressly reserved, and as the previous practice required the action to be brought by the assignor, the action in this case was properly brought.—2. That the parties having expressly agreed upon a "penalty" of $25 per day upon default, such sum could not be regarded as liquidated damages or otherwise than as a penalty.—3. That, as it appeared that the delay was caused by the default of the defendant, the plaintiff was by such delay exonerated from the penalties and excused from the performance of the work within the time limited. *Covert* v. *Janzen* (No. 2), 1 Sask. L. R. 429, 9 W. L. R. 287.

Balance — Counterclaim — Evidence. *Breakenridge* v. *Mason*, 1 O. W. R. 529.

Breach — Dismissal of contractor—Architect's notice of — Time — Sunday — Fraud. *Anderson* v. *Chandler*, 1 O. W. R. 417, 2 O. W. R. 186.

Breach—Negligent work—Responsibility. *Hagar* v *Hagar*, 1 O. W. R. 78.

Bridge for municipal corporation—*Contract declared forfeit by engineer—Work completed by corporation — Construction of forfeiture clause—Right of contractors to recoupment of moneys expended on plant and preparation for work — Benefit accruing to corporation — Indemnity against loss—Account—Difference between contract price and costs of completing work — Acceptance of bridge—Waiver of certificate.*]—Plaintiff B. entered into a contract with defendants to build a bridge for them. Subsequently B. took S. into partnership with him. The work not progressing satisfactorily defendants, under the special terms of the contract, took it over and finished the bridge, S. acting as foreman. Defendants accepted the bridge:—*Held*, that plaintiffs entitled to an account of what defendants have expended, any balance of the contract price to be paid into Court for the plaintiffs. *Buchanan* v. *Winnipeg, Stewart* v. *Winnipeg*, 12 W. L. R. 613.

Changes in work—*Delay — Damages—Provisions of contract — Architect — Final certificate—Condition precedent—Collusion—Evidence—Correction of mistake—Waiver—Extras contemplated by contract—Work outside of contract—Distinction — Construction of contract — Specifications — Statement—Payment — Estoppel — Substantial performance—Trifling matters uncompleted—Right to final certificate — Judgment directing architect to hold inquiry and issue certificate—Costs.*]—In an action to recover the balance of the contract price of a building and extras, the plaintiff, the contractor, alleged that by reason of the making of certain changes mentioned, not included in the contract, he was delayed in the construction work under the contract, and suffered damage and incurred expenses thereby: — *Held*, that the plaintiff was not entitled to damages by reason of the making of changes in the construction work, because he had agreed to make and had stipulated that he should be paid for making the very changes in the construction referred to; and evidence in support of this allegation was rejected.—By the contract, the building was to be erected according to certain plans and specifications prepared by the defendants J. and B., architects, and all payments were to be made upon the written certificates of the architects to the effect that such payments had become due, and it was provided that, before the issue of the final certificate, the contractor should furnish evidence of payment to material-men and workmen. The contractor entered upon the performance of the work, and from time to time received certificates from the architects, the amounts whereof were

paid: but a final certificate was refused, and this action was brought to recover payment from the owners and to compel the architects to give a certificate:—*Held*, that the plaintiff was not entitled to recover without the certificate of the architects, that being a condition precedent to payment, and it not being established that there was collusion between the owners and the architects.—During the course of the work the architects gave the plaintiff a progress certificate for a payment of $6,000. The defendants refused to pay it without seeing the architects. It was then discovered that a mistake had been made, and a new certificate was issued in lieu thereof, the amount of which was paid to the plaintiff's agent. It was contended that the architects could not alter a certificate or issue a new one, and that there was, therefore, collusion covering the whole of the transaction:—*Held*, that, if the architects had not the right to correct a palpable mistake (and, *semble*, they had the right), the plaintiff had waived the illegality or impropriety by accepting and appropriating the money under the substituted certificate, and by afterwards applying for and obtaining certificates for future payments based upon the substituted certificate.—It was further urged that, if an architect refuses to certify in pursuance of the contract, and the owners remain passive, and by that means retain money which belongs to the contractor, there is evidence of collusion:—*Held*, that that would at most be *prima facie* evidence of collusion, and that the facts in this case completely rebutted any such *prima facie* presumption.—Clause 3 of the contract provided that "no alterations should be made in the work shewn or described by the drawings and specifications, except upon a written order of the architect, and, when so made, the value of the work added or omitted shall be computed by the architect, and the amount so ascertained shall be added to or deducted from the contract price." The question arose, what part of the work done was "extra" in regard to the contract, and what part was outside of it:—*Held*, that work may be performed that is entirely outside of the contract, and is not covered by its terms; and in this case having regard to the provisions of clause 3, any work done which was not an alteration in the work shewn or described by the drawings and specifications, would not come within the terms of the contract.—The specifications contained the following provisions: "The contractor shall not deviate from the plans and specifications without the written consent of the architect. No claims for extras will be allowed without the written order of the architect. Should the owner decide to make any alterations in the building in carrying out the work, such alterations shall in no way invalidate the original contract:"—*Held*, that these provisions did not extend the operation of the contract beyond what was held to be its scope under clause 3 of the contract itself.—The plaintiff furnished a statement of extras, and was paid in accordance therewith, upon certain conditions:—*Held*, that the plaintiff was precluded from insisting upon any claim for extras beyond what were set out in that statement.—The evidence shewed that, although some pieces of work of a trifling character were unfinished that ought to have been done under the principal contract, it had been substantially performed. The architects pointed out what had not been done, and the plaintiff did it, but they omitted to refer to three trifling matters which had not in fact been attended to:—*Held*, that the substantial performance and the acquiescence of the architects entitled the plaintiff to a final certificate.—*Munro* v. *Butt*, 8 E. & B. 738, followed:—*Held*, also, that, as against the architects, the plaintiff was entitled to judgment directing them to hold an enquiry and issue a certificate.—*Mahoney* v. *Le Rennetel*, 13 N. S. W. R. (Eq.) 7, approved and followed.—Form of judgment and special disposition of costs.—*Lawrence* v. *Kern* (1910), 14 W. L. R. 337, 3 Sask. L. R. 253.

Completion of work — *Satisfaction of architect—Collapse of building — Refusal of contractors to reconstruct and complete—Recovery by owners of money expended for that purpose—Damages for delay—Terms of contract—Damages for loss of business—Injury to goods in building—Counterclaim—Extra.*] —The defendants contracted to erect a building for the plaintiffs and to complete it by the 10th January. On the 8th June, three weeks after the defendants had, according to their own story, completed the building, it collapsed, because, as was found, the stone work in the foundation had not been properly done. The contract said that the work was to be done to the satisfaction of the architects, and also that no certificate given or payment made under the contract, except the final certificate or final payment, should be conclusive evidence of the performance of the contract, either wholly or in part, and that no payment should be construed to be an acceptance of defective work or improper materials—*Held*, that no such direct expression of satisfaction was ever made by the architects as should be held, in the circumstances of the case, to be binding upon the plaintiffs, whose agents they were. The work in fact had not been properly completed, as the actual collapse shewed, and, in such circumstances, any expression of satisfaction by the architects must, in order to bind the plaintiffs, be clear and unambiguous, and must not be merely inferred from the facts proved. —On the 8th June, then, the defendants had not completed the work to the satisfaction of the architects, and, when the building on that day collapsed, they were still bound to take up the work and complete it. A proper notice was given to them, asking them to do so, and they refused. After the necessary time stipulated for in the contract had elapsed, the plaintiffs went on and completed, and were entitled, under the terms of the contract, to recover from the defendants the amounts expended by them in reconstructing the building and finishing it according to specifications.—The plaintiffs were also entitled to recover at the rate of $17 a day (fixed by the contract) for the time which elapsed between the 10th January and the date on which they entered into complete use and possession of the building. As the contract did not authorise the plaintiffs to deduct this amount from payments made, their omission to do so did not prevent them from recovering. — The plaintiffs were not entitled to damages for loss of business owing to the delay after the collapse, there being no definite evidence to sustain a claim therefor.—Nor were they

entitled to damages for implements injured in the fall of the building—they entered into possession before completion of the building, at their own risk.—On the defendants' counterclaim they were entitled to credit for such charges as should be found upon a reference to be properly due in respect of extras. *Cockshutt Plow Co.* v. *Alberta Building Co.* (1910), 13 W. L. R. 234.

Condition precedent — *Performance of work in a "good and workmanlike manner" — Faulty workmanship — Acceptance — Quantum valebat.*] — Plaintiff agreed to remodel defendants' house "in a good and workmanlike manner and according to the best skill and art."—*Held*, that the performance of the work in this manner is a condition precedent, and not having performed the contract is not entitled to be paid. He cannot recover on a *quantum valebat*, for there is no evidence of a contract to pay on that basis. When the plaintiff claimed he had finished the work he withdrew, leaving defendants in possession. This is not a waiver by defendants. *Cole* v. *Smith*, 13 O. W. R. 774.

Conditions — *Extras — Certificate of superintendent.*] — A contract for the carpenter's work at the defendant's house provided that the contractor should be paid for work and extras, if any, "on certificate of superintendent of work." The contractor died after doing part of the work, and the plaintiff thereupon agreed to deliver at the house "all the material referred to in the late (contractor's) contract, and all the conditions of that contract are to apply." The superintendent of the work was a relative of and indebted in a large sum to the defendant, and the plaintiff did not know this. Disputes having arisen, the superintendent of the work gave to the plaintiff under the defendant's instructions a certificate that the plaintiff had furnished all the material according to specifications, "except small matters which I will adjust under the terms of the contract:"—*Held*, that as to the extra material furnished by the plaintiff, the condition as to the superintendent's certificate did not apply; and that at all events the certificate in fact given put an end to the contract and relieved the plaintiff from doing anything further under it, so that the non-completion of the "small matters" in dispute formed no defence:—*Held*, also *per* Armour, C.J.O., that the relationships, family and financial, of the superintendent to the defendant should have been disclosed to the plaintiff, and that under the circumstances the plaintiff was not bound to obtain a certificate at all. *Ludlam* v. *Wilson*, 21 C. L. T. 554, 2 O. L. R. 549.

Construction — *Location — Plans and specifications — Deviation — Engineer — Certificate—Jury—Acceptance of work.*] — M. & S. contracted with the defendants for the construction of a half mile track on the Provincial Exhibition grounds at Halifax. Under the terms of the contract, of which certain plans and specifications were made a part, the track was to be located as nearly as possible on the lines shewn on the plan, and the exact location was to be staked out by the engineer or his assistant:—*Held*, that the word "location" referred only to the horizontal location of the track, and had no reference to the grading or sub-grades.—It was required by the specifications that the track should be finished to the required grades in every particular, and that the decision of the engineer on any matter connected with the grading or lines should be final; also, that no deviation should be allowed from the plans and specifications unless directed by the engineer in writing:—*Held*, that the construction of the track a foot lower than as shewn in the plans was a deviation, and that the placing of stakes by the engineer or his assistant, assuming it to have been done, was not equivalent to written instructions making a change in the terms of the contract.—2. The height and width of the track, grades, etc., being fixed by the plans and specifications, and the only duty of the engineer being to see that the contractors built accordingly, the finding of the jury that the contractors were misled by stakes placed by the engineer or his assistant, was irrelevant.—3. The engineer being the sole judge as to whether the contract was completed to his satisfaction or not, a finding of the jury that it was "practically completed," was irrelevant and must be set aside.—4. It was not an acceptance of the work for the defendants to take possession under a provision of the contract enabling them to do so in the event of the contract not being completed within the time specified. *Courtney* v. *Provincial Exhibition Commission*, 2 E. L. R. 226, 41 N. S. R. 71.

Contractor who delivers a building erected under a penalty clause, has the right to recover the balance due on the contract price, after allowance has been made for the doing over of faulty work and for the damages resulting from the delay in completing the contract. The proprietor will not be permitted to claim, by a cross-demand, by reason of such faulty work, in addition to the cancellation of the contract, complete immunity from the payment of the contract price, including the reimbursement of the amounts paid on account and the tearing down of the work. *Favreau* v. *Rochon* (1910), 38 Que. S. C. 421.

Defects in building—Damages. *Brayley* v. *Nelson*, 2 E. L. R. 339.

Deduction for portion of work dispensed with — Waiver of performance. *Reid* v. *McDonald* (1906), 1 E. L. R. 171.

Delay—*Extras—Penalty — Alterations — Written order of architect—Onus—Disputed items — Appeal.*]—A building contract contained a provision that the work should be completed by the contractor by a specified date, with a penalty of $5 a day, as liquidated damages, for each day that the work should remain unfinished after that date. It was agreed, on the part of the defendant, that the contractor should be put in possession of the premises, and should be furnished with the lines and levels, by another fixed date, and that, for every day thereafter, he should be entitled to have two days added to the time for the completion of his contract. It was further agreed that the contractor should have no action for damages, or otherwise,

against the defendant by reason of said delay:—*Held*, that the clause of the contract denying the plaintiff's right to an action for damages applied to the giving possession of the premises only, and not to the delay in furnishing lines and levels and that the plaintiff was entitled to recover for extra work resulting from the latter delay:—*Held*, also, that the delay in putting the plaintiff in possession of the premises, and in furnishing lines and levels, and delay caused by extra work which he was called upon to do, relieved the plaintiff from the obligation to complete his work by the date agreed, and that the defendant was debarred from enforcing payment of the penalty. One of the clauses of the contract provided that, if alterations were required in the work, a fair and reasonable valuation of work added or omitted should be made by the architect, and that the sum payable to the plaintiff should be increased or diminished by such amount, provided that, where the amount was not agreed upon, the contractor should proceed with the work on the written order of the architect, and that the amount payable therefor should be fixed as further provided:—*Held*, that alterations under this clause only required a written order where the architect and contractor differed as to the valuation; that the furnishing of plans by the architect, shewing additional work, was a "written order" within the meaning of the contract; that the burden was upon the plaintiff of shewing that work claimed for as extra was ordered by the architect. In determining the amount to which the plaintiff was entitled for extra work the trial Judge had the assistance of an assessor, but the Court, on appeal, were not furnished with the assessor's report, or with the reasons for allowing the plaintiff different items claimed by him:—*Held*, that the Court could not adopt the views of the trial Judge and the assessor, as to disputed items, in these circumstances, but must consider the different items and the evidence bearing upon them, and that the amount allowed, being excessive, should be reduced. *Munro* v. *Town of Westville*, 36 N. S. R. 313.

Delay caused by other contractors—*Failure to notify architect — Time—Extension—Penalty—Liquidated damages — Relief against—Extras—Estoppel.*]—The plaintiff's contract bound him to complete a building for the defendant within a specified time, and to pay a penalty of $20 a week in case of delay beyond the time, subject to clauses providing for an extra time allowance in case the plaintiff should be obstructed or delayed "in the prosecution or completion of the work" by the act, neglect, delay, or default of the owner or the architect or of any other contractor on the house, but that "no such allowance shall be made unless a claim therefor is presented in writing to the architect within 36 hours of the occurrence of such delay:"—*Held*, that the plaintiff was bound by this last proviso, and was liable for the stipulated penalty, although the delay in completion was entirely owing to causes beyond his control, and a large part of it took place before he commenced his work at all, as he had failed to give notice in writing to the architect of any claim for extra time allowance.—*Jones* v. *St. John's College*, L. R. 6 Q. B. 115, followed.—(2) As the trial Judge found that, as a matter of fact, the defendant was not responsible for any part of the time lost, and he suffered from the delay damage to the extent of $20 per week, the case did not come within s.-s. (c) of s. 38 of the King's Bench Act, giving the Court power to relieve against agreements for liquidated damages.—(3) The allowance of $20 per week should be made only from the time named in the contract for the completion up to the 19th January, 1904, and not up to the date of the actual completion, because the defendant ordered some extra work to be done, which was only commenced on the 19th January, and that estopped him from claiming damages for delay beyond that date.—*Holme* v. *Guppy*, 3 M. & W. 387, *Westwood* v. *Secretary of State for India*, 7 L. T. 736, and *Dodd* v. *Churton*, [1897] 1 Q. B. 562, followed. *Grey* v. *Stephens*, 4 W. L. R. 201, 16 Man. L. R. 189.

Extra work—*Covenant that balance of price and cost of extras shall be subject to architect's certificate — Clause, compromissoire.*]—A covenant in a contract for the erection of a building for a stated price, that the architect may order alterations in the course of the work, entailing a proportionate increase or diminution in the price, takes the contract out of the operation of Art. 1690 C. C. and renders the restriction therein, as to recourse for extra work, inapplicable.—A covenant in a contract for the construction of a building according to a plan and specifications, that the balance of the price and of all extras shall be paid by the proprietor to the contractor, on delivery by the latter of a certificate of the architects that the works are completed and that a stated sum is due, as a net balance, and that no account will lie unless such certificate is produced, is in the nature of an agreement of submission to arbitration (*clause compromissoire*), and of no binding force, as it does not contain the essentials required by Art. 1434 C. P. — Hence, the production of the certificate is not a condition precedent to the right of the contractor to sue for the balance of the price and the cost of the extras. *Quinlan* v. *Redmond* (1910), 39 Que. S. C. 145.

Extras—Absence of written order—Want of authority — Pleading — Counterclaim—Costs. *Williams* v. *Cornwall Paper Co.*, 9 O. W. R. 111.

Extras—Architect—Set-off—Cost of completing work. *Smith* v. *Glines* (Man.), 5 W. L. R. 206.

Extras—*Authority of agent—Setting aside findings of jury.*]—M. contracted to erect a building in Vancouver for the defendants, a Milwaukee company, the contract providing that no extras would be allowed unless their value was agreed upon and indorsed on the contract. S., who had intended to occupy the building for the purposes of a bottling company, of which he was a member, ordered extras, but no indorsement thereof was made on the contract. In an action by M. for the price of the extras, the jury found "that S. as authorised agent for the company, ordered the extras for it, and that it did either hold out or permit S. to hold himself out as its agent for the purpose of ordering extras:"—

Held, that such indorsement on the contract was a condition precedent to the plaintiff's right to recover. *McKinnon* v. *Pabst Brewing Co.*, 22 C. L. T. 39, 8 B. C. R. 265.

Extras. *Brine* v. *Shearing*, 2 E. L. R. 42.

Extras — *Certificate of architect.*] — The certificate for additional work given by the architect of the owner after the completion of the work will avail, instead of the authorisation in writing of the owner required by Art. 1690, C. C. *Bayard* v. *Drouin*, 22 Que. S. C. 420.

Extras — Onus—Date of completion — Quality of work—Mechanics' liens—Constitutional law — Mechanics' Lien Ordinance — Priority of lien over mortgage—Ultra vires—Land Titles Act. *Withey* v. *Francomb* (N. W. T.), 6 W. L. R. 390.

Extras—*Oral testimony—Tender.*] — F. had contracted with L. to build a warehouse and do certain repairs, by an agreement in writing, giving certain details of the work to be done, but unaccompanied by a plan. The contract price was $1,100. F. claimed $32.55 for extras which he maintained were authorised by L., but which L. denied. At the trial F. offered oral evidence in support of his claim for extras, and L. objected, setting up Art. 1690:—*Held*, that Art. 1690 of the Code must be interpreted strictly. (2) When it is a question of a contract unaccompanied by plans and definite specifications, but relating to building and repairing buildings, either erected or to be erected, described in a writing giving certain details of the work to be done, it is not a case for the application of Art. 1690, and oral evidence may be adduced to prove the doing of work outside the contract, and the cost thereof, without the production of any writing authorising them. *Carriveau* v. *Roy*, 15 Que. S. C. 90, followed. (3) A tender to avail should be made in the terms of Art. 1163, C. C., and especially in legal tender, if it is a question of money, and including the amount of the costs, if made after action brought. *Ferland* v. *Laflamme*, 27 Que. S. C. 66.

Failure of contractor to do work within time agreed—Owner stopping work on building—Express promise to pay for work done—Consideration — Benefit — Counterclaim—Damages. *Vogan* v. *Barry*, 7 W. L. R. 812.

Faulty construction — Extra work — Specifications—Delay — Quantum meruit — Reference. *Metallic Roofing Co.* v. *City of Toronto*, 3 O. W. R. 646, 6 O. W. R. 656.

Findings of referee—Appeal — Amendment—Reformation—Costs. *Goring* v. *Hawkins*, 5 O. W. R. 529.

Implied conditions—*Contract for carrying out lapsed contract — Commercial contracts—Oral testimony.*]—When a building contract has not been executed in the specified time and has lapsed, and the parties enter into a new one for the same work, at an advanced price, the following year, they are presumed to intend the other conditions of the former contract, as to time and season of performance, to apply.—2. Building contractors are traders, and contracts between them for the performance of their work are commercial, and oral testimony is admissible to prove the circumstances and conditions under which they are made. *Pagé* v. *Connolly*, 35 Que. S. C. 121.

Material supplied not covered by contract—Damages — Arbitrator — Bias—Lien. *Piggott* v. *Toronto Rubber Shoe Mfg. Co.*, 1 O. W. R. 541.

Oven included in contract for building — *Defective construction — Collapse — Acceptance—Undertaking or guaranty—Fire caused by collapse—Destruction of building—Measure of damages—Finding of fact of trial Judge—Reversal by Appellate Court.*]—The defendant contracted with the plaintiff to erect a building, including a bake-oven, for a stated price. The defendant sublet the erection of the oven to M. After the completion of the oven the plaintiff complained that the arch was so constructed as to be in danger of falling, but both the defendant and M., after examining the oven, assumed to consider it to be properly constructed. The plaintiff called in an expert, who reported that the oven was in danger of collapsing. The defendant having called upon the plaintiff to fulfil his part of the contract by giving a mortgage as security for the contract price, the plaintiff demurred that the oven was not properly constructed. But in March, 1908, the plaintiff agreed to pay the defendant the contract price in manner set out in a letter, still insisting, however, that the oven was improperly built; whereon the defendant wrote to the plaintiff that "if what you dread," that is, that the oven would fall down, "happens, why it will be put right." The plaintiff went on using the oven for about six months from its completion, when a fire occurred in the bake-house in which the oven was, injuring the bake-house and the main building adjoining it:—*Held*, upon the evidence, reversing the finding of Martin, J., the trial Judge, that the fire originated from the collapse of the oven; and the plaintiff was entitled to recover damages from the defendant.—There was no serious conflict of evidence, and the Court could draw the inference from the facts without violating the rule that, where the evidence is conflicting, the finding of the trial Judge will not lightly be interfered with.—*Held*, also, Irving, J.A., dissenting, that the plaintiff was confined to such damages as the parties had in contemplation, namely, the damages to the oven itself.—*Per* Irving, J.A., that the plaintiff was entitled to damages for loss of the use of the building, and the estimated cost of re-building, but not loss of profits. *Baker* v. *Atkins* (1910), 13 W. L. R. 327, 15 B. C. R. 177.

Parol evidence to vary — *Statute of Frauds—Written agreement to build house—Contemporaneous oral agreement to accept conveyance of land as part of price—Consistent agreements standing together—Offers to convey—Lien on land for amount overpaid and costs—Reformation of contract—Form of judgment.*]—Action for balance due on a

building contract, which was in writing. Defence that for the balance owing the plaintiff had agreed to accept certain lots, but this did not appear in the written contract. The trial Judge reformed the contract and dismissed the action. On appeal, *held*, that parol evidence of the agreement as to the lots was admissible; that the Statute of Frauds did not prevent the real agreement being set up. Judgment for defendant, who is given a lien on the lots for the amount overpaid. *Eaton* v. *Crook*, 12 W. L. R. 658.

Payment of price—Time—Duplicate instruments—Discrepancy — Extras — Delay —Inferior work—Failure to supply money to pay workmen—Mechanics' liens—Judgment —Reference — Account — Secret commissions. *Bater* v. *Brown* (Man.). 2 W. L. R. 36.

Plans and specifications — *Failure to comply with—Absence of acceptance of work actually done—"Substantial performance" —Dismissal of action on contract—Implied contract to pay for value of work done — Amendment — Inference—Taking possession of building—Waiver—Acceptance — Absence of knowledge of breaches—Extras—Express or implied request—Counterclaim—Damages —Delay—Penalty — Relief against.*]—By a written agreement the plaintiffs agreed to build and furnish all material for a certain building for the defendant, according to plans and specifications, for a lump sum of $4,367, payable in "3 equal payments, one to be made when roof is on building, one when plastered, balance when job is completed (30 days after completion of building)":—*Held*, upon the evidence, that the plaintiffs had not built and furnished all material for the defendant's building according to the plans and specifications; and there was no evidence that the defendant had accepted what work the plaintiffs did do as a fulfilment of the contract; the plaintiffs were, therefore, not entitled to recover upon the written contract. —The doctrine of "substantial performance" has no place in the British Columbia jurisprudence.—*Ellis* v. *Hamlen*, 3 Taunt. 52; *Lakin* v. *Nuttall*, 3 S. C. R. 685; *Sherlock* v. *Powell*, 26 A. R. 407, and *The Madras*, 67 L. J. P. 53, followed.—The plaintiffs asked leave to amend so as to claim as upon a contract to pay *quantum valebat*:—*Held*, that no such implied contract was to be inferred merely from the taking or retaining possession of the land and the building which had become part of the land, and there was nothing more than that in this case; there was no evidence of knowledge on the defendant's part of the plaintiffs' departure from the plans and specifications; to make out a case either of waiver and acceptance or the substitution of a new agreement, knowledge of the breach on the defendant's part must be shewn, and must be followed by or coupled with some attitude of acquiescence adopted towards and made manifest to the plaintiffs, and sufficient to warn reasonable men in concluding either that what the plaintiffs had done was accepted as a fulfilment of the actual existing contract or that the defendant was a consenting party to an alteration in the contract and the substitution of a new scale of payment.—*Munro* v. *Butt*, 8 E. & B. 738; *Sumpter* v. *Hedges*, 67 L. J. Q. B. 545; *Whitaker* v. *Dunn*, 3 Times L. R. 602, and *Forman* v. *The Liddesdale*, 69 L. J. P. 44, 49, followed.—The defendant had paid the plaintiffs $1,460, and this action was for a few dollars of the first payment and for the whole of the second and third payments:—*Held*, that, although the defendant had at one time intimated his willingness, upon certain conditions, to make the second payment, there was no evidence thereby of waiver and acceptance, because it was not shewn that the intimation was made with knowledge of the breaches:—*Held*, also, that the right of the plaintiffs to call for any one of the 3 payments was conditional upon the work, so far as completed up to the period specified, being completed according to contract:—*Held*, upon the evidence, that the plaintiffs were entitled to recover for work done and goods supplied outside of the written contract, at the request, express or implied, of the defendant:—*Held*, also, that the defendant's counterclaim for damages, being much more than offset by the difference between the value of the building and what he had paid for it, should not be allowed; the claim for $5 a day for delay in the completion of the building was a claim for a penalty, and the plaintiffs should be relieved therefrom. *McDonald* v. *Simons* (1910), 15 W. L. R. 218.

Pretended tender—*Estoppel—Quantum meruit—Owner's default — Penalty—Certificate of architect.*]—Where a tender for the erection of a building is made and accepted, but without the intention on the part of either owner or contractor that the amount stated in the tender should be the contract price, the contractor is entitled to recover on a *quantum meruit*. The fact that the plaintiff's tender was made for the purpose of deceiving other tenderers did not estop the plaintiff from disputing its *bona fides* as against the defendant. Failure by the owner to supply material which the contract provides he shall supply, discharges a penal clause. Where a building contract provides for the certificate of an architect and no architect is appointed the provision is inoperative. *Degagne* v. *Chave*, 2 Terr. L. R. 210.

Proof of work constituting extras claimed by a contractor under a contract with a penalty clause, and according to plans and specifications, may be made by the evidence of proprietor himself.—A writing signed by the architect alone, without special authority thereto from the proprietor, is sufficient for the purpose of establishing that the extras were duly authorised. C. C. 1690. *Quinet* v. *Racette* (1909), 17 R. L. n. s. 6.

Provisions of—Construction — Architect —Remuneration—Extra work—Payment for outside contract—Increase in cost—Knowledge and acquiescence of owner—Breach of covenant—Damages — Cross-action—Stay of execution—Negligence — Dismissal of claim without prejudice to new action. *Mills* v. *Small*, 9 O. W. R. 893, 10 O. W. R. 499, 11 O. W. R. 1041.

Purchasing a house—*Faults in construction—Liability of the contractor—Acceptance by the owner with knowledge of these faults and on unqualified promise to pay the price.*] —The acceptance of the house by the owner with the knowledge of its poor construction

and defects and his unqualified promise to pay the balance of the price frees the contractor from the liability of Art. 1688 C. C. *Beaucage* v. *Harpin*, 190 Q. R. 36, S. C. 219.

Question whether certain kinds of work included—Admissibility of oral evidence—Penalty for delay in completion—Effect of delay by opposite party. *Page* v. *Green*, 2 O. W. R. 137, 3 O. W. R. 494.

Slating a roof.]—A contractor brought action against executors of Jefferson Stevens for balance alleged to be due for slating a roof for him. Defendants counterclaimed for damages, alleging that the work was not completed within time agreed upon. At trial judgment was given plaintiff for $117 with costs on proper scale and given defendant for $227 on their counterclaim, with costs on County Court scale, one to be set off against the other. The Divisional Court *held*, that contractor was delayed by the default of the proprietor or his workmen in beginning his work until a date after the termination of the time fixed by the contract. There was in effect a new contract at the contract price, but without revival of the penalty. The delay in the after prosecution of the work should not be visited by the imposition of the penalty of so much per day, but should be limited to damages sustained thereby. *Holme* v. *Guppy*, 3 M. & W. 387, and *Moore* v. *Hamilton*, 33 U. C. R. 279, 520, followed. Reference back to allow amendments and to have the damage for delay in the prosecution of the work ascertained upon evidence. Costs of appeal to plaintiff, other costs to be disposed of by referee. *Findlay* v. *Stevens* (1910), 15 O. W. R. 212, 20 O. L. R. 331.

Specific sum—*Destruction of building before completion—Quantum meruit.*]—The defendant, who had taken a contract for the erection of a dwelling house at $4,050, accepted the plaintiff's tender to do the plumbing and tinsmithing work for $500; but before the completion of the plaintiff's contract, though after he had done work up to $488, the building was destroyed by fire. The defendant had received two sums of $1,500 on account of his contract, but he denied that any portion of it was for work done by the plaintiff. In an action by the plaintiff to recover the $488 on a *quantum meruit*:—*Held*, that where, as here, the contract is to do work for a specific sum, and this applies as well to original as to sub-contracts, there can be no recovery until the work is completed, unless the failure to do so is caused by the defendant's fault; and, as the plaintiff admitted the non-completion by suing on a *quantum meruit*, and there was nothing to shew any fault on the defendant's part, there could be no recovery. *Appleby* v. *Meyers*, L. R. 2 C. P. 660, followed. *King* v. *Love*, 22 C. L. T. 107, 3 O. L. R. 234.

Sub-contract—Defective work—Decision of architect—Right of contractor against sub-contractor—Counterclaim. *Mitchell* v. *Flodden* (Man.), 4 W. L. R. 194.

Sub-contract for plastering building—*Contract price—Retention of percentage—Premature action.*]—Action to recover the balance of a contract price and extras. This amount was ascertained. According to the contract twenty per cent. was to be paid one month after work was accepted by architects. —*Held*, that the action which was brought before the expiration of the month, was premature as to the twenty per cent. *Duborgel* v. *Whitham*, 13 O. W. R. 934.

Sub-contract—*Extras—Changes in work — Deductions — Architects' certificates — Adjustment of accounts — Evidence.*]—The defendants were the contractors for a building, and the plaintiffs sub-contractors for the stone and masonry work. The plaintiffs claimed payment of $66 for extra plastering, not originally provided for:—*Held*, on the evidence, that, although the plaintiffs did plastering not provided for, more plastering was omitted by the change, and as to this item the plaintiffs failed.—The defendants alleged that $1,480 should be deducted from the plaintiffs' contract price because alterations were made in the plans, reducing the height of the wall in stone, and the contract provided that in case of alterations in the works shewn or described by the drawings and specifications, the value of the work added or omitted should be added to or deducted from the contract price. The plaintiffs contended that the $1,480 was counterbalanced by additional work caused by such alterations. The plaintiffs were to act under the directions and to the satisfaction of the architects, whose decision was to be final, and all payments were to be made only under the written certificate of the architects: —*Held*, that the certificates of the clerk of the works relied on by the plaintiffs were not certificates of the architects and had no effect; that there had been no adjustment of accounts between the parties at Montreal, as alleged by the plaintiffs; and that the plaintiffs had not made out a case of counterbalancing the $1,480 by additional work; and a nonsuit was granted. *Winnipeg Stone Co.* v. *Senecal* (1910), 14 W. L. R. 570.

Substantial completion — *Unimportant defects — Waiver of strict performance — Estoppel — Amendment.*] — Action to recover balance of contract price for erection of a dwelling-house for the defendant. Objection was made to the plaintiff's right to recover on account of the following defects: 1. The specifications required that the walls should be "beam-filled or built in between the joists on the inside," whereas the plaintiff had only put in one row of bricks above the inner side of the foundation wall between the joists to the floor above, thus leaving an empty air space between the bricks and the outer wooden wall of the house.—2. Want of quarter round in the kitchen and bath room.—3. Want of collar ties to the rafters. The defendant had been in occupation of the house for nearly two years without specifically mentioning the 2nd and 3rd defects, to supply which would have cost only about $7, and, when examined for discovery before the trial, had not mentioned them. They were raised for the first time at the trial. He had, however, always objected to the beam-filling as not being in accordance with the specifications, and as causing the freezing of his water pipes, and had often complained about the work as a whole: —*Held*, *per* Howell, C.J.A., and Perdue, J.A., that the manner in which the beam-filling

was done sufficiently complied with the contract, and the defendant should be held to have waived the requirements as to the quarter round and collar ties. The plaintiff should be allowed to amend, if necessary, so as to set up such waiver.—*Per* Richards, J.A.:—The beam-filling or building-in between the joists above the foundation required by the specification, meant such a building-in as would fill up the spaces from the wooden walls to the inner line of the foundation, and, as the plaintiff had refused to do the work in that manner, he should not recover. *Forman* v. *Liddesdale*, [1900] A. C. 190, referred to.—*Per* Phippen, J.A. (expressing no opinion as to the sufficiency of the beam-filling):—As it was admitted that the plaintiff had not put in the quarter round or the collar ties, and it was not alleged by the pleadings or shewn by the evidence that the defendant had waived the strict performance of the contract or entered into any new agreement with the plaintiff in regard to the work, the plaintiff could not recover, notwithstanding that there had been substantial completion of the work in all other respects.—*Brydon* v. *Lutes*, 9 Man. L. R. 463, and *Oldershaw* v. *Garner*, 38 U. C. R. 37, followed.—No amendment of the statement of claim should now be allowed, as none was asked for either at the trial or on the hearing of the appeal, and no evidence was directed to any issue of waiver or estoppel.—The Court being equally divided, the defendant's appeal was dismissed without costs. *Davis* v. *O'Brien*, 8 W. L. R. 562, 18 Man. L. R. 79.

Substantial completion of work — *Trifling omissions — Mechanics' liens.*]—The plaintiffs contracted to "put in a complete job of steam heating" for the sum of $660. According to the findings of fact, they did the work in a satisfactory manner and within a reasonable time. They had omitted, however, to provide floor and ceiling plates around the pipes. These plates were shewn to cost about 10 cents each and about $4 for all:—*Held*, following *Lucas* v. *Godwin*, 3 Bing. N. C. 744, and *Stavers* v. *Curling*, 3 Scott 755, that the omission of these plates should be considered as so trifling that the plaintiffs should not thereby be deprived of the whole consideration of a contract substantially completed, and that the plaintiffs were entitled to recover. *Adams* v. *McGreevy*, 6 W. L. R. 188, 17 Man. L. R. 115.

Supply of material—Action for balance of price — Extras — Terms of contract—Failure to comply with — Inferior material—Counterclaim — Acceptance of material — Delay in completion of building. *Garson* v. *Watson* (Man.), 5 W. L. R. 534.

Supply of material—Mistake in tender—Evidence of other tenders—Admissibility—Rectification of contract—Pleading—Amendment—New cause of action—Costs. *Anderson* v. *Osborne* (N.W.T.), 5 W. L. R. 24.

Supply of work and materials for building.]—Action on promissory note and account:—*Held*, that even if it had been agreed that no payment was to be made, but on production of architect's certificate, that had been waived. *Gamble* v. *Arnold*, 12 W. L. R. 91.

Tearing down building—*Penalty clause—Interpretation of the contract—Obligations of the proprietor and of the contractor, C. C. 1071.*]—In the case of a contract whereby certain work was to be completed at a fixed date, under a penalty of a sum of money for each day's delay, the proprietor for whom the work is to be done is thereby obliged to put the property at the disposal of the contractor for the purposes of the contract. Failure on the part of the proprietor to do so not only discharges the contractor from the penalty clause but also gives him a remedy in damages for the prejudice he has suffered. *Workman* v. *Chagnon* (1910), 16 R. de J. 337, 16 R. L. n. s. 402.

Theatre.]—Plaintiff brought action to recover $15,000 damages, alleged to have been caused plaintiff by reason of actions threatened and liens put upon his property in Hamilton, known as the Grand Opera House, which had been erected by defendants for him, at an agreed price of $25,000, and which liens plaintiff had to pay. At trial Anglin, J., gave judgment for the plaintiff for $8,750 and costs, and the Divisional Court dismissed defendants' appeal therefrom. Court of Appeal reversed above judgments and entered judgment for defendants for $950 on a counterclaim with costs throughout. *Small* v. *Claflin* (1910), 15 O. W. R. 574.

Unambiguous clause, *susceptible of but one application.*]—The proprietor, who, having given the contract for the building of a house, to a contractor who had become insolvent before the completion of the work, agrees with a sub-contractor, who up to then had not been paid, that the work under the sub-contract should proceed and obliges himself to pay the sub-contractor "in full for his former work and materials," thereby obliges himself to pay the whole amount due the sub-contractor by the principal contractor, the words in question not being ambiguous and not being susceptible of application to other work and materials than those for which, at the time, money was owing. *Lefebvre* v. *Trepanier*, 37 Que. S. C. 291.

Warranty of materials and work.—A workman, who contracts to lay a tiled or mosaic floor, for a set price, incurs the liability of warranty, both of the material supplied and of the work done, provided in Articles 1696 and 1688 C. C., and is not relieved therefrom by the circumstances that the tiles were selected by the owner and his architect, and the work performed under the supervision of the latter.—A certificate delivered by an architect for a payment on account of the contract price, and the payment thereof pursuant to the terms of the contract, at a time when the inadequate quality of the material and work has not been ascertained, is no ground of estoppel against the owner who sets up his rights of warranty, in defence to an action for the balance of the contract price. *Reid* v. *Birks* (1910), 39 Que. S. C. 133.

Work and labour and materials—Extras—Action for price — Building erected for municipal corporation—Authority of architects—Decision as to necessity for extra work—Quantum meruit—Pleading — Amend-

ment — Evidence adduced on appeal. *Dominion Paving and Construction Co.* v. *City of Toronto*, 9 O. W. R. 38.

Work done according to plans and specifications—*Increase of price and change in plans—How established—Repeal of laws—Decisory oath—Admissions by a party examined as a witness.*]—The repeal of the articles of the Civil Code respecting the decisory oath (60 Vict., c. 1), has had the effect of replacing the decisory oath by the admissions of a party examined as a witness and applies to a change in plans, etc., and to an increase in the price mentioned in Art. 1690, C. C. *Ouimet* v. *Racette* (1909), 38 Que. S. C. 151.

Work to be performed to satisfaction of architect—*Construction of contract—Terms of payment—Architect's certificate—Changes in plans—Authority of owner or architect — Extras — Progress certificates—New trial.*]—At trial, Clute, J., gave plaintiffs judgment for $1,470, full amount of their claim for work, alleged to have been done for defendant in building a house and stable in Toronto, and granted a declaration of a lien on defendant's lands for that amount. Defendant's counterclaim dismissed.—Court of Appeal ordered a new trial, not merely on account of the failure of proof on the part of plaintiffs, but also on account of the refusal to allow defendant to prove if he could, wherein the contract had not been performed, either according to its terms, or as varied according to its terms. Costs of former appeal to defendant. Costs of the former trial to be dealt with by trial Judge. *Smallwood* v. *Powell* (1910), 16 O. W. R. 615, 1 O. W. N. 1025.

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4. Conditions.

Consent of third party — *Time—Misdirection.*]—Where an agreement is made subject to the consent of a third party, it must be looked upon as a conditional agreement, dependent upon such consent being given within a reasonable time; in default of which the agreement must be taken not to have become effective:—*Held*, on the evidence, that, assuming there was evidence of such a conditional agreement, the date at which it was alleged the consent of the third party was obtained could not, under the circumstances, be reasonably found by the jury to be within a reasonable time after the making of the agreement; and that therefore the Judge's charge to the effect that there was no evidence of an agreement was not objectionable—at all events, as no substantial wrong or miscarriage of justice was occasioned thereby. *Martin* v. *Reilly*, 1 Terr. L. R. 217.

Default—*Application of alternative rate of payment.*]—A contract between a newspaper proprietor and a customer, for 12,000 lines of advertising to be furnished within a year, based upon a price of four cents a line for advertising, if the conditions of the contract as to prompt payment, &c., be strictly complied with by the customer, and of fifteen cents per line in case of failure to comply with such conditions, is an alternative contract, and where the customer makes default to comply with the conditions, the other party is entitled to recover the higher alternative rate for the work actually done. Article 1076, C. C., does not apply to such case, the claim not being based upon the enforcement of a penalty but upon the application of a condition. *Berthiaume* v. *Kent*, 11 Que. K. B. 312.

Forum — *Acceptance of jurisdiction — Pleading to merits.*] — The defendant, by pleading to the merits of the action, accepts the jurisdiction and is not entitled thereafter, by declinatory exception, to invoke, as ousting the jurisdiction of the Court, the condition of the bill of lading, sued on, to the effect that all disputes arising from the bill of lading were to be settled before the Hamburg law Courts. *Ramsay* v. *Hamburg-American Packet Co.*, 17 Que. S. C. 232.

Non-performance—Delivery of deed in escrow—Option—Trust. *Harris* v. *Bank of British North America*, 1 O. W. R. 76, 285.

Printed conditions—*Party signing in ignorance.*]—A party to a contract is not bound by conditions, printed on the back thereof, of which he was ignorant, and to which his attention was not called before he signed the contract, although the contract bears on its face an acknowledgment by the signer that he has had communication of the conditions printed on the back and consents to be bound by them; but also bears on its face the statement that the other party to the contract will not be bound by it until it shall have been accepted by a duly authorised agent and notice in writing by registered letter sent to the signer's address, which was never done. *Royal Electric Company* v. *Dupéré*, 17 Que. S. C. 534.

Written promise—*Legal obligation.*]—*Held*, that a written promise by the appellants that, if satisfied with the respondent as a customer, they would favourably consider any application by him to renew a subsisting contract between them on its expiration, does not impose a legal obligation to grant it. Judgment in 8 Que. Q. B. 412, reversed. *Montreal Gas Co.* v. *Vasey*, [1900] A. C. 595.

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5. Consideration.

Assignment of hypothecary claim—*Consideration — Creation of debt.*]—The assignment of an hypothecary claim as the consideration for the assignee's discounting the note of a third party for the benefit of the assignor, creates no indebtedness by the latter to the assignee. *Buchanan* v. *Napier*, 16 Que. K. B. 347.

Evidence—*Promise to pay share of commission—Principal and agent—Sale of land to syndicate—Agent member of syndicate—Pleading.*]—In an action by a land agent against another land agent for a share of a commission earned by the defendant upon the sale of land to a syndicate of purchasers, of whom the plaintiff was one:—*Held*, that the defendant's promise to pay the plaintiff a share of the commission was well proved,

on the evidence adduced at the trial, and the plaintiff was entitled to recover notwithstanding his interest in the purchase, and notwithstanding that in his pleading he alleged that one C., who was merely a trustee for the syndicate, was the purchaser, it being immaterial who the purchaser was. *Frank* v. *Goodman* (1910), 14 W. L. R. 406.

Money claim against company—*Oral agreement to postpone payment till after sale of treasury stock—Estoppel.*] — The plaintiff in consideration of $1 agreed with defendants to wait for payment of his account until sufficient treasury stock sold to pay him. Must he wait a reasonable time for the happening of the contingency before suing?—*Held*, to be an absolute postponement of his cause of action. *Dalton* v. *Selkirk Copper Mines Limited* (B.C.), 10 W. L. R. 259.

"**Scrip**"—*Payment of money—Failure of consideration — Right to return of money—Agent holding himself out as principal—Liability.*] — The plaintiffs paid the defendant $1,350 for Dominion half-breed scrip for 720 acres of land, and received certain documents which were not "scrip," and which did not entitle the plaintiff to obtain scrip from the Government. Neither of the parties knew what "scrip" was. The defendant set up that he was, to the plaintiffs' knowledge, acting merely as the agent of W.:—*Held*, on the evidence, that there was a total failure of consideration; that the defendant held himself out as a principal; and that the plaintiffs were entitled to recover from him the $1,350. *Sliter* v. *McCombe* (1910), 15 W. L. R. 188.

Seal—*Undisclosed principal — Partnership —Amendment.*]—P. sold mining areas, and was paid part of the price. The purchaser signed an agreement under seal that he would organise a company to work the areas and give P. stock for the balance at the market price. H. organised a company, which received a deed of the land and did some work, but finally ceased operations. Only a small part of the stock was sold, and none was given to P., who brought an action against the purchaser H., in which he alleged that the latter was a partner of the purchaser, and that the agreement was signed on behalf of both. The purchaser did not defend the action: — *Held*, that no action could lie against H. as the agreement under seal was not signed by him, even if it was for his benefit, and a seal was not necessary. The Court refused to interfere with the discretion of the Court below in refusing an amendment to the statement of claim. *Porter* v. *Pelton*, 23 C. L. T. 213, 33 S. C. R. 449.

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6. CONSTRUCTION OF CONTRACT.

Action to recover money paid.] — Plaintiff, defendant's son, brought action against his father to recover money expended in the erection of a dwelling house upon father's farm, it being alleged that the expenditure was made upon faith of a promise by father to give son a deed of the farm upon which the house was built, and that on demand he refused to do so. The evidence tended to rebut the idea that the father undertook to give the son an absolute deed of the farm, the intention being to reserve an interest to his father during his lifetime:—*Held*, on the evidence, that plaintiff could not recover, as his demand was for something he was not entitled to, but that nevertheless, as defendant intended to and did repudiate any obligation in reference to the matter, plaintiff was entitled to recover the sum expended by him, and defendant's appeal must be dismissed with costs. *Morrison* v. *Morrison*, 43 N. S. R. 267, 6 E. L. R. 407.

Advances—*Share of profits—Absolute or conditional undertaking—Damages.*]—A contract between W. and B. recited that W. owned land to be worked as a gravel-pit; that he was about to enter into contracts for supplying sand therefrom; and that he had requested B. to assist him financially, to which B. had consented on certain conditions; it then provided that "the said W. is to enter into contracts as follows," naming 5 corporations and persons to whom he would supply sand to a large amount at a minimum price per yard; that B. would indorse W.'s note to the extent of $5,000, and have 60 days to declare his option to take a one-fourth interest in the profits from said contracts, or purchase a one-third interest in the property and business; that each party would account to the other for moneys received and expended in connection with the property; that if either party wished to sell his interest he would give the other the first choice of purchase; and that "each of the parties hereto agrees to carry out this agreement to the best of his ability according to the true intent and meaning of the same and to do what he can of mutual benefit to the parties hereto." B. endorsed notes as agreed. W. entered into 2 of the 5 contracts, sold a quantity of sand, and then sold the property, without notice to B., who brought an action claiming his share of the profits that would have been earned if the 5 contracts had been entered into and fully carried out:—*Held*, Fitzpatrick, C.J., and Maclennan, J., dissenting, that the undertaking by W. to enter into the 5 contracts was absolute, and, having by the sale put it out of his power to perform it, he was liable to B., who was entitled to damages on the basis of the contracts having been carried out.—*Held*, also, Duff, J., *hæsitante*, that the clause quoted did not modify the rigour of the absolute covenant by W. to procure these contracts in any event.—Judgment of the Court of Appeal, 10 O. W. R. 732, reversed, and judgment of a Divisional Court, 9 O. W. R. 48, reversing that of Anglin, J., 8 O. W. R. 4, restored. *Battle* v. *Willox*, 40 S. C. R. 198, 44 C. L. J. 433.

For judgment on further directions—Appeal from report of Master—Quantum of allowances; see 12 O. W. R. 413.

Advertising—Construction of contract—Moneys expended by advertising agent — Breach of contract—Loss of profit—Damages —Services—Remuneration—*Quantum meruit* —Evidence—Credibility of witnesses—Evasion in taking oath—Entire contract—Failure in part—Termination of contract—Refusal to pay. *McKim* v. *Cobalt-Nepigon Syndicate*, 10 O. W. R. 1121.

Advertising — *Vagueness — Renewal — Price to be agreed on.*]—A provision in a contract for the right to use space for advertising purposes for its renewal "at the end of three years at a price to be agreed upon, but not less than $5,000 per annum," leaves the matter at large unless the price is agreed upon, and the person using the space cannot insist on a renewal at the rate of $5,000 per annum. — Judgment of Teetzel, J., 5 O. W. R. 227, affirmed. *Henning* v. *Toronto Rw. Co.*, 11 O. L. R. 142, 7 O. W. R. 1.

Agreement by agent not to sell, canvass for, or be interested in the sale of, goods of others in competition with the principal.]—An agreement by an agent with his principal not to sell, canvass for, or be interested in the sale of goods of other persons in competition with the principal is not violated by entering into an agreement with a rival manufacturer, accepting an agency for the latter until the agent has actually sold, or canvassed for, or been interested in the sale of, some of the goods of the latter. *Graham* v. *Case Threshing Machine Co.* (1909), 19 Man. L. R. 27.

Agreement to pay money on an uncertain event—*Illegality—Wages—8 & 9 Vic. c. 109, s. 18.*]—Plaintiff and defendant were at a Dominion land office to make entry for the same land. They agreed to draw lots, the winner to pay $50 towards the loser's expenses. Defendant got the land and plaintiff sued for $50:—*Held*, a wagering contract. Action dismissed. *DeJardin* v. *Roy*, 12 W. L. R. 704.

Agreement to provide aid for person ill—*Consideration — Two-thirds interest in action against mining company — Recovery under agreement — Division of proceeds — Share retained for further advances — Action to recover — Costs.*]—Plaintiff's action was brought to recover 334 mining shares, or for the recovery from defendant of $3,797.05, and interest, for moneys alleged to have been handed defendant by plaintiff and expended by plaintiff, for which defendant was liable. —An agreement was entered into when plaintiff was ill, it being agreed that defendant would advance plaintiff certain moneys and otherwise provide for plaintiff during "his present illness" in consideration of two-thirds of plaintiff's rights against the Columbus Silver Mining Co. Defendant brought action against said mining company and recovered a considerable amount of capital stock. In settlement with plaintiff, defendant kept out 334 shares for advances made plaintiff, which defendant alleged was not covered by the above agreement.—Latchford, J., *held*, that the action should be dismissed without costs, except as to the certificate for 334 shares in the Columbus Silver Mining Co., which was to be delivered up to the plaintiff.—Divisional Court, *held*, that the above judgment should be set aside with costs, and judgment entered for plaintiff, with a reference to the Master at ——, to ascertain what sums of money should have been paid to the plaintiff as reasonable for his care during an illness for the period covered by the claims mentioned in the plaintiff's statement of claim.—Court of Appeal reversed the Divisional Court and restored the judgment of Latchford, J., with costs if demanded. Middleton, J., dissenting. *McKnight* v. *Robertson* (1910), 17 O. W. R. 254, 1 O. W. N. 469, 679, 2 O. W. N. 231.

"Appurtenances" — *Circumstances — Proof—C. C. 1013, 1498, 1499.*]—When a thing is sold "with all its appurtenances," the meaning implies only those articles contained in a list which is shewn to the purchaser.—Proof of facts and circumstances accompanying and surrounding a contract, as well as of the correspondence exchanged between the parties, is legal and should be allowed in order to help in interpreting such contract. *Harbour Commissioners of Montreal & Connolly* (1910), 16 R. L. n. s., 527. (An appeal to the Supreme Court of Canada is now under advisement.)

Assignment of sub-contract — Variation—Pleading — Amendment — New trial. *Belanger* v. *Prevost*, 4 O. W. R. 1.

Board and lodging—Bequest in lieu of payment—Lapse. *Larose* v. *Ottawa Trust and Deposit Co.*, 1 O. W. R. 210, 309.

Breach—Dependent and independent covenants — Indemnity — Evidence — Costs. *Twyford* v. *York* (N.W.T.), 2 W. L. R. 348, 3 W. L. R. 74.

Breach—*Penalty or liquidated damages—Proof of damage.*]—A contract for the sale of 1,500 tons of coal to be paid for in carload lots as ordered within a fixed period contained the following provision: "And for *the insuring of the more effectual performance of this agreement*, the purchasers further agree to pay to the vendors . . . the sum of one dollar *as a penalty by way of liquidated damages* for every ton of the said full amount not ordered and paid for by them on the first day of April, 1907:"—*Held*, that the contract should be construed as providing for the payment of $1 per ton as a penalty only, and that, as the plaintiffs had suffered no damages from the refusal of the defendants to take the whole 1,500 tons, they could recover nothing. —*Wilson* v. *Love*, [1896] 1 Q. B. 626; Hudson on Building Contracts, p. 519; Joyce on Damages, ss. 1298, 1300, 1301; Mayne on Damages, p. 155, 19 Am. and Eng. Encyc. of Law, 402, followed. *Brock* v. *Royal Lumber Co.*, 7 W. L. R. 247, 17 Man. L. R. 351.

Coal for coking purposes—*Defective quality—"Freshly mined, run of mine" coal —Damages — Specific performance.*] — The Dominion Coal Co. agreed to supply the Dominion Iron & Steel Co. for a term of years, all the coal which the Steel Co. should require for use in its works. All coal furnished was to be reasonably free from stone and shale and was to be supplied from such seam being then worked by the Coal Co. as the Steel Co. should designate. The Steel Co. agreed to purchase all coal required from the Coal Co. so long as the Coal Co. was ready and willing to supply the coal:—*Held*, that the Coal Co. were bound to supply coal from the seams designated, which was reasonably suitable in quality for the purposes of the Steel Co. to the extent that the same could be obtained by the reasonable working of their mines; and that the Steel Co. was justified in refusing coal not suitable for their purposes, though supplied from the seams

designated: and that the Coal Co. could not treat the rejection of unsuitable coal as a repudiation of contract; and that the Steel Co. was entitled to damages but not to specific performance. Judgment of the Supreme Court of Nova Scotia, 43 N. S. R. 77, 4 E. L. R. 280, and Longley, J., at trial, 3 E. L. R. 512, affirmed. *Dom. Steel* v. *Dom. Coal*, C. R., [1909] A. C. 64, 6 E. L. R. 187, [1909] A. C. 293, 100 L. T. R. 245.

Company — *Sale of business — Assumption of liabilities by purchaser—Liabilities not appearing in company's books.*]—Plaintiffs contended they bought the business of the company, assuming the liabilities as they stood on the books of the company on a particular date; the defendant claimed that he sold all the shares of the company, thereby giving plaintiffs control:—*Held*, that plaintiffs' contention correct, and defendant held liable for liabilities not appearing in books. *Strong* v. *Van Allen*, 13 O. W. R. 490.

Conditional obligation—*Mandatory.*]—One who undertakes, in case he succeeds in recovering the amount of a life insurance policy, to pay a certain sum of money to another, both having an interest in the policy, becomes the mandatary of the other for the purpose of recovering the money. If then he makes terms with the insurer and accepts less than the amount of the insurance, without consulting the other, he puts himself in the position of a debtor conditionally bound who hinders the accomplishment of the condition, and is therefore bound to pay the sum agreed. *Ménard* v. *Jackson*, 14 Que. K. B. 348.

Conjunctive conditions.]—Where two conditions are imposed in an agreement in a conjunctive manner, the fulfilment of the conditions is indivisible. 2. When it is certain that one of the two conjunctive conditions cannot be fulfilled within the time fixed by the agreement, the condition is then considered to have failed. *Chartrand* v. *Dessouard*, 6 Que. P. R. 131.

Consideration — *Public exhibition — Competition for medal — Competition instituted by manager of exhibition — Scope of duties.*]—Three proprietors of blends of tea, exhibiting their teas at a public exhibition held by the defendant society, allowed their teas to be judged by a committee appointed by the society, in competition for a gold medal offered by the society. During the exhibition each of the competitors served the public gratuitously with samples of made tea, and tea was served by them to the committee in the same way that it was served to the public. The committee having awarded the medal to the plaintiff, a competitor:—*Held*, that there was consideration for the offer, entitling the plaintiff to the medal. Where the executive of the above society adopted a resolution to award medals to all displays of merit or excellence of goods on exhibition, the awards to be made by regularly appointed judges, and the general manager of the exhibition, who was a vice-president of the executive, and a member of a committee of three to appoint judges, thereupon arranged the above competition, and, with a co-member of the committee to select judges, named the judges for the competition, it was held that the competition must be taken to have been instituted by the society. *Peters* v. *Agricultural Society of District 3½*, 25 C. L. T. 90, 3 N. B. Eq. 127.

Covenant to deliver possession of land—*Dominion Lands Act—Assignment or transfer—Mistake—Rectification.*]—A covenant contained in an agreement for farming "on shares" to deliver possession of land in which the covenantor has homestead rights only, is not an assignment or transfer within the meaning of the Dominion Lands Act, R. S. C. c. 54, s. 42, as amended by 60 & 61 V. c. 29, s. 5. Rectification of contract for mistake discussed. *Spence* v. *Arnold*, 5 Terr. L. R. 176.

Custom of trade—*Sale of goods — Delivery.*]—The construction of a contract for the sale of goods cannot be affected by the introduction of evidence of local mercantile usage unless the terms of the contract are doubtful or ambiguous. *Dufresne* v. *Fee*, 25 C. L. T. 6, 35 S. C. R. 274.

Delivery of goods — *Place — "At," meaning of.*]—The plaintiff, tendering for a supply of coal for the defendants' waterworks, wrote, "I will deliver in bond into the coal shed at pumping station or grounds adjacent thereto where directed by you, one thousand tons," etc. The plaintiff's tender being accepted, a contract was drawn up by which he agreed to deliver *at* the coal shed," etc.—The defendants refused to accept or pay for the greater part of the coal furnished by the plaintiff, because it was not delivered to them at the place mentioned in the contract, i.e., it was not put into the shed by the plaintiff, but left at the dock near the pumping station:—*Held*, that the portion of the coal in question was not delivered at the place designated by the contract.—*Per* Boyd, C.—"At" means rather within a place than without; "at" the coal shed means "in" or "in close proximity to" the shed. The cases referred to as to the meaning of the word "at" merely shew its meaning under the circumstances of each case. Such words take their colouring from their circumstances and situation. *Holmes* v. *Town of Goderich*, 20 C. L. T. 303.

See 22 C. L. T. 303, 32 S. C. R. 211.

Divisibility—*Completion.*] — By a contract to remove spans from a wrecked bridge in the St. Lawrence, the contractors agreed "to remove both spans of the wrecked bridge and put them ashore, for the sum of $25,000, to be paid $5,000 as soon as one span is removed from the channel, and another $5,000 as soon as one span is put ashore, and the balance as soon as the work is completed. . . . it being understood and agreed that we push the work with all possible despatch, but if we fail to complete work this season we are to have the right to complete it next season:"—*Held*, reversing the judgment of the Court of Appeal (21st September, 1901), Taschereau and Davies, JJ., dissenting, that the contract was divisible, and the contractors, having removed one span from the channel and put it ashore, were entitled to the two payments of $5,000 each, notwithstanding that the whole work was not completed in the second season. *New York and Ottawa Co.* v. *Collins Bay Rafting and Forwarding Co.*, 22 C. L. T. 250, 32 S. C. R. 216.

Division of land — Trespass — Title—Damages—Scale of costs. *Scott* v. *Jerman*, 8 O. W. R. 813.

Duration—*Contract for five years with option to renew—Suspensive condition—Retroactive operation.*]—When a contract is made for a term of five years, with an option in favour of one of the parties to renew it for a further term of five years, such an option has the effect of a suspensive condition, and, when exercised, operates with a retroactive effect, as if the contract had been made at the outset for ten years. Hence, the party who agreed, upon securing it, to make certain payments, out of the returns, to another till its expiration, is bound to do so for the whole period.—Judgment in *Brook* v. *Wolf*, 32 Que. S. C. 467, affirmed. *Wolf* v. *Brook*, 18 Que. K. B. 17, 5 E. L. R. 244.

Easement — *Aqueduct* — "*Augmentations*"—*Pipes and tubes.*]—An agreement by which the owner of land gives "the right to make upon his land the said aqueduct, as it actually exists, comprising reservoir and tubes placed upon and passing over his said property, right of passage or entry upon his said property, at any time of the year, to repair the said reservoirs, tubes, and pipes, serving the said aqueduct and actually existing . . paying . . when they make certain repairs or augmentations to the said aqueduct the damages which may result from it . . " does not comprise the addition of a breach of the system in another part of the land. The "augmentations" referred to must be understood as meaning augmentations to the pipes, etc., existing at the time of the making of the agreement. *Prévost* v. *Belleau*, 14 Que. K. B. 526.

Electric lighting — *Action for price — Statutory regulation — Reading of meter — Duplicate for purchaser—Condition precedent —Waiver.*]—The Dominion Acts, 1894, c. 13, s. 13, s.-s. 2, enacts that "Whenever a reading of a meter is taken by the contractors for the purpose of establishing a charge upon the purchaser, the contractor shall cause a duplicate of such reading to be left with the purchaser." In an action by the plaintiff company to recover the price of electric lighting and rent of meter:—*Held*, that the burden was upon the plaintiff to shew compliance with the Act, and that non-compliance was not excused by the fact that the person to whom the duplicate reading was required to be delivered might not be able to understand it. 2. That an offer to compromise, made on the part of the defendant, could not in any sense be treated as a waiver of the right conferred by the statute. 3. That the fact of previous bills having been paid could not be taken as dispensing with the requirement of the statute for more than the particular bills paid. *Cape Breton Electric Co.* v. *Slayter*, 36 N. S. R. 513, 24 C. L. T. 135.

Electric light companies — Agreement with municipal corporation—Privilege of occupying streets—Condition against amalgamation of companies—Forfeiture—Laches—Acquiescence. *City of Toronto* v. *Toronto Electric Light Co.*, *City of Toronto* v. *Incandescent Light Co. of Toronto and Toronto Electric Light Co.*, 3 O. W. R. 825, 6 O. W. R. 443, 10 O. L. R. 621.

Evidence to aid — Reformation after breach. *Pritchard* v. *Fick*, 1 O. W. R. 815.

Farming on shares—Account — Appeal —Findings—Costs. *Harrison* v. *Harrison*, 2 O. W. R. 397, 3 O. W. R. 247.

Furnishing heating apparatus — *Guaranty as to degree of heat.*]—The plaintiff entered into a contract with the defendant to construct and complete a hot-water heating apparatus in a house being erected for the defendant, and agreed that the apparatus would give seventy degrees of heat when the weather was ten degrees below zero.—The apparatus was put in, but it failed to give the promised heat, and another contract was entered into by which the plaintiff undertook to make some changes, and guaranteed that the apparatus would heat the rooms in which the radiators were changed to a temperature of seventy degrees when the thermometer registered ten degrees below zero outside:—*Held*, that guaranties such as these are to be construed reasonably, according to the intent of the parties, and the more strongly against those giving them.—The proper construction was that the heating apparatus, if fed and managed in the ordinary way, would give seventy degrees of heat when the weather was ten degrees below zero, and would heat the rooms in which the radiators were changed to a temperature of seventy degrees when the thermometer registered ten degrees below zero outside.—The evidence shewed beyond reasonable doubt that the apparatus did not answer and was incapable of being made to answer these guaranties. *Greenway* v. *Gardiner*, 20 C. L. T. 68.

Gaming contract—*Money advanced for speculation in stocks.*]—An agreement under which money is advanced for purposes of speculation in stocks, is a gaming contract and no action will lie on an I. O. U. given by the borrower as security for the loan. *Selby* v. *Clark* (1910), 38 Que. S. C. 287.

Implied covenant — *Intention of parties.*]—The plaintiff contracted with the defendant for 330 hours' dredging in the harbour of St. John, with a specific dredge and appliances, and for so much longer as the city might require, on giving notice at the expiration of that period, to be paid for at the rate of $400 per each 11 hours, subject to deductions and allowances agreed upon for time lost, (1) when the dredge was unable to work by reason of injury to the plant or machinery, and (2) where the work could not go on by reason of stormy weather. The water was too deep at high tides for the dredge to work, and there was, therefore, delay caused in this way. Both parties were aware at the time the contract was made that the high tides would interfere with the work, but there was no provision for any deduction or allowance on that account:—*Held*, that a verdict for the plaintiff, ordered on a construction of the contract that there was an implied covenant that the defendants should pay for the time lost by reason of the high tides, was erroneous, and should be set

aside and a new trial granted. *Connolly* v. *City of St. John*, 36 N. B. R. 411, 35 S. C. R. 186.

Independent covenants—*Right of action—Condition precedent — Arbitration — New trial—Costs.*]—Where different clauses in an agreement contain independent and collateral covenants, and a breach of a covenant occurs, the party aggrieved is entitled to bring his action without reference to anything contained in any separate covenant, unless that covenant is made a condition precedent by express terms. *Scott* v. *Avery*, 5 H. L. C. 847, followed. In an agreement for the sale by the defendant to the plaintiffs of certain timber lands and mills, clause 4 was divided into two paragraphs, the first of which provided that in the event of the quantity of timber on the lands turning out to be short of that represented in a statement attached to the agreement, the defendant would repay to the plaintiffs the just proportion that the amount of shortage bore to the value of the total number of feet of timber estimated in the statement; and the second of which paragraphs provided that if the quantity of timber found was not equal to that represented, there should be an arbitration:—*Held*, Irving, J.A., dissenting, that the two paragraphs contained independent covenants; and that arbitration was not a condition precedent to a right of action for repayment on account of shortage, under the first paragraph. Judgment of Morrison, J., reversed. A new trial was directed, and the defendant was ordered to pay the costs of the abortive trial, he having insisted upon the objection to the right of action which was now decided against him. *Swift* v. *David* (1910), 13 W. L. R. 368.

Informal agreement — *Parol evidence—Intention of parties—"More or less."*]—Where there is an informal agreement, and such agreement is embodied in an informal memorandum in writing, parol evidence may be given to shew what the parties were dealing about. *Embree* v. *McKee*, 14 B. C. R. 45, 9 W. L. R. 404.

Lease of hall—*Insurance.*]—In the interpretation of a contract, doubts must be solved in favour of the debtor and against the creditor, and more particularly so when the contract has been prepared by the creditor. Such doubts, however, must be reasonable, not such as to embarrass a person of intelligence as to the real intention of the parties. Applying this principle to the present case, in which the defendant, lessee of a hall to be used as a theatre, was bound to pay "all extra premium of assurance that the company with which the premises now leased may be assured shall exact over and above the present rates paid by the lessors or any of their tenants *under said hall* in consequence of the nature of any performance or entertainment carried on in said premises," the words "*under said hall*" could not be extended to include stores on the lower floor which were not under *the hall*, though extra insurance was paid thereon by the lessor in consequence of the use of the hall as a theatre. *Watson* v. *Sparrow*, 16 Que. S. C. 459.

Lease of land or hire of goods—*Fixtures—Services.*]—A contract by which a person grants to another the use of an engine and boiler affixed to land, with, in addition, a place to deposit wood, is a lease of an immovable, even where the contract provides for payment of a lump sum for the use of the engine and bolier and the wages of the son of the lessor, whose services are leased by the same contract to the lessee. *Lanoie* v. *Sylvestre*, 24 Que. S. C. 233.

Lease of license—*Sale of stone to be extracted from quarry—Remedies of landlord.*]—An agreement by which the owners of a quarry give a person the right to extract stone from it during a fixed period, at places to be indicated by them, and in consideration of a sum to be paid according to measurement of the stone, is not a lease of a portion of the quarry, but a sale of the stone to be extracted. No relation of landlord and tenant arising out of such an agreement, the remedies specially provided by law to enforce obligations under a lease, do not apply in favour of the parties to it. *Hendershot* v. *Lionais*, 27 Que. S. C. 292.

Manitoba Grain Act—*Storage of wheat to be specially binned—Storage tickets issued—Agents agreeing to specially bin wheat contrary to instructions—Liability of elevator company—Delivery of wheat — Amount to which bailor entitled—Place of delivery.*]—Plaintiff delivered a quantity of wheat to defendant's elevators at Saskatoon and Osler, receiving tickets or receipts therefor in the form of storage tickets mentioned in the Manitoba Grain Act. The agent marked the words "specially binned" on these tickets; but it was shewn he had express instructions not to accept any wheat to be specially binned. The amount of wheat shipped from the bins in which plaintiff's wheat was stored was greater than that mentioned in the tickets, and he claimed this wheat. The plaintiff also claimed damages by reason of the defendants' failure to deliver the wheat to him at Palmerston, Ont., the wheat being in fact delivered at Fort William:—*Held*, that the plaintiff having accepted ordinary storage receipts under the Manitoba Grain Act calling for the delivery to him of the "above quantity, grade and kind of wheat" could not claim that the wheat was specially binned under the provisions of the Act, and was entitled only to delivery in accordance with the provisions of the Act when the grain is stored under storage tickets. That the endorsement of the words "specially binned" on the ordinary storage receipt would not give any greater privilege than those to which the plaintiff was entitled under storage tickets. That the contract between the parties being for delivery of the wheat in car lots at any terminal elevator in the district, the delivery of the wheat at Fort William was sufficient compliance with the contract. *Caswell* v. *Western Elevator Co.*, (1909), 2 Sask. L. R. 153, 10 W. L. R. 52

Meaning of words "money or other property"—*Real estate—Ejusdem generis rule—Lien.*]—The defendants had executed agreements authorising the plaintiffs in the event which happened "to take possession of any money or other property" which the plaintiffs might find belonging to the defend-

ants, and "to sell such goods or property" and take such other proceedings as the plaintiffs might deem best for recovering the amount of the payment made under guarantee bonds issued for the defendants, and expenses, etc. The agreements also contained the following: "The undersigned agrees to do and execute any deed or thing that the company may deem to be necessary in order to give the company the rights and powers herein expressed or intended to be given." The agreements were on printed form prepared by the plaintiffs:—*Held*, that the plaintiffs were not entitled, under the agreements, to a lien on any real estate of the defendants for the amount of their claim, and that the words used should not be constructed to include land, the rule of *ejusdem generis* being applicable in this case. *London Guarantee and Accident Co.* v. *George*, 3 W. L. R. 236, 16 Man. L. R. 132.

Mineral rights—*Right to possession.*]—By an agreement made on the 13th January, 1897, in consideration of $1, the owner of certain lands agreed "to lease and hereby does lease (to the plaintiff) the following described premises," mentioning them, and "hereby leases and agrees to give and convey hereby to said (plaintiff) all mineral rights on said premises, the right to quarry stone, and the right to bore for gas, with privilege to erect and bring to said premises all necessary tools, machinery, and conveniences for mining, quarrying, and boring on said premises, and to erect buildings thereon for said tools and machinery and for hauling employees, and also to drain said premises and to build necessary railroad thereon."—"Said (plaintiff) also agrees if he uses said property under this agreement to take therefrom the amount of 50,000 cords of stone, and to pay therefor the sum of 25 cents per cord per United States specifications. Said (owner) hereby agrees that he will give no other party or corporation any rights on said premises for the above described purposes on or before August 1st, 1897."—"Unless said (plaintiff) utilizes said premises for said purposes on or before August 1st, 1897, this lease shall be null and void."—*Held*, that under this agreement the plaintiff was not entitled to exclusive possession of the land, or to quarry all the stone thereon, but only to quarry 50,000 cords. *Haven* v. *Hughes*, 20 C. L. T. 55, 27 A. R. 1.

Mines and minerals — *Working agreement—Option to purchase — Ownership of ore—"Net proceeds."*]—Under an option to purchase a mineral claim, and develop the same during the term of the option, one of the conditions was that "if any ore is shipped from the property the net proceeds are to be deposited to the credit of the vendors . . . and to be applied in part payment to the vendors." The defendant contended that the words "net proceeds" as used in the option, meant a sum to be arrived at after deducting from gross proceeds the cost of mining, delivery at smelter, and of smelting. — *Held*, on facts, that defendant's rights in respect of ore extracted from property were limited to right to ship ore for purposes of conversion, and were subject to condition that proceeds of such conversion should be applied in accordance with terms of agreement above mentioned. Pending payment of purchase price provided for in option, defendant acquired no right of property in ore *in situ*, and none after extraction from the mine.—The operation of developing property was, pending payment of purchase price, to be done by defendant for owners of property, and in shipping or dealing with ore, he was to deal with it as a trustee for plaintiffs, and proceeds would be in his hands as such trustee. *Grobe* v. *Doyle* (1906), 12 B. C. R. 191, 3 W. L. R. 285.

Modification — Waiver — Work done under contract — Damages for breach — Counterclaim — Detinue — Demand and refusal — Conversion. *Nichols Co.* v. *Markland Pub. Co.* (1906), 7 O. W. R. 407.

Municipal works — *Specifications — "From" and "to" streets——Plan.*]—The words "from" and "to" streets mentioned in specifications for the construction of works undertaken by an agreement in writing, as shewn on a plan annexed to and declared to form part of the contract, are not necessarily exclusive. When the agreement provided that the works should be constructed "along Notre-Dame street from Berri street to Lacroix street, as shewn on the said plan," these words mean, "as far as the plan shews along Notre-Dame street, but not exceeding the most distant side of Lacroix street." *City of Montreal* v. *Canadian Pacific Ry. Co.*, 33 S. C. R. 396.

Niagara river power — *Dispute as to measuring the amount of electricity.*]—The action was on a contract between the Commissioners of Queen Victoria Niagara Falls Park and the defendants, by which the defendants were allowed to take water from the Niagara River to generate and sell electric energy, and to settle disputes as to the proper way of measuring the amount of electricity. Plaintiffs measured the energy on certain days and demanded rates for the intervening time as per that measurement:—*Held* (14 O. W. R. 853, 1 O. W. N. 127), that this was not the proper mode of computation, but that the amount generated and sold from day to day was the proper mode of computation. On application by plaintiffs the matter was reopened and evidence taken, but above decision was not altered. Action dismissed with costs. *Atty.-Gen. for Ont.* v. *Can. Niagara Falls Power Co.* (1910), 16 O. W. R. 35.

Oil lands—*Forfeiture — Lease or license —Profit à prendre.*]—Defendant by written lease gave plaintiff exclusive right to drill on certain oil lands for five years from 16th December, 1903, "this lease to be null and void and no longer binding . . . if a well is not commenced . . . within 6 months, . . . unless lessee shall thereafter pay yearly to lessor $50 per year for delay." No well had been begun by 16th June, 1904, when the first 6 months expired. On 8th July, 1904, plaintiff paid defendant $50 by cheque, which defendant cashed on 10th August, 1904, and receipted as "received on account of delay in beginning operations under lease." In August, 1905, plaintiff tendered second yearly payment of $50, which defendant refused, having made another lease to his co-defendant on 28th July, 1905:—*Held*, that second payment of $50 was in time, and might have been validly made at any time

during second year, which did not terminate until 16th December, 1905.—The legal effect of instrument in question was more than a license; it conferred a *profit à prendre*, an incorporeal right to be exercised in land comprised in it. *McIntosh* v. *Leckie* (1906), 13 O. L. R. 54, 8 O. W. R. 490.

Operation and management *of theatre —Partnership or hiring—Division of profits —Right to dismiss manager.*]—Plaintiff and defendants, who were proprietors of two theatres respectively, agreed to close that owned by the plaintiff, he to assume the management of the other under the terms of an agreement. In a few months the defendants assumed to cancel the agreement and expelled plaintiff from management on the grounds of habitual intoxication:—*Held*, that the relationship between the parties was that of partners and not that of master and servant, and defendants were restrained from excluding plaintiff from management. *Hemming* v. *Lemarquand*, 11 W. L. R. 280.

Option—*Refusal.*]—A contract stipulating that the first party shall have the hauling of all ore shipped up to 15,000 tons, and not less than 10,000 as required by the second party, does not bind the second party to supply more than 10,000 tons. *Haggerty* v. *Lenora Mount Sicker Copper Mining Co.*, 22 C. L. T. 106, 9 B. C. R. 6.

Part performance—*Settlement of action —Litigious rights—Party in default—Judgment.*]—An agreement between the parties to several transactions involving litigation, to do a series of acts, in settlement of their differences, is divisible, and a performance of part of them will be held binding and effective, notwithstanding the failure to perform the whole, more particularly as against the party through whom such failure occurs.—2. A right affirmed by a judgment is by law, excluded from the class of litigious rights, and is not, therefore, subject to the restraints put upon the sale and alienation of such rights. *Armstrong* v. *Connolly*, 14 Que. K. B. 295.

Party to a contract, involving t alienation of immovable property is estopped from suing for a rescission of it, when it has been carried out in such a way as to render impossible the restoration of the property to its former state.—When an alienation of immovable property involved in a contract, in favour of parties assumed to be the owners of contiguous land, but who are only the lessees thereof, the other party when suing to rescind the contract with a view to recover the property, must include in his action the real owner as one of the defendants. *Montreal Harbour Commissioners* v. *Record Foundry* (1909), 38 Que. S. C. 161. (An appeal is now pending before the Court of King's Bench.)

Party who draws up a contract—*Meaning of the words "similar stock."*]—A written contract should, in case of doubt, be interpreted against the party who has drawn it up. The word "similar," used in a contract of sale of goods, to qualify other goods, is not synonymous with "identical," but means "resembling" or "like" or "of like characteristics." Hence, when the price of calf trimmings and fleshings, sold by a tanner to a glue manufacturer, is covenanted to be that of "similar stock paid to other tanners," hide trimmings used for the same purpose come within the description. *Canadian Glue Co.* v. *Galibert* (1909), Q. R. 36 S. C. 473.

Payment — *Condition precedent—Deduction — Arbitration — Independent collateral contract.*]—In answer to an action to recover the balance due under an alleged contract, the defendant, by paragraph 6 of his statement of defence, set up that there was a shortage in the assets delivered by the plaintiff, and that the plaintiff could not sue for the unpaid balance until the deduction from such balance proper to be made in respect of such contract had been determined by arbitration. The defendant's agreement was to pay, not the balance after deduction made, but the whole sum, in specified instalments. Under one paragraph of the agreement, however, the defendant was entitled in certain events to a deduction:—*Held*, that the provision as to deduction was a collateral bargain, and it was for the defendant to put forward his claim thereto which he had not done; the award of arbitrators was not a condition precedent to or part of the plaintiff's cause of action; and paragraph 6 of the defence should be struck out. *Cuddy* v. *Cameron* (1910), 13 W. L. R. 632.

Affirmed (1910), 15 W. L. R. 502. B. C. R.

Permit to cut hay—*Provisions for cancellation of permit if land sold or leased—Subsequent lease of part of land covered by permit.*]—The defendant paid for a permit to cut hay in 1908, on a parcel of land, across which was printed the following:—"This permit becomes cancelled by the sale or lease of the land." Subsequently the plaintiff obtained a lease of half the said parcel:—*Held*, that the defendant's permit gave him an actual interest in the land; that the provision for cancellation should be most strictly construed, and that, as the land had not been leased but only a part of it, the permit was not cancelled and the defendant had a right to the hay cut in that year on the whole of the land, including some that had been cut by the plaintiff under his lease. *Decock* v. *Barrager* (1909), 19 Man. R. 34.

Provision for cancellation—*Supply of electric light—Condition for terminating service—Interest in premises ceasing—"Heirs" —"Assigns" — Partnership — Rights of administrators.*]—The electric company and S. entered into an agreement for the supply of electric lighting in a hotel, for 10 years from the 1st May, 1902, and it was provided that either party might cancel the agreement by notice in writing, if, after the expiration of 5 years, neither S. nor his heirs, executors, administrators, or assigns, should be owner, tenant, or occupier of the hotel, alone or with other persons. The lease to S. extended only until the 1st May, 1907; it gave him no right to a renewal, and he had no other interest in the building. He sold a half interest in the lease to two persons with whom he formed a partnership in the hotel business, which was carried on till 1904, when the partnership terminated by his death, and the defendants were appointed administrators of

his intestate estate. The affairs of the partnership were settled between the defendants and the surviving partners, who became transferees of the business, exclusive owners of the lease, and sole occupants of the hotel for the unexpired term. They gave notice to the plaintiffs to cancel the agreement on the 1st May, 1907, and, on that date, obtained a new lease of the premises, under which they continued in occupation and possession:—*Held*, that, after the 1st May, 1907, the new tenants of the hotel were not assigns of S., and consequently, were entitled to cancel the agreement for electric lighting by notice according to the proviso. Judgment in 9 O. W. R. 517, 10 O. W. R. 311, affirmed. *Deschenes Electric Co.* v. *Royal Trust Co.*, 39 S. C. R. 567.

Public work — *Finding of references—Claim of contractor—Repetition—Waiver.*]—The specifications accompanying a call for tenders for the widening and deepening of canals formed a part of the contract subsequently entered into, and provided that no part of the work could be unwatered during the season of navigation, but might be at the close of navigation. The contractor claimed payment for extra work and increased cost by reason of the refusal to unwater during the winter months:—*Held*, that the contractor might be called upon to work under water during the time the canal was closed to navigation, as well as when it was open, and was not entitled to extra payment therefor, especially as no demand was made for unwatering. The contractor was entitled to payment at a specified rate for removal of earth and at a higher rate for "earth provided, delivered, and spread in a satisfactory manner to raise towing path where required." He claimed payment at the higher rate for over 200,000 cubic yards, and the resident engineer returned 69,000 as falling under the above provision, and the Government allowed 23,000 yards. The Exchequer Court Judge referred it to the registrar of the Court and two engineers, who reported that the amount allowed by the Crown was a sufficient allowance, and their report was confirmed by the Court:—*Held*, that the Supreme Court would not overrule the judgment of the expert referees. Other clauses of the contract required the contractors to make and repeal their claims in writing within fourteen days after the date of each monthly certificate during the progress of the works, and every month until adjusted or rejected. By the order in council referring the claims of the appellant to the Exchequer Court these clauses were waived "in so far as the repeated submission of claims is required." — *Held*, that the waiver did not relieve the contractor from making a claim after the first monthly certificate issued subsequent to its having arisen, but only from repeating it after the following certificate. *Poupore* v. *Rex*, 24 C. L. T. 163. 163.

Purchase of land — Contract of purchaser to build—Fulfilment—Improvement of old building. *Fisken* v. *Walton*, 12 O. W. R. 137.

Railway—*Exemption from liability—Consideration—"Property"—Ejusdem generis.*]—In consideration of the construction of a siding to their mill premises, the plaintiffs entered into an agreement with the defendants, freeing them from liability for damages to the "siding, or to buildings, fences, or other property whatsoever" of the plaintiffs "or of any other person." Two horses of the plaintiffs, engaged in hauling a car from one part of the siding to another, were killed by being run down with a car sent on the siding by a flying switch:—*Held*, that the word "property" in the agreement was not confined to fixtures, buildings, and rolling stock, and that the horses were properly included. *East Kootenay Lumber Co.* v. *Canadian Pacific Ry. Co.*, 13 B. C. R. 422, 8 Can. Ry. Cas. 310.

Receipts—*Sale or bailment—Future delivery of grain—Agent's authority.*]—Plaintiff claimed that he agreed on 20th October, 1907, with defendant's agent, to sell them his 1907 wheat crop at one cent per bushel over market price. He delivered this wheat to their elevators a few days later, and now sued for the price of the wheat:—*Held*, that the agent had no authority to contract for future delivery, and that on the evidence plaintiff had merely stored his wheat in defendant's elevator. Action dismissed. *Sly* v. *Western Canada Flour Mills Co.*, 9 W. L. R. 581.

Removal of timber — Injunction—Refusal—Appeal—Merits—Affirmance. *Murphy* v. *Lake Erie and Detroit River Ry. Co.*, 1 O. W. R. 827, 2 O. W. R. 444.

Reward — *Apprehension of murderer—Party entitled to reward.*]—The Government offered a reward of $500 for the arrest of a murderer. Defendants agreed to pay plaintiff to aid them in effecting the arrest. This he did. Defendant received the reward from the Government. Plaintiff sued for one-third of the amount.—Divisional Court *held*, that the defendants were liable, they having received the reward on condition that they should arrange with plaintiff.—Judgment of Chadwick, Co.C.J., 6th April, 1909, reversed. *Coughlin* v. *Farrell* (1910), 17 O. W. R. 127.

Sale of business.] — Plaintiff brought action to recover from defendants $1,500, on a promissory note which represented part of the purchase price of a business bought by defendants. On default of payment plaintiff took possession of the business, and claimed the amount of this note, as well as a previous cash payment of $1,000, to be forfeited:—*Held*, that only the $1,000 was forfeited. Action dismissed. Judgment of Chapple, Dis. Co. J., affirmed. *Parrott* v. *McLean* (1910), 15 O. W. R. 305.

Sale of cattle—*Substituted agreement—Terms of trade—Usage.*]—On the evidence it was found that, by usage among cattle-men in the McLeod District, calves under six months old and unbranded are, in the buying or selling of a herd of cattle by the head, included with the cows with which they are running. Where an agreement related to two classes of things, and one of which alone was subsequently dealt with by a substituted agreement, and a new agreement dealing with the other class was made for the purpose of continuing the first agreement regarding it, the first agreement was properly looked at to interpret the second. The same ex-

pressions used in different parts of the same document should ordinarily be interpreted in the same sense. *Woolf* v. *Allen*, 21 C. L. T. 99, 4 Terr. L. R. 431.

Sale of goods—*Delivery—Place—"At," meaning of.*]—A tender by H. to supply coal to the town of Goderich, pursuant to advertisement therefor, contained an offer to deliver it "into the coal shed at pumping station, or grounds adjacent thereto, where directed by you." (Meaning by a committee of the council.) The tender was accepted, and the contract afterwards signed called for delivery "at the coal shed." A portion of the coal was delivered, without directions from the committee, from a vessel upon the dock, about 80 feet from the shed, and separated from it by a road:—*Held*, reversing the judgment of the Court of Appeal (15th November, 1901, unreported), that the coal was not delivered "at the coal shed," as provided by the contract signed by the parties, which was the binding document:—*Held*, also, that if the contract was to be decided by the terms of the tender, the delivery was not in accordance therewith, the place of delivery not being "at the pumping station or grounds adjacent thereto." (See, also, 20 C. L. T. 308.) *Holmes* v. *Town of Goderich*, 22 C. L. T. 222, 32 S. C. R. 211.

Sale of goods or agency for sale—*Promissory note — Consideration.*] — When goods are supplied to order by a manufacturer to a dealer for sale to the public, together with forms of promissory notes in favour of the manufacturer to be indorsed by the dealer, the relation between them is in reality that of buyer and seller, not of agent and principal. The dealer cannot, therefore, set up a plea of want of consideration to an action brought against him by the manufacturer, on one of the purchaser's note endorsed by him. *Richardson* v. *Eldridge*, 34 Que. S. C. 424.

Sale of homestead and stock—*Entire contract—Invalidity as regards homestead—Conversion.*]—The plaintiff signed a written memorandum as follows: "I hereby agree to sell, and make and execute the necessary papers to convey, all my right, title, and interest in (describing his homestead, for which he had not been recommended), also (3 horses, a waggon and a plough), and any other implement or chattel of which I am now the owner to (the defendant) for the sum of $480 to be paid as soon as the necessary papers are executed." The defendant, without the plaintiff's knowledge, took possession of the horses; the plaintiff immediately objected to this. The plaintiff sued for conversion and the defendant counterclaimed for damages for breach of the agreement:—*Held*, that the contract was an entire one, and that, according to its terms, the property in the personal property would vest only on a proper conveyance of the land.—(2) That the agreement, being one for the assignment of an unrecommended homestead, was void, and that, although an agreement may be void in part and valid in part, yet this being an entire contract was wholly void. Judgment was therefore given for the plaintiff for damages for conversion of the horses; and the defendant's counterclaim for damages for breach of the agreement was dismissed. *Flannaghan* v. *Healy*, 4 Terr. L. R. 391.

Sale of private banking business to chartered bank—*Bank became insolvent —Action to recover money under contract of sale.*]—The plaintiffs, seven surviving members of the firm of Telford & Co., sued for $250 and interest for each of them, part of the consideration for sale by them of the private banking business of Telford & Co. to defendants. Defendants denied liability by reason of an alleged prior breach of the agreement of sale by one of the plaintiffs, W. M. Telford, in taking a position with another bank:—*Held*, that the evidence shewed that the defendants having become embarrassed, their entire business was taken over under agreement with other banks, and in January, 1908, W. M. Telford was notified that at the expiration of three months his services would not be longer required. On 4th February, 1908, he sent his resignation, informing the general manager that he had received an offer of a position with the Merchants' Bank at Owen Sound. The resignation was accepted, and no objection made to his taking the position until the defence in this action. Judgment entered for plaintiffs for $1,750 and interest from the 1st of June, 1908, and costs. *Carpenter* v. *Creswell* (1827), 4 Bing. 409, followed. *Telford* v. *Sovereign Bank* (1910), 16 O. W. R. 133.

Sale of securities — *Interpretation of contract — Arts. 1618, 1619, C. C. — Railway — Debtor and creditor — Right of way claims—Legal expenses incurred in settlement.*]—The plaintiffs sold the defendants stocks and bonds of the P. and I. R. Co., with an agreement in writing, which contained a clause stipulating as a condition that the vendees might declare the option of paying a further sum of $30,000, in addition to the price of sale, in consideration of which the vendors agreed to pay all the debts of the P. and I. R. Co., except certain specially mentioned claims, some of which were in respect of settlement for the right of way. The final clause of the agreement was as follows: "After two years from the date hereof the Montreal Street Railway Company will assume the obligation of settling any right of way claims which the vendors may not previously have been called upon to settle, and will contribute $5,000 towards the settlement of any such claims which the vendors may be called upon to settle within the said two years. Any part of the said sum not so expended in said two years or required by the purchasers so to be, shall be paid over to the vendors at the end of the said period, it being understood that the purchasers will not stir up or suggest claims being made." The vendees exercised the option, and paid the $30,000 to the vendors, who reserved their right to any portion of the $5,000 to be contributed towards settlement of the right of way claims which might not be expended during the two years. An unsettled claim for right of way, in dispute at the time of the agreement, was subsequently settled by the vendors within the two years. The question arose as to whether or not this existing claim and legal expenses connected therewith was a debt which the vendors were obliged to discharge in consideration of the extra $30,000 so paid to them, and whether or not the $5,000 was to be contributed only in respect of right of way claims arising after the date of the agreement: — *Held*, affirming 15

Que. K. B. 77, that the agreement must be construed as being controlled by the provisions of the last clause thereof: that the last clause was not inconsistent with the previous clauses of the agreement: and that the vendees were bound to contribute to the payment of such claims and legal expenses in respect of the right of way to the extent of the $5,000 mentioned in the last clause. *Montreal Street Ry. Co.* v. *Montreal Construction Co.*, 27 C. L. T. 314, 38 S. C. R. 422.

Sale of timber—*Terms of payment.*]—The appellant held rights in unpatented lands and agreed to sell the timber thereon to respondent, one of the conditions as to payment therefor being that, as soon as the Crown grant issued, the respondent should "settle" a judgment against the appellant, which, they both understood, could at that time be purchased for $500. On the issue of the grant, about six months afterwards, the judgment creditor refused to accept $500 as full settlement at the latter date, and he took proceedings to enforce execution for the full amount. The execution was opposed on behalf of the appellant, the respondent becoming surety for the costs and being also made a party to the proceedings.—*Held*, affirming the judgment in 10 B. C. R. 84, that the agreement to settle the outstanding judgment was not made unconditionally by the respondent, but was limited to settling it for $500, after the issue of the Crown grant for the land: — *Held*, also, Davies, J., dissenting, that the costs incurred in unsuccessfully opposing the execution of the judgment, upon being paid by the respondent, were properly chargeable against the appellant. *O'Brien* v. *Mackintosh*, 24 C. L. T. 115, 34 S. C. R. 169.

Sale of wheat—*Correspondence by telegraph—Price of wheat — Ascertainment by reference to quotations — Evidence—Trade usage or custom.*]—On the 22nd May, 1903, the plaintiffs, grain merchants of Winnipeg, Manitoba, telegraphed to the defendants at Goderich, Ontario: "Referring to my telegram we offer subject to immediate reply by telegraph one cargo about eighty thousand bus. part number one hard three over part number two northern one quarter under New York July c.i.f. Goderich in ten days, terms twenty-five thousand sight draft balance weekly payments as suggested int. and ins. Goderich paid by you as before if you wish will fix price to-day's close hard eighty-two cents two northern seventy-eight and three quarters telegraph immediately whether you accept or not can give you more two northern than one H." The defendants telegraphed to the plaintiffs on the next day: "We accept half one hard half two northern price fixed date shipment or sooner." Five days later the plaintiffs telegraphed to the defendants: "Probably send Algonquin to-morrow takes about fifty-eight thousand two northern thirty-seven thousand one hard do you want the surplus fifteen thousand two northern one half under July telegraph immediately on receipt." And on the same day the defendants telegraphed to the plaintiffs: "We accept will provide insurance here see to-day's letter." The 95,000 bushels of wheat mentioned were shipped and received by the defendants, and, a dispute having arisen as to the price, the plaintiffs withheld the bill of lading for 10,000 bushels of the 95,000, and the defendants having, notwithstanding the absence of the document, taken the 10,000 bushels, the plaintiffs brought this action for conversion thereof, or alternatively for the balance of the price. The defendants maintained that the price was paid in full:—*Held*, that there was a complete contract for the sale of the goods in question, at a price to be fixed, on or before the date of shipment, by reference to New York quotations; and that the words used by the plaintiffs "three over . . . one quarter under New York July" had not the effect of importing into the contract a term, in accordance with a custom or trade usage of the wheat market at Winnipeg, of which evidence was given at the trial subject to objection, that the buyer was bound to sell a similar quantity of New York wheat to the original vendor. Judgment of Falconbridge, C.J.K.B., 7 O. W. R. 484, affirmed. *Northern Elevator Co.* v. *Lake Huron and Manitoba Milling Co.*, 9 O. W. R. 139, 13 O. L. R. 349.

Services of advertising agent — Remuneration — Territory — —Extra services — Account — Access to books of principal. *Miller* v. *Globe Printing Co.*, 3 O. W. R. 369, 6 O. W. R. 258.

Services by near relatives — *Implied right to remuneration—Presumption.*]—The presumption against an implied right to remuneration for services rendered by near relatives arises only when the persons rendering the services, and those to whom they are rendered, are in effect living together as members of the same household, but even where this is not the case the implied right to remuneration may in the case of near relatives be negatived on very slight grounds. The Court held on the facts in this case that the plaintiff, a married woman who left her own home to nurse her sister, was not entitled to remuneration for her services. *Mooney* v. *Grout*, 23 C. L. T. 327, 6 O. L. R. 521.

Shares in company—*Sale of—Terms of payment—Absence of covenant to pay—Default in payments—Refusal of Court to infer obligations to pay.*]—By agreement of 11th August, 1903, between plaintiff and defendant, after reciting that plaintiff was owner of 302 fully paid-up shares of common stock in a named company, of par value of $100 each, and his agreement to sell same to defendant, for consideration therein mentioned, and subject to terms thereinafter expressed, it was witnessed that plaintiff had agreed to sell shares to defendant for $18,120, with interest at 6 per cent., viz., on his paying $500 on account, he was to have right of paying balance in manner set out in agreement. Plaintiff was to deposit in a bank the stock certificates, endorsed in blank, to be delivered to defendant, on payment of purchase money in full, and he was to be at liberty to pay into the bank sums of money thereinafter referred to, to be held to his credit, and which should fully discharge him in respect of payment of purchase price and interest, and entitle him to delivery of shares; defendant was to pay plaintiff $500 on account upon deposit of certificates so endorsed; and in consideration of premises and of $500 plaintiff cove-

nanted and agreed with defendant that he would not for 5 years from date of agreement, directly or indirectly, erect or cause to be erected in Canada a mill for the manufacture of book and writing papers, or of coated papers, or associate himself or accept employment from any mill erected during the said period for manufacturing such papers:—*Held*, that the terms and whole effect of the agreement completely negatived the existence of any covenant on the defendant's part to pay for the shares. *Finlay* v. *Ritchie*, 12 O. L. R. 368, 8 O. W. R. 176.

Supply of electric light—Tolls and charges — Construction of statutes—N. S. Acts of 1907 c. 40—Change of system of charges — "Readiness to serve"—Charges added to meter rate—Non-compliance with statutory requirements to file schedule of rates with Provincial Secretary—Liability of consumer. *Chambers Electric Light Co.* v. *Cantwell* (N.S.), 6 E. L. R. 529.

Supply of electric power—*Continued existence of property—Condition precedent.*]—Where, under the terms of an agreement, the plaintiffs were to supply the defendants with electric current to a specified amount of horse power, to be used by them for operating their machinery, and for use in their business, and for no other purpose, the limitation was held to be for the purpose of confining the use of the power to the defendants' premises, and not to any existing mill thereon, so that the fact of such mill being afterwards destroyed by fire did not dispense with the defendants' obligation to receive and pay for the power. *Taylor* v. *Caldwell*, 3 B. & S. 826, distinguished. *Ontario Electric Light and Power Co.* v. *Baxter and Galloway Co.*, 23 C. L. T. 152, 2 O. W. R. 138, 5 O. L. R. 419, 2 Com. L. R. 125.

Supply of natural gas—Covenant restricting supply to others than plaintiffs—Breach — Exceptions — Supply to consumers' company. *St. Catharines and Niagara Power and Fuel Co.* v. *Thorold Natural Gas Co.*, 9 O. W. R. 86, 860.

Supply of natural gas—Remedy for insufficient supply—Right to enter upon "field" of plaintiffs—Covenants and conditions of contract—Injunction — Dissolution — Damages. *Niagara Peninsula Power and Gas Co.* v. *St. Catharines and Niagara Power and Fuel Co.*, 9 O. W. R. 531.

Telegraph company.]—Agreements between plaintiffs and defendants each contained the following clause: "The railway company to pass the inspectors, linesmen, and repairers of telegraph company, and their tools and stores for construction and maintenance of said lines and any extensions thereof:"—*Held*, that defendants were not bound to furnish unlimited passes, as demanded by plaintiffs, but only such free transportation as was reasonably necessary in connection with plaintiff's work of construction and maintenance, nor can they succeed in an action for money had and received. *Held*, further, on defendants' counterclaim, that the latter are entitled to damages because of plaintiffs' failure to maintain telegraph lines in working order, and for breach of covenant to construct and maintain a wire and sound instruments for defendants' use between two of their stations, but that the plaintiffs are not bound to maintain poles that were erected on defendants' right of way before date of agreements. *North American Telegraph Co.* v. *Bay of Quinte Rw. Co.* (1909), 13 O. W. R. 275.

Varied, both claim and counterclaim being dismissed, 14 O. W. R. 8.

Telegraph company *leased railway company private wire—Unauthorized messages—Must account for same.*]—In 1888 the plaintiffs leased the defendants predecessors a special telegraph wire for 27½ years, to be used in connection with the management, operation and control of their railway lines then constructed. Later the railway became the property of the defendants, who operated several other businesses, and have extended lines of railways. The defendants used the special wire for all sorts of messages pertaining to their general business and refused to account to the plaintiffs for any of such unauthorised messages:—*Held*, that the defendants were bound to account to plaintiffs for the messages transmitted by them through the special wire, which did not relate to the management, operation or control of the railway lines existing in 1888. Judgment of the Supreme Court of Newfoundland affirmed. *Anglo-Am. Tel. Co.* v. *Reid-Newfoundland Co., C. R.*, [1908] A. C. 386.

Termination—Provisions for renewal—Waiver—Rights of third persons—Injunction — Parties. *Street Railway Advertising Co.* v. *Toronto Rw. Co.*, 3 O. W. R. 849.

Time — *Season* — *Reckoning—Starting point.*]—Though a delay stipulated in a contract to run from a space of time or a period, such as a season, is generally to be computed after or from the end thereof, nevertheless the whole purport of the agreement, or proof of circumstances, or both, may shew that the parties intended that the whole period from its initial day should be counted into and form part of the delay, and effect must be given to this intention when it clearly appears.—Hence, when the seller of rights under location tickets of Crown lots, makes a reservation of the cut of timber thereon, for three years, "*a compter de l'automne prochain*," and it appears that he could not acquire full ownership of the timber by the required lapse of two years (and have time to manufacture and sell it, the manifest object of the reservation), unless the starting point of the three years were the end of the next ensuing fall, that construction of the words used will be held to be the proper one.—Judgment in 32 Que. S. C. 505, affirmed. Judgment in 29 Que. S. C. 175, set aside. *Columbus Fish and Game Club* v. *Edwards Co. Limited*, 18 Que. K. B. 8.

Traffic agreement.] — Action for recovery of damages for breach of contract to provide cargoes for plaintiffs' steamers, sailing from Quebec to Manchester, at current rates from Montreal. The defence denied the contract as alleged; set up that the defendants had never been placed in default to settle and determine the freight rates obtainable in Montreal; that they were prevented from fulfilling their contract by the destruction of a bridge on their line of railway; that they could not be held respon-

sible for the empty space without having been first put in default to fill the same:—*Held*, that the defendants were responsible for the difference between the Quebec and Montreal freight rates, but only to the extent of forty per cent. of the cargo of the ship, in accordance with the letter of the 3rd of February, 1903. For this reason $533.25 was deducted from the amount of the judgment. As the appeal failed on the substantial points costs were not allowed. *Great Nor. Rw. Co.* v. *Furness, Withy & Co.* (1908), 42 S. C. R. 234, affirming, but slightly reducing the amount of damages allowed in 32 Que. S. C. 121.

Two separate documents construed as one — *Agreement to purchase land — Secret arrangement to pay purchaser commission on sales—Consideration—Illegality—Pleading—Ground of appeal not raised at trial—Variation of agreement—Authority of agent — Ratification—Right to commission under substituted agreement.*]—On the 23rd February, 1904, the plaintiff agreed to purchase 50,000 acres of land from the defendants, at a fixed price per acre, upon terms specified in a written document. In a letter written by the president of the defendants, on their behalf, to the plaintiff, dated the 24th February, 1904, the defendants promised to pay the plaintiff a commission of 25 cents per acre on each sale as made, as soon as the defendants had received sufficient over and above $1 per acre to pay such commission. The plaintiff being in default under his contract, the defendants' agent made an arrangement with the plaintiff, which was embodied in a letter dated the 14th June, 1904, written by the plaintiff to the agent, reducing the plaintiff's purchase to 20,000 acres, the plaintiff releasing his privilege of making selections from certain townships, upon the understanding that the defendants should release him from all obligations as to the other 30,000 acres. The agent also found a purchaser, D., for 10,000 acres of the land, and the plaintiff agreed to accept this, and afterwards sold D. another 10,000 acres. The trial Judge found, upon conflicting evidence, that the two documents dated respectively the 23rd and 24th February were signed at the same time and as one transaction:—*Held*, that this finding should not be interfered with; that there was a consideration to support the promise set out in the document of the 24th February; and that evidence of the circumstances in which the documents were executed was properly received to shew that there was in fact only one transaction:—*Held*, also, that, although the evidence established that the plaintiff in making the purchase was acting for himself and others, and the document of the 24th February disclosed a secret arrangement to enable the plaintiff to obtain something in the nature of a commission without the knowledge of the other persons interested in the purchase, the defendants were not at liberty to maintain this as a ground of appeal, it not having been pleaded or raised at the trial, and no application for leave to amend having been made. And *quære*, whether, in any case, it was open to the defendants to maintain such a defence as against the plaintiff:—*Held*, also, that the document of the 14th June, 1904, did not cancel the agreement of the 23rd and 24th February; it was merely a substitution of 20,000 acres for the 50,000 acres, and left the 20,000 acres subject to the terms of the original agreement; and the plaintiff was, therefore, entitled to his 25 cents per acre commission on the 20,000 acres sold to D.; the arrangement made by the defendants' agent, if beyond his powers, having been ratified by the defendants, as the evidence shewed.—Judgment of Newlands, J., affirmed. *Willoughby* v. *Sask. Valley & Man. Land Co.* (1910), 13 W. L. R. 526, 3 Sask. L. R. 130.

Uncertainty — *Findings of fact — Appeal.*]—The findings of a trial Judge on questions of fact will not be disturbed unless it appears clearly that such findings are erroneous. In an action on a contract to furnish supplies to be used in floating one of the defendants' steamships, where the evidence was of a contradictory character, the trial Judge, as to certain amounts claimed, found in favour of the defendants, on the ground that if the plaintiff wished to make a contract under which he would be fully paid, whether the services were or were not performed that should have been clearly expressed in his tender and not left in doubt:—*Held*, that the decision ought not to be disturbed. *Barrey* v. *Allan S. S. Co.*, 36 N. S. R. 307.

Use of licensed premises—*Exclusive occupation—Landlord and tenant—Breach of contract—Damages.*]—An agreement between a licensed restaurant keeper and a third person whereby the latter engages, under a penalty, to fulfil the obligation of the former prescribed by the License Act, s. 913, to be able at all times to furnish meals to at least ten persons at one time, implies the right of the third person to use the restaurant for this purpose, but does not give him any right of exclusive occupation; and the relationship of landlord and tenant does not arise from the agreement. Therefore, the restaurant keeper has no right to refuse the person with whom he contracts access to the restaurant, and the refusal of the latter to perform his engagement is equivalent to a renunciation of the bargain on his part, and puts an end to it.—One who violates the right of another, while not causing any appreciable injury, is nevertheless liable to exemplary damages. *Bourque* v. *Massé*, 28 Que. S. C. 133.

Use of race track—*Lease or license—Forfeiture.*]—An agreement under seal between the plaintiff and defendants providing for the use of the defendants' race track by the plaintiff under certain conditions and in consideration of certain payments:—*Held*, upon its true construction, not to be a lease, but a mere license; that the relationship of landlord and tenant did not exist between the parties; and, upon the evidence, that there was a breach of the contract, for which the defendants might properly forfeit, and that the contract was in law properly forfeited and declared void by the defendants. *Lyles* v. *Windsor Fair Grounds and Driving Park Association*, 20 C. L. T. 363.

Wager.]—The parties deposited with H. $1,250, of which the defendant contributed $1,000 and the plaintiff $250, and signed a

document in which it was set forth that the money was to be held by H. until the determination of the question whether a certain horse in the possession of the defendant (describing it) was the same horse as described in the British Hackney Stud Book as "Towthorpe Rupert;" the question to be decided by a report from that book. "Should such report shew that the horse . . . be the horse described in the . . . . book, the whole $1,250 shall be paid to" the defendant. "Should the said report shew that the said horse . . . . is not the horse described . . . . in the . . . . book, the said money shall be paid to" the plaintiff:—*Held*, a wager. *Evans* v. *Robert* (1910), 13 W. L. R. 380.

Water supply — Rate of payment — School buildings — Municipal corporations. *Montreal Water and Power Co.* v. *St. Henri School Commissioners*, 5 E. L. R. 385.

Work and labour—*Usage or custom.*]—Under a contract to "drill or punch all holes required in the iron-work on the extension of the Intercolonial Railway station, St. John, N.B., according to plans and specifications, at the rate of 5 cents per hole, which will include rivetting and bolting up," the persons doing the work are entitled to be paid for each separate hole in each separate plate required for the work, and are not restricted to the holes at the places designated upon the plans and specifications, that is, where the plates are rivetted or bolted. *Wilson* v. *Clark*, 2 E. L. R. 347, 465, 38 N. B. R. 69.

Written document — *Promise to pay money—Promissory note—Proof of signature—Comparison of handwriting—Admission—Oral testimony—Amount in controversy.*]—1. In a document signed by two persons for the purpose of stating several reciprocal engagements, the promise by one of them to pay, on demand, to the order of the other, a fixed sum of money, is not a promissory note, and Arts. 2340 and 2341, C. C., have no application to it. Therefore, if the signature is denied, verification by comparison of writing is admissible.—2. Proof by oral testimony of an extra-judicial acknowledgment by a party, of a signature denied by him, even when the sum demanded exceeds $50, is admissible. *Paquin* v. *Turcotte*, 35 Que. S. C. 266.

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7. Enforcement of Contract.

Adoption of illegitimate child—*Promise to "make her heir"—Statute of Frauds—Part performance.*]—The plaintiff was the illegitimate daughter of D. C. K. The plaintiff's mother and D. C. K. lived together for several years, but finally separated. The mother died in 1897. The plaintiff lived with her grandmother until the latter's death. On the 1st April, 1899, the plaintiff wrote to D. C. K. telling him of her mother's death and asking him to write to her. Some time afterwards he wrote to her addressing her as "Dear daughter," signing himself as "Your anxious father. In a postcript he added, "Now I have agreed to become your real solid father as hard and fast as you can wish." A close correspondence followed, which resulted in the plaintiff going to Winnipeg to live with her father; he met her at the station, took her to his house, and they lived together as father and daughter until he died suddenly on the 6th June, 1903. After his death a will was found dated the 5th December, 1881, by which he bequeathed all his property to another. So far as known, D. C. K. had not, at the time of his death, any relative existing. The plaintiff swore that her father told her on various occasions that all his property would be hers when he died; that he would make a will to that effect. Friends were called as witnesses, who stated that D. C. K. told them he would make his will in the plaintiff's favour and make her his heir:—*Held*, specific performance will be enforced by the Court of an agreement in writing, though not in formal terms, whereby the father of an illegitimate child offered, if she (plaintiff) would come to him and live with him as his daughter, to keep her and leave all his property by will to her, the agreement having been acted upon by the parties and fully performed on the part of the plaintiff, and the omission to make the promised will being attributable to mere negligence and procrastination, no contrary intention on the part of the father appearing; in spite of the want of mutuality, the complete performance by the plaintiff sufficed to take the case out of the Statute of Frauds. *Kinsey* v. *National Trust Co.*, 24 C. L. T. 104, 15 Man. L. R. 32.

Assignment of.]—Money paid by defendant for superintending work being done under contract cannot be charged against the contractor doing the work. Where plaintiff had a claim in excess of jurisdiction of County Court, but defendant had a set-off which upon being allowed reduced the amount below the maximum County Court jurisdiction:—*Held*, that the County Court had no jurisdiction. *Finn* v. *Gosnell* (1909), 14 O. W. R. 830, 1 O. W. N. 117.

Assignment of moneys due—*Conflicting evidence—Findings of fact.*]—Action to recover certain sums of money under an agreement. Judgment for plaintiff, his evidence being accepted in preference to that of the defendant. *Greetham* v. *Gilroy*, 11 W. L. R. 395.

Conveyance of land to son upon undertaking of latter to pay money to daughter—Enforcement by latter—Trust—Pleading — Amendment — Statute of Frauds—Instrument of fraud—Perjury. *Kendrick* v. *Barkey*, 9 O. W. R. 356.

Covenant between two parties for a like performance by both — *Right of either to specific performance by the other—Interest therein — Previous performance by party seeking to enforce covenant against the other.*]—*Held*, when two shareholders in a trading company agree, for their mutual advantage, to deposit their shares in the hands of a third party, neither of them is entitled to specific performance of the covenant by the other, without establishing his interest therein, nor until he has himself executed his part of it. *Kupperheimer* v. *MacGowan* (1908), 18 Que. K. B. 215.

Covenant to pay legacy—Construction of covenant—Enforcement by covenantee for benefit of another — Judgment — Interest — Costs — Payment into Court. *Mowbray* v. *Fletcher*, 11 O. W. R. 937.

Interest in syndicate for sale of patent — Royalty — Share of profits — Evidence—Agent. *McIntyre* v. *Newton*, 9 O. W. R. 303.

Parent and child—Conveyance of land —Agreement for maintenance — Subsequent oral agreement—Specific performance — Setting aside original agreement—Improvidence —Want of independent advice. *Poole* v. *Poole*, 3 O. W. R. 831.

Promise to transfer shares—*Consideration—Measure of damages—Interest.*]—The plaintiff was superintendent of the blast furnaces of a company of which the defendant was the president. The plaintiff's contract of employment was for no definite period, and the employment could be terminated upon two months' notice by either party. During the plaintiff's employment the defendant promised him a certain number of the shares of the capital stock of the company if the production of the blast furnaces was increased to a certain number of tons, and he gave the plaintiff a memorandum containing the figures mentioned. The blast furnaces produced the necessary number of tons, and on two occasions the defendant sent the plaintiff certificates for shares "with my compliments." The furnaces continued to produce the requisite number of tons, but the defendant failed to deliver any more shares, and thereupon this action was brought to recover damages for breach of the contract. The shares of the capital stock of the company had gone up in value, and then had gone down between the time when the stock should have been delivered and the date of the trial:—*Held*, that the stock delivered was not a mere gratuity; that there was a contract for the delivery of the stock, and consideration for the same. It was not a case of assessing the damages at the highest price reached between the date of refusal and the trial, but simply a case in which their market value at the time when the stock should have been delivered should determine the amount of damages. Interest should not be allowed. *Means* v. *Whitney*, 24 C. L. T. 93, 237.

Res judicata—*Defendant ordered to complete his contract—Loss of the amount deposited as security—C. P. 541; C. C. 1241.*]—When the final judgment orders the defendant to complete his contract with the plaintiff within a certain time, under a penalty of losing an amount deposited with the plaintiff, there is *res judicata* as to the forfeiture of such deposit, if the defendant does not obey the orders of the Court; the defendant cannot later on demand a new ruling upon that part of the conclusions respecting such deposit. *Brazer* v. *Elkin* (1909), 11 Que. P. R. 292.

Restraint of trade — *Sale of goods—Stipulation that vendee shall re-sell at fixed price — Validity—Interest of vendor—Termination of contract — Injunction.*] — An agreement between the manufacturer of an article and the retailer thereof that the latter will sell the article at a fixed price, is not unlawful nor in restraint of trade, nor against the public interest, when the manufacturer has an interest in entering into the agreement by sharing in the profits of sales or otherwise. When no time is specified for the duration of an agreement of this kind, either party may terminate it without the consent of the other. One who seeks an injunction to prevent some one doing something—in this case to prevent freedom of trade in the Wampole preparation — must prove, as must every plaintiff, an actual and tangible interest in bringing the action, and, as well, that, unless an interlocutory injunction is granted, he will suffer serious and irreparable injury. *Wampole* v. *Lyons*, 25 Que. S. C. 390. See S. C., 14 Que. K. B. 53.

Sale of restaurant business and furniture—Action for balance of purchase price—Counterclaim for goods wrongfully removed by vendor—Evidence — Presumption from wrongful acts—Costs. *Ross* v. *Parks* (Man.), 4 W. L. R. 212.

Services—*Contract to accept part payment in stock—Failure to deliver—Damages —Specific performance.*]—The plaintiff contracted with the defendant to do certain work at the rate of $7 a day, whereof $1.50 should be paid in cash, and the balance of $5.50 in stock in a mining company at fifteen cents a share:—*Held*, that on the defendant's failure to deliver the stock the plaintiff was entitled to damages for breach of contract, and could not be compelled to accept stock. *Miller* v. *Averill*, 24 C. L. T. 103, 10 B. C. R. 205.

Services rendered to relative — Promise to remunerate by testamentary bequest —Part fulfilment — Inadequacy of provision —Action against executors. *Fitzgerald* v. *Wallace*, 2 O. W. R. 1047, 3 O. W. R. 900.

Services to deceased person—Action against administrators — Presumption from quasi relationship — Rebuttal—Evidence— Corroboration. *Doan* v. *Canada Trust Co.*, 3 O. W. R. 655.

Settlement of actions—Agreement for division of mining property—Enforcement— Further agreement based on original agreement—Formation of joint stock company— Fraud or mistake—Evidence. *Crawford* v. *Lawson Mine Limited*, *McLeod* v. *Crawford*, 12 O. W. R. 454.

Specific performance.] — Defendant was indebted to plaintiff for $6,500 secured by I. O. U.'s, notes and an assignment of mining shares. Plaintiff agreed to accept $1,500 cash and 20,000 shares of mining stock. The defendant could not deliver the shares:—*Held*, that the Court could not compel specific performance; that the plaintiff's account was correct and entitled to recover. Reference to Master-in-Ordinary, unless parties agree upon some other reference to determine amount of plaintiff's damage. *Goodall* v. *Clarke* (1909), 14 O. W. R. 785, 1 O. W. N. 95; appeal dismissed, 14 O. W. R. 1276, 1 O. W. N. 288.

Specific performance—Parent and child—Maintenance of parent—Promise to make provision by will—Part performance—Executors—Damages — Quantum meruit—Moneys disbursed. *Campbell* v. *Pond*, 4 O. W. R. 16.

Supply of light to building—Rate of payment—Continuance after expiry of period — Acquiescence. *St. Thomas Gas Co.* v. *Donley*, 2 O. W. R. 209.

Supply of natural gas — *Action for price—Measurement of gas supplied—Adequacy of meter used — Rules 648, 729.*]—Action to recover price of natural gas supplied to defendant:—*Held*, that meter satisfactory and in accordance with terms of agreement. An official referee under above rules has power to nonsuit. Where judgment at trial directing a reference was by consent it is too late on appeal to contend that action was premature. Appeal dismissed. *Henderson* v. *Manufacturers Natural Gas Co.* (1909), 14 O. W. R. 313.

Time for appealing extended, *ib.* 575.

Undertaking for performance by another—*Specific performance—Authentic contract.*]—Where A. has contracted with B. that until a third party does a certain act, he, A., will be personally responsible for the fulfilment of the obligation under the contract on the part of such third party—if the latter does not do the thing stipulated, B. has an action against A. to enforce specific performance of obligation, and to compel A. to sign an authentic contract, and to obtain an order from the Court that in the event of A. refusing to sign, the judgment shall avail in lieu of such authentic or notarial contract. *Connolly* v. *Montreal Park and Island Rw. Co.*, 22 Que. S. C. 322, distinguished. *Beaubien* v. *Ekers*, 24 Que. S. C. 199.

Undertaking to pay debt of another—Security—Assignment of claim—Conflict of evidence—Finding of trial Judge—Reversal on appeal. *Riddle* v. *Todd*, 12 O. W. R. 615.

Validity — *Taking effect at death—Testamentary disposition — Married woman—Absence of authorisation.*]—A writing in the following words, "I hereby state that if death should overtake me, I hereby wish and command that she shall have the option on all the Bridge Company stock held by me, paid for or on option of same," does not disclose a perfected agreement or undertaking transmissible to and binding on the legal representatives of the writer. It amounts at most to a testamentary disposition, and is therefore subject to revocation by a subsequent will.—*Per* Trenholme, J.—Even if such a writing were a valid contract in form, it would be null and void in the present instance, because the obligee, a married woman, was not authorised thereto by her husband or by a Judge. *Pattle* v. *Simpson*, 14 Que. K. B. 178.

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8. Evidence to Vary.

Agreement for maintenance — *Consideration—Conveyance of property — Evidence to vary agreement—Reformation—Detinue—Damages.*]—In an action to recover certain personal property which, it was alleged, the defendant unlawfully detained, the defendant relied upon an agreement, entered into between the plaintiff and him, whereby the plaintiff, in consideration that the defendant would provide him with sufficient and comfortable maintenance during his lifetime, agreed to convey to the defendant his real and personal property. The document put in evidence in support of the defence set up contained no reference to personal property:—*Held*, that parol evidence could not be introduced to vary the terms of the written document, and that the plaintiff was entitled to judgment; and if, through fraud or mistake, the personal property was omitted from the written agreement, the defendant had his remedy in a proper action to have the agreement reformed. The damages assessed for the detention of the personal property being excessive, the Court directed a reference back to the County Court Judge who had tried the action, to make a new assessment. *Guiou* v. *Thibeau*, 36 N. S. R. 542.

Sale of land—*Possession under written agreement—Timber—Seizure under execution—Bill of sale.*]—The plaintiff sold to S. a property containing a quantity of woodland, for $8,500, under an agreement in writing by which S. agreed to pay a portion of the purchase money on the execution of the agreement, and the balance in yearly instalments, with interest subject to the condition that if S. failed to pay any of the instalments, with interest, as agreed, the payments made would be forfeited and the plaintiff would be at liberty to resume possession; and subject to the further condition that S. would not cut more than a specified quantity of lumber in any one year. In an action of replevin brought by the plaintiff against the defendant sheriff, who had levied upon a quantity of lumber on the premises, under executions issued at the suit of creditors of S., the plaintiff tendered evidence to shew that all lumber cut by S. was to be sold, and the proceeds, after deducting certain disbursements, paid to the plaintiff on account of the purchase money, and that the title to the land and lumber was to remain in the plaintiff until the payments agreed to be made by S. were completed:—*Held*, that the evidence was not admissible, the effect of it being to vary the written contract:—*Held*, further, that a bill of sale of the lumber made by S. to the plaintiff, while writs of execution, of which the plaintiff failed to shew that she had not notice, were in the hands of the sheriff, was void, as made contrary to the provisions of the statute. *Blaikie* v. *McLennan*, 33 N. S. R. 558.

Supply of gas—Fixing rate—Oral agreement — Conversations — Evidence. *Selkirk Gas and Oil Co.* v. *Erie Evaporating Co.*, 8 O. W. R. 667.

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9. Formation of Contract.

Acceptance—*Purchase of goods—Acceptance by delivery.*]—The plaintiff, who had had previous dealings with the defendants, wrote to them on the 5th May, asking them

if they were going to buy cucumbers that year, and what they were going to pay for them; adding, "please let me know, as I want to make a contract with some one for them, as I want to put in quite a few this year." The defendants replied: "We are pleased to learn that you are going to do a lot of growing this year, and will be pleased to take all you grow at the same price as last year. We will see you later on and make final arrangements." Nothing further occurred until the following August, when the plaintiff sent several loads of cucumbers to the defendants, who accepted them and paid for them, nothing being said at the time of any contract between the parties:—*Held*, that the defendants' letter was not an offer open to acceptance by the plaintiff, or by the delivery of cucumbers to them by the plaintiff, but a statement of their readiness to enter into an agreement with the plaintiff upon terms to be arranged. *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, distinguished. *Baston* v. *Toronto Fruit Vinegar Co.*, 22 C. L. T. 232, 4 O. L. R. 20, 1 O. W. R. 301.

Acceptance of conditions — *Construction of telegram.*]—Where negotiations have been carried on by correspondence, for the lease of premises, between the owner and the agents of a company, without a final understanding, and the last letter is from the owner, containing new conditions and proposals, a telegram from the agents in these words "Will meet you at store, Saturday 2 p.m. Authority to sign lease," is not an acceptance of such conditions and proposals and does not amount to a closing of the contract. *Robichon* v. *Charlton Co.* (1910), 39 Que. S. C. 22.

Agent—*Ratification.*]—A contract made by an agent is complete before he has advised his principal of it, and before the latter has sent a ratification to the other party to the contract. *Hibbard* v. *Thompson Co.*, 5 Que. P. R. 372.

Cause of action, where arising—*Correspondence—Place of making—Sale of goods—Place of delivery—Superior Court—District.*]—A contract by correspondence is completed at the place where the acceptance is received, to the knowledge of the acceptor. 2. An action for damages on account of the insufficiency and poor quality of goods sold may be begun in the district in which such goods ought to be delivered, inspected, and paid for. *Reeves* v. *McCullock*, 4 Que. P. R. 285.

Company—*Authority of agent—Ratification.*]—On an appeal from a Master defendant claimed he should have been allowed a credit of $1,000, which he alleged plaintiffs' agent had agreed he should get on giving up Ottawa agency of plaintiffs. Making such an arrangement was outside of the scope of this agent's authority, but as Master believed defendant, and as plaintiffs appeared to have ratified what agent did, it was held they were estopped. The report was also varied by allowing interest computed as simple interest and not with rests. *McCarthy* v. *McCarthy*, 12 O. W. R. 1123.

Correspondence — *Acceptance—Mailing—Post Office Act—Place of payment—Domicil—Delivery of goods sold.*]—An offer was made by letter dated and mailed at Quebec, the defendant's acceptance being by letter dated and mailed at Toronto. In a suit upon the contract in the Superior Court at Quebec, the defendant, who was served, substitutionally, opposed a judgment entered against him, by default by petition in revocation of judgment first by preliminary objection taking exception to the jurisdiction of the Court over the cause of action, and then, constituting himself incidental plaintiff, making a cross-demand for damages to be set off against the plaintiff's claim:—*Held*, that, in the Province of Quebec, as in the rest of Canada, in negotiations carried on by correspondence, it is not necessary for the completion of the contract that the letter accepting an offer should have actually reached the party making it, but the mailing in general post office of such letter completes the contract, subject, however, to revocation of the offer by the party making it before receipt by him of such letter of acceptance. *Underwood* v. *Maquire*, 6 Que. Q. B. 237, overruled. Article 85 of the Civil Code, as amended by 52 V. c. 48, providing that the indication of a place of payment in any note or writing should be equivalent to election of domicil, at the place so indicated, requires that such place should be actually designated in the contract. *Magann* v. *Auger*, 21 C. L. T. 329, 31 S. C. R. 186.

Correspondence—*Offer and acceptance—Rescission — Breach.*]—Defendant wrote plaintiff that he had fifty tons of hay for sale, to be shipped by schooner. This being found impracticable, defendant said he would ship by rail, which plaintiff accepted.—*Held*, not a rescission but a modification of the existing contract. Judgment for plaintiff. Appeal dismissed. *McGrath* v. *Black*, 6 E. L. R. 501.

Correspondence — *Parties in different provinces—Jurisdiction.*] — Where the contract upon which the action was based arose out of a proposition made by the defendants at Kingston and sent to the plaintiffs at Montreal by letter, and accepted by the latter, also by letter:—*Held*, that it was made at Kingston and the Courts of the district of Montreal had no jurisdiction. *Beaubien Produce and Milling Co.* v. *Richardson*, 3 Que. P. R. 464.

Correspondence—*Place of completion—Acceptance.*]—A contract by correspondence is complete at the place whence the acceptance is sent. *Ward* v. *Johnston*, 5 Que. P. R. 123.

Correspondence — *Place of contract—Parties in different provinces—Breach—Sale of goods—Property in province — Jurisdiction.*]—1. A contract by correspondence is not complete until the answer of the person to whom the offer is made has reached him who makes the offer. 2. When the vendor of articles ascertained as to kind only, who resides in Ontario, and also by virtue of a contract completed at Montreal, sends from Ontario, the goods sold to the purchaser at Montreal, if the purchaser, who has paid for them in advance, does not find them to be as stipulated for, and refuses them, his action to recover what he has paid and

the costs cannot be begun at Montreal, because the whole cause of action has not arisen there, the fact of the shipping from Ontario being a part of the cause of action. 3. Goods shipped to Montreal which the purchaser refuses to accept should be considered as property belonging to the defendants for the purposes of the suit, and to give jurisdiction to the Court at Montreal. *Hislop* v. *Bernatz*, 3 Que. P. R. 451.

Correspondence — *Proposal and acceptance — Condition — Inspection.*]—A correspondence between a customer and a manufacturer, consisting of: (*a*) an inquiry by the customer whether the manufacturer can supply a stated quantity of his produce; (*b*) a reply by the manufacturer that he can, at a stated price; (*c*) a further inquiry from the customer whether the manufacturer can supply, at the price quoted, a lesser but also stated quantity than that of the first inquiry; and (*d*) an affirmative reply by the manufacturer: — *Held*, to constitute a complete contract for the manufacture of the lesser quantity, and to make the manufacturer liable in damages for failure to carry it out. A reference to conditions of inspection of the manufactured article, in correspondence subsequent to the foregoing, affords no ground for pretending that there was no complete contract. *Central Vermont Ry. Co.* v. *Dubé*, 35 Que. S. C. 180.

Delivery of lumber—Orders for lumber — Acceptance — Correspondence—Evidence—Failure to deliver part — Damages. *Watts & Co.* v. *Mohler*, 7 W. L. R. 627.

Formation of company — Oral agreement between corporators before formation —By-laws — Unanimous approval of shareholders—Omission of term in written agreement — Evidence to establish agreement—Statute of Frauds—Pleading—Amendment—Costs. *Berkinshaw* v. *Henderson*, 12 O. W. R. 919.

Hiring—*Breach—Cause of action, where arising—Contract made outside of province —Jurisdiction.*]—In an action for damages for breach of an agreement of hiring, the contract itself and its conditions are material facts which must be proved by the plaintiff; therefore, if the contract was made outside of the Province of Quebec, it cannot be said that the whole cause of action arose in the province. *Landry* v. *Hurdman*, 5 Que. P. R. 273.

Ignorance of the purpose of agreement — *Interest due as damages for non-performance of contracts.*]—Held, the consent required for the formation of a contract cannot be given by one who does not know the purpose of the contract. Hence, the acceptance by a receiving messenger of an express company of merchandise that it carries, does not prove his engagement to comply with the terms printed on the back of the document, which were neither read nor explained to him, especially if he can neither read nor write. The driver is responsible for goods he carries so far as acknowledging their value at their destinations, but he is not responsible for the profits that their owner might have realized on reselling them, if nothing was said when the contract for carrying was made, to cause him to foresee the consequence of his failure to perform it. Art. 1074, C. C. *Black* v. *Can. Express Co.* (1909), 36 Que. S. C. 499.

Implied contract—*Payment for keep of horse — Proof of ownership.*]—The obligation, quasi-contractual, to reimburse money expended upon the chattel of another person (in this case the keep of a horse), arises from the fact of ownership of the chattel, which it is necessary to prove against one from whom reimbursement is sought. *Richard* v. *Stevenson*, 28 Que. S. C. 188.

Intention — *Liability for work done—Principal and agent—Notice.*]—If a man's words or acts, judged by a reasonable standard, manifest an intention to agree in regard to any matter, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on the subject.—The defendants, in authorising a Mr. B. to employ a contractor to perform certain repairs to their building, supposed that he was the local agent of their architect, S., to whom they had complained of certain defects in his plans necessitating such repairs, and supposed that S. had recognised his liability for such defects and had authorised B. to have the repairs made. S. had not, however, given any such instructions to B., and B. had in fact ceased to be in S.'s employment some weeks before the defendants arranged with him about the repairs. B. employed the plaintiff, who in good faith did the work without any notice or knowledge of what was in the minds of the defendants' officers: — *Held*, that the defendants were liable to the plaintiff for the cost of the work. *Watson* v. *Manitoba Free Press Co.*, 18 Man. L. R. 309, 9 W. L. R. 77.

Negotiation — *Incompleteness—Acceptance of offer not proved.*]—The defendant telegraphed: "Propose to go in from Alert Bay over to west coast of Island hunt elk; guarantee one month's engagement at least from arrival here; take earliest date you could arrive here; Paget recommends; state terms; wire reply." The plaintiff telegraphed in reply: "Five dollars per day and expenses." Upon which the defendant telegraphed: "All right, please start on Friday," but received no reply, and on the same day telegraphed the plaintiff: "Sincerely regret obliged to change plans and therefore will not be able to avail myself of your services. Kindly acknowledge receipt this wire; collect:"—*Held*, that there was no contract. The telegram from the plaintiff to the defendant was not an acceptance of the defendant's offer, but was merely a quotation of terms, and could not bind the plaintiff except as to terms. The acceptance of the defendant's offer of an engagement must be expressed and could not be implied.—*Harvey* v. *Facey*, [1893] A. C. 552, followed. *Little* v. *Hanbury*, 14 B. C. R. 18, 9 W. L. R. 115.

Offer and acceptance — *Telegrams — Completion—Mutuality.*]—On the 7th December, 1897, the plaintiff telegraphed defendant asking for quotations for white and mixed oats delivered at Truro, N.S. On the same day the defendant replied offering white oats

for 32c. per bushel, in bulk, and 34½c. in bags, and mixed oats for one-half cent less. On the following day the plaintiff telegraphed the defendant confirming purchase of 20,000 bushels of oats, at 32c. and mixed 31½c. bagged, even four bushels, in my bags." On the same day the defendant replied "Cannot confirm bagged—am asked half cent for bagging—bags extras." Plaintiff replied on the same day, "All right; book order; will have to pay for bagging:"—*Held* (Meagher, J., *dubitante*) that the defendant by his last telegram, which was thus accepted, kept on foot the offer previously made, and that the telegram constituted an offer by the acceptance of which the parties reached the same terms. *Sumner* v. *Cole*, 32 N. S. R. 179; reversed, 30 S. C. R. 379, 20 C. L. T. 324.

Offer in writing — *Acceptance—Concluded agreement—Proviso as to formal contract.*]—The defendants by advertisement invited tenders for lighting the city buildings for five years. The plaintiffs tendered to supply the necessary light for $945 per annum. The city council by resolution accepted the plaintiffs' tender, and the city clerk on the 18th May wrote to the plaintiffs notifying them thereof, and adding:—"The necessary contract will be prepared as soon as possible." No formal contract was ever signed by the parties. The plaintiffs supplied the defendants with gas, and sent in quarterly accounts for $236.25, which were paid by the defendants. The plaintiffs' president made inquiries about the formal contract from time to time from the city clerk and the chairman of the finance committee, and this state of things continued for nearly two years, when the plaintiffs wrote to the defendants, submitting that there was no existing contract, because the formal contract had never been executed, and also making certain compaints. They also claimed payment on the basis of a *quantum meruit*, contending that there was no binding contract:—*Held*, that by the offer of the plaintiffs and the acceptance of the defendants there was a concluded agreement; that the words at the end of the acceptance did not qualify the acceptance or leave it conditional on the execution of a contract. The conduct of the plaintiffs shewed that they did not so construe it, for they immediately after the acceptance entered upon and performed their part of the agreement without first requiring any formal contract, sent in their accounts for eighteen months on the basis of the contract being in existence, and were paid accordingly. *Ottawa Gas Co.* v. *City of Ottawa*, 21 C. L. T. 528.

Parol evidence—*Collateral verbal contract.*]—D. gave instructions in writing to H. respecting the sale of a coal mine on terms mentioned, and agreeing to pay a commission of five per cent. on the selling price, such commission to include all expenses. H. failed to effect a sale:—*Held*, affirming the judgment in 6 Brit. Col. L. R. 505, that in an action by H. to recover expenses incurred in an endeavour to make a sale, and reasonable remuneration, parol evidence was admissible to shew that the written instructions did not constitute the whole of the terms of the contract, but there had been a collateral oral agreement in respect to the expenses; and that the question as to whether or not there was an oral contract in addition to what appeared in the written instructions was a question that ought properly to have been submitted to the jury. *Dunsmuir* v. *Lowenberg, Harris, and Co.*, 20 C. L. T. 273, 30 S. C. R. 334.

Place of making — *Cause of action — Jurisdiction.*]—An action to recover a sum of money paid to his principal by an agent for the sale of goods on commission, in excess of what is due, cannot be brought at the place in this province where the money so paid was deposited to be transmitted by the bank, if the contract between the parties was not entered into at the same place, but in another province. *Hamel* v. *Stapleton*, 5 Que. P. R. 247.

Place of making—*Correspondence—Acceptance of offer — Posting letter.*] — Although a contract by correspondence is made at place where offer is accepted, the acceptance must be held to result from the deposit in office of letter which contains it. Therefore, an order sent from Montreal to New York, and simply noted by clerk of vendor on its arrival on 21st November, 1901, without any other manifestation of acceptance of it, is not a sale concluded on that day. *Borgfield* v. *La Banque d'Hochelaga* (1906), 28 Que. S. C. 344.

Place of making — *Correspondence — Superior Court—Territorial jurisdiction.*] — A contract by correspondence is made at the place where the acceptance is sent, by letter or telegram, to the party making the offer. *Schmidt* v. *Crowe*, 5 Que. P. R. 361.

Place of making—*Purchase of goods—Superior Court — Territorial jurisdiction.*]—A contract made by telephone for the purchase of goods to be forwarded by the vendor, at the expense and risk of the purchaser, is not regarded as having been made at the place from which the goods are sent. 2. The receipt by the vendor of letters confirming the purchases made by telephone is not sufficient to give jurisdiction to the Court of the district in which these letters are received and from which the goods bought have been sent. *Walker* v. *Gervais*, 5 Que. P. R. 330.

Place of making—*Sale of goods—Circuit Court — Territorial jurisdiction.*] — Where an order is given to a travelling salesman to have sent by a carrier goods which are at the warehouse of the vendor and are afterwards delivered to the traveller to be forwarded to the purchaser, the contract is made at the place from which the goods are forwarded, and the Court of the district in which that place is situated has jurisdiction in an action for the price of goods so sold and delivered. *Gravel* v. *Gendreau*, 5 Que. P. R. 360.

Pollicitation — *Offer — Acceptance—Correspondence — Conditions — Disagreement.*]—An offer made with a view to a contract, or a pollicitation, does not in itself create a binding obligation. The acceptance of the other party is necessary, especially if the offer has been followed by correspondence respecting the conditions, as to which the parties have disagreed. *Vaillancourt* v. *La Sauvegarde*, 32 Que. S. C. 516.

Proof of making—*Telegraph—Original message—Destruction—Absence of proof — Secondary evidence.—Admissibility of transcript received—Mistake—Agency of telegraph company—Failure to prove contract—Sale of goods—Refusal to accept—Non-delivery of part.*]—Plaintiffs, dealers in canned fruits in Ontario, wrote to defendants in British Columbia a letter quoting prices. Proof of loss of this letter was given, and secondary evidence of its contents received. It concluded with a request to defendants to order by telegraph at expense of plaintiffs. Defendants telegraphed an order for specified quantities of goods. The message as received by plaintiffs specified "three fifty Lombard plums," and plaintiffs shipped 350 cases of plums, and the other goods specified, with exception of 250 gallons of pears, which they proposed to send later. Defendants refused to accept goods shipped, because they said they had ordered only "fifty Lombard plums" and because the pears were not sent. Defendants alleged that the telegraph company had made a mistake in transmission of message, but the original message as delivered by defendants to company at Vancouver was not proved:—*Held*, that, assuming the mistake to be proved by proper evidence, defendants were not responsible for it, for, even if telegraph company were defendants' agents, the authority of agents was limited to transmission of message in terms in which defendants delivered it; and the document handed to the company for transmission was the original order which must be proved to establish contract. *Henkel* v. *Pape*, L. R. 6 Ex. 7, and *Kinghorne* v. *Montreal Telegraph Co.*, 18 U. C. R. 60, followed.—The fact of destruction of message delivered by defendants to telegraph company was not shewn, and, though secondary evidence of contents was given by defendants, it was inadmissible, and there was therefore no evidence that transcript delivered to plaintiffs was incorrect. But the burden of proving contract was upon plaintiffs; and the admission of the transcript in evidence without objection did not render its terms binding upon defendants. It was not evidence of order given by defendants; it was relevant and admissible primary evidence to prove that order had in fact been transmitted and delivered to plaintiffs; but its admission in evidence did not excuse plaintiffs from making proof of order by production of original or by proof of its destruction or loss and secondary evidence of its contents. Moreover, although secondary evidence was given of a portion of contents of plaintiffs' letter quoting prices, plaintiffs had omitted to prove what were prices quoted, and this material element of a contract was lacking:—*Held*, also, that non-delivery of pears ordered would have justified defendants' rejection of other goods. *Flynn* v. *Kelly* (1906) 12 O. L. R. 440, 8 O. W. R. 120.

Purchase of goods—*Correspondence—Acceptance—New terms.*]—On the 2nd October, O. handed the company's purchasing agent the following letter:—"I can offer you thirty cars of timothy hay, at $10.50 per ton, on cars at Chewelah, subject to acceptance in five days delivery within six months. P.S.—I also agree to furnish seven cars of timothy hay at $10 per ton if above offer for 30 cars is accepted." On the 5th October the company mailed to O. an answer as follows:—"We would now inform you that we will accept your offer on timothy hay as per your letter to us of the second instant. Please ship as soon as possible the order you already have in hand, and also get off the seven cars at $10 as early as possible, as our stock is very low. Try and ship us three or four cars so as to catch the next freight here from Northport. We will advise you further as to the shipment of the 30 cars. Should we not be able to take it all in before your roads break up, we presume you will have no objection to allowing balance to remain over until the farmers can haul it in. Do the best you can to get some empty cars at once, as we must have three or four cars by next freight." This letter was received by O. on the 8th October:—*Held*, *per* McColl, C.J., and Martin, J., that the company's reply was not a complete acceptance. *Per* Walkem and Irving, JJ., that it was a complete acceptance. *Oppenheimer* v. *Brackman and Ker Milling Co.*, 9 B. C. R. 343.

See 32 S. C. R. 699, 1901, 5 Beel 135.

Reducing to writing—*Substantial condition—Onus.*]—When 2 persons have agreed that a contract which has been the subject of interview between them shall be reduced to writing, there is a presumption that they have made reducing to writing a substantial condition of formation of contract, and burden of proof is on the one who asserts the contrary. *Dorion* v. *Bédard* (1906), 27 Que. S. C. 193.

Sale of goods—*Correspondence—Completion.*] — Contract by correspondence for sale of coal is concluded by offer of seller of a quantity at a given price and acceptance by purchaser, and a statement by latter in letter of acceptance that he understands "the ton to be 2,240 lbs., and that he would prefer not to have more than 2 cars shipped at a time," is not one of essential terms to which a reply of seller is required to perfect the bargain. *Keating* v. *Dillon* (1906), 28 Que. S. C. 323.

Sale of goods—*Principal and agent—Rescission.*] — Action to recover price of scrap iron sold to defendant. Delivery was to be f. o. b at Megantic. As defendant's agent examined the iron there, defendant held liable and Quebec Court of Review dismissed an appeal. *Metallic* v. *Sapery*, 6 E. L. R. 201.

Sale of immovable—*Written proposal to buy and acceptance—Substantial identity of both—Departure in acceptance.—Held*, when a contract is formed by a written offer and a written acceptance, the acceptance need not repeat the identical words of the offer, but it must be in substance an acceptance of the offer exactly as made. Hence, to a proposal to buy an immovable for a stated price, payable at the owner's option, either cash or on terms, an answer by the letter that he will sell on the terms proposed, but with the added words, "the property to be taken as it is without any repairs," is not the unqualified acceptance required for the formation of the contract of sale. *St. Lawrence Investment Co.* v. *Levesque* (1908), 18 Que. K. B. 289.

Sale of ship — *Statute of Frauds — Memorandum — Acceptance and receipt.*]— Damages for breach of contract by defendants to sell and deliver to plaintiff a schooner. One of the defendants said that he had written to C. saying he had an offer of $150 from plaintiff for the schooner. As it did not say the offer was accepted, nor does it admit the contract, nor was there any evidence of acceptance or the receipt of the schooner or any evidence of part payment, there is no note or memorandum as required by the Statute of Frauds. Action dismissed. *Allen* v. *Graves*, 6 E. L. R. 347, 43 N. S. R. 249.

Sub-contractor — *Rights against principal—Promise—Burden of proof—Acceptance of order—Ratification — Bills of Exchange Act—Money had and received.*]—Plaintiff contracted with F., for the sum of $200, to do the plumbing of a house which F. had contracted to build for the defendant W. E. M. according to specifications which included plumbing. F. having failed to complete his contract, plaintiff sought to recover the amount due him from W. E. M., whose wife, M. M., was joined as a co-defendant, alleging that, before he undertook the work, he saw M. M., who was acting for W. E. M., in his absence, and that she agreed to pay him the $200 and keep it out of the contract: —*Held*, that the promise alleged, if made, was gratuitous, and not legally binding; that it would take strong evidence as to consideration and as to the intent of the parties, to give the promise an effect which would make the party promising liable to pay plaintiff; that the burden of proof was on plaintiff, and, the evidence on the point being contradictory and unsatisfactory, the finding of the trial Judge that plaintiff looked to defendants as his paymasters, and did the work for them and not for F., must be set aside.—After the work which plaintiff contracted to do had been completed, F. drew an order on M. M. for the amount to which plaintiff was entitled, which M. M. accepted in these terms: "Accepted by Mrs. Matheson." — The trial Judge found that M. M. had no authority to accept so as to bind her husband, but that the latter had ratified his wife's act and was liable on the order.—*Held*, reversing this finding, that the acceptance, being one which purported to be binding only upon M. M., was incapable of ratification by the defendant W. E. M. and that the doctrine of ratification was inapplicable. —*Held*, further, that the document was governed by s. 23 of the Bills of Exchange Act, and that no one could be made liable on it as acceptor who had not signed it as such.—*Held*, further, that the action for money had and received was inapplicable to the case under consideration, such action lying only where a person has received money under circumstances rendering the receipt of it a receipt by such person to the use of the plaintiff. *Craig* v. *Matheson*, 32 N. S. R. 452.

Telegrams — *Completion—Place of contract.*]—A contract made by telegraph is not complete until the party who has made the offer has received from the party to whom it was made notification of his acceptance.—2. Such a contract is regarded as made at the place where it has been completed. *Beaubien Produce and Milling Co.* v. *Robertson*, 18 Que. S. C. 429.

Want of consensus — *Misrepresentation.*] — The defendant, negotiating with the plaintiffs' agent for the purchase of a stacker was asked to sign an order for one. The agent filled up a form of order, and the defendant said to him: "Now, if there is anything in this order that binds me to keep the stacker if it does not give satisfaction, I won't sign it." To which the agent replied that there was not, that he could take the stacker out and keep it ten days, and if it did not give satisfaction he need not settle for it, but could bring it in and leave it on the agent's platform at B. The defendant then signed the order without reading it, as he was in a hurry to catch a train. By the terms of the order only one day's trial of the machine was allowed, and the buyer, if it did not give satisfaction, was to return it to the plaintiffs at C. There was a printed direction at the top of the order to give the purchaser a duplicate, but none was given to him. On receipt of the machine the defendant tried it, and, not finding it to work satisfactorily, returned it within ten days to the agent at B. At the trial the agent admitted that, at the time the order was signed, he thought it provided for a ten days' trial:—*Held*, that there was no such consensus *ad idem* between the parties as is necessary to create a binding contract, and that the verdict of the County Court Judge in favour of the defendant in an action by the plaintiffs for the price of the machine should be sustained, and the plaintiffs' appeal dismissed with costs. *Foster* v. *McKinnon*, L. R. 4 C. P. 704, *Smith* v. *Hughes*, L. R. 6 Q. B. 597, and *Murray* v. *Jenkins*, 28 S. C. R. 565, followed. *Saults* v. *Eakes*, 11 Man. L. R. 597, distinguished. *Jones Stacker Co.* v. *Green*, 22 C. L. T. 264, 14 Man. L. R. 61.

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10. Illegal Contract.

Bonds obtained by fraud, were given as security for debt, the creditor having reason to suspect that they were so obtained.—*Held*, contract void. C. C. 989. *Can. Fiber Fibre Co.* v. *Coffin* (1910), 16 R. L. N. S. 366.

Contracts guaranteed by a third party having for its object to stifle a criminal prosecution for a conversion of funds and to shield the culprit, are null as based on illegal consideration. *Montreal Fire Ass'nce. Co.* v. *Therrin* (1909), 18 Que. K. B. 490.

Dominion Lands Act — *Assignment of interest in homestead before patent issued—Invalidity of agreement.*] — The defendant made a homestead entry of land, and afterwards, finding cement upon it, made an agreement with the plaintiff to give him a one-half interest in all cement deposits on the land. The plaintiff claimed a declaration that he was the owner of a half interest in the lands, and that the defendant should be ordered to convey to him. The defendant raised the point that the agreement between him and the plaintiff was illegal and void, being in contravention of the provisions of the Dominion Lands Act, R. S. C. c. 54, s. 42, as amended by 60 & 61 V. c. 20, s. 5:—*Held*, that a nonsuit should be entered, without costs. The invalidity of the agreement went

to the root of the whole action, and the plaintiff could not recover. In the present case the point involved was not merely a penalty imposed upon an infringement of some provision of the statute, nor a mere prohibition; the statute says positively that the act in question, viz., every assignment or transfer of homestead rights and every agreement to assign or transfer any homestead right, or any part thereof, after patent obtained, made or entered into before the issue of the patent, "shall be null and void." *Cumming* v. *Cumming*, 24 C. L. T. 406.

Gaming contract — Promissory note—Chose in action — Assignment — "Common gaming house"—Hotel—Game of chance in private room—Criminal Code, s. 226—Imperial Statute, 9 Anne c. 14, not in force in Nova Scotia. *Robinson* v. *McNeil*, 4 E. L. R. 134.

Gaming transaction — *Intention.*] — A contract, to be a gaming transaction, must be so in the intention of both the parties to it. The intention to gamble of one of them, even though known to the other, does not alter the nature of the contract. *Brosseau* v. *Bergevin*, 27 Que. S. C. 510.

Hiring conveyances — *Parliamentary elections — Evidence — Ratification.*]—The plaintiff, a livery stable keeper, sued the defendant on an account for horses and rigs furnished by him to the defendant, who was a candidate at an election for a member of the House of Commons of Canada. The evidence shewed that to the knowledge of the plaintiff his account was for horses and rigs furnished by him to the defendant during the time he was a candidate and solely for the purposes of and in connection with the election:—*Held*, following *Luke* v. *Perry*, 12 C. P. 424, that the contract of hiring was an executory one and that it came therefore within the terms of s. 131 of the Dominion Elections Act, which is incorporated with the North-West Territories Representation Act, by 57 & 58 V. c. 15, s. 10, and that the contract was therefore void in law, and the plaintiff could not recover. The plaintiff also sued the defendant on an account for horses and rigs furnished by one P., some of them to the defendant, others to the defendant's wife, and some to both of them, which account P. had assigned to the plaintiff. These horses and rigs were not clearly shewn to have been furnished in connection with the election, though the evidence led to a strong suspicion to that effect:—*Held*, that when the defendant seeks to rely upon provisions of the statute to avoid liability upon an executory contract alleged to have referred to or arisen out of an election, nothing should be intended in favour of such a defence, and it must clearly appear that such contract did refer to an election held under the Act. Evidence of ratification discussed. *Parslow* v. *Cochrane*, 4 Terr. L. R. 312.

Illegality — *Betting on race tracks — Agreement—Incorporated racing association with bookmaker — Criminal Code, ss. 227, 235 — Lawful bookmaking — Peripatetic bookmaker—Booth for payment of bets—Injunction.*] — Action to restrain defendants from making a contract with a bookmaker. By the terms of the contract the bookmaker was allowed to carry on his business on defendant's race track if he carried on his betting operations at no fixed spot, but kept moving around. He could pay his bets at a booth. Injunction refused as nothing illegal in such a contract. *Fraser* v. *Victoria*, 11 W. L. R. 499.

Immorality — Bawdy house—Part performance—*Locus pœnitentiæ*—Rescission before execution. *Perkins* v. *Jones* (N.W.T.), 1 W. L. R. 41.

Indemnity — *Consideration—Withdrawal of criminal charge — Invalidity of agreement.*]—A charge laid before a magistrate against a person for procuring from the plaintiff, by false pretences, the sum of $10, was, by direction of the magistrate withdrawn, in consideration of an agreement entered into between the plaintiff and the defendants, whereby the plaintiff was to withdraw from a certain syndicate and forfeit the $10 paid, the defendants indemnifying him against all liabilities of the syndicate. Judgment having been recovered against the plaintiff for a liability of the syndicate, he brought an action against the defendants for indemnity:—*Held*, that the agreement for the withdrawal of the criminal charge was void and could not be enforced, and that the plaintiff's action was not maintainable. *Keir* v. *Leeman*, 6 Q. B. 308, 9 Q. B. 371, specially considered. *Morgan* v. *McFee*, 18 O. L. R. 30, 13 O. W. R. 93, 14 Can. Crim. Cas. 308.

Intoxicating liquors—*Canada Temperance Act—Purchase by agent — Refusal of principal to pay.*] — The plaintiff agreed, subject to the general control and supervision of the defendant, to act as manager of the defendant's hotel, situate in the city of Moncton, where the Canada Temperance Act is in force. At the request of the defendant, the plaintiff purchased, in his own name, in the city of St. John, intoxicating liquor, to be supplied to the hotel guests and sold at the bar. There was no proof that the vendor knew that the Canada Temperance Act was in force in Moncton:—*Held*, that, having knowledge that the liquor was to be disposed of contrary to law, the plaintiff could not recover from the defendant on her promise, express or implied, to pay or indemnify him against payment for the liquor. *Wilkins* v. *Wallace*, 2 E. L. R. 460, 38 N. B. R. 80.

Lottery—*Recovery back of moneys paid —Statute.*]—The respondent, having obtained from the Lieutenant-Governor of the Province of Quebec, authorised to that effect by a statute of the legislature, the privilege of carrying on a lottery to assist a work recognised by the legislature as being a laudable and useful public work, delegated his powers to the appellant, on the condition that the latter should pay him $5,000 per year. The appellant carried on the lottery for two years, realising considerable profits, and during this time paid the respondent $10,000. The carrying on of the lottery having been declared illegal, the appellant sued to recover back the $10,000 which he had paid to the respondent. Both parties admitted the unconstitutionality of the statute

by virtue of which the lottery had been authorised:—*Held*, that the payment in question having been made voluntarily and not by mistake by the appellant, who had made considerable profits by virtue of his contract with the respondent, the appellant, who alleged the illegality of the contract, could not, the contract having been executed on both sides in good faith, recover the sums which he had so paid. *Brault* v. *L'Association St. Jean Baptiste*, 12 Que. K. B. 124. (Cf. 30 S. C. R. 598, 31 S. C. R. 172.)

See Beel 1901-5, col. 136.

Non-recovery back of money paid and cancellation of notes—*Impounding of notes.*]—The Court will not intervene, at the instance of a party to an illegal contract, to enable him to obtain relief from the exigencies thereof. — W., having been threatened with a criminal prosecution for having sexual intercourse with a young girl under 16 years of age, effected a settlement whereby cash payments were made and promissory notes given by him. On his death, he having in no way repudiated the settlement during his lifetime, his administrator brought an action for the recovery of the money paid and the cancellation of the notes: —*Held*, that the action was not maintainable, but the notes having been filed in Court, it was ordered that they, being illegal and void as against public policy, should remain on the files until further order. *Wood* v. *Adams*, 10 O. L. R. 631, 6 O. W. R. 407.

Oral agreement—*Proof of terms—Right to recover—Subsequent agreement in writing.*]—The defendant agreed to pay the plaintiff $150 as wages or compensation for his services on a fishing voyage, and afterwards persuaded him to sign articles for the purpose of inducing other men to join the vessel as sharemen:—*Held*, that the plaintiff was not debarred, by the fact of signing articles, from shewing that that was not the real contract made between himself and the defendant, but that it was made for another and different purpose.—*Per* Russell, J.—As the plaintiff made out his case on the oral and valid contract between himself and the defendant, without having to prove any fact shewing fraud or illegality, he must succeed on that contract. For the same reason the defendant must fail in his defence, which could not be made out without exposing an illegal transaction to which he was a party. *Smith* v. *Haughn*, 38 N. S. R. 153.

Performance in unlawful place—*Municipal regulations — By-laws — Music halls — Licensing.*] — *Cafés-chantants*—that is to say, establishments in which intoxicating liquors are sold and in which vocal or instrumental music, or both, are furnished with the object of attracting passers-by — being prohibited by the by-laws of the city of Montreal, a contract by which the services of a person have been retained to provide music in such a *café-chantant* is void, because it has for its object a thing prohibited by law, and, therefore, a musician who has been dismissed cannot maintain an action for wrongful dismissal. — 2. By-law No. 236 of the city of Montreal, which imposes a license fee of $50 a year upon museums, halls for concerts, dances, theatrical performances, and other amusements, does not apply to *cafés-chantants*, or drinking shops where music is given for the purpose of attracting passers-by, in such a way as to withdraw them from the prohibition of by-law No. 36 of the same city. *Morel* v. *Morel*, 19 Que. S. C. 123.

Prete-nom agreement — *Obligations of the mandator — Recourse of third parties against him.*]—A *prête-nom* agreement is not in itself illegal, and third parties have no recourse against the mandator unless he led them to believe that they had contracted with him in spite of the intervention of the *prête-nom*. *Lefebvre* v. *Massicotte* (1910), 38 Que. S. C. 249.

Promissory note — Illegal consideration—Five cases under BILLS OF EXCHANGE AND PROMISSORY NOTES, cols. 492 and 493.

Public morals — *Action involving indecent matter — Striking out objectionable causes of action—Judgment—Form of—Dismissal of action—Res judicata—Costs.*]—On the trial of an action containing three different causes of action, one of which was an action for moneys had and received, another for damages for assault and false imprisonment, and a third for damages for procuring the plaintiff to enter a house of prostitution, the Judge, after reading the plaintiff's examination for discovery, came to the conclusion that the evidence disclosed an illegal contract under which the defendants were to receive a part of the moneys obtained by the plaintiff while engaged in prostitution, and that the action involved the taking of an account in respect thereof, and was of an indecent character and unfit to be dealt with, and he dismissed it out of the Court of his own motion; the formal judgment stating that "this Court does of its own motion and without adjudicating as between the plaintiff and defendants on the matters in dispute between them, order that this action be dismissed out of this Court, with costs:" —*Held*, that the order dismissing the action would have precluded the plaintiff from again suing in respect of any of the causes of action included in the statement of claim, and that the plaintiff should have been allowed to prove her case in respect to those causes of action against which there was no objection; and that the respondent who supported the judgment on appeal must pay the costs of the appeal. *Guilbault* v. *Brothier*, 24 C. L. T. 342, 10 B. C. R. 449.

Sale of club charter—*Club license to sell liquor—Evasion of law—Failure of consideration — Declaration of nullity—Costs.*] —Letters patent of incorporation of a so-called club and a license to sell liquor issued to it, as such, when in reality an individual alone is interested in the matter, as lessee of the premises, purchaser of the furniture, fixtures and stock, and as sole beneficiary of the profits, the whole as a scheme to evade the law respecting the more expensive license and stricter regulations imposed on tavern-keepers, confer no rights that can be the lawful consideration of a contract. A sale, therefore, of any such pretended rights cannot be enforced, and no action will lie to recover the price thereof. The Courts, in dealing with such cases, will only declare the nullity of the proceedings had in viola-

tion of the law, and leave each party to pay his costs. *Bernier* v. *Dequoy*, 33 Que. S. C. 237.

Sale of gas—*Gas Inspection Act—Certificate of inspector—Posting up—Testing place — Penalties — Notice — Local inspector.*] —(1) Section 34 of the Gas Inspection Act, R. S. C. 1906, c. 87, only makes the sale of gas illegal after notice to the undertaker of the location of the testing place prescribed by the Department of Inland Revenue and until the connections specified in that section are made.—2. Section 44, requiring the posting up of the certificates of tests made by the inspector, does not become operative till s. 34 has been acted on and a testing place prescribed and notified by the undertaker.—3. The penalties provided for by ss. 59 and 60 for failure to procure and post up the certificates of tests required by s. 44 and for selling gas before connections have been made with the testing place, etc., are not incurred when s. 44 has not become operative by notification to the undertaker of the prescribing of a testing place.—*Per* Phippen, J.A.—Sections 34 and 44 are both subsidiary to s. 31, which limits the obligations therein imposed to undertakers "in any city, town, or place for which there is an inspector of gas," and the provisions of ss. 31 to 47 inclusive are not applicable to places for which there is no local inspector. *Carberry Gas Co.* v. *Hallett*, 8 W. L. R. 119, 17 Man. L. R. 525.

Sale of goods—Supplying liquor for sale in county where Canada Temperance Act in force—Principal and agent—Knowledge of principal. *Ross* v. *Coade*, 4 E. L. R. 51.

Sale of liquor—*Place of completion—Prohibited sale — Knowledge of vendor.*]—The plaintiffs, who carried on business in Glasgow, in Scotland, as whisky distillers, appointed sales agents at Halifax, N.S., with authority restricted to receiving and transmitting orders; the acceptance of such orders and forwarding of the goods being in the discretion of the plaintiffs' officers in Glasgow. The defendant, who carried on a trade in liquors in Nova Scotia, without the license required by the Liquor License Act, R. S. N. S. 1900, c. 100, placed orders, by written memoranda, with these agents, which orders were transmitted to the plaintiffs at Glasgow. On receipt of the orders, the plaintiffs shipped the whisky thereby ordered to the defendant, through common carriers at Glasgow, to be forwarded to him at the addresses he gave in Nova Scotia, and, after he had received the goods, passed drafts upon him for the price, which he accepted. The drafts were dishonoured at maturity, and, upon being sued for the amount, the defendant pleaded that the contract was void, having been entered into in Nova Scotia with the object of enabling him to make illicit re-sales of the whisky in a locality where the Canada Temperance Act was in force, and in contravention of the provisions of that Act, and of the local License Act prohibiting such sales on pain of fine and imprisonment: — *Held*, affirming the judgment appealed from, 37 N. S. R. 482, Idington, J., dissenting, that the contract was not completed until the acceptance of the orders and delivery of the goods to the defendant at Glasgow, in Scotland, and that the plaintiffs were entitled to recover, as there was no evidence to shew actual knowledge upon their part of any intention to contravene the statutes. *Bigelow* v. *Craigellachie-Glenlivet Distillery Co.*, 26 C. L. T. 186, 37 S. C. R. 55.

Simulation — *Nullity — Parties.*] — Simulation not being an absolute cause of nullity, a contract tainted with it may be declared void as against the person who invokes it, without bringing before Court the other contracting parties. *Desmarais* v. *Leveille* (1906), 14 Que. K. B. 382.

Statutory prohibition—*Penal statute — Wholesale purchase — Liquor license — Guarantee—Validity of—Forfeiture.*] — An agreement guaranteeing payment of the price of intoxicating liquors sold contrary to statutory prohibition is of no effect. The imposition of a penalty for the contravention of a statute avoids a contract entered into against the provisions of the statute. *Brown* v. *Moore*, 22 C. L. T. 196, 32 S. C. R. 93.

Threshing wheat — *Weights and Measures Act—Burden of proof—Voluntary payment—Appropriation of payments — Appeal —Question of fact.*]—The chief part of the plaintiff's claim was for the price of threshing oats and wheat for the defendant, and the defence was that the quantities were ascertained in a manner prohibited by the Weights and Measures Act, R. S. C. c. 104, and that therefore the plaintiff could not recover. It appeared from the evidence that the oats threshed had been measured by the bag, but it also appeared from a statement rendered to plaintiff by defendant that he had credited the plaintiff with the amount of his account for threshing the oats, and charged the plaintiff with certain items dated prior to any other credit to the plaintiff and amounting to about the same as the price of threshing the oats:—*Held*, following the rule in *Clayton's Case*, 1 Mer. 610, that the defendant had appropriated the amount of his charges in settlement of the price of threshing the oats, and, following *Hughes* v. *Chambers*, 14 Man. L. R. 163, 22 Occ. N. 333, that he could not now set off such amount against the price of threshing wheat. As to the threshing of the wheat, the bargain was that the defendant was to pay by car measurements, if it was clean, if not, then by bag measurement, neither of which modes would be legal under the statute; but the defendant in the statement rendered to the plaintiff had credited him with the threshing of 4,597.20 bushels of wheat at 5¼ cents per bushel. The defendant gave no evidence, and there was no express testimony that the wheat had been measured by the bag, but the trial Judge held that the proper inference was that the measurement had been by the bag, and he dismissed the plaintiff's claim:—*Held*, following *Hanbury* v. *Chambers*, 10 Man. L. R. 167, 14 Occ. N. 321, that the trial Judge was not bound to draw such inference in a case where it would enable the defendant to evade payment of an honest claim; that, as there was no conflict of testimony, the appellate Judge was free to follow his own views as to the conclusions to be drawn from the evidence; that the defence raised should not prevail

without strict proof of a violation of the Act; and that there was no such proof in this case. *Fox* v. *Allen*, 23 C. L. T. 28, 14 Man. L. R. 358.

Trade combination — *Agreement between dealers to maintain prices and prevent competition—Division of profits—Restraint of trade—Common law rights—Criminal Code, secs. 496 (b), 498 (d).*]—An agreement between the plaintiff and defendants, both dealers in junk, to prevent competition and to maintain fixed prices to be paid for junk, the tendency of which was to lower the prices of junk purchased from the public, and possibly to increase the prices of junk sold to the consumer, with a further provision for a division of profits, was *held*, not void at common law as being in restraint of trade.—*Collins* v. *Lock*, 4 App. Cas. 674, followed:—And *held*, not a violation of sec. 496 (*b*) of the Criminal Code.—*Rex* v. *Gage*, 18 Man. L. R. 175, 7 W. L. R. 564, followed:—And *held* (Richards, J.A., dissenting), that the agreement between the two dealers who practically monopolised the junk trade of Western Canada, was not an agreement to unduly prevent or lessen competition within the meaning of s. 498 (*d*) of the Code.—*Per* Howell, C.J.A., and Cameron, J.A., that when Parliament used the word "unduly" in describing the restraints of trade which thereby became criminal, the intention was not to make contracts unlawful which, at common law, would be enforced in the Courts between parties had the statute not been passed.—Review of the authorities. Judgment of Mathers, C.J.K.B., 14 W. L. R. 561, varied. *Shragge* v. *Weidman* (1910), 15 W. L. R. 616, 20 Man. L. R. 178.

Trade combination—*Putting in default—Obligation not to do—Annual penalty—How far exigible—Insolvency—Procedure—Contestation by curator for personal motives—Costs.*]—An agreement whereby a liquor dealer undertakes, for a period of nine years, to purchase his liquors and cigarettes from two particular merchants only, is not null as being a contract in restraint of trade.—It creates an obligation not to do (*i.e.*, to not buy elsewhere), and, consequently, the penalty of $500 per annum, the amount agreed upon as liquidated damages, becomes exigible from the date of a breach of the contract and without putting in default.—In the event of the insolvency of the promissor, the creditor cannot claim the penalty for a period longer than from the date of the breach to the date of the abandonment by the promissor of his estate.—The curator of an insolvent estate who contests a judicial proceeding for personal motives and in his own interest should, in case he is unsuccessful, be personally condemned to the costs. *Gervais* v. *Paquette & Turgeon* (1909), 37 Que. S. C. 501.

Trade union—*Combination in restraint of trade—Validity—Public policy—Penalty.*]—An agreement by employers, made in anticipation of a strike to be ordered by the union to which their workmen belong, to lock out any of the latter who are members of it, if the strike takes place, is valid, and does not constitute a combination in restraint of trade or of the freedom of contracting. Therefore, a further undertaking of the parties that any one of them who breaks the agreement shall forfeit to trustees a sum of $500, as unliquidated damages, is binding, and an action will lie by the trustees to recover that sum from any defaulting party. *Lefebvre* v. *Knott*, 32 Que. S. C. 441.

Uncertificated engineer—Steam Boilers Ordinance — Failure of action for wages. *Hardy* v. *Worchomoka* (N.W.T.) (1906), 3 W. L. R. 579.

Unduly lessening competition—*Trade Association—Criminal Code, sec. 520 (d)—"Cheque conditional deposit."*]—The Brantford Coal Importers' Association was an organization composed of all the coal dealers in the town of Brantford. They had agreed to sell coal at a fixed price, and for breach of such agreement were to forfeit $1 for each and every ton of coal so sold. Among other contracts put up at auction among the members of the association was one for the public schools of the city, and the defendant was declared the purchaser thereof at $212, and on the 19th June, 1901, he forwarded his cheque to plaintiff for that amount, it being marked "cheque conditional deposit;" the condition being referred to in the letter accompanying the cheque as follows: "That the contract for the city schools is to be awarded to me, and the same commenced and binding tenders received on the 20th day of the current month. Defendant was awarded the contract and was paid the contract price fixed by the association, but owing to a disagreement arising the defendant notified the bank not to pay the cheque. Action brought upon the cheque. Defence: 1. That the cheque was given conditionally. 2. That the Brantford Coal Importers' Association was an organisation coming within sec. 520 of the Criminal Code, and that the transactions out of which the alleged cause of action arose were illegal, and plaintiff could not recover. On appeal the trial judgment was reversed and defence held good, the Divisional Court finding that there was an agreement by the members of the association to "unduly lessen competition in the sale of coal," and that the association was an illegal one within sec. 520 of the Criminal Code, therefore plaintiff could not recover. *Hately* v. *Elliott*, 5 O. W. R. 261, 9 O. L. R. 185.

Unlawful consideration—*Public policy—Monopoly—Trade combination—Interest—Judicial notice—Laws of another province.*]—Action to recover advances with interest under an agreement which defeated the policy of the Government of Ontario seeking the cheap manufacture of binder twine, obtained a monopoly, and increased the price of its production. The defence was the general issue, breach of contract, and an incidental demand of damages for the breach. The judgment appealed from maintained the action and dismissed the incidental demand, giving the plaintiffs interest according to the terms of the contract:—*Held*, that, under the provisions of the Civil Code, the moneys so advanced could be recovered back, but that interest before action could not be allowed thereon, as the law merely requires that the parties should be replaced in the positions they respectively occupied before the illegal transactions took place; Taschereau and

Gwynne, JJ., dissenting. *Rolland* v. *La Caisse d'Economie de Notre-Dame de Quebec*, 24 S. C. R. 405, discussed, and *L'Association St. Jean Baptiste de Montreal* v. *Brault*, 30 S. C. R. 589, referred to:—*Held*, also, that laws of public order must be judicially noticed by the Court *ex proprio motu*:—*Held*, further, that, in the absence of any proof to the contrary, the laws of another province must be presumed to be similar. *Consumers' Cordage Co.* v. *Connolly*, 21 C. L. T. 331, 31 S. C. R. 244.

Usurious transactions—*Commission of five per cent. besides interest—Customary allowance for transacting business.*]—Where a merchant supplied goods, money, promissory notes, and other commercial instruments to country customers and where accounts, returns and settlements were made from time to time at their convenience with produce from the upper country, transferred by vessels and barges, the Privy Council—*Held*, that a commission of five per cent. on all advances besides interest, under the circumstances, was not an usurious transaction, but a customary allowance for the trouble and inconvenience of transacting the business. *Pollok* v. *Bradbury* (1853), C. R. 2, A. C. 46.

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11. NOVATION.

Acceptance of note of stranger on account of debt — *Receipt—Liability of debtor.*]—Intention to effect novation is not apparent from the fact that the note of a third party was accepted on account of the debt, where a receipt was given as follows: "Received from J. V. (the debtor) the note of M. S. & Sons for $160 at 30 days, on account of pony and buzz planer." In the event of the note not being paid at maturity the creditor retains his recourse against the debtor for the debt. *Cowan* v. *Vezina*, 26 Que. S. C. 7.

Consideration — Collateral promise — Oral evidence to alter writing—Costs. *Webb* v. *Ottawa Car Co.*, 1 O. W. R. 90, 2 O. W. 62.

Discharge of old contract — *Statute of Frauds — Breach of contract — Damages — Recovery of money paid.*] — 1. If the parties to a written contract enter orally into a new agreement to be substituted for it, such new agreement, although, by reason of the Statute of Frauds, it cannot be enforced, will have the effect of discharging and cancelling the written contract.—*Goss* v. *Lord Nugent*, 5 B. & Ad. 65; *Morgan* v. *Bain*, L. R. 10 C. P. 15, and *Ogle* v. *Lord Vane*, L. R. 3 Q. B. 272, followed.—2. In such case neither party can enforce the new agreement or recover damages as for a breach of the written contract.—3. Any money or other consideration, however, that may have been paid or given under the substituted agreement by one of the parties to the other may be recovered back or its value sued for by such party. *Clements* v. *Fairchild Co.*, 15 Man. L. R. 478, 1 W. L. R. 524.

Liability for benefit received.] — Plaintiff, a traveller for a commercial house prior to 1st September, 1906, continued in their employ until January, 1907, when defendants took over the firm's assets and liabilities as they stood on the 31st August, 1906. Plaintiff continued in the employ of defendants, who filled orders sent in by plaintiff. Defendants sent plaintiff a statement of orders taken by him from 1st September, 1906, including a balance of $65, then due him. When plaintiff quit the employ of defendants they disputed their liability for orders sent in by plaintiff prior to January, 1907:—*Held*, that there was a clear novation and substitution of the liability of the old firm by the new. The defendants received the benefit of plaintiff's work, recognised and adopted it by filling his orders, and should pay whatever under a reference is found due him. Judgment of Latchford, J., 9th March, 1909, affirmed. *McGregor* v. *Van Allan Co.* (1909), 14 O. W. R. 896, 1 O. W. N. 135.

Order to pay money — *Sub-contractor — Order on owner — Evidence — Bill of exchange.*]—T. was contractor for building a house and F. sub-contractor for the plumbing work. When F.'s work was done he obtained an order from T. on the owner in the following terms: "Please pay F. the sum of $705, and charge to my account on building, Lucknow street." F. took the order to the owner, who agreed to pay if the architect certified that the work had been performed. F. and T. saw the owner and architect together shortly after, and, on being informed by the latter that the account was proper and there were funds to pay it, the owner told F. that it would be all right and retained the order when F. went away. F. filed no mechanic's lien, but other sub-contractors did the next day, and T. assigned in insolvency. In an action by F. against the owner:—*Held*, Davies, J., dissenting, that there was a novation of the debt due from the owner to T.; that it was not merely an agreement by the owner to answer to F. for T.'s debt, nor was the order to be treated as a bill of exchange and accepted as such. *Farquhar* v. *Zwicker*, 41 S. C. R. 30, 6 E. L. R. 73.

Payment of wages — *Extra services — Acknowledgment — Company — Partnership — Authority of manager — Substitution of debtor.*]—Action for wages for work done by plaintiff as a miner. Plaintiff had worked for a society organised in France to mine in Alaska. Subsequently this society sold out to a company also organised in France:—*Held*, that there was no novation. The defendant company had not authorised its manager to assume payment of plaintiff's debt. Plaintiff given judgment for work done for the defendant company in 1907. He cannot collect for work done for the society in 1906. *Demesmay* v. *Society Miniere du Klondike*, 11 W. L. R. 377.

Presumption — *Proof—Conflict of evidence.*]—Novation will not be presumed, and, as the intention that it shall operate must be plain, it will not be held proved in a case in which there is a conflict of evidence. *Marcotte* v. *Limoges*, 33 Que. S. C. 510.

Substitution of third party—*Relief over.*]—A party, who is bound under a condition which has not been fulfilled, and whose

obligations have been assumed by a third party accepted by the plaintiff, cannot, if he is sued for non-execution of the contract which he has thus transferred, bring in *en garantie* the third person who has been substituted for him. *Veilleux* v. *Atlantic and Lake Superior Rw. Co.*, 5 Que. P. R. 290.

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12. Reformation of Contract.

Obvious error.] — Where the word "company" was used in a sub-contract for the construction of fencing for a railway in error for "Charlebois," the principal contractor, as clearly appeared, reformation of the contract was decreed. *Sinclair* v. *Preston*, 20 C. L. T. 359.

Above varied as to interest, 21 C. L. T. 97, 13 Man. L. R. 228.

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13. Statute of Frauds.

Absence of writing — *Novation.*]—M., who had agreed with the defendants and a number of other lumber manufacturers to drive down their logs for them, the defendants' contract being an oral one, arranged with the plaintiff to act for him; the obligation to drive the defendants' logs to continue to a named date, for which the plaintiff was to be paid a specified sum, and if M. did not then arrive and take over the drive, the plaintiff was to continue it and to be paid a specified sum per day for himself and those employed by him. M. did not arrive, and the drive was continued by the plaintiff. Subsequently, M. having some difficulty in paying his men, an oral agreement was entered into between M. and the defendants, whereby in consideration of M. assigning over to them the amounts due him by the defendants and other manufacturers, the defendants undertook to continue the drive and to pay the existing as well as the indebtedness thereafter to be incurred, the plaintiff being instructed and agreeing to continue the drive on these terms.—*Held*, by Robertson, J., that there was a new contract founded on new and substantial consideration, so that the Statute of Frauds did not apply. On appeal to a Divisional Court the judgment was affirmed, on the grounds (1) of novation, or (2), even if M.'s indebtedness still continued, the moneys coming to him having been assigned to the defendants upon their express promise to pay the indebtedness thereout, and the plaintiff having continued the drive on such terms, there was a binding obligation to pay him, and that in either view the Statute of Frauds did not apply. *Bailey* v. *Gillies*, 22 C. L. T. 289, 4 O. L. R. 182, 1 O. W. R. 325.

Agreement to give farm at death—*Consideration of taking care of deceased—Plaintiffs entered into possession—Equivocal effect of—Statute of Frauds—Part performance of contract—Parol evidence—Admissibility.*]—Plaintiffs brought action to enforce an alleged parol agreement between T. Elvin, deceased, and plaintiffs, that if they would come and live at his home and work his farm during his lifetime, he would give the plaintiff, Maggie Coulter (his niece), the farm in question. At trial the action was dismissed with costs.—Divisional Court *held*, that the circumstance of the plaintiffs being in possession of the farm of the deceased was not unequivocally referable to such an agreement as alleged by plaintiffs, and, therefore, was not necessarily evidence of any such contract. In explanation of such possession it was not necessary to suppose the existence of some other contract than the one entitling plaintiff George Coulter, to possession.—That inasmuch as the possession relied upon was capable of explanation, without reference to the alleged agreement, parol evidence was inadmissible to shew the existence of such an agreement, and that the Statute of Frauds was an effectual answer to the plaintiffs' claim. Action and appeal dismissed with costs. *Coulter* v. *Elvin* (1911), 18 O. W. R. 99, 2 O. W. N. 678.

Agreement to answer the debt or default of another—*Defence to action—Statute of Frauds, s. 5—Costs.*]—An action by plaintiffs against Williscroft, H. F. Murphy and J. E. Murphy, alleged to be trading as the Tobermory Lumber Co., and against said company and J. E. Murphy to recover $4,206.01, balance of price of certain timber sold by plaintiffs to Williscroft and H. F. Murphy. J. E. Murphy was not registered as a partner in Tobermory Lumber Co. Default judgment for $4,206.01 was entered against the company, J. E. Williscroft and H. F. Murphy. The issue was between plaintiffs and J. E. Murphy. He paid into Court $942 as in full of plaintiffs' claim against him, but plaintiffs claimed the whole balance of $4,206.01 on the ground that J. E. Murphy agreed to give in payment the joint promissory note in question, and would himself become directly responsible to plaintiffs for the price of the timber. In answer thereto defendant pleaded the Statute of Frauds.—Latchford, J., *held*, that plaintiffs were entitled to judgment against J. E. Murphy for $940.37, and their costs of action to the date of payment in and to have a charge therefor upon the fund in Court.—That the Statute of Frauds, s. 5, was a complete though dishonourable defence, and the action upon the issues other than those connected with the promissory note must be dismissed as against J. E. Murphy, but in the circumstances without costs. *Isle of Cows Hunt Club* v. *Williscroft* (1911), 18 O. W. R. 344, 2 O. W. N. 558.

Canadian Act 25 Geo. III., c. 2, s. 10 — *Code Civil Act, 1206 — Contract with Government — Supply of stone for canal — May be proved by parol evidence.*] — By the Canadian Act 25 Geo. III., c. 2, passed by the Legislature of Lower Canada, for regulating proceedings in the Courts of Justice, in Canada, it is enacted, that in proof of all facts concerning commercial matters, recourse should be had by the Courts of civil jurisprudence in the provinces, to the rules of evidence laid down by the laws of England:—*Held*, by the Judicial Committee, affirming the judgment of the Court of Appeals for Lower Canada,—That this Colonial Act revoked so much of

the Old French Law, which formerly prevailed in Canada, and was laid down in the *Ordonnance de Moulens*, passed in the year 1566, and subsequently altered by the *Ordonnance of 1667*, whereby parol evidence was excluded from the proof of all *contrats* or matters, exceeding the sum of 100 livres, except in the case of accident, or where there was a commencement in writing; and that the English law, as to the admission of parol evidence in commercial matters, was substituted. A contract entered into by persons in Canada with the Government Commissioner, to supply stone for making a canal, is a commercial matter, and is to be proved by the English law. An agreement entered into by a contractor to share in the profits of the undertaking, although the contract was not capable of being completed within a year, is not such an agreement, as by the Statute of Frauds, 29 Car. II., c. 3, s. 4, is required to be in writing, but may be proved by parol evidence. *McKay* v. *Rutherford* (1848), C. R. 1 A. C. 312.

Contract of service — *Performance within a year.*]—A verbal contract for service, under which the defendant was to receive "$700 a year, to be increased per year until it reached $1,000," is a contract not to be performed within a year, and is within the provisions of the Statute of Frauds. *Fairgrieve* v. *O'Mullin*, 40 N. S. R. 215.

Failure to state terms — *Nudum pactum—Conditions — Impossibility of performance.*]—The plaintiff, having recovered judgment for $542.50 against O'B., issued a garnishee order against the defendant, and an issue having been ordered the trial Judge held that the agreements between O'B. and the defendant, by virtue whereof the alleged indebtedness arose, did not comply with the Statute of Frauds, inasmuch as the parties had omitted to state therein the terms actually agreed upon, and decided the issue in favour of the defendant:—*Held*, on appeal, that the promise made by the defendant and now sought to be enforced against him was *nudum pactum*.—2. That O'B. and the defendant in reality came to an agreement in ignorance of the fact that its performance, in view of the conditions it was contingent upon, was impossible. *Manley* v. *Mackintosh*, 10 B. C. R. 84.

Interest in land — *Part performance—Evidence.*]—M. leased land to his two sons S. and W., of which 50 acres was to be in the sole tenancy of W. In an action by M. against S. for waste by cutting wood on the 50 acres, the defence set up was that by parol agreement, in consideration of S. conveying 100 acres of his land to W., he was to have a deed of the 50 acres, and having so conveyed to W., he had an equitable title in the latter. M. admitted the agreement, but denied that the land to be conveyed to S. was the 50 acres:—*Held, per* Nesbitt and Idington, JJ., that the conveyance to W. was a part performance of the parol agreement, and the Statute of Frauds was no answer to the defence. The majority of the Court held that, as the possession of the 50 acres was referable to the lease as well as to the parol agreement, part performance was not proved, and affirmed the judgment appealed from in favour of the plaintiff (37 N. S. Reps. 23) on this and other grounds. *Meisner* v. *Meisner*, 25 C. L. T. 101, 36 S. C. R. 34.

Master and servant—*Employment for an indefinite term—Damages.*]—A sub-contractor to employ a person as a salesman so long as the employer's contract with third persons might remain in force, that contract being terminable at any time, is not within the Statute of Frauds, for the sub-contract may or may not continue for a year. Such a sub-contract does not come within s. 5 of the Master and Servants Act, R. S. O. 1897 c. 157. The employers' contract came to an end by the voluntary dissolution of their firm:—*Held*, that this voluntary dissolution operated as a wrongful dismissal of the plaintiff under his sub-contract, and that, although the probable duration of the contract and consequently of his sub-contract would have been, apart from the dissolution of partnership, quite uncertain, he was entitled to substantial and not merely nominal damages. *Glenn* v. *Rudd*, 22 C. L. T. 113, 3 O. L. R. 422, 1 O. W. R. 116.

Memorandum — *Signature—Conflicting evidence.*] — Action for damages for breach of a contract for the delivery of flour. The writings relied on were: (1) paper signed by plaintiffs and addressed to defendants, to enter order for 2,000 barrels of flour and to have option for 3,000 barrels more with delivery as required. (2) The entry made in the contract book of the defendant in these words: "1904. Dec. 30. By 2,000 P. Rose $4.10—cash discount of one per cent." This appeared as one of a series of orders under heading on the page of Nasmith Co., and formed an item of an account which began in the book in 1899. On the fly sheet of the book was stamped the name of defendants with words in red ink above it, "New account, 1st June, 1902:"—*Held*, that the contract sued on by the plaintiffs was not proved against defendants according to the requirements of the Statute of Frauds. *Nasmith Co.* v. *Alexander Brown Milling and Elevator Co.*, 4 O. W. R. 451, 25 C. L. T. 38, 9 O. L. R. 21.

Oral agreement for use of roadway —*Part performance—Evidence — Unsigned draft of agreement.*] — Where the defendants' predecessors in title induced and allowed the plaintiff's predecessors in title to remove their house and fence and give up their land for the purpose of improving the entrance to the street in the way they wished, there was sufficient part performance to take an oral agreement for the use of a roadway, though relating to an interest in land, out of the Statute of Frauds; and unsigned drafts of such agreement containing alterations providing for the part maintenance of the way by the plaintiff's predecessors in title, which obligation is entirely disclaimed by the plaintiff, are not admissible in evidence where they were not shewn to the parties to the agreement when giving evidence, and no explanation as to them was sought from the parties. *Fairweather* v. *Lloyd*, 36 N. B. R. 548.

Oral agreement respecting land—Work and labour—Wages. *Hubley* v. *Hubley*, 4 E. L. R. 132.

Oral agreement to lease—Damages for breach. *McNellen* v. *Torrens*, 40 N. S. R. 626.

Oral promise—*Payment of debt — Consideration — Assignment of chose in action — Notice.*] — S., in consideration of B.'s giving him a confession of judgment and other security for a debt due by B. to S., gave B. an oral promise to pay two promissory notes of B. in favour of A. B. assigned his right of action against S. to the plaintiff, the executrix of A.:—*Held*, that the promise by S. to pay the notes was an original promise, founded on a new consideration, and was not a promise to pay the debt of another within the Statute of Frauds, and need not be in writing. That the assignment was good under the Supreme Court Act, 1897, s. 150 (N.B.), and the plaintiff might bring an action without notice of the assignment before action brought. *Allen* v. *Shehyn*, 35 N. B. R. 635.

Part performance—*Damages for breach —Debtor and creditor — Judgment — Agreement for settlement between parties—Consideration — Promissory note — Subsequent parol agreement — Enforcement—Statute of Frauds.*] — Action for specific performance and damages for breach of contract:—*Held*, that under the evidence the agreement as alleged in the statement of claim, had been made and entered into between the parties, but as agreement not in writing, under Statute of Frauds, action must fail. Payment of a portion of the purchase money cannot be treated as part performance. *Gass* v. *Dickie*, 7 E. L. R. 104.

Promise to become answerable for debt of another — *Form of action — Pleading.*]—In an action against the defendants M. and G. for work done and materials provided by the plaintiff for the defendants, at the defendants' request, the evidence shewed that the defendant G. entered into a contract with the defendant M. for the building of a house, and that the defendant M. employed the plaintiff to do the work of painting and glazing. M. failed to make payments to the plaintiff as agreed, and the plaintiff thereupon went to G., who told him to go ahead and he would see him paid:—*Held*, that, as there was no evidence to shew that the defendant M. was to be discharged, the promise made by the defendant G. was within s. 4 of the Statute of Frauds, and, not having been made in writing, could not be enforced:—*Held*, that, in view of the form of action, there was no necessity for pleading the statute, and that judgment was rightly given in favour of the defendant G. *Boorstein* v. *Moffatt*, 36 N. S. R. 81.

Promise to convey land on marriage —Specific performance — Statute of Frauds —Intended marriage—Postponement on account of insanity of one of the parties—Part performance. *Freel* v. *Royal*, 10 O. W. R. 258.

Promise to pay debt of another—*Extension of time—Promise not in writing—Liability of debtor continuing—Guaranty—Statute of Frauds—Guarantor a shareholder in company-debtor.*]—The plaintiff sought to make the defendant F. liable for the price of goods supplied by the plaintiff to the other defendants, who were a firm composed of the sons of F. and an incorporated company in which his sons were interested and in which F. himself was a shareholder. The plaintiff alleged that F. offered, if the plaintiff would extend the time for the payment of sums due by the firm and the company and make further advances of goods to F. for the purpose of carrying on the businesses, to pay the amounts due to the plaintiff; that the plaintiff accepted the offer, and extended the time, and advanced goods to F.; and that it was also agreed that, if F. should fail to pay the plaintiff, the firm and company should remain liable. There was no writing setting forth any obligation of F.; the plaintiff's case depended on two conversations:—*Held*, that, as the original debtors remained liable, it was not a case of novation; if there was any contract by F., it was merely an oral one to answer for the present and future debts of another; the fact that F. was a large shareholder in the company did not alter the case; and there was no ground upon which F. could be held liable. *Shea* v. *Lindsay* (1910), 15 W. L. R. 362, 20 Man. L. R. 208.

Sale and delivery of mining stock —*Evidence—Statute of Frauds—Conflict of testimony.*]—Action to compel defendants to deliver certain mining stock. As a conflict of evidence, action dismissed. Opinion expressed that 17th section of Statute of Frauds ought to be amended to cover sales of stock other than on stock exchange. *Pitt* v. *Warren*, 13 O. W. R. 655.

Trust—*Interest in mining areas—Sale by trustee — Recovery of proceeds of sale — Agreement in writing—Part performance—Acts referable to contract—Evidence.*]—M. transferred to C. a portion of an interest in mining areas, which he alleged was held in trust for him by the defendant. In an action by C. claiming a share in the proceeds of the sale thereof, no deed or note in writing of the assignment was produced, as required by s. 4 of the Nova Scotia Statute of Frauds, and there was no evidence that, prior to the assignment, there had been such a conversion of the interest as would take away its character as real estate:—*Held*, that the subject of the alleged assignment was an interest in lands within the meaning of the Statute of Frauds, and not merely an interest in the proceeds of the sale, as distinguished from an interest in the arrears themselves, and, consequently, that the plaintiff could not recover on account of failure to comply with that statute.—It was shewn that, on settling with interested persons, the defendant had given M. a bond for $500 as his share of what he had received on the sale of the areas:—*Held*, that, as this act was not unequivocally and in its own nature referable to some dealing with the mining areas alleged to have been the subject of the agreement, it could not have the effect of taking the case out of the operation of the Statute of Frauds. *Maddison* v. *Alderson*, 8 App. Cas. 467, referred to. Judgment appealed from, 41 N. S. R. 110, reversed. *McNeil* v. *Corbett*, 39 S. C. R. 608.

14. Work, Labour and Services.

Accidental destruction of product of work before completion — *Liability for loss.*]—When work is undertaken by contract or by estimate and bargain, and the articles produced by the work are destroyed by accident before completion and delivery to the employer, the loss is that of the workman or contractor. *Shallow* v. *Lessard*, 14 Que. K. B. 292.

Action for price of work—*Plaintiff contracting in partnership name—Failure to register declaration—Effect on contract—Penalty—Partnership Act.*]—The plaintiff sued the defendant for a balance due on a printing contract. The plaintiff carried on business under the name of the Victoria Printing and Publishing Company, during the term of the contract, until after his action was launched, and in excess of a period of three months, without having complied with the provisions of ss. 74 and 75 of the Partnership Act, which require (s. 74) every person trading alone under a firm or company name implying a plurality of partners, to file a declaration to that effect with the registrar of the County Court of the county in which the business is being conducted, and (s. 75) that such declaration shall contain certain particulars and be filed within three months of the adoption of such firm or company name. The defendant contended that the action was barred by his non-compliance with ss. 75, 75, and 76, and that he therefore could not enforce the contract:—*Held*, that while the plaintiff came within the wording of the statute, and became liable to the penalty provided for not registering, yet the penalty is imposed for something not contemplated by the contract in this case, and he was therefore entitled to recover. *Smith* v. *Finch*, 12 B. C. R. 186, 3 W. L. R. 476.

Action for wages—Miners' Lien Ordinance—Contest as to whether plaintiff working for wages or under lay agreement—Conflict of evidence—Perjury—Weight of evidence—Costs. *Gleason* v. *Garbutt* (Y.T.), 6 W. L. R. 418.

Advertising for publication — *Action for services performed—Evidence as to services, salary and commission—Costs.*]—Plaintiff brought action to recover $2,802.28 as a balance due for salary and commission on advertising secured by him for defendants' publication, and for services in connection with writing for said publication and for other work done for defendants.—Britton, J., *held*, that the contract was established by the evidence and gave plaintiff judgment for $500, without costs. *McPhillips* v. *I. O. F.* (1910), 16 O. W. R. 214, 1 O. W. N. 895.

Agreement to work adjoining homesteads jointly — Partnership—Goods purchased—Account—Counterclaim. *Furlong* v. *Thomas* (N.W.T.), 2 W. L. R. 188.

Amount of remuneration—Report of referee—Appeal—Costs. *Nicholson* v. *Folinsbee*, 11 O. W. R. 813.

Appliances for work—*Use of by contractor—Tacit permission—Injury by defects in—Action against contractor—Relief over against owner—Evidence.*] — A contractor who undertakes a work at a fixed price, by a contract containing no stipulation as to the construction of scaffolds necessary for such work, although such scaffolds have been previously erected by the owner for use in other works being executed at the same time, is considered to have contracted with the tacit understanding that he may use the scaffolds, especially if he makes use of them with the knowledge and approval of the owner.—Therefore, if, in consequence of defects in the construction of such scaffolds, an accident happens, the contractor, being sued on account of injuries sustained thereby, has a right to call upon the owner of the scaffolds for relief over.—2. The costs of the scaffolds as compared with the contract price, as well as the uselessness of having new scaffolds, are properly the subject of evidence in such an action. *Tardivel* v. *Fabrique de St. Jean Deschaillons*, 13 Que. K. B. 9.

Assignment—Payment for work done—Estimates—"Moneys due"—Moneys retained as guarantee—Moneys payable to contractor—Claims of lien-holders, assignees, and creditors—Priorities — Marshalling. *Re Bunyan and Canadian Pacific Ry. Co.*, 5 O. W. R. 242.

Author and publisher — *Contract to write life of Wm. Lyon Mackenzie — Payment for writing—Refusal to publish — Action to recover manuscript on return of money paid.*]—The plaintiff, an author, of the city of Ottawa, brought action against the defendants, publishers of the city of Toronto, for the recovery of the manuscript of a book entitled "Life of William Lyon Mackenzie," which he alleges was delivered to the defendants pursuant to a contract between plaintiff and defendants, and which was to form one book in the series of books called the "Makers of Canada," and to pay him damages for detention of same and non-publication of said book. At the trial before Clute, J., on June 16, 1909, he directed that the contract in question in the action should be rescinded and that the defendants should deliver to the plaintiff the manuscript, "The Life of William Lyon Mackenzie," in question, upon the plaintiff repaying to the defendants the $500 by him received, and ordered the defendants to pay plaintiff costs of action. Court of Appeal dismissed the defendants' appeal with costs. Moss, C.J.O., dissenting. *Le Sueur* v. *Morang* (1910), 15 O. W. R. 705, 20 O. L. R. 594.

Authorisation — *Performance—Benefit—Implied engagement to pay.*]—When work is performed in pursuance of a writing, which is on its face only a simple authorisation to do it, without promise, or engagement, the obligation of the signatory to pay the value thereof, can be deducted from the fact that the work was necessary to him and profitable to the extent of it. *Graham* v. *Corona Hotel Co.*, 35 Que. S. C. 217.

Boat built by defendant for plaintiff—*Dispute as to price—Refusal of defendant to deliver boat—Action for detention—Counterclaim for extras and ground rent—Damages.*]—Action for damages for detention of plaintiff's launch, which was built by defendant:—*Held*, that defendant having been paid agreed amount was wrong in detaining

the boat, and damages allowed plaintiff. The fact that the boat was built in defendant's back yard gives him no claim to ground rent. *Allan* v. *McEachern*, 12 W. L. R. 646.

Bond to be given by contractor to school corporation—*Refusal to accept—Compliance with contract—Form of bond—Misnomer of corporation—Irregularity—Objection not taken before action — Implied agreement to let the contractor do the work—Breach—Damages—Loss of profit—Liabilities incurred in preparation for work.*]—The plaintiffs entered into a contract with the defendants under the name of "Estevan School Board of Estevan" for the construction by the plaintiffs of a school building for the Estevan School District No. 257, according to plans and specifications incorporated into the contract, which required that the contractor should "give a surety bond equal to the amount of his contract." The contract provided for a bond to be given to the corporation in the sum of $5,000. The plaintiff filed a bond for $5,000, but the obligees were named as "the Estevan School Board of Estevan," while the proper name of the defendants was "the Board of Trustees for the Estevan School District No. 257 of the North-West Territories." The bond was not objected to on this ground by the defendants before action; but the defendants insisted that the bond should be that of a bonding company, which the contract did not call for. The plaintiffs did not furnish another bond, but, relying on the one they had furnished, asked to be allowed to proceed with the work. The defendants insisted that another bond should be filed or that the contract should be cancelled. The plaintiffs then brought this action for damages for breach of the contract:—*Held*, that, in order to succeed, the plaintiffs must prove that the bond furnished by them was in compliance with the terms of the contract, and that, having furnished the requisite bond, they were prevented from performing the contract by the action of the defendants.—2. That the defendants' objection to the bond because it was not that of a bonding company was untenable.—3. That the irregularity of describing the defendants by the name of "the Estevan School Board of Estevan" did not render the bond unenforceable, and did not invalidate it, the name of the obligees in the bond being the same as that of the defendants in the contract, and the objection not having been taken before action. — 4. That, upon the evidence, the plaintiffs were prevented by the action of the defendants from carrying out their contract. Where a contractor enters into a contract with an owner of land to erect for him a building thereon, there is an implied agreement on the part of the owner to let the contractor do the work and to enter upon the land for that purpose. The plaintiffs were entitled, by the conduct of the defendants, to treat the contract as at an end except as regards damages for its breach.—5. That the plaintiffs were entitled to recover as damages what they had lost by the act of the defendants, *i.e.*, loss of the profit they would have made on the construction of the school-house and loss suffered by incurring liabilities in preparation for its construction.—Judgment of Johnstone, J., 13 W. L. R. 270, reversed. *Greenwood* v. *Estevan School Trustees* (1910), 15 W. L. R. 568. Sask. L. R.

Breach—Refusal to allow contractor to complete—Construction of contract — Payment—Default—Damages. *Williams* v. *Alpena Oil and Gas Co.*, 6 O. W. R. 410.

Breach—Wrongfully preventing contractor from completing — Delay — Damages. *Reiner* v. *Ross*, 6 O. W. R. 25.

Breach by contractors—Completion of work by employers—Notice — Assent—Reasonable expenditure—Recovery — Condition precedent. *Toronto Harbour Commissioners* v. *Sand and Dredging*, 2 O. W. R. 1178.

Bridge built for municipal corporation — Contract for day labour—Counterclaim for breaches of warranty—Recovery by both parties—Costs. *Riches* v. *Town of Wolseley* (N.W.T.), 6 W. L. R. 372.

Building ditch to carry water to defendants' mining property — Time of completion—Delay—Waiver—Extra work—Acceptance—Payment — Tender — Counterclaim—Damages—Accounts — Reference—Costs. *Bannerman* v. *Detroit Yukon Mining Co.* (Y.T.), 6 W. L. R. 704, 8 W. L. R. 714.

Building a railway—*Non-fulfilment of contract caused death of third party.*]—Plaintiff brought action to recover $5,655.45 balance alleged to be due on a contract to build a railway for defendants. Defendants pleaded that under the agreement it was the duty of plaintiff to fill the narrow places between the rails at frogs, guard rails, and switches with standard wooden blocks, and that, by reason of plaintiff failing so to do, one Clarke had his foot caught in a frog and was run over and killed and the defendants had to pay his legal representatives $5,250. Defendants paid into Court $405.45 as a balance due plaintiff on their contract.—Boyd, C., held (15 O. W. R. 151), that the action should be dismissed with costs, the money in Court sought to impound it to answer costs.—Court of Appeal reversed above judgment on ground that there was no liability upon plaintiffs to the Can. Pac. Rw. Co. for injury done to that company's servants. Judgment entered for amount of plaintiff's claim with costs. *MacDonald* v. *Walkerton & Lucknow Rw. Co.* (1910), 16 O. W. R. 558, 1 O. W. N. 967.

Certificate—*Condition precedent — Mechanic's lien.*]—The plaintiff agreed with S. to do tunnelling in mineral claims in which S. and McL. were interested, and the agreement was contained in correspondence part of which read: "I'll pay you on the completion of each 80 feet of tunnelling. All you need to do is to have McL. to certify that you have done the work." McL. did not give a certificate. In an action by the plaintiff to enforce a mechanic's lien:—*Held*, that the obtaining of the certificate was a condition precedent to the plaintiff's right to recover. *Leroy* v. *Smith*, 22 C. L. T. 72, 8 B. C. R. 293.

Condition precedent—*Right of action.*]—In a contract for the construction of works, it was provided that the works should be fully completed at a certain time and that no money should be payable to the contractors until the whole of the works were completed. In an action by the contractors for the full

amount of the contract price, the trial Judge refused leave to amend the claim by adding a count for *quantum meruit;* found that the works were still incomplete at the time of action; but entered judgment in favour of the plaintiffs for a portion of the contract price, with nine-tenths of the costs. The defendant alone appealed from this decision, and the judgment was affirmed by the Court of Review: — *Held*, reversing the judgment appealed from, that, as the whole of the works had not been completed at the time of the institution of the action, the condition precedent to payment had not been accomplished, and the plaintiffs had no right of action under the contract. *Whiting* v. *Blondin*, 24 C. L. T. 203, 34 S. C. R. 453.

Construction of sewer—*Action upon—Substituted contract—Evidence as to—Failure to prove substituted contract—Action dismissed.*]—Plaintiff brought action to recover $421.29 for work done in construction of a sewer in town of Sandwich. At trial the action was dismissed with costs.—Divisional Court *held*, that plaintiff had failed to establish the existence of any substituted contract, therefore, the action and appeal should be dismissed with costs. *Drake* v. *Cadwell* (1910), 17 O. W. R. 539, 2 O. W. N. 282.

Cutting cord wood—*Acceptance of part—Effect of—Measurement—Compliance with contract—Special conditions—Knowledge of contractor.*]—Action for contract price for cutting wood and for work done for defendants—*Held*, (1) that plaintiffs were not notified by defendant that the wood was specially required for a four-foot boiler; (2) that even if some of the wood should exceed four feet by a few inches that would not vitiate the contract; (3) that the wood was reasonable cord wood; (4) that defendant's acceptance of part, and his presence while the wood was being cut, binds him to take the balance; (5) that the making of the road was not part of the contract. Judgment for plaintiffs for the amount claimed. *Ester* v. *Wilson*, 11 W. L. R. 407.

Dam and power house *built for municipal corporation—Defective work—Dismissal of contractor.*]—Action for balance of contract price of work done by plaintiff for defendants. Counterclaim for damages for delay, defective work, etc. Defendants' engineer dismissed plaintiff. Plaintiff held not liable for damages for non-completion within required time. Amount of work done ascertained and judgment accordingly. *Winger* v. *Streetsville* (1909), 13 O. W. R. 635.
Affirmed, 14 O. W. R. 216.

Damages for delay—*Liquidated damages or penalty—Part performance—Useful occupation—Extras—Time.*]—Where damages or a penalty have been stipulated in advance for delay in the completion of a contract for work, the party for whom the work was done is entitled to recover such sum, without being obliged to prove the actual amount of damage suffered,—the object of the clause being to obviate the necessity of determining the amount of the damages by an action at law or expertise.—2. A contractor, restricted as to time for the execution of a contract, who undertakes extra work in connection with the same contract, without stipulating for additional time, is not relieved from responsibility for the penalty or damages fixed by the contract for delay in the completion of the work.—3. Work is not "performed in part," within the meaning of Art. 1076, C. C., where the owner cannot have useful occupation of the portion completed. *McDonald* v. *Hutchins*, 12 Que. K. B. 499.

Damages resulting from their non-execution—*Set-off — Contracts with penal clause—Legal warranty—Work done according to owner's plan—Acceptance of the work and its effect upon the warranty.*]—Damages resulting from the non-execution of a contract are a set-off against the price agreed upon, operations having to do with one and the same contract being parts of one and the same account of which the final balance determines the obligations and rights of the parties. (Cf. *Ottawa Northern & Western Ry. Co.* v. *Dom. Bridge Co.*, 14 Que. K. B. 197.—A contractor under penalty for work connected with his trade or profession guarantees that it will be sufficient for the purpose for which it is to be used, although he may have done such work according to the plan supplied and directions given by the proprietor. — Notwithstanding his final acceptance of the work, the proprietor has a remedy which exists during thirty years from the time defects in the work commence to shew themselves.—The contractor who undertakes to do certain repairs to a steamboat is responsible for the damages caused resulting from the non-execution of the work and consisting in: (*a*) the cost of temporary repairs, including the loss sustained by the delay in effecting them; (*b*) the loss of profit which the boat would have earned if it had been properly repaired; (*c*) the cost of the work required to put her in good condition. —The loss resulting from delay in fostering trade cannot be included in the damages, such loss not being immediate and direct. *Chateauguay & Beauharnois Nav. Co.* v. *Ponthriand Co.* (1909), 37 Que. S. C. 392. Pending in Review.

Decoration of house.]—The plaintiffs brought action for $2,364.55, balance alleged to be due for work done and materials supplied to defendants in the erection of a house in St. Catharines. Defendant denied that the work was well done and refused to pay: —*Held*, that the work had been done in accord with what had been contracted for. Judgment for $2,100 and costs. *Thornton-Smith Co.* v. *Woodruff* (1909), 14 O. W. R. 84; affirmed, *Ib.* 691, 1 O. W. N. 45.

Delegation of payment—Revocation of authority—Contract for construction of public works for Government. *Bank of Ottawa* v. *Hood*, 42 S. C. R. 231.

Dispute as to extent of work—*Evidence—Contract prepared by defendants, but not executed.*]—In an action to recover payment for excavating work done by the plaintiffs for the defendants, the matter in dispute was as to what work the plaintiffs agreed to do. There was no written contract signed by the parties, but a document was submitted by the defendants to the plaintiffs, which the defendants afterwards repudiated, but which the plaintiffs said contained the true agreement except as to one point. This document was

not signed:—*Held*, nevertheless, that it was evidence, as far as it went, of what the agreement was, and was clearly evidence of the work which the plaintiffs had figured on and agreed to do, and the defendants were bound by it; and, upon the footing of this document, and making certain charges and deductions, in accordance with the evidence, the plaintiffs were entitled to recover $836.15. *Dolmer* v. *Sharpe* (1910), 15 W. L. R. 597, Man. L. R.

Drainage work—*Municipal corporation—Progress certificate of engineer—Action by contractors to recover moneys due under—Assignment of contract — Recognition by corporation — Non-completion of work by time specified.*] — A contract for drainage work stipulated that defendants would not recognize any assignment of the contract. Plaintiff and another firm were the contractors, and shortly after work was commenced, the latter assigned their interest to the plaintiff:—*Held*, that an assignment of the contract was not prohibited, and defendants were not to be prejudiced by an assignment and need not recognise it. The firm therefore were not necessary parties to this action. There was also an express stipulation as to a time limit for finishing the contract, but the evidence shewed waiver of this by the defendants. Damages recovered against the defendants by a third party could not be set off because they arose through fault of defendants' engineer, not through plaintiff's fault. *Barrett Brothers* v. *Township of Cornwall*, 12 O. W. R. 970.

Drainage work—Tender based on estimates of engineer—Mistake as to measurements and quantity of work to be done—Contractor declining to proceed unless paid for extra work — Contract held not binding. *Township of McKillop* v. *Pidgeon and Foley*, 11 O. W. R. 401.

Drilling a well.]—Plaintiffs drilled a well for water, on a farm owned by defendants, for the purpose of their charity work. Defendants contended that plaintiffs agreed to find water in three or four days, or to get no other pay than board for men and fuel for engine. The jury found this was not a condition and that the agreement was as stated by plaintiffs. Plaintiffs claimed $308 for drilling, and $6 for pipe supplied:—*Held*, at trial, that the contract was not valid and binding upon defendants, as it was beyond the scope of the authority of Sister Demers, the procurator-general, who had entered into the contract, and it not being in writing, and not under the corporate seal of defendants, the action should be dismissed, without costs. Divisional Court reversed above decision and entered judgment for plaintiff for $308 and costs. Judgment of Britton, J., 15 O. W. R. 315, reversed. *Campbell* v. *Community General Hospital* (1910), 15 O. W. R. 529, 20 O. L. R. 467, 1 O. W. N. 529.

Effect of contract — *Findings of trial Judge—Appreciation of evidence—Reversal on appeal.*]—In a dispute as to the nature and effect of a contract, the trial Judge, on his view as to the weight of evidence, found the facts in favour of the plaintiff, and gave judgment accordingly. His decision was reversed by a majority of the Court *in banco*, and the action was dismissed with costs:—*Held*, *per* Idington, Maclennan, and Duff, JJ., reversing the decision of the full Court, that the findings of the trial Judge, who had seen and heard the witnesses, should not have been reversed.—Fitzpatrick, C.J., and Davies, J., considered that the trial Judge had not made his findings as the result of conclusions arrived at by him, having regard to the conduct and appearance of the witnesses in giving their evidence; and, on their view of the conflicting testimony, were of the opinion that the full Court was right in reversing the judgment at the trial, and that the appeal ought to be dismissed.—Judgment in 1 Alta. L. R. 441, 8 W. L. R. 143, reversed. *Hayes* v. *Day*, 41 S. C. R. 134.

Elevator for building—*Destruction by fire before completion—Acceptance by insuring and receipt of insurance money—Interest—Pleading.*]—The plaintiffs were prevented from completing their contract to put an elevator into the defendants' building by a fire which destroyed the building and the partly completed elevator. The defendants were not in any way responsible for the fire. The second instalment of the contract price was to be paid when the "machine" was in place, but the "machine" had not been put in its place, although its parts had been assembled in the building: — *Held*, that the plaintiffs could not recover such second instalment or anything further under the contract. *Fairchild* v. *Rustin*, 39 S. C. R. 274, and *Ross* v. *Moon*, 17 Man. L. R. 24, followed.—The plaintiffs claimed in the alternative that they were entitled to recover the whole price of the elevator *quantum meruit*, because the defendants had insured it for its full value, and had collected and received the full amount of the insurance, having included the value of the elevator in their proofs of loss sent in to the insurance companies, and should, therefore, be deemed to have accepted it. It appeared, however, that the defendants had left the placing of the insurance upon their property in the hands of their agent, and had not instructed him to insure the elevator, and were not aware, when their proofs of the loss were made, that the elevator had been so included, and that their total loss was much in excess of the total insurance:—*Held*, that the defendants, having paid $1,400 on the elevator, had an insurable interest in it and a right to receive the insurance money, and that what they had done in connection with the insurance did not constitute an acceptance of the elevator.—Interest is not recoverable unless a case for its allowance is made by the statement of claim; but, if such case is made, interest may be allowed under the prayer for general relief. *Fensom* v. *Bulman*, 7 W. L. R. 134, 17 Man. L. R. 309.

Evidence — *Abandonment of contract—New contract — Quantum meruit—Contract price—Reasonable worth of work.*]—In an action to recover the value of work done for the defendant by the plaintiff in getting out ties, under a contract in writing, it was *held*, upon the evidence, that the plaintiff acquiesced in and agreed to an altered arrangement by which he was to place the ties in a place other than originally agreed upon; that the old contract was abandoned, and

nothing more than a new implied contract was created, under which the plaintiff would be entitled to receive what his work was reasonably worth: and, that being so, the old contract price was not necessarily to be taken as an unalterable basis of arriving at the value of the work done, but only as one element in arriving at an estimate; and the Court, upon the evidence, determined what it was reasonably worth to place the ties at the place designated in the contract as altered, and gave judgment for the plaintiff for the amount so found.—Judgment of Beck, J., affirmed. *Vanscoyoc* v. *Simons* (1910), 13 W. L. R. 125.

Evidence to vary inadmissible.]—In an action for breach of a written contract for work of classified grades, at stated prices per grade, parol testimony that by verbal agreement, at the time of the contract, a specified quantity of work, viz., enough to employ a given number of men, was to be supplied, is inadmissible as tending to vary the terms of a valid written instrument. The party to a contract in whose hands a deposit is made as guaranty of due performance, will, upon proof of a breach and of damage caused thereby to the amount of the deposit, be awarded the ownership of the same. *Iroyer* v. *Elkin & Co.*, 37 Que. S. C. 154.

"Excavating" — Evidence of custom—Computation of extent of work done. *Kennedy* v. *Hartman*, 12 O. W. R. 795.

Failure to complete — Employment of person to finish work—Counterclaim—Damages for bad work. *Klugman* v. *Mitchell* (N. W. T.), 2 W. L. R. 522.

Faulty work—*Extras — Dismissal.*] — On appeal by the defendants from the judgment of the Court of Appeal in *Metallic Roofing Co. of Canada* v. *City of Toronto*, 6 O. W. R. 656, the Supreme Court of Canada *held*, that the plaintiffs could not recover for extras, as the term of the contract in respect thereto had not been observed. It was held, however, that the plaintiffs were entitled to damages for wrongful dismissal, and the judgment below was varied by directing that the reference should include such damages. No costs of the appeal were given. *City of Toronto* v. *Metallic Roofing Co. of Canada*, 37 S. C. R. 692.

Hauling, agreement to do, as required to amount of indebtedness—Refusal to perform — Damages. *Clark* v. *Murray*, 3 E. L. R. 277.

Imperfect workmanship — *Damages for.*]—He who enters into a contract containing a penalty clause is liable for the damages arising from his imperfect, useless or harmful discharge of his obligations, in other words, from his poor workmanship, and no antecedent putting in default is necessary to have the contractor ordered to do the work over again. *Vermette* v. *Parent* (1910), 20 Que. K. B. 156.

Inexecution of contract—*Damages——Set-off—Inscription in law—C. C. P. 191; C. C. 1065.*]—In an action for work done in virtue of a contract, the defendant may legally plead as set-off the damages resulting to him by the inexecution of the same contract by the other party. *R. & O. Nav. Co.* v. *Pontbriand Company, Limited*, 11 Que. P. R. 98.

Installation of heating plant in house—Assignment of contract by contractor—Consent of owner—Substantial completion of work — Acceptance — Guaranty — Temperature — Compliance with contract — Extras—Breach of contract — Counterclaim —Damages. *Regina Heating and Plumbing Co.* v. *Gillespie* (Sask.), 8 W. L. R. 93.

Labour and materials—Failure to complete to satisfaction of defendants—Adoption of work and materials—Costs. *Smith* v. *Toronto General Hospital Trustees*, 6 O. W. R. 999.

Lease of work—*Execution of same — Acceptance.*]—A contractor has no right of action of a contract of lease of work if the work which he undertook to do has not been satisfactorily completed, or accepted by the proprietor. *Hinkell* v. *Canadian Country Club*, 16 R. L., n. s. 204.

Logs cut by saw-miller — Non-compliance with contract—Wrong dimensions—Knowledge of owners — Acceptance — Passing through customs—Equivocal acts. *Wood Bros.* v. *Western Commission Co.*, 12 O. W. R. 680.

Maintenance of deceased person — Cheque on bank—Arrangement that cheque be cashed after death—Absence of fraud or undue influence—Enforcement against estate in hands of executors — Improvidence — Lack of independent advice—Costs. *Fowler* v. *Robson*, 11 O. W. R. 480.

Making specific article — Action for price. *Selby Youlden Co.* v. *Johnston* (1910), 1 O. W. N. 436.

Money advanced to purchase apples — *Loss on season's dealings — Acknowledgment of debit balance—Written promise to "work-off" debt—Refusal to work—Action on acknowledgment.*]—Plaintiff, the Canadian representative of certain British commission merchants, brought action to recover $4,963.25, balance alleged to be due by defendant, on account of advances made by plaintiff for the purchase of apples. Defendant signed an acknowledgment admitting a balance at his debit of $4,153.25. The acknowledgment did not state that the debt was not to be paid by defendant, but only that it was to be discharged by defendant working for the houses represented by plaintiff. Defendant promised "to work with the company next season and until the above debt is worked off."—*Held*, that that did not amount to a discharge; and in any event the onus would lie on defendant to shew that he was always ready and willing to "work off" the debt, but that he was prevented by some act or default of plaintiff or of his principals; and that onus he had not met. Balance of plaintiff's claim (for which no acknowledgment was given) was not allowed. Judgment for plaintiff for $4,153.25, with interest from 7th April, 1908, and costs. *Brown* v. *Valleau* (1910), 16 O. W. R. 874, 1 O. W. N. 1147.

Motor boat—*Failure to complete in time —New trial.*]—Defendant contracted with a company for the construction of a motor boat according to certain specifications, the boat to be completed by a certain date. The contract was transferred to plaintiff company, who, with defendant's consent, proceeded with the work. The boat was not completed by date fixed, but defendant superintended the construction, and made changes in original specifications, and went out in the boat on trial trips after time originally fixed for completion and delivery of boat had expired: —*Held*, that defendant was estopped from raising the question as to failure of plaintiff company to deliver boat within time agreed. The contract called for delivery, with the boat, of a 90 lb. galvanised anchor and chain. When boat was ready for delivery plaintiff found that they were unable to procure an anchor of kind called for, and in order to avoid delay, offered to put in a 70 lb. anchor until the other could be had, and to allow defendant a deduction of $50 from the contract price as compensation:—*Held*, that plaintiff's failure to deliver the anchor called for would defeat their rights to sue for the balance due on the contract, but defendant was not justified on that account in repudiating the contract absolutely, and that in doing so he relieved plaintiffs from the necessity of going on to completion of contract, and gave them a remedy for breach by defendant, but that, as this could not be accomplished on pleadings before the Court, there must be an amendment, and as there was not before the Court material necessary for assessing damages, there must be a new trial. *Sydney Boat & Motor Mfg. Co.* v. *Gillis*, 43 N. S. R. 259.

At the new trial of above action evidence was given to shew that the hull of the boat was not constructed in a workmanlike manner, and that it would require the expenditure of a certain sum to make the seams and planking conform to the terms of the specifications.—Longley, J., *held*, 7 E. L. R. 75, that such evidence was not receivable, it appearing that after the boat was completed and tendered to defendants, the latter refused to accept delivery, and the boat was suffered to lie for some months exposed to the weather, and that the defects referred to were the result of such exposure and not of any fault in the original construction. Supreme Court of N. S. affirmed above judgment. *Sydney Boat & Motor Mfg. Co.* v. *Gillis* (1909), 44 N. S. R. 152, 7 E. L. R. 518.

Supreme Court of Canada reversed above judgment and entered judgment for defendant. Judgment not yet reported.—Ed.

Municipal work—Construction of contract — Abandonment — Acceptance of part of work actually done—Payment for value of work—Contract not under seal—Powers of corporation — Receiving benefit of work. *Sieling* v. *Village of Kronau* (Sask.), 8 W. L. R. 552.

Municipal work—*Payment to contractors—Provision for minimum rate of wages for workmen—Wages paid at lower rate—Right of municipality to withhold payment of part of contract price—Breach of agreement — Counterclaim — Nominal damages —Costs.*]—The plaintiffs, as part of their contract for the performance of certain work for the defendants, a city corporation, agreed to pay the workmen employed wages at certain minimum rates fixed by what was known as "the fair wage schedule," but the defendants agreed to pay for the work from time to time, as the work should progress, the amounts certified to be due by the city engineer. The plaintiffs sued for the amount of one of these certificates:—*Held*, that the defendants could not keep back out of such amount anything by reason of the plaintiffs having failed to pay their workmen according to "the fair wage schedule."—*Semble*, that the defendants' engineer might, on ascertaining the fact, have been justified in withholding the progress estimate, in which event it might have been difficult for the plaintiff to recover without first paying the wages on the basis of the fair wage schedule. — *Held*, however, that the defendants were entitled to nominal damages on their counterclaim for the plaintiffs' breach of contract in not paying the wages agreed on, with costs incident to the counterclaim. *Kelly* v. *City of Winnipeg*, 18 Man. L. R. 268, 9 W. L. R. 310.

Music for skating rink—*Terms of contract — Refusal to accept service — Damages.*]—Defendant offered to supply a band of 10 musicians for 9 performances for $87 per week during the winter season, and, if this accepted, he would take the contract for the summer season on trial. This was accepted by plaintiffs. After playing for a time plaintiffs refused to let defendant play more than three times a week, but he continued to tender services during the balance of the winter season, and kept his 10 musicians on hand, though he could have dismissed them on two weeks' notice. The trial Judge gave damages claimed, and this was affirmed on appeal. *Amateur Athletic Association "Le Montagnard"* v. *Gagnon*, 6 E. L. R. 54.

Non-completion of work — Payment —Certificate of engineer. *Smith* v. *Finklestein* (1910), 1 O. W. N. 528.

Paving work—Measurements—Certificate of engineer. *Guelph Paving Co.* v. *Town of Brockville*, 4 O. W. R. 483, 5 O. W. R. 626.

Payment—Quantum meruit—Pleading — Amendment after trial and appeal — Claim on *quantum meruit* changed to claim on contract — Judgment — Terms — Parties — Costs. *Patriarche* v. *Town of Orillia*, 3 O. W. R. 595, 723.

Payment for services — Proof of contract—Jury—Nonsuit. *Dowling* v. *Dowling*, 2 O. W. R. 422.

Payment on account — *Action for balance of price—Estoppel.*]—A party sued for the balance of the price of work performed by contract (*à forfait*) who has made a part payment to, and taken a receipt from, the contractor, on account of what is due him, is estopped from setting up the defence that the whole work is bad and worthless. *Lavallée* v. *Dubeau*, 30 Que. S. C. 181.

Peeling, piling, and delivery of bark —Failure of plaintiff to do work—Damages for breach of contract—Remedy provided by

contract—Right of defendants to do the work —Exercise of right—No right to damages— Construction of contract—Implication from deletion of clause — Trespass — Principle of assessment—Crown dues paid by defendants—Disallowance. *Boyd* v. *Shaw-Cassils Co.*, 12 O. W. R. 913.

Varied on appeal, 13 O. W. R. 991.

Performance of work within fixed time—*Penalty for delay—Delay caused by owner.*]—A person who undertakes by contract to build a bridge for a municipal corporation, to be completed and delivered at a stated date, under a penalty of $5 *per diem* for delay, is liable only for such delay as occurs through his own fault or negligence, and not for that caused by failure of the corporation to locate, through some proper officer, as agreed, the site of the abutments, or by their altering the work, during performance, and substituting iron railings for the wooden ones mentioned in the contract. *Dupuis* v. *Parish of Laprairie*, 28 Que. S. C. 196.

Plant and materials of contractor to become property of employer—*Security for performance of contract—Necessity for registration under Bills of Sale Act —"Complete transfer and delivery"—Termination of contract—Evidence—Claim under bills of sale made by contractor—Articles not provided for works—Kitchen supplies and utensils.*]—The plaintiff claimed ownership of certain goods seized by the defendants, and based his title upon two absolute bills of sale made by F. The defendants set up that the property was theirs by virtue of a contract between them and F., whereby F. agreed to perform certain works for the defendants, and one of the terms of the contract was that all the plant, materials, etc., provided by F. for the work was to become and until the completion of the work be the property of the defendants for the purpose of the works, but, upon the completion of the work, such plant, materials, etc., as should not have been used and converted, should be delivered up to F.:—*Held*, that the true intent and meaning of this was that the plant, materials, etc., were to be retained by the defendants as security for the performance by F. of his contract; and the contract did not come within the Bills of Sale Act so as to require registration.—Since, in the nature of things, it was impossible at the time of the execution of the contract to identify the plant, materials, etc., provided under it, they could not then be articles capable of "complete transfer and delivery," and it is only a bill of sale of such articles that the Act requires to be registered.—It was contended that the defendants put an end to the contract, and could, therefore, claim nothing under it; but *held*, upon the evidence, and the proper construction of the contract, that this contention was not sustained by the facts.—*Semble*, that the plaintiff's bills of sale were intended as a security and not as evincing an absolute sale, but s. 8 of the Bills of Sale Act in such cases only makes the registration void; and as to an alleged defect in the affidavits of execution of the bills of sale, as to the residence of F., s. 7 makes a bill of sale void only against the classes of persons therein named, and the defendants did not come within any of those classes.—*Held*, that the plaintiff was entitled to the value of any goods seized by the defendants which had not been provided by F. for the works contracted for; to come within those terms they must have reached the field of F.'s operations, that is, a point beyond which they would be handled by F.'s men only; and the kitchen supplies and utensils were not plant, materials, or things provided for the work. *Clancey* v. *Grand Trunk Pac. Rw. Co.* (1910), 14 W. L. R. 201.

Ploughing land — *Breach of contract —Work not properly done—Mortgages given as security for payment for work—Assignment of mortgages—Transfer of mortgaged land — Redemption.*]— Action for delivery up and cancellation of certain mortgages made by plaintiff to defendant to secure payment of a sum to be paid by plaintiff to defendant for work to be done by defendant for plaintiff under a contract, and to restrain defendant from transferring mortgages given as security:—*Held*, that defendant has not done the work in good and workmanlike manner, and plaintiff is entitled to damages. *Wheeler* v. *Bionne*, 11 W. L. R. 129.

Plumbing—*Contract not established — Quantum meruit—Set-off for defective work —Action for price of work done for and material supplied to defendant.*]—*Held*, on appeal from Official Referee's report, that there was no contract, and that plaintiff be paid as on a *quantum meruit* with set-off for damages. *Longstaff* v. *Hamilton* (1909), 14 O. W. R. 208.

Preparation of designs for engines— Terms of contract—Payment of price—Conditions—Sale of engine—Security—Mortgage —Discharge. *McLaughlin* v. *Dyment*, 11 O. W. R. 904, 12 O. W. R. 412.

Preparation of literary work — Employment of editor by publishers—Right to literary materials — Replevin. *Morang* v. *Hopkins*, 2 O. W. R. 285, 703.

Preparation of plans — Architect — Condition as to cost of building—Remuneration for plans — Evidence — Authority of agent—Correspondence. *Wilson* v. *Ward*, 9 W. L. R. 481.

Preventing contractor from executing work—Cancelling contract — Conduct justifying cancellation—Refusal to proceed —Architect's certificate—Delay—Evidence— Appeal on questions of fact. *Sloane* v. *Toronto Hotel Co.*, 5 O. W. R. 400.

Printing of reports—Assignment by printers of claim for payment—Subsequent assignment for creditors—Sale of claim by assignee—Rights of vendee—Judgment—Set-off. *Langley* v. *Law Society of Upper Canada*, 1 O. W. R. 143, 718.

Professional services — Payment of fee—Evidence—Corroboration—Authority to bind co-defendants—*Quantum meruit*. *Magee* v. *Gillespie*, 11 O. W. R. 212.

Proof of contract — Servant or contractor—Burden of proof—Damages for defective work—Trade discounts—Right of mas-

ter to credit for — Counterclaim — Costs. *Brown* v. *Vandervoort*, 2 O. W. R. 742.

Putting elevator in building—*Time for completion—Delay—Extension of time—Novation—Accord and satisfaction—Measure of damages.*]—Action for damages for non-performance of contract to instal an elevator in plaintiff's hotel by 1st November. Some delay took place and on 3rd December defendants gave a written guaranty to pay $15 for each day after the time elevator remains in incomplete running order. It never worked satisfactorily and plaintiff acquiesced in another attempt of defendants to make it satisfactory:—*Held*, this was not a novation or an accord and satisfaction, that amount paid must be repaid and damages were assessed. *Porter* v. *Parkin Elevator Co.*, 13 O. W. R. 1053.

Putting furnaces in house — Insufficient heating capacity—Refusal of sub-contractor to put in new furnaces—Performance by contractor—Action against sub-contractor for damages. *Ritchie* v. *Plaxton* (Man.), 5 W. L. R. 414.

Question as to rate of payment—*Failure to establish contract by telephone—Payment into Court—Quantum meruit—No costs.*] — An action by plaintiff to recover $1,245 for teaming work done for defendants. Plaintiff claimed $5 per day, or 50 cents an hour, while defendants claimed that the price to be paid was $4 or 40 cents an hour, and paid into Court $1,000 as full satisfaction for plaintiff's claim. — Falconbridge, C.J.K.B., *held*, that plaintiffs had failed to satisfy the onus of establishing a contract by telephone to pay $5 a day or 50 cents per hour, or that the rate as to *quantum meruit* ought to be $5 per day or 50 cents per hour, instead of $4 per day or 40 cents per hour, as contended by defendants. Judgment for plaintiff for $1,000, amount paid into Court, at rate of $4 per day. No costs. *Montgomery* v. *Cockshutt Plough Co.* (1911), 18 O. W. R. 905, 2 O. W. N. 924.

Railway construction — *Certificate of engineer.*]—Where the contract for construction of a railway provided that the work was to be done to the satisfaction of the chief engineer of a railway company, not a party to such contract, who was to be the sole and final arbiter of all disputes between the parties, the contractors were not bound by such condition, when the person named as arbiter proved to be, in fact, the engineer of the other party to the contract, while supposed by the contractors to be the engineer of the railway company as described. Judgment in 26 A. R. 133, 10 C. L. T. 131, affirmed. *Good* v. *Toronto, Hamilton and Buffalo Rw. Co.*, 20 C. L. T. 49, 30 S. C. R. 114.

Railway work—Sub-contractor — Knowledge of terms of principal contract—Remuneration—Damages for breach—Counterclaim. *Carroll* v. *Gilbert*, 3 O. W. R. 357.

Rate of payment—"Clear"—Wages—Waiver—Counterclaim — Damages — Reference—Costs. *Hunton* v. *Coleman Co.*, 10 O. W. R. 610.

Rate of payment — *Evidence—Liability—Set-off.*]—The defendant, who was a sub-contractor under McA., who had a contract with the Transcontinental Railway Commission, employed the plaintiff to do certain work in the construction of a railway. The Commission directed the manner of construction and the class of material to be used, and it also had the right to order substitution for or even different work from that shewn upon the specifications. At the scene of the operations there was a resident engineer, to whose satisfaction the work had to be done before it would receive the approval of the chief engineer of the Commission. The resident engineer instructed the plaintiff to do certain masonry work, and the defendant said he would allow the plaintiff $5.50 a square yard for this. After the plaintiff had done 25 yards, he told the defendant that he could do no more at that price, and the defendant said he would give him what he was getting himself, which was $6, though he did not name that amount. McB. subsequently allowed the defendant $7, and the plaintiff having done the work and received payment at the rate of $6, sued for the extra dollar per square yard:—*Held*, that the plaintiff could not recover.—The plaintiff also sought to recover for some work done by him, under the instructions of the engineer, which did not appear in the specifications. The defendant said that he assumed no obligation for such work other than to pay to the plaintiff such money as he received. In carrying out this and other work, the plaintiff performed labour in "rock-borrowing," necessary for the performance of the work ordered by the engineer. No allowance was made for this either to McA. or the defendant:—*Held*, that no liability was at present established against the defendant; but, if the money should afterwards come into the defendant's hands for this work, he would become liable; and as to these items the plaintiff was nonsuited, without prejudice to a subsequent action.—The plaintiff was *held*, entitled to judgment in respect of other items, and the defendant to a set-off as to part. *Nordquist* v. *Peterson* (1910), 14 W. L. R. 397.

Refitting steam yacht — Materials supplied — Action for price — Specifications—Authority of agent—*Quantum meruit*—Incomplete work—Defective work—Deductions—Counterclaim—Damages for delay—Penalty—Interest—Costs. *Goderich Engine and Bicycle Co.* v. *Menzies*, 9 O. W. R. 1, 398.

Religious society — *Expulsion of member—False imprisonment—Compensation for services—Statute of Frauds—Public policy—Residence of society—Branch in Ontario—Jurisdiction.*]—Action to recover the value of plaintiff's services to a religious society, incorporated in France, having branches in United States, Quebec and Ontario, these appearing to be separate corporations. The plaintiff became a member in United States and took vows of poverty, chastity and obedience required of an "aspirant," in which condition the plaintiff remained until dismissed. In 1901 she was transferred to Mount Hope Institute at the city of London, Ontario, where she remained until the following month of June, when, in consequence of great disturbance and destruction of property in the Institute, ascribed to her, she was removed to Longue Pointe Insane Asylum in the province

of Quebec, upon certificate of two physicians that she was insane. Here she remained until the following September, when she was declared cured and was discharged. During this time the Mother Superior reported these facts to the society in France, and obtained a release from her vows for the plaintiff, and on being released from the asylum she executed a release under seal, before a notary in the city of Montreal, whereby, in consideration of $300, then paid her, she released the society, the Mount Hope Institute and Les Dames Religieuses du Sacre Coeur, and all persons members of the society, from all actions, debts, etc. Shortly after the plaintiff brought this action against the society, the Mount Hope Institute, and Elizabeth Sheridan, claiming wages, damages for wrongful dismissal, false imprisonment and imputations of insanity; contending that she was not insane at any time:—*Held*, in answer to several defences—1. That there was jurisdiction.—2. That the defence of the Statute of Frauds fails, see *McGregor* v. *McGregor*, 21 Q. B. 424.—3. Action dismissed as against the Mount Hope Institute (it being clearly a separate corporation, incorporated by a Canadian statute), on grounds that plaintiff never had any contract with this institute, and for same reason was also dismissed against the Mother Superior of that institute.—4. The document executed in Quebec held binding, the plaintiff failing to shew that the defendants had taken any undue advantage of her. *Archer* v. *Society of the Sacred Heart of Jesus*, 2 O. W. R. 847, 5 O. W. R. 113, 9 O. L. R. 474.

Remuneration for services—Quantum. *White* v. *Harris*, 3 O. W. R. 352, 620.

Repairs — *Completion—Acceptance from day to day—Destruction by fire——Incidence of loss.*]—The handing over of works completed according to estimate and bargain, within the meaning of Art. 1684, C. C., is to be regarded as having taken place when, consisting in repairs to a house occupied by the owner, it is done under the supervision of the latter, and is accepted by him from day to day, according to the portion done. Therefore, loss caused by fire immediately after the completion of the work, without other handing over or putting in formal possession, falls upon the owner. *Lidstone* v. *Hayes*, 15 Que. K. B. 416.

Repairing steamers — *Defective performance—Counterclaim for damages.*]—Action for work done on certain small steamers belonging to defendants. Defendants contended that owing to faulty caulking of a tank sufficient water had leaked out so as to cause steamer to sink:—*Held*, that work had been done in a proper and workmanlike manner. Judgment for plaintiff. *McPherson* v. *Judge*, 7 E. L. R. 110.

Sales of Goods Act — *Specifications — Manufacturer's description of engine—"Quiet running"—Warranty — Recommendation — Reference to surrounding circumstances — Suitability of engine for purpose—Implied undertaking or warranty—Operation—"In operating order."*]—The plaintiffs installed in the defendant's theatre an engine and appliances to operate a lighting and ventilating plant, and claimed the balance of the price contracted for:—*Held*, that the transaction was not a sale of goods, but a supply of work and materials, and the Sales of Goods Act did not apply.—The plaintiffs submitted a written proposal to the defendant to supply and erect in operating order, on foundations supplied by the defendant, an engine, generator, and switchboard, for a sum mentioned. This proposal embodied specifications for each of these pieces of machinery. The engine specifications described an "Ideal" engine and stated that they were submitted by the manufacturer to the plaintiffs; they referred to the "Ideal" engine as "quiet running." The proposal was accepted by the defendant: — *Held*, that this was not a warranty, but only a recommendation, and the plaintiffs' right to payment did not depend upon their shewing that the engine was "quiet running"—and this view was confirmed by reference to the surrounding circumstances, to which reference might properly be made.—*Held*, also, that there was no collateral warranty or undertaking by the plaintiffs that the machinery should be suitable for the defendant's special purpose—the choice of engine being made on the independent judgment of the defendant's agent, uninfluenced by the plaintiffs; nor should the Court imply an undertaking on the part of the plaintiffs that the engine would operate in a way suitable for the defendant's purpose.—*Held*, also, upon the evidence, that the plaintiffs had erected the engine "in operating order," and were entitled to recover. *Allis-Chalmers-Bullock Co.* v. *Walker* (1910), 15 W. L. R. 357, Man. L. R.

Services — Account — Reference — Report—Appeal. *Rabbitts* v. *McMahon*, 6 O. W. R. 716.

Services—Implication of promise to pay for—Circumstances shewing intention — Professional services—Officer of Court. *Willcox* v. *Barclay*, 6 O. W. R. 522.

Services to be performed after death of party — *Executory contract — Action against executors—Lack of corroboration.*]—The plaintiff sued the executors of R. for services rendered in taking care of a child of R., after his death. She had been engaged by R. as a nurse to attend him in his last illness, and her evidence was that R., previous to his death, asked her to continue in the house and to look after his wife and child, and deceased had said, "If anything happens, will you promise that you will stop with her?" There was no corroboration of the plaintiff's testimony as to the promises made her by the deceased:—*Held*, allowing an appeal from the verdict of a County Court in the plaintiff's favour, that the contract as alleged was open to two constructions; (1) that the plaintiff was to stay with Mrs. R. if anything happened to the testator; (2) that she was to take care of the child; and, the plaintiff having contended that R. meant that she was to stay with the child and take care of it, each may have intended a different thing, and consequently no contract was clearly proved; also, that corroboration of the plaintiff's evidence was necessary in this case. *Simpkin* v. *Paton*, 9 W. L. R. 111, 18 Man. L. R. 132.

Services rendered to deceased person —Promise to pay for services, but no rate fixed—Claim against estate—*Quantum meruit* —Evidence—Report varied on appeal by reducing amount allowed. *Dixon* v. *Garbutt*, 10 O. W. R. 838.

Services to deceased person—*Quantum meruit—Claim against estate—Burden on executor—Evidence—Credibility of witness.*]— The claimant came from the United States at the request of the testatrix, and remained with her for a considerable period of time previous to her death, performing services of an onerous character. There was no relationship between the parties:—*Held*, that the case was the ordinary one of a request and services performed, for which the claimant was entitled to recover on a *quantum meruit*, and that the burden was on the executor of the deceased of establishing a sufficient answer.—*Held*, also, that the mere fact that the claimant expected the property of testatrix to be left to her, and that, under the terms of the will, she was given a share of the residue, in the absence of any understanding or agreement that she was to be remunerated in that way, was no bar to her recovery; and that the omission of the claimant to mention her claim, in the course of an ordinary conversation with the executor, did not constitute a satisfaction of the debt, but would merely go to her credibility as a witness. *In re Ansley*, 41 N. S. R. 527, 3 E. L. R. 234.

Smelting — *Sampling ores — Mine owner's representative—Authority — Ores improperly sampled—Method of estimating values.*] —A contract between mine owners and smelter owners provided *inter alia* that the ores supplied by the former to the latter should be sampled within one week after shipment. The evidence shewed that "automatic" or machine sampling had displaced the old method of "grab" or "shovel" sampling and had been in vogue for about twenty years:—*Held*, *per* Hunter, C.J., and Walkem, J., that the contract was entered into on the footing that the sampling was to be done automatically. *Per* Drake and Irving, JJ.— The contract permitted any mode of sampling, so long as it was done properly, and the true value of the ore was arrived at. A mine owner's representative at a smelter for the purpose of watching the weighing and sampling of ores, so that the mine owner may be satisfied as to the correctness of the weight and sampling, has no authority to consent to a method of sampling not allowed by the contract. Where the smelter returns of ore of average character sampled either negligently or in a manner not contemplated by contract, shew a value below the average, the probable value of the ore will be estimated by the Court by taking the average value of a certain number of lots immediately before and after the lots in dispute. *Le Roi Mining Co.* v. *Northport Smelting Co.*, 24 Occ. N. 32, 10 B. C. R. 138.

Sub-contract — *Non-completion of work —Payment — Money had and received — Implied trust — Money spent in completing work—Rent of engine and cars—Payment for —Waiver — Consideration.*]—A contracting company had a contract with a railway company to grade and excavate a portion of their line, and sublet to the plaintiff the work between stations 580 and 770. After the work had progressed for a time, the contracting company went into liquidation and abandoned the contract. At this time the plaintiff had removed 3,000 yards, part of a cut of 4,710 yards, for which had he completed his work, he would have been entitled to 20 cents a yard, but he did not complete his work after his superiors had gone into liquidation, and nothing was paid him for the 3,000 yards. The present defendants entered into a contract with the railway company to do the work originally let to the contracting company, at the same price for that class of work, viz., 23 cents a yard, and, upon their completing the cut of which the 3,000 yards removed by the plaintiff formed part, they were paid by the railway company at 23 cents a yard for the whole cut, including the 3,000 yards. The defendants thus received $1,083.30, and, in settling with the plaintiff for other work done by him for them, they charged him with the cost of completing the cut, amounting to $1,182.72, and credited him with the $1,083.30, leaving a balance against him of $99.42, and later with a further sum of $90, as having overcredited him 3 cents a yard on 3,000 yards, his price being 20 cents a yard, and not 23 cents:—*Held*, that the plaintiff was not entitled to recover from the defendants $600 for the work done by him as money had and received for him or paid to his use; there was no privity of contract between the plaintiff and the railway company or between the plaintiff and defendants with respect to this particular work; and the money was not paid upon a trust, either express or implied.— But *held*, that the plaintiff was entitled to succeed as to the two items of $99.42 and $90; the plaintiff was under no obligation to the defendants to complete the work, and they could not charge him with their loss in completing it. — The defendants counterclaimed against the plaintiff for $2,000 for the rent of engine and cars:—*Held*, on the evidence (Irving, J.A., dissenting), that the defendants had waived their right to this, and there was consideration in the plaintiff foregoing the right to purchase the engine and cars on the price of which the payments of rent he had actually made would have been applied, had he completed the purchase.—*Per* Irving, J.A., that there was no consideration moving from the defendants to the plaintiff or from the plaintiff to the defendants.—*Chadwick* v. *Manning*, [1906] A. C. 231, referred to. *Tucker* v. *Puget Sound Bridge & Dredging Co.* (1910), 14 W. L. R. 468.

Supply of machinery—Refusal to perform—Construction of contract — Breach — Damages. *Mann Coal Co.* v. *Pendrith Machinery Co.*, 11 O. W. R. 412.

Supply of manufactured goods—Impossibility of fulfilment — "*Cause beyond control.*"]—A covenant, in a contract for the supply of manufactured goods, that the manufacturer shall not be liable for damages, "if at any time by failure in supply of electric power, the occurrence of a strike, or other cause beyond his control, it becomes impossible for him to fulfil this contract," affords no relief from liability for non-fulfilment, if it appears that the failure of electric power was due to the inefficiency of the manufac-

turer's own electrical apparatus; nor can the fact that his pond ran dry, whereby he was prevented from using his steam power, be accounted a "cause beyond his control." *Morgan* v. *Lyall*, 16 Que. K. B. 562, 4 E. L. R. 68.

Supply of manufactured lumber — Breach—Damages. *Curran* v. *O'Leary*, 5 E. L. R. 80.

Supply of railway material — *Payment—Certificate of railway commission's engineer—Condition precedent—Interference by commission with engineer—Fraud—Hindering performance of condition—Monthly estimates—Finality—New trial.*]—The plaintiff supplied the defendants with railway ties under a written contract, which provided that 90 per cent. of the value of the ties delivered and accepted was to be paid monthly on the written certificate of the engineer, which was to be a condition precedent to the right of the plaintiff to be paid the 90 per cent., or any part thereof; the remaining 10 per cent. to be retained until the final completion of the whole work to the satisfaction of the engineer, whereupon the engineer was to give the final certificate accordingly, and such 10 per cent., or the balance payable under the contract, was to be paid within 40 days after the granting of such final certificate, which was also to be a condition precedent to the right of the plaintiff to be paid 10 per cent., or any part thereof; and it was declared that the word "engineer" should mean the chief engineer for the time being appointed by the defendants having control of the work of construction of the defendants' line of railway: — *Held*, that under this contract the certificate was in the nature of a condition precedent, and, while the plaintiff might be said to have agreed to the risk of the natural bias created by the situation, he was entitled to have at the hands of the engineer, the defendants' servant, good faith, and the expression of his own honest opinion. The employer has the right to direct the attention of the certifying official, before he certifies, to alleged defects of performance, and to ask for care and diligence in the discharge of his duty, but he has no right to dictate or impose his own opinion; and any attempt by the employer to do so, especially if yielded to by the servant, is in the nature of a fraud, or is at all events evidence of fraud which will, if established, relieve the plaintiff from the necessity of obtaining the certificate—no one can take advantage of the non-fulfilment of a condition the performance of which he has himself hindered.—And *held*, in the circumstances of this case, that there was evidence for the jury that the defendants had prevented their engineer from certifying; and a nonsuit was set aside and a new trial directed.—*Semble*, that the monthly estimates certified to by the engineer under the contract were final as to the quantities mentioned in them. Judgment of Falconbridge, C.J.K.B., reversed. *Wallace* v. *Temiskaming and Northern Ontario Railway Commission*, 12 O. L. R. 126, 7 O. W. R. 605. An appeal from this decision was dismissed by the Supreme Court of Canada, no opinion being expressed on the merits, and the reasons of the Court of Appeal not being adopted. *Temiskaming and Northern Ontario Rw. Commission* v. *Wallace*, 37 S. C. R. 696.

Syndicate land purchase.]—In November, 1902, plaintiff and defendant F. with a number of others formed a syndicate to acquire options and purchase land with a view to sale.—The transaction was a large one, involving some 200,000 acres in the N. W. T. Before the land was finally disposed of the syndicate was compelled to pay the owners $60,000.—The agreement between plaintiff and F. was verbal, and at time it was made plaintiff paid $200. On 30th March, 1903, defendant F. wrote plaintiff to hold himself in readiness to raise $2,000, "to hold your corner of the deal," and that if they had to call upon him it would be at short notice. Plaintiff took no notice of this letter and made no preparation for securing the money. On 14th April, 1903, F. telegraphed plaintiff:—"Three thousand dollars absolutely necessary to hold your interest in land deal. Will I draw? Wire." To this plaintiff sent no reply.—In 1903 plaintiff learned that the speculation had been successful and that large profits had been made, but it was not until 1907 that this suit was brought:—*Held*, that in view of the special nature of the transaction, plaintiff's refusal to contribute his share to complete purchase, and his refusal to answer or take any notice of both letter and telegram, justified defendants in acting on assumption and belief that he had entirely abandoned his interest in the purchase.—*Held*, also, that plaintiff's delay in commencing a suit until long after he knew that a large profit had been made by a resale of the land was, in absence of any satisfactory explanation, evidence that his failure to pay the money, and his refusal to answer either letter or telegram, were in fact intended at the time as an abandonment of all interest in the transaction. *Pugsley* v. *Fowler & Pope* (1909), 4 N. B. Eq. 122, 6 E. L R. 465.

Tender — Specifications — "Estimate or certificate" of engineer of municipal corporation—Construction of contract — Costs. *Fry* v. *Town of Indian Head* (Sask.), 7 W. L. R. 203.

Terms and conditions — Payment — Satisfaction of engineer — Value of work—Conflicting evidence. *Wallace* v. *Township of Tilbury East*, 7 O. W. R. 34.

Theatrical company—*Contract of actor—Repertoire—Time.*]—In a contract whereby an actor is engaged by the manager of a theatre to take all the rôles designed in all the plays which the management deems suitable, a stipulation that he shall be ready to play without delay the "rôles of his *repertoire*," and all the others with 15 days' time to learn them, does not apply as to the first alternative to all the rôles of all the pieces in his *repertoire*, but to those only which he knows and is accustomed to play. Therefore, where he mentions in his *repertoire* the play "La Tosca," and the management orders that that piece shall be produced within 8 days, assigning to the actor the rôle of Baron Scarpia, he has good ground for asserting that his rôle in that play is that of the "Marquis Attavanti," and, therefore, to require the delay agreed upon of 15 days. *Lasalle* v. *Montreal Theatre Co.*, 34 Que. S. C. 193, 4 E. L. R. 59.

Time fixed for completion—Delay of owner of building—Increase in cost of materials—Contract price — Correspondence — *Quantum meruit*. *Sherlock* v. *Toronto*, 8 O. W. R. 646.

Violation of spirit of agreement—*Hire of services—Notice by lessee to lessor—Right of action to have contract cancelled.*]—A contract of hire of services should be interpreted by taking into account the object the parties had in view and the circumstances of time and place respecting the execution of it. Hence, the lessor who violates the spirit of the contract cannot pretend that the delinquencies with which he is charged are not expressly mentioned therein.—The lessee of services, who gives notice to the lessor and thus terminates the contract, has, in addition, the right to take an action to have the cancellation of the contract judicially confirmed, more particularly when the lessor persists in executing the contract as if it still subsisted. *Ouimet* v. *Fleury* (1909), 19 Que. K. B. 301.

Warranty—*Heating of building — Construction—Judge's charge—Condition precedent—Allowance for defects — Admissions—Mistake—Substantial performance — Waiver —Quantum meruit.*]—Action to recover the contract price of putting a hot water heating apparatus into a building for the defendant. The contract provided "as the essence" that "the heating of the entire building shall, easily and without forcing the boilers, maintain throughout the building a temperature of not less than 65 degrees Fahrenheit in the most severe cold." The trial Judge charged the jury (*inter alia*) that the contractors were bound to supply a system which which easily maintain 65 degrees without forcing the boilers; that they were bound to put in a radiating surface to the percentage named in the contract in any event, and if a greater surface was necessary, in order to produce the 65 degrees, they were bound to furnish it; that the maintenance of the 65 degrees was necessary to entitle the plaintiffs to recover; that if the jury found that the system was not capable of maintaining the required temperature, they must find for the defendant, and must not take into consideration the question of the amount which would be required to alter the system to render it capable of giving the required temperature; that the defendant was not bound by an admission in a letter as to the amount due by him, so long as the plaintiffs had not altered their position by reason of the admission, and the defendant was not precluded from shewing that the admission was a mistake. The jury found a verdict for the defendant:—*Held*, that there had been no misdirection. The questions of the "substantial performance" of a contract and of the waiver of a special contract, and the substitution of a new contract to pay according to a *quantum meruit*, discussed. *Toronto Radiator Mfg. Co.* v. *Alexander*, 2 Terr. L. R. 120.

Water power — *Construction of dam—Agreement to pay for damages by flooding——Indemnity—Protective works.*] — Owing to the condition of the locality and the character of certain improvements made for the purpose of increasing the water power at Chambly rapids, in the Richelieu river, the parties entered into an agreement respecting the construction of dams and other works at the *locus in quo*, and it was provided that the company should assume the responsibility and pay for all damages caused by "flooding of land, bridges, or roads, if any, as well as all other damages caused" to the plaintiff "during or by reason of" the constructions:— *Held*, reversing the judgment appealed from, that, under the agreement, the plaintiff could recover only such damages as he might suffer from time to time in consequence of the floods at certain seasons being aggravated by the constructions in the stream, and that, in the special circumstances of the case, the Courts below erred in decreeing the construction of protective works, inasmuch as the company were entitled to take the risks on payment of indemnity as provided by the contract. *Chambly Manufacturing Co.* v. *Willet*, 24 C. L. T. 204, 34 S. C. R. 502.

Work and labour—*Substituted contract —Consideration — Extras.*] — The plaintiff, who had contracted to supply materials for re-seating a church, contended that, under the terms of his contract to furnish, among other things, "pew ends, divisions, seat lining, book racks," for a lump sum, "seat, lining," should read "seat-lining" and that under this term, he was only bound to furnish the materials of which the seats were to be constructed. The defendant's contention was that the "lining was intended to go over the old wainscoting:"—*Held*, that to admit the plaintiff's contention would be to ignore the actual reading, and to give an unusual and improper meaning to the word "lining" so as to materially vary the terms of the contract, and a promise, if any, to pay for such lining as an extra could not be supported, the performance by a contractor of what he is already bound to do not being a consideration to support such a promise; and *quære*, whether the settlement in this way of a *bona fide* dispute between the parties, as to the meaning of the terms used, would constitute sufficient consideration for the alleged promise to pay. *Dempster* v. *Bould*, 37 N. S. R. 330.

CONTRACT OF HIRING.

See MASTER AND SERVANT.

CONTRACTOR.

See CONTRACT.

CONTRAINTE PAR CORPS.

See ARREST.

CONTRE-LETTRE.

See CONTRACT—VENDOR AND PURCHASER.

CONTRIBUTION AND INDEMNITY.

Action for—*Joint tort-feasors—Res judicata—Remedy over.*]—A party sued jointly with another in damages for a tort who is condemned alone, the action being dismissed as to the other, and who pays the plaintiff the amount of the judgment, has an action against his co-defendant to recover the whole or part of the amount so paid, accordingly as it is proved at the trial of such action that the tort was caused solely or in part by such co-defendant. The judgment in the original suit is not *chose jugée* between the joint tort-feasors, and their liability to one another is not affected by it, nor by the payment made by the one against whom it was rendered. *Mills* v. *Cox*, 28 Que. S. C. 375.

Contribution between wrongdoers—*Knowledge of illegal act—Third party procedure.*]—The defendant contracted with P. to cut timber on P.'s land within defined boundaries. The defendant cut timber, but it was shewn that the title to the *locus* was in the plaintiff, who brought an action of trespass against the defendant. The defendant obtained leave to serve P. with a third party notice, and upon application for directions, which was opposed by P.:—*Held*, that the application should be granted; the rule that wrongdoers cannot have redress or contribution against each other being confined to cases where the person seeking redress must be presumed to have known that he was doing an illegal act. *Wier* v. *Blois*, 40 N. S. R. 266.

Co-sureties.]—Defendant, J., was liable as a co-surety for $3,000, plaintiff for $3,000, and E. for $1,000:—*Held*, that the defendant should contribute three-sevenths of sum which had been paid by plaintiff. The principle of contribution among co-sureties does not rest on contract, but upon principles of equity which may be modified by extent to which each has engaged himself. *Ostrander* v. *Jarvis*, 13 O. W. R. 375.

Co-sureties — *Degrees of suretyship.*]—The defendant and E. G. were joint makers of a promissory note given to M. for an indebtedness of E. G. When this note fell due, E. G. and his brother, the plaintiff, signed a renewal note in favour of M., after promising the defendant that they would try to get M. to accept this renewal for the former note and so release the defendant. M., however, was not willing to release the defendant, and insisted on his joining in the new note. The plaintiff paid this when due, and claimed contribution of one-half the amount from the defendant. At the trial in the County Court, the Judge found that E. G. and the plaintiff agreed with the defendant to assume the debt due to M., and gave the note in question in pursuance of such agreement, and that the defendant signed the note as surety that it would be paid by one or other of the G's.; that the defendant was not a co-surety with the plaintiff, and therefore not liable to reimburse him in any amount:—*Held*, on appeal, Phippen, J.A., dissenting, that the evidence did not support such finding, and that the defendant was liable as a co-surety.—*Whiting* v. *Burke*, L. R. 6 Ch. 345, and *Ianson* v. *Paxton*, 22 C. P. 505, followed. *Grobb* v. *Darling*, 7 W. L. R. 97, 17 Man. L. R. 211.

Co-sureties—Makers of promissory note for accommodation of third person—Question of fact—Finding of trial Judge—Defendant guarantor for plaintiff, and note paid by plaintiff — Right to contribution from defendant. *Grobb* v. *Darling* (Man.), 7 W. L. R. 97.

Costs of former action—Joint defence —Agreement — Evidence — Counterclaim—Money paid for timber—Failure of consideration—Set-off—Costs. *Reece* v. *Payne*, 3 O. W. R. 712.

Implied obligation—*Assignment—Right of action—Vendor and purchaser—Parties—Amendment.*]—One G. agreed in writing to purchase certain lands from the plaintiff and paid $200 on account of the purchase money. He afterwards transferred his interest in the lands under the agreement to the defendant, by an assignment indorsed thereon, signed by himself, but not by the defendant. The defendant did not make any of the payments remaining due to the plaintiff under the agreement, and G. then assigned to the plaintiff "all and every covenant, agreement, and obligation of the said A. B. McClelland, of any and every nature and kind whatsoever, whether expressed in the assignment hereinbefore mentioned to the said McClelland or implied from any or all of the transactions between them, and also all obligations both legal and equitable" of the defendant:—*Held*, that, upon the plaintiff adding G. as a party defendant with his consent, for which leave was given, the plaintiff was entitled under the assignment from G. to him to recover from the defendant the amount remaining due under the original agreement of sale to G. *Maloney* v. *Campbell*, 28 S. C. R. 228, and *Cullin* v. *Rinn*, 5 Man. L. R. 8, followed. *Brough* v. *McClelland*, 18 Man. L. R. 279, 9 W. L. R. 6.

Joint and several guarantors — *Actions for contribution.*] — The defendant raised numerous objections, none of which he established. Other defences could be disposed of in the winding-up proceedings. Judgment for plaintiff as claimed. *Elliott* v. *Forrester*, *McVicar* v. *Forrester*, 9 W. L. R. 373.

Joint and several guarantors — Payment — Liability — Evidence — Account. *Elliott* v. *Forrester*, *McVicar* v. *Forrester*, 9 W. L. R. 373.

Joint sureties — *Accommodation—Promissory note — Retirement of note — Presumption as to payment—Relations between sureties—Set-off.*]—Where A., B., C., and D., shareholders in a company, by way of accommodation to the company, become jointly liable for a promissory note, and at maturity it is paid out of the proceeds of a second note signed by A. and B., but not by C. and D., which is ultimately redeemed by the company, no relation of creditor and debtor arises between A. and C., and the former cannot claim to have paid part of C.'s indebtedness. The fact that he holds the note, to which the

latter was a party, is no evidence of such relation, especially when the signatures of all the parties to it have been cancelled, and his position of manager of the company makes it likely that he is possessed of the note as such. He cannot, therefore, set up a plea of compensation, founded on the above recited facts, to an action for debt brought against him by *C. Lafontaine* v. *Léveillé*, 16 Que. K. B. 515.

Joint tort-feasors—*Negligence—Injury by electric wire—Remedy over — Municipal corporation — Electric company — Municipal Act, s. 609 (1).*] — The plaintiff recovered judgment against two of the defendants, a town corporation (the appellants) and an electric company, for damages for the death of her husband by contact with a live wire in a street of the town. The appellants carried their fire alarm wires upon the poles of a telephone company. The electric company carried their electric current by means of wires strung upon poles, at a lower level than the fire alarm wires. Through negligence on the part of the appellants the fire alarm wire was allowed to fall and remain upon or across the wires of the electric company, passing beneath. There were no guards between the two sets of wires, and the electric company's wires were either improperly insulated in the first instance, or had become worn, and were negligently left in that condition. The fire alarm wire resting upon the live electric wire, both were melted at the point of contact, and the severed live wire fell to the sidewalk and came in contact with the deceased. It was found that his death was due to separate acts of negligence on the part of the two defendants, the combined effect of which was to bring about the fatal result:—*Held*, that the appellants were not entitled at common law to contribution or indemnity from the electric company; nor were they so entitled under an agreement whereby the electric company undertook to indemnify and hold the appellants harmless against all damages, actions, etc., by reason of any danger or injury from the company's electrical system, if incurred by or consequent on the negligence of the company.—*Per* Moss, C.J.O., that the rule against contribution between wrongdoers has not been qualified to the extent of entitling one who is himself a wilful or negligent wrong-doer to indemnity from another involved with him in causing the injury or wrong in respect of which judgment has gone against them. *Merryweather* v. *Nixon* (1799), 8 T. R. 186, applied.—*Per* Meredith, J.A., that s. 609 (1) of the Municipal Act, 3 Edw. VII. c. 19 (O.), did not apply to the claim of the appellants against the electric company.—Judgment of Teetzel, J., 11 O. W. R. 501, affirmed. *Sutton* v. *Town of Dundas*, 17 O. L. R. 556, 13 O. W. R. 126.

CONTRIBUTORIES.

See COMPANY.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONTROLLER.

See MUNICIPAL ELECTIONS.

CONTROVERTED ELECTION PETITION.

See ELECTIONS.

CONVERSION.

Bill of sale—*Estoppel—Misdirection.*]—F. claimed to be the owner of a horse that S. had given her for the board of herself and child. S., being indebted to H., left the province, and H. seized the horse as the property of S. under an absconding debtor's warrant. While the horse was in the possession of the sheriff under the warrant, negotiations were had with H. by persons professing to be acting for F., and a bill of sale of the horse was given to H., and the horse was returned to F. The amount secured by the bill of sale not having been paid, H. seized the horse under the bill of sale, and F. brought an action in the Kent County Court against H. for a conversion of the horse. On the trial, the Judge told the jury that the only question was, who was the owner of the horse at the time it was taken, and that the plaintiff was not estopped by the bill of sale from recovering in the action:—*Held*, on appeal from a judgment affirming a verdict entered on a finding on this direction, that the direction was right. *Hannay* v. *Fraser*, 37 N. B. R. 39.

Broker—Conversion of shares by — *See* BROKER.

Debt—*Conversion—Small debt procedure—Tort waived—Goods sold—Rule 602.*] — A claim for the value of goods converted by the defendant, the plaintiff expressly waiving the tort and suing as for goods sold and delivered, may be sued under the small debt procedure. The plaintiff, in his statement of claim under the small debt procedure, alleged that the defendant had wrongfully taken possession of a horse and converted it to his own use, and expressly waived the tort, and sued for goods sold and delivered, claiming $75, the value of the horse. An application to set aside the writ and service, upon the ground that the claim was not for one debt within the meaning of Rule 602, which brings "all claims and demands for debt whether payable in money or otherwise where the amount claimed does not exceed $100," within the small debt procedure, was refused. The word "debt" is not restricted to "a sum certain or capable of being reduced to a certainty by calculation," but includes claim for value of goods sold where no price is mentioned. *Henry* v. *Mageau*, 5 Terr. L. R. 512.

Detention of goods—Demand and refusal—Qualified refusal—Proof of title and ownership of goods—Delay to obtain solicitor's advice—Absence of bona fides—Defendant's right to return goods after action and obtain stay of proceedings—Practice since

Judicature Act—Damages. *Griffiths* v. *Grand Trunk Rw. Co.*, 9 O. W. R. 875.

Goods—Ownership—Conversion— Seizure —Delivery — Acceptance. *Union Bank of Can.* v. *Blackwood* (Man.), 2 W. L. R. 574.

Goods obtained by fraud—*Sale to innocent purchaser—Title "Agent"—"Intrusted with the possession"—R. S. O. c. 150.*]—One McK., who was in the habit of taking orders from persons desirous of obtaining the plaintiffs' machines, and forwarding the orders to the plaintiffs to be filled, but who was not employed by the plaintiffs to sell their machines, by a course of falsehood and forgery obtained a machine from the plaintiffs, which he sold to the defendant, and the price of which he received from the defendant, who believed that he was purchasing from McK. and did not know the plaintiffs in the transaction, while the plaintiffs believed they were selling to the defendant, having received an order for the machine and a promissory note for the price, both purporting to be signed by the defendant, whose signature was forged by McK.:—*Held*, in an action for conversion of the machine, that McK. never had any title thereto, and therefore at common law could pass none to the defendant, and at common law there was no defence; nor was McK. an "agent" of the plaintiffs or "intrusted with the possession" of the machine, within the meaning of R. S. O. 1897 c. 150; and therefore the plaintiffs were entitled to succeed. *Ontario Wind Engine and Pump Co.* v. *Lockie*, 24 C. L. T. 220, 7 O. L. R. 385, 3 O. W. R. 281.

Leave and license—Findings—Appeal. *Jones* v. *Lakefield Cement Co.*, 2 O. W. R. 107.

Mining shares—*No market value—Measure of damages — Estimate as if trial by jury.*]—Defendant sold 20,000 shares of mining stock, having no market value, in breach of contract with plaintiff. Reference was had before Referee to assess damages to be awarded plaintiff for conversion of said shares. Referee fixed the amount at $8,000, or 40 cents per share, the highest price which had been obtained for such shares. He also found that defendant had paid plaintiff $5,100, which should be deducted from amount so assessed, and that the balance, $2,900, should bear interest at 5% from 17th March, 1909.—Meredith, C.J.C.P., *held*, that the above assessment was too high, and reduced the damages to 26 cents per share, the price obtained by defendant for such shares.—Divisional Court *held* (16 O. W. R. 820, 21 O. L. R. 614, 1 O. W. N. 1131), that the sale was exceptional, and that plaintiff was entitled to damages, but the question should be dealt with as a jury probably would, taking into consideration the fact of a sale at a higher price than that obtained by defendant, and a fair assessment of damages would be to increase the assessment appealed from by $1,500.—*In re Bahia & San Francisco Rw. Co.* (1886), L. R. 3 Q. B. 584, followed. — *Mitchell* v. *Hart*, [1901], 2 K. B. 867, [1902] 1 K. B. 482, considered.—Court of Appeal affirmed assessment by Divisional Court, Meredith, J.A. (*dissenting*), being in favour of restoring the assessment of Meredith, C.J.C.P. *Goodall* v. *Clarke* (1911), 18 O. W. R. 185, 2 O. W. N. 567. O. L. R.

Personal action—*Abatement of — Trespass by testator—Suggestion of death—Liability of executors—Amendment — Money had and received.*]—Where one converts to his own use and sells the goods of the plaintiff, and dies after writ issued, but before declaration, the action may be continued against his executors, and they are liable on a count for money had and received.—In the above case the declaration was in trespass and for conversion, and upon the argument of the motion for a new trial, application was made to add a count for money had and received:—*Held, per* Hanington, Landry, and Gregory, JJ., that, as the only fact in dispute, namely, the existence of a tenancy between the parties, had been passed upon by the jury in favour of the plaintiff, and as no possible injustice could be done to the defendants, the amendment should be allowed.—*Per* Barker and McLeod, JJ., that as the proposed amendment introduced a new form of action, to which there were on the record no suitable pleas, and upon which there was no issue joined or damages assessed, the amendment proposed was improper and should not be allowed at that stage of the case. *Frederick* v. *Gibson*, 37 N. B. R. 126.

President of company—Detention of books — Terms of giving up. *Strathroy Petroleum Co.* v. *Lindsay*, 1 O. W. R. 356.

Proof of plaintiff's title—*Contract — Statute of Frauds—Pleading.*]—In an action for damages for the conversion of goods, the plaintiff must prove an unquestionable title in himself, and, if it appears that such title is based on a contract, the defendant may successfully urge that such contract is void under the Statute of Frauds, though no such defence is pleaded. It is only when the action is between the parties to the contract which one of them seeks to enforce against the other, that the defendant must plead the Statute of Frauds if he wishes to avail himself of it. Judgment in 32 N. S. R. 459, affirmed. *Kent* v. *Ellis*, 21 C. L. T. 153, 31 S. C. R. 110.

Purchase of goods—*False pretences of supposed agent of purchaser — Contract—Consensus.*]—H. fraudulently represented to the plaintiffs that he was the agent of the defendants sent by them to make a purchase of goods. He was not, in fact, in the defendants' employment; they did not send him to make the purchase, nor did they know he was going to make it; but, on the contrary, after he had so fraudulently obtained the goods, they purchased the goods from him and paid him in full without knowing where he had purchased. The goods were afterwards sold by the defendants in the ordinary course of business:—*Held*, that the property in the goods did not pass to the defendants, and they were liable to the plaintiffs for conversion. *Cundy* v. *Lindsay*, 3 App. Cas. 459, applied. There was no contract between the plaintiffs and defendants—no consensus

ad idem—and no contract between the plaintiffs and H. *Eby-Blain Co.* v. *Frankel*, 23 C. L. T. 173.

Sale—Trover—Judgment against vendor—Failure to realise—Action against vendee—Levy of small part—Part payment. *McArthur* v. *Clark*, 2 O. W. R. 319.

Sale by sheriff under execution—*Action for conversion—Goods of partnership—Misdirection—New trial.*]—L. and P. each carried on business in Saint John, buying and selling fruit. P. was a licensed auctioneer. To avoid competition between the parties, it was agreed that P. was to buy all the apples handled by either in the market square, L. to furnish the money when apples were purchased. All commissions on commission sales, and net profits on sales of apples purchased, were to be equally shared. Under this agreement P. purchased the cargo of the schooner C., some 342 barrels. After a part had been sold, the sheriff, under an execution in the suit of R. against P., seized and, without removing any of them, sold 62 barrels. At the sale the sheriff, in answer to a bidder, stated that he was selling P.'s interest only, and would guarantee nothing, and he did not deliver the barrels sold to the purchaser. In an action of trover, brought by L., in the St. John County Court against the sheriff for a conversion of the 62 barrels, the Judge told the jury that if they found that the apples were purchased under the agreement on the joint account of L. and P., there was a conversion, and the verdict should be for the plaintiff:—*Held*, on appeal, that the direction was wrong, and there must be a new trial. *Ritchie* v. *Law*, 37 N. B. R. 36.

Tenants in common—*Removal of chattel to foreign country.*]—An action for conversion of his interest in a chattel lies by one tenant in common against his co-tenants in common if the chattel owned in common is destroyed by them, or so dealt with by them as, in effect, to put an end to his rights. In this case the removal of a brick making machine to a foreign country was held sufficient to support the right of action, the plaintiff's power of enforcing his rights in the Courts of this province being thus interfered with. *McIntosh* v. *Port Huron Petrified Brick Co.*, 20 C. L. T. 200, 27 A. R. 262.

Trespass—Horse used in common—Exchange by person not its owner—Owner's right to substituted horse. *Dillman* v. *Simpson*, 2 E. L. R. 105.

Trespass—Trees — Damages. *Parent* v. *Cook*, 1 O. W. R. 366.

Trover—*Permission to store goods, with knowledge of dispute as to title—Intent to convert necessary—Evidence of intent—Setting aside finding of trial Judge.*]—Mere permission by the defendant to store goods in the defendant's barn, with knowledge of a dispute as to the title to the goods, but without intent to exercise dominion over the same, does not constitute conversion.—Where a cause is tried by a Judge without a jury, and the facts in evidence are not disputed, the Court may reconsider the evidence in the case and overrule the judgment of the trial Judge, if they think it wrong.—Here, in the opinion of the majority of the Court, the evidence did not prove any intent on the part of the defendant to convert the goods in dispute, and the finding of the trial Judge, 5 E. L. R. 54, that there had been a conversion, wes reversed: *per* Barker, C.J., McLeod, Gregory, and White, JJ., Landry, J., dissenting. *Donald* v. *Fulton*, 39 N. B. R. 9, 6 E. L. R. 397.

Trover goods converted — *Return of goods after action begun — Dispute as to identity—Stay of proceedings.*] — After the commencement of an action of trover for the conversion of a threshing engine, the defendants shipped to the plaintiffs an engine which the defendants alleged but the plaintiffs denied to be the one in question. The plaintiffs also asserted that, if it was the same, it was of very much less value than when converted: —*Held*, that the defendants were entitled, on motion, to an order permitting them to return the engine in question upon paying the costs of the action to date and of the motion within two weeks, and providing that if thereafter the plaintiffs should proceed to trial and should not recover more than nominal damages, they should pay the costs subsequently incurred. *Phillips* v. *Heyward*, 3 Dowl. 362, *Peacock* v. *Nichols*, 8 Dowl. 367, and *Earle* v. *Holderness*, 4 Bing. 462, followed. *Brown* v. *Canada Port Huron Co.*, 15 Man. L. R. 638, 2 W. L. R. 151.

CONVEYANCE.

See DEED.

CONVICTION.

See CERTIORARI — COURTS—CRIMINAL LAW —HAWKERS AND PEDLARS — INDIAN— JUSTICE OF THE PEACE — LIQUOR LICENSES — PRAIRIE FIRE ORDINANCE— PUBLIC HEALTH ACT—RAILWAY — REVENUE—SOLICITOR.

COPYRIGHT.

Assignment of British copyright—*Canadian registration—Infringement—Proof of title—Imperial statute.*]—The assignee of a copyright granted in England under 5 & 6 V. c. 45 (Imp.), is entitled to copyright of the same work, etc., in Canada by having it registered at the Department of Agriculture, under the provisions of R. S. C. c. 62, s. 6.—Upon suit brought for infringement of such a copyright, the certificate of its registration by the proper officer of the department, together with proof of the assignment of the British copyright, is sufficient evidence of the plaintiff's title to the same.—Evidence, in addition to the foregoing, that the work had been entered at Stationers' Hall, London, Eng., entitles the plaintiff to his remedy under the Imperial Act. *Anglo-Canadian Music Publishers' Association* v. *Dupuis*, 27 Que. S. C. 485, 5 Que. P. R. 351, 2 Com. L. R. 325.

Assignment of copyright — *Registration.*]—The Canadian Copyright Act, R. S. C. 1886 c. 62, s. 15, does not apply to assignments of foreign copyrights. It applies only to assignments of Canadian copyrights. *Anglo-Canadian Music Publishers' Assoc.* v. *Dupuis* (No. 2), 2 Com. L. R. 503.

Bas relief—*Patent—Trade-mark — Public usage—Injunction.*] — Copyright differs from a patent right and from a trade mark, in so far as the latter cannot exist unless they apply to something new and useful, which is not one of the conditions of copyright.—Thus a moulded bas relief which is reproduction of a well-known portrait of Champlain, may be copyrighted, the labour and skill requisite to the creation of the bas relief being ample reasons therefor. *Beullac Co.* v. *Simard* (Que., 1910), 16 R. L. n. s. 347.

Book—*Absence of registration—Pirating —Injunction—Change of title.*]—The author of a work not protected by registration as provided by law has no exclusive right of republication; and is not entitled to an injunction to restrain the republication and sale of the work by another without the author's consent, or to recover damages for such republication.—2. The fact that in republishing the work the title was changed to one which was disagreeable to the author and wounded his susceptibilities, does not give him the right to restrain the sale of such republication,—particularly where both the original work and the republication appeared under a pseudonym and it was not proved that the author was known to the public under such pseudonym. *Angers* v. *Leprohon*, 22 Que. S. C. 170.

Books — *Infringement—Imperial Act—Colonies — Importation of foreign reprints—Assignment of proprietorship—Necessity for registration—Status to maintain action.*]—At the time of an author's death he was the owner of and entitled to the copyright in a book for the British Dominions including Canada, and after his death such copyright and ownership was assigned and transferred to the plaintiffs by those upon whom they devolved. The defendants had imported copies of the book from the United States of America and were offering them for sale in Canada:—*Held*, that s. 17 of the Imperial Act to amend the Copyright Act, 5 & 6 V. c. 45, prohibiting the importation of foreign reprints by any person, not being the proprietor of the copyright or some person authorised by him, is in force in Canada; and the plaintiffs were therefore entitled to prohibit the importation of foreign reprints into Canada.—2. But the plaintiffs had no right to maintain this action or proceeding, for, although they were the assignees of the proprietorship and ownership of the book, they had not complied with s. 24 of 5 & 6 V. c. 45 by causing an entry of their proprietorship to be made in the book of registry of the Stationers' Company; the word "proprietor" in s. 24 meaning the person who is the present owner of the work. Dictum of Cockburn, L.C.J., in *Wood* v. *Boosey*, L. R. 2 Q. B. 340, not followed. *Weldon* v. *Dicks*, 10 Ch. D. 253, and *Liverpool General Brokers' Association* v. *Commercial Press Telegraph Association*, [1897] 2 Q. B. 1, followed. *George N. Morang & Co. Limited* v. *Publishers' Syndicate Limited*, 21 C. L. T. 77, 32 O. R. 393; 2 Com. L. R. 232.

Book — Infringement—5 & 6 V. c. 45 (Imp.) — Injunction — Damages. *Oman* v. *Copp-Clark Co.*, 1 O. W. R. 542.

Certificate of registration is *prima facie* evidence of due compliance with the requirements of the Copyright Act, entitling the party producing to registration under the Copyright Act, when produced from the proper branch of the Department of Agriculture, *Anglo-Canadian Music Publishers' Assoc.* v. *Dupuis* (No. 2), 2 Com. L. R. 503.

Dramatic rights—Acquisition by foreigner—Defence denying title—Striking out pleading. *Liebler* v. *Harkins* (N.S.), 1 E. L. R. 157.

Drawings—*Publication in newspapers—British copyright — "Book" — Contract—"Assign"—Foreign author—4 & 5 V. c. 45 (Imp.)—Infringement—Form of judgment—Injunction — Delivery up of copies.*]—The plaintiffs claimed copyright in certain cartoon drawings and the accompanying titles and letter-press prepared for the plaintiffs by a celebrated artist, and first published simultaneously in the plaintiffs' newspaper in the United States and in another newspaper in England owned by one H., under agreements between H. and the plaintiffs, to which the artist was also a party. By the agreements H. was acknowledged to be the owner of the British copyright. H. granted a license to the artist to publish the drawings in book form in the United Kingdom. Entry was duly made at Stationers' Hall of H.'s ownership of the copyright of his newspaper. Subsequently this copyright was said to have been assigned by H. to H. & Sons, and before this action was brought H. & Sons registered eight copies of the newspaper containing the eight drawings and letter-press in question, and assignments thereof to the plaintiffs. Before this registration the defendants had, without the consent of the plaintiffs or their predecessors, printed in Canada for the purpose of sale a quantity of pictorial post cards, on which were reproduced copies of the eight drawings, taken from books published by the artist under the license mentioned, but not registered at Stationers' Hall. The artist was not a British subject, and was not, at the time of the preparation or publication of the material in England, within any part of the British Dominions. None of the material was protected by a Canadian copyright:—*Held*, that the effect of the agreements referred to was to vest in the plaintiffs the common law right to copyright in the drawings, and this right was validly transferred to H., who was an "assign" of the artist or author, within the meaning of s. 3 of the Imperial Copyright Act, 4 & 5 V. c. 45; and the English newspaper was a book within the meaning of that section, and H. became entitled thereunder to statutory copyright in the drawings as part of his book, for when drawings form part of a book they come within the provisions of that Act, and are protected not only as part of the book but as drawings.—

Maple & Co. v. *Junior Army and Navy Stores*, 21 Ch. D. 369, and *Bradbury* v. *Hotten*, L. R. 8 Ex. 1, followed:—*Held*, also, that the evidence sufficiently established the plaintiffs' title to the copyright by re-assignment:—*Held*, also, that the present Copyright Act protects the productions of foreign authors wheresoever resident, where there is a first or contemporaneous publication within the Empire.—*Jeffries* v. *Boosey*, 4 H. L. C. 815, and *Routledge* v. *Low*, L. R. 3 H. L. 100, discussed:—*Held*, therefore, that the plaintiffs were entitled to an injunction, and to delivery up of the infringing copies. — Judgment of Teetzel, J., affirmed. *Life Publishing Co.* v. *Rose Publishing Co.*, 12 O. L. R. 386, 7 O. W. R. 337, 8 O. W. R. 28.

Foreign reprints — *Notice to English Commissioners of Customs — Entry at Stationers' Hall — Encyclopædia—Prima facie evidence — Imperial Acts — Agreement — License—Assignment—Registration.*] — Section 152 of the Imperial Customs Act, 1876, 39 & 40 V. c. 36, requiring notice to be given to the Commissioners of Customs, of copyright and of the date of its expiration, is not in force in this country, notwithstanding the statement to the contrary in the note to table iv. of the appendix to vol. 3 of R. S. O. 1897. That statement is no part of the enactment of the legislature, but is intended merely as a reference, so that the Imperial Copyright Act of 1842, 5 & 6 V. c. 45, is left to its full operation; Garrow and Maclaren, JJ.A., dissenting. *Smiles* v. *Belford*, 1 A. R. 436, followed. A certified copy of the entry at Stationers' Hall of an encyclopædia is *prima facie* evidence of ownership under ss. 18 and 19 of the Act of 1842, and it is not necessary in making a *prima facie* case to prove the facts whereby such sections are made conditions precedent to the vesting of the copyright in one who is not the author. An agreement in writing whereby the plaintiffs, for value, gave certain other persons the right to print and sell a work at not less than certain fixed prices for the remainder of the term of the copyright, except the last 4 years thereof, and under which the plates used in printing were delivered over, which, with all unsold copies, were to be redelivered on the expiry of the agreement, and in which it was agreed not to announce the publication of another edition before such last mentioned period, expressly reserving the copyright to the plaintiffs:—*Held*, to be a license, and not an assignment and so not to require registration under s. 19 of 5 & 6 V. c. 45 (Imp.) Judgment in 5 O. L. R. 184, 23 C. L. T. 68, 1 O. W. R. 743, 1 Com. L. R. 417, 2 Com. L. R. 252, 2 O. W. R. 117, affirmed. *Black* v. *Imperial Book Co.*, 8 O. L. R. 9, 3 O. W. R. 467, affirmed. The Court, however, declining to decide whether or not *Smiles* v. *Belford*, 1 A. R. 436, was rightly decided. *Imperial Book Co.* v. *Black*, 35 S. C. R. 488.

Importing foreign reprints.] — Although the owner of an Imperial copyright has ineffectually attempted to secure a Canadian copyright, it is still illegal to import foreign reprints into Canada. *Morang* v. *Publishers' Syndicate*, 32 O. R. 393, followed. *Anglo-Canadian Music Publishers' Assoc.* v. *Dupuis* (No. 2), 2 Com. L. R. 503.

Infringement — Historical work—"Pirating." *Liddell* v. *Copp-Clark Co.*, 2 O. W. R. 16.

International Copyright Act, 1886 (Imp.)—*Force in Canada—Canadian Copyright Act — B. N. A. Act — Constitutional Law.*]—Under the International Copyright Act, 1886 (Imp.), s. 4, compliance with the conditions and formalities of the country where a literary work is first published gives the author a copyright in Canada without his having to conform to the Copyright Act, c. 62, R. S. C.—The International Copyright Act, 1886 (Imp.), extends to the whole of the British Dominions and is therefore in force in Canada. — The words "*exclusive* legislative authority" in s. 91, and "may "*exclusively* make laws," in s. 92, of the B. N. A. Act, 1867, mean, "to the exclusion of provincial legislatures" in the former, and "to the exclusion of the Dominion Parliament" in the latter.—They cannot be construed to affect the power of the Imperial Parliament to legislate for Canada. Judgment appealed from 29 Que. S. C. 334, affirmed. *Hubert* v. *Mary*, 15 Que. K. B. 381.

Literary property—*Dictionary—Nomenclature — Infringement — Evidence — Presumption.*[—An historical., biographical, and geographical dictionary, containing a selection of articles treating in an original manner subjects taken from the public domain, may be the subject of copyright. It is the same with the nomenclature of such dictionary, it being the result of a work of choice. The infringement may be shewn by any kind of evidence, and notably by the resemblance between the two works, but the presumption which results from that is less strong when the works in question are compilations. However, when, besides the resemblance, the *animus furandi* appears in the author of the second work, the presumption which results from it is evidence of infringement. It matters little that the second work is an improvement upon the first, and contains additional information, the improvements not effacing the wrong. Upon the question of literary property English jurisprudence must prevail over French when there is a divergence between the two. Judgments in 22 Que. S. C. 482, and 10 Que. K. B. 255, Com. L. R. 337, affirmed. *Beauchemin* v. *Cadieux*, 31 S. C. R. 370, 2 Com. L. R. 170.

Newspaper — *Infringement — "First publication."*]—A nwspaper printed and issued at a place in the United States, copies of which are deposited in the post office there addressed to subscribers both in that country and England, cannot be considered to be first published or even simultaneously published, in England, so as to come within the provisions of the Imperial Act 5 & 6 V. c. 45, requiring first publication in the United Kingdom to entitle the publishers to British copyright. *Grossman* v. *Canada Cycle Co.*, 23 C. L. T. 48, 5 O. L. R. 55, 1 O. W. R. 846, 2 Com. L. R. 307.

Operatic composition — *Proof of proprietorship — Infringement — Indemnity — "Place of dramatic entertainment" — Liability of performers and committee—Registration—Damages—Costs.*] — *Held*, that the

proprietorship of the plaintiff in the operatic composition in question was established by the evidence; and that the evidence also established that the opera performed by the defendants was the identical composition of which the plaintiff had the sole right of representation. *Boosey* v. *Davidson*, 13 Q. B. 257, and *Lucas* v. *Williams*, [1892] 2 Q. B. 117, considered.—2. The town hall, where the defendants performed the opera, was a "place of dramatic entertainment" within the meaning of the statute, tickets for admission of the public having been sold. *Russell* v. *Smith*, 12 Q. B. 217, and *Duck* v. *Bates*, 13 Q. B. D. 846, followed.—3. All the defendants who took part in the performance or in the work of the committee of the society in relation to the performance, were liable to the plaintiff.—4. It was not necessary for the plaintiff to prove registration under the Copyright Act, R. S. C. c. 62; the Imperial Act, 5 & 6 V. c. 45, applying to Canada by express enactment; and the Dominion Act having no provision relating to the right of dramatic representation. *Smiles* v. *Belford*, 25 Gr. 590, 1 A. R. 436, followed.—5. As to the question of damages and costs, the Imperial Act, 51 & 52 V. c. 17, applies and the damages should be of such amount as the Court considers reasonable, and the costs in the discretion of the Court. *Carte* v. *Dennis*, 21 C. L. T. 267, 5 Terr. L. R. 30.

Particulars — *Copyright in book—Registration—Infringement.*]—In an action for infringement of copyright in a book, the statement of claim alleged that the plaintiffs were the proprietors of a subsisting copyright duly registered, but did not mention the date of registration, and further alleged that the defendants printed for sale a large number of copies of another book a part whereof was an infringement of the plaintiffs' copyright: —*Held*, that the defendants were entitled to particulars shewing the date of registration of the plaintiffs' copyright, and shewing what part of the defendants' book infringed the plaintiffs' right. *Sweet* v. *Maughan*, 11 Sim. 51, not followed. *Mawman*, v. *Tegg*, 2 Russ. 385, 390, and *Page* v. *Wisden*, 20 L. T. N. S. 435, followed. *Liddell* v. *Copp-Clark Co.*, 21 C. L. T. 126, 19 P. R. 332.

Pleading — *Notice of objections—Imperial Copyright Act, 1842.*]—Section 16 of the Imperial Copyright Act, 1842 (5 & 6 V. c. 45) provides that the defendant in pleading shall give to the plaintiff a notice in writing of any objection on which he means to rely on the trial of the action. Section 26 allows the pleading of the general issue: — *Held*, that s. 16 is complied with if the objections intended to be relied on are taken in the statement of defence. *Dicks* v. *Yates*, 18 Ch. D. 76, followed. *Carte* v. *Dennis*, 21 C. L. T. 68, 5 Terr. L. R. 30, 2 Com. L. R. 256.

Unauthorised circulation and publication of foreign reprints is no bar to effectual copyright in Canada. *Anglo-Canadian Music Publishers' Assoc.* v. *Dupuis* (No. 2), 2 Com. L. R. 503.

Who entitled to register—*Joint registration with person not entitled does not invalidate.*]—On a motion to continue, until trial, an *ex p.* injunction restraining defendants from publishing the report of plaintiff's journey to the North Pole, it appeared from material before the learned Judge that the copyright had been registered in England by "*The Times*," and in association with the "*New York Times*" in contract with plaintiff, summarised in the judgment, and also that copyright in Canada had been registered in the names of plaintiff Peary and The Globe Printing Co.:—*Held*, that either registration by "*The Times*" as assignees under the contract was binding in Canada or publication in England, vesting the copyright in plaintiff Peary as author, allowed him to register here under s. 8 without registration in England. "*Times*" *& Peary* v. *Mail Printing Co.* (1909), 14 O. W. R. 627.

Works of fine art—*Imperial statute.*]—The Imperial Fine Arts Copyright Act, 1862, confers on British subjects and persons resident in British dominions copyright in pictures, drawings and photographs. It extends to the whole of the United Kingdom, but does not extend to any part of the British dominions outside the United Kingdom. *Tuck & Sons* v. *Priester*, 19 Q. B. D. 629, approved. There is nothing in the Canadian Copyright Act, 1875, or in the International Copyright Acts, which conflicts with this view. Judgment in 20 C. L. T. 456, 22 C. L. T. 172, 3 O. L. R. 697, 1 O. W. R. 259, affirmed. *Graves* v. *Gorrie*, [1903] A. C. 496, 2 Com. L. R. 186.

CORONER.

Jurisdiction — *Issue of warrant to arrest witness disobeying summons — Ministerial act—Certiorari—Prohibition—Place of execution of warrant—Re-examination of witness.*]—*Certiorari* will not lie to remove a warrant issued by a coroner for the apprehension of a witness, upon default in obeying a summons to appear and testify, because the coroner in issuing the warrant is acting in a ministerial and not a judicial capacity: R. S. O. 1897 c. 97, s. 5.—A coroner is a local officer who can act only within his own municipal jurisdiction; and a warrant to apprehend issued by him cannot be validly executed out of his county.—The fact that a witness at an inquest has already been questioned at great length is not a ground for prohibiting the coroner from subjecting her to further examination; the Court assumes that the coroner will not permit the witness to be unduly harrassed. *Re Anderson and Kinrade*, 18 O. L. R. 302, 13 O. W. R. 1082, 14 Can. Cr. Cas. 448.

See CRIMINAL LAW.

CORONER'S INQUEST.

See RAILWAY.

CORPORATION.

See COMPANY—MUNICIPAL CORPORATIONS.

CORPSE.

Autopsy—*Tort — Widow's right of action.*]—The unauthorised autopsy of a deceased person is a tort, and his widow has a right of action to recover damages therefor. *Philipps* v. *Montreal General Hospital*, 33 Que. S. C. 483, 4 E. L. R. 477.

Post mortem examination.]—No post mortem examination of a body will be allowed where persons having a family interest in relation to the removal of the body from the vault and its examination, oppose the same. *In re Grothe, North American Life Assurance Co.* v. *Grothe*, 7 Que. P. R. 111.

Property in — *Right of custody, control, and disposition — Exercise by executor or relative—Remedy for invasion—Delay of railway company in delivering corpse — Damages—Expenses caused by delay—Mental anguish—Tort—Negligence.*]—The plaintiff, the mother and executrix of a deceased man, shipped his body by the defendants' railway from Revelstoke to Rawlf, and accompanied the body. By a mistake of the defendants' servants, the body was put off the train at Banff, and did not arrive at Rawlf until a day later than it should have arrived, occasioning expense by postponement of the funeral, etc. The plaintiff's luggage was also treated in the same way, and she was put to expense in consequence: — *Held*, that the proposition, accepted in English law, that there can be no property in a corpse, does not rest upon a sound foundation, and is not sustainable at least as a general proposition. The English decisions rest to a large extent upon ecclesiastical law, which has no application or effect in Alberta. —Review of the decisions.—The true rule is, that, inasmuch as there is a legal right of custody, control, and disposition, the law recognises property in a corpse, but property subject to a trust, and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise.—*Pettigrew* v. *Pettigrew* (1904), 207 Pa. 313, 64 L. R. A. 179, approved.—The property in a corpse is subject, on the one hand, to the obligations of proper care and decent burial, and the restraints upon its voluntary or involuntary disposal and use provided by law, or arising out of the fact that the thing in question is a corpse; and, on the other hand, the nature and extent of the right or obligation of the person for the time being claiming property; and the Courts will give appropriate remedies against interference with the right of custody, possession, and control of a corpse awaiting burial, pre-supposing a right of property therein, subject to the obligations and restrictions indicated:—*Held*, also, that the action was one of tort, for damages occasioned by the defendants' negligence; and the plaintiff was entitled to recover as damages not only the money loss occasioned by the mistake, but compensation for her mental anguish occasioned by the delay and the decomposition of the corpse.—Review of the authorities. *Miner* v. *Can. Pac. Rw. Co.* (1910), 15 W. L. R. 161, Alta. L. R. .

See CEMETERY—MANDAMUS—WILL.

CORROBORATION.

See CRIMINAL LAW—EVIDENCE.

CORRUPTION.

See MUNICIPAL CORPORATIONS.

CORRUPTION OF WITNESS.

See CRIMINAL LAW.

COSTS.

1. GENERALLY—RIGHT TO COSTS AND INCIDENCE OF COSTS, 966.
2. SCALE AND QUANTUM OF COSTS, 1005.
3. SECURITY FOR COSTS, 1025.
4. TAXATION OF, 1063.
5. WITNESS FEES, 1086.

1. GENERALLY—RIGHT TO COSTS AND INCIDENCE OF COSTS.

Abandoned motion—Committal for contempt of Court—"Criminal matter"—Powers of taxing officer — Necessity for order— Appointment given by taxing officer—Motion to set aside—Jurisdiction of Master in Chambers. *Rex ex rel. Bawkes* v. *Letherby, Re Goodfellow*, 12 O. W. R. 703.

Abandoned motion — Examination of transferees of judgment debtor. *Lumbers* v. *Dundass*, 7 O. W. R. 230.

Abortive trial—*Successful party to action—Practice under Judicature Act.*]—The successful party to an action is not entitled to recover costs of a trial rendered abortive by disagreement of the jury.—The Judicature Act has made no change in this practice by granting power to award costs where costs were not ordinarily given previous to its enactment. *Hacket* v. *Rorke*, 42 N. S. R. 341.

Acceptance of money paid into Court —*Notice.*]—After the full Court had rendered judgment (20 C. L. T. 136), reversing the decision of Henry, J. (19 C. L. T. 400), the plaintiff delivered a reply accepting the money paid into Court. The amount paid in was $1. This reduced the action to a question of costs:—*Held*, that Order 22, Rule 6 (*b*), latter part, applied to this case. It was the case of a delivery of a reply accepting the money and not a case for notice. This was not a case where the plaintiff should be deprived of his costs. *Miller* v. *Archibald*, 20 C. L. T. 356.

Action—*Compromise—Acceptance of offer to pay part of claim—Time for payment—Costs of action—Process not served.*]—When a creditor, by way of compromise, consents to accept from his debtor a part of the debt for the present, the time allowed for paying

the amount is that which is reasonably necessary for the receipt of a letter and an answer.—In order that a plaintiff shall have a right to costs, it is not necessary that service of process shall have been made; it is sufficient that costs have been legitimately incurred before offer of compromise made and accepted. *Kearney* v. *Morin*, 8 Que. P. R. 288.

Action — Injunction — Partnership — Fraud—Master and servant—Disclosure by servant of master's business secrets—Use in another action—Action becoming unnecessary—Summary disposition of costs. *Mitchell* v. *Mackenzie*, 8 O. W. R. 139.

Action against police officers—*R. S. O. 1897 c. 88, s. 22—Dismissal of action—Absolute right of defendants to costs as between solicitor and client.*]—This action had been dismissed without costs. Judgment was now varied by the action being dismissed with costs as between solicitor and client under R. S. O. 1897, c. 88, s. 22, following *Arscott* v. *Lilley*, 14 A. R. 283; *Bostock* v. *Ramsay*, [1900] 1 Q. B. 357, being distinguished. *Ing Kon* v. *Archibald*, 17 O. L. R. 484, 12 O. W. R. 997, 14 Can. Crim. Cas. 201.

Action by Attorney-General — *Payment of costs by relator—Statutes.*]—In an action by the Attorney-General at the relation of a private individual, the Crown sues as *parens patriæ*, and the only object of inserting the name of the relator in the proceedings is to make him responsible for costs. —The Act 18 & 19 V. c. 90 (Imp.) is not in force in British Columbia. *Att.-Gen. for B. C. ex rel., Kent* v. *Ruffner*, 12 B. C. R. 299, 3 W. L. R. 272.

Action by attorneys to recover—Quebec Courts—"Distraction" in favour of attorneys — Rights against unsuccessful party in litigation—Interest. *Hutchinson* v. *McCurry*, 2 O. W. R. 136, 5 O. L. R. 261.

Action by execution creditors for declaration that land subject to execution—Class suit—Payment of execution creditors' claim—Disposition of costs. *Walkerville Brewery Co.* v. *Knittle*, 8 O. W. R. 696.

Action by solicitor for—Reference — Costs of. *Sale* v. *Watt*, 2 O. W. R. 115.

Action ended by conduct of defendant — Question whether action has succeeded—Incidence of costs—Motion for summary disposition. *Titterington* v. *Bank of Hamilton*, 9 O. W. R. 399.

Action en garantie—*Dismissal of principal action—Plaintiff's liability for costs.*]—Where the principal action is dismissed with costs to be paid by the plaintiff, the plaintiff may also be ordered to pay the costs of an action *en garantie*, upon the sole ground that it arose out of the principal action, without trial or adjudication of the merits of the action *en garantie*. *Houle* v. *Hébert*, 10 Que. P. R. 238.

Action dismissed with costs—*Successful appeal by plaintiff—Further appeal to Privy Council—Original judgment restored.*] —In a suit against L. and R. the bill was dismissed by this Court with costs. An appeal to the Supreme Court was allowed with costs. On appeal by R. to the Judicial Committee of the Privy Council it was ordered that the decree of the Supreme Court should be discharged as against the appellant with costs, and that the decree of this Court should be restored:—*Held*, that costs under the original decree should be taxed to L. *Fairweather* v. *Robertson*, 3 N. B. Eq. 276; *Fairweather* v. *Lloyd*, 1 E. L. R. 154.

Action for costs — *Mise-en-cause — Demand for costs in former action.*]—Costs cannot by direct action be recovered from a party who has been assigned as *mise-en-cause*, and against whom costs have been demanded in the event of contestation on his part, especially where the latter has not thought fit to contest the action. *Michaud* v. *Roy*, 34 Que. S. C. 352.

Action for construction of will.] — *Held*, upon the evidence, that the plaintiff should not be called upon to pay costs to the estate. *Hoblirk* v. *Smillie* (1909), 14 O. W. R. 486.—Where testator had been the real cause of the litigation it was held that all costs must come out of the estate. *Vollmer* v. *Baechler* (1909), 14 O. W. R. 485.

Action for destruction of dog while at large—*Justification under statute—Judgment for defendant without costs—Motion for costs—Judgment varied—Practice.*]—On motion judgment, 7 E. L. R. 408, varied by giving costs to defendant. *Fraser* v. *Sinclair*, 8 E. L. R. 3.

Action for defamation — Defence — Money paid into Court—Amendment—Subsequent acceptance by plaintiff of money paid in. *Morency* v. *Wilgress*, 9 O. W. R. 415.

Action for malicious arrest—*Damages —Verdict less than $10.*]—In an action to recover damages for malicious arrest and prosecution, plaintiffs recovered verdict for $5. Defendant asked for certificate under section 312, Common Law Procedure Act of 1873, disentitling plaintiff to costs:—*Held*, that under the circumstances of the case, defendant was entitled to the certificate. *Robinson* v. *Nelson* (1880), 2 P. E. I. R. 318.

Action for money demand — Recovery of small part of amount claimed—General costs—Witness fees. *Vopni* v. *Stephenson*, 7 W. L. R. 753.

Action for trespass and trover — Verdict for $1.60—C. L. P. Act, s. 312. *McLean* v. *Ings*, 5 E. L. R. 475.

Action to establish will — Undue influence asserted — Grounds for suspicion — Costs of all parties to be paid out of estate. *Reith* v. *Reith*, 12 O. W. R. 20.

Action tried with jury—Event—Good cause for depriving plaintiff of costs—Rule 525—Apportionment of costs—Distinct issues —Abandonment of one claim—Costs of interim injunction motion. *Gallagher* v. *Bonanza Creek Gold Mining Co.* (Y.T.), 6 W. L. R. 603.

Added defendants — Unnecessary parties. *Gurney* v. *Tilden*, 1 O. W. R. 207.

Adjournment of trial.]—No costs of an adjournment of the trial of an action will be allowed to the successful party, where the adjournment was caused by reason of there being no Court room available. *Macdonald* v. *Perry*, 10 B. C. R. 326.

Administration proceeding — Taxed costs in lieu of commission—Special circumstances—Consent. *Re Greer, Greer* v. *Greer* 8 O. W. R. 69.

Advocate's letter before action—*Attempt to recover—Client's action.*]—The costs of an advocate's letter warning a person that unless a chattel which he detains is given up to its owner, an action for revendication will be brought against him, cannot be recovered from the person addressed.—2. An action for the costs of such a letter must be brought by the client, and not by the advocate who wrote it. *Davidson* v. *Drolet*, 9 Que. P. R. 372.

Amendment after inscription.] — A defendant who amends his pleas after the cause has been inscribed for *enquête et mérite* must pay the difference between items 7 and 8 of the tariff. *Union Bank of Halifax* v. *Vipond*, 3 Que. P. R. 490.

Amendment at trial—*Counterclaim—Damages—Detention of goods.*]—On the trial of an action for damages for the wrongful detention and conversion of the plaintiff's horse, judgment was given in favour of the plaintiff for detention, but the defendant's pleadings were amended to enable him to counterclaim for amounts paid to and on account of the plaintiff, and judgment was given in his favour for this amount with costs, and the costs were offset:—*Held*, that the plaintiff should not have been made to pay costs of an amendment required by the defendant, and that the defendant should not have been allowed costs of a counterclaim put on the record to enable him to get the benefit of payments not put forward by a claim against the plaintiff.—There was no evidence to warrant the damages awarded to the plaintiff for detention of the horse, but it was held that, in the absence of an appeal, the judgment could not be disturbed. *Cox* v. *McLean*, 2 E. L. R. 291, 41 N. S. R. 238.

Appeal—"*No order as to costs*"—*Meaning of.*] — From an interlocutory order made in the action an appeal was taken. Before the hearing of the appeal, the plaintiff lost his interest in the case by allowing the mineral claim in question to lapse, and so the full Court "struck out the appeal—no order as to costs." Subsequently the plaintiff's action was dismissed with costs, and the defendants claimed the costs of the appeal, which the Registrar disallowed on taxation:—*Held*, following *In re Hodgkinson*, [1895] W. N. 85, that the statement "no order as to costs" means that each party must pay his own costs. So also where the Court refuses to make any order as to costs. *McCune* v. *Botsford*, 22 C. L. T. 340, 9 B. C. R. 129.

Appeal — *Offer of settlement.*]—Where the amount of a judgment is reduced on appeal, and pending the disposition of the appeal the respondent offers to accept in settlement an amount smaller than the original judgment but greater than the reduced judgment, the appellant will be allowed the costs of the appeal. *Dallin* v. *Weaver*, 8 B. C. R. 241.

Appeal — *Point not raised below.*]—Where an appeal is allowed on a point of law not taken at the trial or in the notice of appeal, but open on the pleadings, it is not in strictness successful, and no costs of the appeal will be allowed, but as the appellant should have succeeded at the trial, he will be allowed the costs of it. *White Co.* v. *Sandon Waterworks & Light Co.*, 10 B. C. R. 361.

Appeal—*Practice.*]—In interlocutory appeals, when a party is allowed costs, they are payable forthwith. *Star Mining and Milling Co.* v. *White Co.*, 22 C. L. T. 104, 9 B. C. R. 9.

Appeal—*Trifling success.*]—A defendant appealed to the Superior Court in review from a judgment against him for the recovery of $115.55, and succeeded in reducing the amount of the judgment, but only by $5:—*Held*, that he was entitled to the costs of the appeal against the plaintiff. *Gamache* v. *Déchene*, 3 Que. P. R. 399.

Appeal — *Two notices of appeal by different parties—Costs of respondent.*]—Where an appeal asserted by the assignor and the principal beneficiary from a judgment in favour of the plaintiff in an action to set aside an assignment under 13 Eliz. c. 5, had been dismissed:—*Held*, that only one bill of costs should be taxed, though two notices of appeal had been given. *Taylor* v. *McKinnon*, 40 N. S. R. 124.

Appeal from award—*Five grounds of appeal—Success on one—"Event"—Statutes—Construction.*]—Sam Kee, having obtained an award from arbitrators appointed under the Railway Act, 1903 (Dominion), which award, by reason of s. 162 of the Railway Act, 1903, entitled him to the costs of the arbitration, the railway company appealed to the full Court, advancing several distinct grounds of appeal, on all of which with the exception of that relating to the rate of interest allowed by the arbitrators, they failed, the interest being reduced to the statutory rate, from six per cent. to five per cent.:—*Held*, Irving, J., dissenting, that the word "event" in s. 100 of the Supreme Court Act, 1904, may be read distributively.—2. That s. 162 of the Railway Act, 1903 (Dominion), does not apply to costs of appeals to the full Court from the award of arbitrators, but that such appeal is an independent proceeding, and is therefore governed by s. 100 of the Supreme Court Act, 1904.—3. That the success of the appellant company on the question of interest was merely an "issue" arising on the appeal, and not an "event" on which it was taken. *Vancouver, Westminster and Yukon Ry. Co.* v. *Sam Kee*, 12 B. C. R. 1; *Re Sam Kee*, 3 W. L. R. 8.

Appeal on merits where only costs involved. *Holmes* v. *Goderich*, 1 O. W. R. 367, 814.

Appeal to Court of Appeal—Parties—Added plaintiff. *Murray* v. *Wurtele*, 1 O. W. R. 298, 353.

Appeal to Court of Review—*Discretion of trial Judge.*]—The Court of Review (Quebec) will not alter the order as to costs of the Judge of first instance, unless the latter has made an unreasonable use of the discretion which the law allows him. *Re Hurtubise & Birks*, 26 Que. S. C. 137.

Appeal to full Court—*Supreme Court Act, 1904, s. 100—"Event"—Set-off.*]—By s. 100 of the Supreme Court Act, 1904, the legislature provided an automatic code for the disposition of the costs of all trials, hearings, and appeals in the Supreme Court, and swept away all discretion save in relation to the specific exception set out in s. 100.—Therefore, in an action relating to the validity of a will, the full Court could not order that the costs of an appeal thereto should be paid out of the estate, but was confined to a strict observance of the section. But, there being two distinct appeals, the Court could and ought to distribute the costs according to the event of each, and, success being divided, to order a set-off. *Hopper* v. *Dunsmuir*, 12 B. C. R. 18, 3 W. L. R. 35.

Appeal to Privy Council—*Costs incurred in Canada—Taxation — Order for — Rules 818, 1255.*]—Appeal by plaintiffs from an order of Falconbridge, C.J., upon a petition of defendants, directing that it should be referred to the senior taxing officer to ascertain the amount to which the petitioners were entitled under the terms of the order of the Privy Council of 10th December, 1901, with reference to the costs incurred in Canada in relation to an appeal to the Judicial Committee, and directing plaintiffs to pay to defendants the costs of the petition and reference: — *Held*, dismissing the appeal with costs, that Rule 1255 (818a) simply gives effect to R. S. O. 1897, Ch. 48 s. 7, and does not carry the procedure beyond what is therein provided for. It is a rule of procedure and applies, but even without Rule 1255, plaintiffs are entitled under the above Act and Rule 818, to have the costs ascertained "as if the decision had been given in the Court below." *Earle* v. *Burland*, 5 O. W. R. 629, 9 O. L. R. 663.

See also 1 O. W. R. 527, 2 O. W. R. 769, 3 O. W. R. 702, 23 C. L. T. 276, 24 C. L. T. 355, 8 O. L. R. 174.

Appeal to Privy Council — *Practice—Execution—Stay—Set-off of other costs or damages.*]—When costs of appeal to the Judicial Committee of the Privy Council have been awarded by the judgment of that tribunal, they are not subject to the rules of practice of the lower Courts; there is no right of set-off, and no right to modify the direction to pay, which means forthwith after the amount is fixed, unless by application made to the Committee before final judgment is completed.—*Russell* v. *Russell*, [1893] A. C. 307, applied and followed.—The plaintiffs, having been ordered by the Judicial Committee to pay the costs of the defendants' appeal to that tribunal, were held not entitled to a stay of execution for such costs in the Court below (the High Court), with a view to a set-off of other costs or of damages to be recovered upon a new trial ordered by the Judicial Committee. *Metallic Roofing Co.* v. *Jose*, C. R. [1900] A. C. 1, 12 O. W. R. 670, 17 O. L. R. 237.

Application for security.]—On principle and by practice costs of an application for security for costs are made costs in the cause and given to the party finally succeeding in the litigation. In an action brought against defendant as secretary of school trustees, defendant applied for security on the ground that the relator named was a person against whom costs could not be recovered, and that the proceedings were really brought on behalf of the trustees: —*Held*, that defendant, as the party finally succeeding, was entitled to costs of the application. *Atty.-Gen. for N. S.* v. *Cameron* (1908), 43 N. S. R. 49.

Application to stay actions against administratrix — Ascertainment of assets of estate—Payment of creditors—Costs of actions. *Rat Portage Lumber Co.* v. *Martin* (N.W.T.), 2 W. L. R. 85.

Arbitration under Railway Act — Taxation by Judge. *Re Parks and Lake Erie and Detroit Rw. Co., Re McAlpine and Lake Erie and Detroit River Rw. Co.*, 1 O. W. R. 484.

Assault—Small damages—Action brought for revenge. *Sawler* v. *Adams*, 40 N. S. R. 599.

Assault — Small damages—Plaintiff acting unreasonably. *McDonald* v. *Sydney and Glace Bay Rw. Co.*, 40 N. S. R. 598.

Attachment against next friend for non-payment of costs—Rule for—Practice. *McGaw* v. *Fisk*, 39 N. B. R. 1, 6 E. L. R. 373.

Attorney's fees—*Discretion.*] — The fee to be allowed attorneys upon questions of law submitted to the Court under Art. 509, C. P., is in the discretion of the Court. *Pare* v. *County of Shefford*, 24 Que. S. C. 50.

Attorney's fees upon interventions.]—By virtue of par. 13 of Art. 46 of the tariff, the fees payable upon an intervention are of the class of action represented by the amount claimed by such intervention. *Gelinas* v. *Finkelstein & Lafond* (1910), 16 R. de J. 527.

Awarding costs against partly successful plaintiff—*Discretion—Excess.*] — *Semble*, that when the plaintiff's claim, consisting of two grounds of action, is maintained as to one and rejected as to the other, a judgment for costs of the contestation against the plaintiff as regards the ground upon which he fails, is in excess of the discretionary power of Courts in the matter of costs. *Boursier* v. *Bergevin*, 34 Que. S. C. 97.

Class action—Plaintiff held not entitled to sue. *Hart* v. *Halifax*, 2 E. L. R. 158.

Company — *Winding-up — Costs of alleged contributories payable out of assets—Deficiency—Costs of petitioning creditors—Liquidator's costs and compensation — Priority—Abatement.*]—On the application of the liquidator of a company directed to be wound up, an order was made by a local Judge directing two persons to be placed on the list of contributories, which was affirmed by a Judge of the High Court and by the Court of Appeal, but was reversed by the Supreme Court of Canada with costs to be paid by the liquidator as well of that Court as of the prior appeals:—*Held*, that the successful appellants were entitled to their costs out of the assets of the estate in priority to those incurred by the liquidator—the reasonableness of the liquidator's claim forming no element in the matter—but subject to certain costs payable by the liquidator to the petitioning creditors, and to such costs of litigation as were incurred by the liquidator in the realisation of certain assets, as well as a reasonable sum as compensation for his care and trouble in such realisation, payable out of the assets so realised. *Re Baden Machinery Co.*, 12 O. L. R. 634, 8 O. W. R. 555.

Company—*Winding-up. Morton Co.* v. *Ont. Acc. Ins. Co.* (1910), 1 O. W. N. 364.

Conclusion of litigation.] — There is no fixed rule in British Columbia that in all cases costs of interlocutory proceedings shall not be payable until the conclusion of the litigation. *Jones* v. *Davenport*, 7 B. C. R. 452.

Contestation as to costs—*Costs of.*]—A party who prays that the costs of an application be borne by another party, who is under no obligation to him, thereby forcing the latter to appear and contest, will be condemned to pay the costs of such contestation. *Gingras* v. *Boon*, 6 Que. P. R. 37.

Conviction—*Discharge of prisoner—Order for payment by informant.*]—The defendant was convicted for stealing the property of B., and was sentenced to be imprisoned in the city prison of the city of Halifax. An order made by the Judge of a County Court, under N. S. Acts of 1897 c. 32, s. 2, for the defendant's discharge, under a writ of *habeas corpus*, directed that the informant B. pay to the defendant his costs of the application and order for his discharge. There was nothing to shew that B. was the informant, except a statement to that effect in the affidavit of the defendant, upon which the application for the order was made, which was not borne out by either the conviction or the commitment:—*Held*, that the order was wrong, and must be set aside. *Per* Meagher, J., that B. was not bound to appear in answer to the summons for the writ of *habeas corpus*, and that the fact of his not appearing was not to be regarded as conduct or acquiescence justifying the imposition of costs. *Quære*, also, whether the Judge had jurisdiction to make the order. *Regina* v. *Bowers*, 34 N. S. R. 550.

Conviction — *Motion to quash.*]—In a motion to quash a conviction, such conviction being in a criminal matter, and not merely for a penalty imposed by or under provincial legislation, no jurisdiction is conferred on the High Court to give costs to the applicant against the prosecutor or magistrate. *Rex* v. *Bennett*, 22 C. L. T. 290, 4 O. L. R. 205, 1 O. W. R. 309.

Costs in the cause — Counterclaim — Distributive reading. *Kirk* v. *Kirk*, 40 N. S. R. 600.

Costs of amendment — *Discretion of Court below.*]—The disposition of costs occasioned by the amendment of a clerical error is within the discretion of the Court of first instance, and, unless that discretion is reviewed, it will not be interfered with by the Court of Appeal. *Forcier* v. *Bélanger*, 16 Que. K. B. 289.

Costs of plaintiff in principal action —*Payment by defendant—Recovery from defendant in warranty — Taxation—Notice.*]—Where a principal defendant, plaintiff in warranty, has paid the costs of the principal action, he can recover them from the defendant in warranty, who has been condemned to pay, after these costs have been regularly taxed and notice given to the defendant in warranty by the principal plaintiff. *Malo* v. *Monette*, 9 Que. P. R. 315.

Counsel fee increased — *Fiat for — Application to Judge—Procedure applicable—Principles governing.*]—No formal summons is necessary on an application for increased counsel fee; merely a letter notifying the other side of intention to apply at a time mutually convenient is sufficient. Applicant should have a certificate from the registrar shewing dates and extent of sittings and the highest fee taxable by the registrar. These facts should be submitted without any argument. Observations on the reasons which will be taken into consideration by a Judge in exercising this discretion. *Bryce* v. *Can. Pac. Ry. Co.* (1907), 14 B. C. R. 155.

Counterclaim—*Relief obtainable without cross-action—Interlocutory costs — Order of revivor.*]—The counterclaim of a defendant, properly so-called, is a claim by the defendant for a relief which cannot be obtained by him in the action; and calling a claim made by the defendant a counterclaim cannot make it one.—The plaintiff claimed a declaration that his interest as a chargee upon land could not be sold under the power in the defendant's mortgage upon such land, and, in the alternative, that he was entitled to redeem the defendant. By her pleading in answer the defendant alleged certain facts justifying her right to exercise the power of sale, and "by way of counterclaim" claimed payment of her mortgage, sale or foreclosure, possession, costs, and damages. The action was at the trial dismissed with costs, and the counterclaim was also dismissed with costs, the defendant not desiring a foreclosure, which she was offered:—*Held*, that the relief claimed by the defendant was obtainable by her in the action brought against her, and was not the subject of a cross-action or counterclaim; and the only costs taxable by the plaintiff against the defendant were such costs as were occasioned to the plaintiff by reason of the claim made

by the defendant, treating it as a claim properly made in the action and dismissed; and such costs should be set off *pro tanto* against the defendant's costs of the dismissal of the action. The judgment dismissing the "counterclaim" with costs meant that such costs should be taxed as were appropriate to it in its true character.—*Semble*, that in this Province the law as to set-off is different from the English law, and here a set-off should not be treated as a counterclaim nor be pleaded as such:—*Held*, also, that such costs were interlocutory costs within the meaning of Rule 1165; and, if not, that they were costs falling within Rule 1164, and subject to the discretion of the taxing officer in setting them off against the defendant's costs of the action.—*Held*, also, that costs of an order of revivor obtained by the plaintiff after judgment in order to tax his costs should be taxed to him and added to his other costs and set-off against the defendant's costs. *Girardot* v. *Welton*, 20 C. L. T. 231, 257, 19 P. R. 162, 201.

Counterclaim—Several issues — Divided success. *Hekla* v. *S. Cunard & Co.*, 40 N. S. R. 611.

County Court — *Appeal.*] — Action brought in a County Court to recover $155.98 due upon a promissory note. Defence, as to $122, payment and set-off; but no defence was set up to the residue of the demand. The Judge found in the defendant's favour on the question of payment and set-off, but refused the defendant the costs of suit, because the balance of $33.98, which the defendant did not deny was due to the plaintiff, had not been paid into Court or to the plaintiff.—On appeal, the defendant was allowed his costs of suit in the County Court. *Kendall* v. *Benson*, 20 C. L. T. 408.

County Court—*Appeal—Forum.*]—This action was brought in a County Court for alleged false imprisonment. The plaintiff made a motion to strike out the defendant's notice of defence, which was granted. The defendant appealed against the order to the Supreme Court, and the appeal was allowed with costs. Subsequently the plaintiff secured a judgment.—This was an application by the defendant for an order to set off his costs of appeal against the plaintiff's judgment:—*Held*, that the application should be to the County Court: s. 75 of 49 V. c. 28. *Anderson* v. *Shaw*, 20 C. L. T. 18.

County Court or High Court scale—*County Courts Act, s. 23 (1, 8).*]—Actions for the recovery of or trespass or injury to land where the value of the land exceeds $200 are not within the jurisdiction of the County Court, therefore costs of such actions should be taxed on the High Court scale. *Ross* v. *Vokes* (1909), 14 O. W. R. 1142, 1 O. W. N. 261.

Court en banc—*Application to fix disbursements—Travelling expenses.*]—It is not proper to make a formal application to the Court *en banc* to fix a counsel fee in a case argued before it. If the marking of the fee is overlooked by the Court, it would be proper for counsel to draw attention, either in open Court or otherwise, to the omission, and, as a matter of courtesy only, to notify counsel on the other side of his intention.—No allowance can be made to counsel for travelling expenses. *Hull* v. *Donohue* (No. 2), 2 Terr. L. R. 351.

Criminal libel—*Depositions not used at trial—Abortive trial.*]—The prosecution was for criminal libel, and the defendant, in support of his plea of justification, obtained a commission and had the evidence of certain witnesses out of the jurisdiction taken, for use at the trial. The order granting the commission provided that the costs of the commission be reserved to be dealt with by the trial Judge. The evidence was used at the first trial, and the jury disagreed. At the second trial the jury again disagreed. At the third trial the defendant was acquitted, but the evidence was not used, owing to the private prosecutor giving evidence and admitting substantially what was stated by the witnesses in their depositions before the commissioner:—*Held*, that, as the commission evidence was not put in by the defendant as part of his case, the defendant should not have the costs of it:—*Held*, also, that the defendant was not entitled to the costs of the abortive trials. *Rex* v. *Nichol*, 22 C. L. T. 75, 8 B. C. R. 276.

Damages—Action for specific performance of contract for sale of land—Sale by defendant to another—Contract by plaintiff to sell to another—Costs recoverable as damages—Quantum of costs—Fulfilment of contract after action brought. *Hill* v. *Bayvis*, 7 W. L. R. 428.

Declaration of garnishee—*Striking out—Option.*]—A garnishee having made default in the completion of his declaration, the attaching creditor made a motion to strike out such declaration or to give the garnishee the option of continuing and completing it:—*Held*, that the costs of such motion should be paid by the garnishee. *Garbacht* v. *Silverman*, 4 Que. P. R. 439.

Defamation—Verdict for defendant—Depriving defendant of costs—Discretion—Rule 1130—Good cause. *Byers* v. *Kidd*, 8 O. W. R. 759.

Defamation.]—In a slander action the plaintiff recovered $1 damages:—*Held*, on appeal, that the Libel Act, R. S. M. (1902), c. 97, s. 13, and Man. K. B. Rule 931 (*a*) are no longer law, and that costs will only be entered on the judgment of the trial Judge or perhaps of the Court. Full costs, as provided by 7 & 8 Ed. VII., c. 12, s. 3, certified to. *Shillinglaw* v. *Whillier*, 12 W. L. R. 128.

Defence of infancy—Prejudice. *Simcon* v. *Gullivan*, 40 N. S. R. 597.

Defence to criminal charge—*Acquittal—Action against prosecutor for costs—Taxation by Judge.*]—The plaintiff had been criminally prosecuted by the defendant for a libel, and had been acquitted by the verdict of a jury. At the time the verdict was given no demand was made for costs against the prosecutor; and the plaintiff afterwards brought this action to recover the costs of his defence to the criminal proceedings. The Judge who tried this action ordered that the

costs in question should be taxed by the Judge who had presided at the criminal trial, and this having been done, the action again came on for hearing:—*Held*, that the plaintiff could claim his costs and disbursements against the defendant by an ordinary action, although he had not asked costs at the time the verdict was rendered. 2. That the Judge who had presided at the criminal trial could, even after such trial, tax the costs. *Mackay* v. *Hughes*, 19 Que. S. C. 367.

Defendants severing—*Liability to plaintiff.*]—Reference to a Judge under Rule 801 by the District Registrar at Nelson on taxation of a bill of costs. The defendants separated in their defence, and the judgment was for the plaintiff against all the defendants:—*Held*, that the plaintiff was entitled to costs against the defendants jointly, and each defendant was liable for the costs of his separate defence, but not liable for any costs occasioned solely by the other. *Stumm* v. *Dixon*, 22 Q. B. D. 99, followed. *Merchants Bank* v. *Houston*, 20 C. L. T. 48, 7 B. C. L. R. 352.

Defendants severing — Trustees—One set of costs. *Jones* v. *Jones*, 40 N. S. R. 598.

Depositions—*Copies—Appeal — Costs in cause.*]—Where the costs of transcription of depositions are incurred by reason of an inscription for review or appeal, they must be paid by the party who fails, because they are part of the costs of the cause. *Lauzon* v. *Corporation du Canton de la Minerve*, 9 Que. P. R. 151.

Depriving defendant of costs—*Discretion—Good cause—Rule 430 (4)—Appeal.*]—Plaintiff, a widow, claimed insurance under policies on her late husband's life, in favour of his mother, which by his dying declaration and attempted disposition she was to receive $1,500, and that if these policies were not altered by Mr. A. through illness and reliance on the assurance that his wishes would be carried out, it would be a fraud upon her. The solicitor for the plaintiff wrote Joseph Armstrong, the deceased husband's brother, requesting a settlement. He replied that the policies were always in favour of the mother and refused settlement. Action was commenced against mother of her husband. After it was discovered that the policies had been assigned by mother to her son Joseph. Motion was then made under Rule 430 (4) to discontinue action without costs. Motion granted owing to the letters written to the plaintiff's solicitor, which deceived him by leading him to believe the policies were in the mother's name, which was not true. *Armstrong* v. *Armstrong*, 4 O. W. R. 223, 301, 25 C. L. T. 74, 9 O. L. R. 14.

Depriving successful party—*Conduct—Acquiescence—Custom.*]—In an action for damages for an alleged interference with a fishing berth, judgment was given in favour of the defendant, but he was deprived of costs, it appearing that both the defendant and plaintiff acted throughout as if they thought the fishing berth in controversy was in Lunenburg county; that it had, up to the time of action, been under the charge and control of Lunenburg officers; that the defendant attempted to take it up according to the custom of fishermen followed in that county; that he attended before the fishery officers of that county when they attempted to settle the dispute between himself and the plaintiff, and did not question their jurisdiction; and that the defence that the berth was not in Lunenburg but in Queen's county was not pleaded, nor the objection taken until the trial:—Held, that this was not a case in which the discretion of the trial Judge should be reviewed. *Semble*, that the parties were bound by the custom assented to by them and the decision of the fisheries officer. *Selig* v. *Nowe*, 36 N. S. Reps. 99.

Depriving successful party—*Defamation—"Good cause."*]—In an action for libel by the publishers of a newspaper against the publishers of another newspaper, arising out of statements as to their respective circulations, the trial Judge found on the facts that the statements made in the defendants' newspaper was not established; but he came to the conclusion that there had been no special damage suffered by the plaintiffs' newspaper in consequence of the statement, and gave judgment dismissing the action without costs:—*Held*, that under the Rule governing costs in British Columbia, as distinguished from that in force in England, the trial Judge must find good cause for depriving a successful party of his costs; and here there was not such good cause. *World Publishing Co.* v. *Vancouver Publishing Co.*, 13 B. C. R. 220.

Depriving successful party—*Defamation—Verdict for defendant — Discretion.*]—In the exercise of his discretion in depriving a successful defendant of his costs, the trial Judge is not obliged to find, under Con. Rule 1130, what would necessarily be "good cause" under the English Order 65, Rule 1; at the same time he must not exercise his discretion arbitrarily, but for a reason which reasonably satisfies him that it should be so exercised.—In an action of slander a successful defendant was disallowed his costs, where the trial Judge was satisfied that the defendant by his conduct had provoked the litigation, and had really made use of the words attributed to him, notwithstanding the finding of the jury to the contrary, and had refused to carry out a proposed settlement which he had at first acceded to, and the jury had intimated that the costs should be equally divided between the parties. *Byers* v. *Kidd*, 8 O. W. R. 759, 13 O. L. R. 396.

Depriving successful party.] — *Held*, varying the decision in 14 Que. S. C. 153, that the consanguinity of the parties, the state of their fortunes (*e.g.*, the poverty of the losing party and wealth of the opposite party), and the good faith of the party who fails, are not sufficient reasons for saving that party from being mulct in costs. *Claude* v. *Claude*, 17 Que. S. C. 130.

Depriving successful party — *Nolle prosequi—Powers of trial Judge.*]—Where a *nolle prosequi* had been entered as to certain defendants before trial, and a verdict was afterwards obtained against the remaining defendant, the trial Judge, under s. 373 of the Supreme Court Act, granted a certificate depriving the first mentioned defendants of

their costs:—*Held*, that the certificate was authorised by the section. *Mellon* v. *Municipality of Kings*, 35 N. B. R. 291.

Depriving successful party—*43 Eliz. c. 6—County Courts.*]—The statute 43 Eliz. c. 6, authorising a Judge to certify to deprive a plaintiff of costs, is in force in New Brunswick, and is made applicable to County Courts by s. 68 of the County Courts Act, 1897. *Warman* v. *Crystal*, 35 N. B. R. 562.

Desistment from action—*New action—Partnership — Costs of former action.*]—A plaintiff who has desisted from an action against a single defendant, will not be ordered to pay the costs of that action before beginning a new action based upon the same claim against a commercial partnership of which the original defendant was a member. *St. Laurent* v. *Doran*, 5 Que. P. R. 449.

Discontinuance — *Judgment.*] — When a party who discontinues does not pay the costs at the time of discontinuance, the opposite party is entitled, upon setting down the cause, to a judgment for costs. *Star Iron Co.* v. *Baxter*, 3 Que. P. R. 178.

Discontinuance before appearance—Right of defendant to tax costs incurred by him. *McLorg* v. *Johnston* (N.W.P.), 6 W. L. R. 369.

Discretion—*Appeal—Canada Temperance Act.*]—In an action against a police constable and a Canada Temperance Act inspector for the wrongful seizure and detention of a quantity of intoxicating liquors, the evidence shewed that the liquors were seized upon the premises of S., who had been several times convicted and fined for violations of the Canada Temperance Act. Both the plaintiff and S. swore that the liquors in question were the property of the plaintiff and were not kept for sale. In the absence of any evidence to the contrary, the trial Judge gave judgment in favour of the plaintiff for a return of the goods, but deprived him of costs on the ground of doubt as to the truthfulness of the evidence, and suspicion as to the purpose for which the liquor was meant to be used:—*Held*, Townshend, J., dissenting, that the illegal purpose was relevant, and there was no reason for interfering with the discretion of the Judge. *Fraser* v. *Watters*, 2 E. L. R. 374, 41 N. S. R. 201.

Discretion—*Appeal to Supreme Court of Nova Scotia.*]—In an action brought by the plaintiff against the defendant for the conversion of a two-masted schooner, the "Mayflower," the trial Judge found that the property claimed was that of the plaintiff, when taken by the defendant, but he deprived the plaintiff of costs on the ground of fraudulent proceedings in connection with the prosecution of his claim.—It appeared that some time previously the defendant recovered judgment against the plaintiff, and issued execution, under which the property in question was levied upon, and that, at the instance of the plaintiff, an action was brought by his wife to recover the property, alleging it to be hers. Afterwards, the judgment recovered by the defendant against the plaintiff having been set aside, the plaintiff brought this action in his own name:—*Held*, that the Judge's discretion was properly exercised, and that, on a question of fact, and especially a question of costs, it should not be reviewed. *Jenkins* v. *McAdam*, 38 N. S. R. 124.

Dismissal of action—Contestation *au fond*—No occasion for—Costs of inscription in law. See *McDowall* v. *Wilcock*, 16 Que. K. B. 459.

Dismissal of action—*Costs of declinatory exception—Bringing in guarantor.*]—A plaintiff whose action has been dismissed with costs, "except, however, the costs occasioned by the *appeal en guarantie*," is nevertheless responsible for the costs of the declinatory exception taken by the principal defendant, whose action *en guarantie* has also been dismissed, for the purpose of bringing in his guarantor. *Robert* v. *Rocheleau*, 4 Que. P. R. 39.

Dismissal of action — Disposition of costs reserved at abortive trial—Conduct of parties. *Sheard* v. *Menge*, 9 O. W. R. 45.

Distraction — *Advocate — Security — Deposit—Withdrawal — Costs of party making deposit.*]—An advocate who has obtained distraction of costs in his favour under a judgment of the Court of Review may immediately withdraw the deposit made by the party who has inscribed in review. He has a right to this amount even if the judgment of the Court of Review is reversed by the Court of Appeal. The party who has made such deposit cannot set off against the advocate, who has withdrawn it, certain costs of a seizure which the latter has caused to be made against such party and which the Court of Appeal has specially granted to him. *Delisle* v. *McCrea*, 7 Que. P. R. 309.

Divided success. *Cairns* v. *Murray*, 1 E. L. R. 93.

Equal by both parties.]—Where a trial had been granted principally on public grounds, the costs were ordered to be borne equally by the parties. *Mecham* v. *Brine* (1817), Wakeham's Nfld. Ca. 31.

Event of action—*Imperative rule—Discretion—Mitigation—Good cause.*]—The rule that the party who fails must pay the costs is imperative, and the Court has no discretionary power to reduce the costs or set them off except for special cause, which must appear in the judgment. *Crotcau* v. *Arthabaska Water and Power Co.*, 31 Que. S. C. 516.

Execution—*Party to cause—Consent of advocate — Opposition.*] — In order that a party may have execution against the opposite party for his costs, as to which there is a distraction in favour of his advocate, it is necessary that the consent of the advocate should appear by writing upon the fiat, the writ of execution, and the *procès-verbal* of the seizure.—2. If this consent in writing does not appear as above, the party issuing execution, not being a creditor for these costs, cannot seize in his own name, and therefore an opposition to the seizure based upon this default is well founded and will be maintained. Judgment in 22 Que. S. C. 302, reversed. *Martin* v. *Arthabasca*, 23 Que. S. C. 297.

Executor—Administrator — Reference—Construction of will—Accounts. *Re Boyd, Boyd* v. *Boyd*, 2 O. W. R. 1056, 3 O. W. R. 343.

Extra-judicial seizure under chattel mortgage—Statutory limitation of costs—Contract to avoid—Penalty—Recovery by action of excessive costs charged and deducted. *Yukon Hardware Co.* v. *McLennan* (Y.T.), 2 W. L. R. 294.

Faits et articles—*Interrogatories not administered.*]—A party served with notice to respond upon *faits et articles* has a right to the costs thereof upon taxation, even when he has not been called upon to answer interrogatories. *Grace Co.* v. *Gollick*, 9 Que. P. R. 276.

Fisheries Act — *Conviction—Penalty—Remission by Minister of Crown—Power to remit costs—Magistrate — Mandamus.*]—R. was convicted under s. 18 of the Fisheries Act, as amended by the Act of 1898, and fined $20 and costs. Both fine and costs were remitted under s.-s. 6 of s. 18, which provides that "persons aggrieved by any such conviction may appeal by petition to the Minister of Marine and Fisheries, who may remit penalties and restore forfeitures under this Act." G., the prosecutor, applied to the convicting magistrate for a warrant of distress for the costs, contending that the Minister of Marine and Fisheries had no power to remit the costs. The magistrate refused to issue the warrant, and a *mandamus* was moved for:—*Held*, by Tuck, C.J., Hanington and McLeod, JJ., that the Minister had no power to remit the costs, and it was the duty of the magistrate to issue the warrant of distress for their recovery, and that the *mandamus* should go:—*Per* Barker and Gregory, JJ., that, the penalty having been remitted, the magistrate had no power to proceed to collect the costs; or, at all events, his right was so doubtful that the Court, in the exercise of its discretion, should refuse the *mandamus*. *Per* Landry, J., that the term "penalties" in the section included costs as well as fine, and the Minister therefore had power to remit the costs. The Court being thus equally divided, the rule for the *mandamus* dropped. *Ex p. Gilbert*, 36 N. B. R. 492.

Foreign commission.] —Where a rogatory commission is issued to another province, or to a foreign country, and the parties do not annex interrogatories and cross-interrogatories thereto, but consent that the commission shall be an open one, and that the witnesses shall be examined directly before the commission, such consent does not justify the taxation against the losing party of counsel fees, for attendance before the commission,—the tariff not making any provision for such case. *Young* v. *Accident Insurance Co. of N. A.*, M. L. R. 5 S. C. 222, approved. *Magann* v. *Grand Trunk Rw. Co.*, 21 Que. S. C. 72, 4 Que. P. R. 348.

Garnishee summons — *County Court —Payment.*]—Where a defendant in a County Court action pays the full amount of the claim and costs called for in a default summons within the five days' limit mentioned in the summons, the plaintiff will not be allowed the costs of a garnishee summons. *Shawinigan Lake Lumber Co.* v. *Fairfull*, 7 B. C. R. 58.

Good cause to refuse costs.]—The fact that jury only allowed plaintiff $400, is not in itself "good cause" within meaning of Rule 170 for Judge to deprive plaintiff of his costs. *Potter & McDougall* v. *Grierson* (1909), 10 W. L. R. 610; 2 Alta. L. R. 126.

Grounds—*Evidence.*]—The plaintiffs sued in trover and detinue for certain articles which they claimed as administrators of the estate of G. B. The defendants were husband and wife, the latter being a daughter of G. B. They pleaded that the chattels belonged to them, and, alternatively, belonged to each of them. At the close of the plaintiffs' case the trial Judge dismissed the action as against the female defendant, but refused to give her costs, for three reasons: (1) because she had claimed to own the personal property in the suit; (2) because she did not apply for letters of administration of her father's estate, but allowed the same to remain unrepresented for a long period; (3) because her conduct contributed to the bringing of the action by the plaintiffs, and to allow her costs would be to assist the other defendant in relieving himself of his liability to the plaintiffs for their damages and costs. The female defendant appealed from this decision refusing her costs:—*Held*, that the action was improperly brought against her, and upon its dismissal she was entitled to costs; that none of the reasons given by the trial Judge were sufficient, upon the facts in evidence, to justify the refusal of costs. *Watt* v. *Logan*, 40 N. S. R. 340.

Incidental demand—*Revivor—Result of principal action—Reservation of costs.*]—The plaintiff in an incidental action brought to compel the representatives of a deceased party to continue the suit, is entitled, if successful, to a condemnation for costs independently of the result of the principal demand, and adjudication thereof should not be reserved to be made by the final judgment in the case. *MacGowan* v. *Stone*, 34 Que. S. C. 164, 9 Que. P. R. 356.

Increased counsel fee—Time for applying. *Cooper* v. *Yorkshire Guarantee Co.* (B.C.), 1 W. L. R. 337.

Indemnity — Liability of plaintiffs for costs—Right to costs against opposite party. *Sarnia* v. *Sarnia St. Rw. Co.*, 6 O. W. R. 367, 487.

Infringement of copyright — *Consent judgment—Damages—Payment into Court.*] —Where judgment was pronounced by consent declaring that the defendant had infringed the plaintiffs' copyright, restraining him from continuing to intringe, and directing a reference to ascertain the damages sustained by reason of the infringement, and the Master found that the damages were only $6.70, and also reported specially that the plaintiffs were aware before action that the defendant was willing to hand over all copies of and to stop selling or giving away the publications in question, but the plaintiffs

demanded $100 compensation, and that after action the defendant offered to pay $25 for damages and costs, and to deliver up any of the publications on hand, and to give an undertaking that there would be no further infringement, but the plaintiffs did not accept the offer:—*Held*, that the plaintiffs were entitled to the costs of the action.—*Cooper* v. *Whittingham*, 15 Ch. D. 501, *Upmann* v. *Forester*, 24 Ch. D. 231, and *Wittman* v. *Oppenheim*, 27 Ch. D. 260, followed.—And also to the costs of the reference, the defendant not having when consenting to judgment offered to pay a fixed sum for damages and to pay it into Court. *Anglo-Can. Music Pub. Assoc.* v. *Somerville*, 20 C. L. T. 120, 19 P. R. 113.

Interest on—*Supreme Court of Canada.*]—The plaintiff was for the first time condemned by the Supreme Court of Canada to pay the costs in the Superior Court:—*Held*, that the judgment of the Supreme Court was the judgment granting the costs under the terms of Art. 556, C. P. C., and that interest was due upon such costs from the date of the Supreme Court judgment only. *Gibsone* v. *Quebec and Montmorency Rw. Co.*, 17 Que. S. C. 74.

Interest on costs can be computed only from date of taxation. *Star Mining Co.* v. *White* (1910), 15 B. C. R. 11.

Interlocutory costs—Appeal to Court of Appeal—Jurisdiction of Master in Chambers. *McConnell* v. *Erdman*, 7 O. W. R. 874.

Interlocutory order — "*Costs in the cause*"—*Trial Judge.*] — Where an interlocutory order in an action directs that the costs of certain proceedings shall be "costs in the cause," that is not a final disposition of such costs in favour of the party who shall succeed in the action, but merely puts those costs in the same position as any other of the ordinary costs of the action, that is, leaves them to be dealt with in the discretion of the trial Judge under Rule 1130 and s. 119 of the Judicature Act, R. S. O. c. 51.—*Koosen* v. *Rose*, [1897] 1 W. N. 25, 76 L. T. 145, 45 W. R. 137, 13 Times L. R. 257, distinguished. *Dickerson* v. *Radcliffe*, 20 C. L. T. 390, 19 P. R. 223.

Interlocutory order — "*Costs in the cause*"—*Trial Judge.*]—The judgment of the trial Judge was in favour of the plaintiff, and was not appealed against. As to costs, it adjudged that the defendants should pay to the plaintiff the costs of certain witnesses, and continued: "This Court doth not see fit to interfere with the interlocutory orders disposing of certain costs throughout the action, nor make any further or other order as to costs."—Two interlocutory orders made the costs of applications "costs in the cause;" two made them "costs in the cause to the successful party;" one order provided that "the defendant do pay to the plaintiff the costs of this motion to be taxed in any event of the cause but on the final taxation of the costs therein." It was conceded that the plaintiff was entitled to the costs made payable in any event: — *Held*, following *Dickerson* v. *Radcliffe*, *supra*, that the costs made costs in the cause were subject to the disposition of the trial Judge, and under the judgment were not to be taxed to the plaintiff:—*Held*, also, that "costs in the cause to the successful party" did not mean more than costs in the cause; and, even if it did, the plaintiff was not a successful party. *Brotherton* v. *Metropolitan District Railway Joint Committee*, [1894] 1 Q. B. 666, followed. *Murr* v. *Squire*, 20 C. L. T. 388, 19 P. R. 237.

Interlocutory motion—*Costs reserved to be disposed of at trial—Jurisdiction of trial Court after appeal.*]—Where on an interlocutory motion costs are reserved to be disposed of at the trial, and the trial is had without any reference to these costs, if an appeal from such judgment be taken and the judgment affirmed, the jurisdiction of the appellate Court attaches, and the trial Court on the further application has no power to render any further decision unless remanded, and even then the Court will deal with such application only under special circumstances. *Tucker* v. *The "Tecumseh,"* 10 Ex. C. R. 153, 7 O. W. R. 377.

Interlocutory proceedings in action—*Judgment on—Disposition of costs—Reservation.*]—A definite judgment rendered in an interlocutory matter arising in an action, for example, security *judicatum solvi*, upon the filing of the authority *ad litem* of the plaintiff resident out of the province, must dispose of the costs and not reserve them for the tribunal which decides the action upon the merits. Cf. *Block* v. *Carrier*, 28 Que. S. C. 49. *Renaud* v. *Beauchemin*, 31 Que. S. C. 156.

Inviting trouble — *Carelessness—Inaccuracy.*]—Where a party had invited trouble by carelessness and inaccuracy in his staking and application costs were withheld. *Re Sinclair* (1908), 12 O. W. R. 138, M. C. Cas. 179.

Joint appeal case—*Preparation, &c., by one party—Costs taxable to his attorneys.*]—If it is proved that a joint appeal case has been prepared, printed, and paid for by one only of the two parties appealing, the costs so incurred will be allowed to the attorneys of the active party. *Glickman* v. *Stevenson*, 9 Que. P. R. 224.

Joint judgment for costs—*Execution for whole amount against one—Opposition—Deposit.*]—A party adjudged jointly with several others to pay the costs of a proceeding, may oppose an execution against him for the whole costs; such an opposition, accompanied by a deposit of an aliquot part of the costs, will not be struck out on motion. *Poplinger* v. *Muir*, 6 Que. P. R. 445.

Judgment after third trial—*Costs of previous trials—Counsel fee—Order for judgment—Form of.*]—On a motion by the plaintiff for an order for judgment on the verdict of the third trial of the action, a question arose as to the right to the costs of the former trials, and also as to the form of the order, the question of damages having been referred to a special referee:—*Held*, that the plaintiff was entitled to an order for an interlocutory judgment, in the form in Chitty's Forms. 2. That a counsel fee could not be

fixed. The former rule as to costs of the previous trials is not now law. It seems to have been a Rule of Court, Hilary Term, 1853, and there was also an express Rule in the C. L. P. Act, 1854. *Creen* v. *Wright*, 2 C. P. D. 354, and *Field* v. *Great Northern Rw. Co.*, 3 Ex. D. 262, make the costs of the former trials the plaintiff's costs. *Bartlett* v. *Nova Scotia Steel Co.*, 25 C. L. T. 130.

Judgment for costs in favour of defendant—Application for stay of proceedings—Practice. *McKinlay* v. *McLean*, 40 N. S. R. 602.

Judgment for defendant—Issues found for plaintiff — Jury trial — Costs following "event"—Meaning of—Power of Judge in Chambers to vary judgment. *Chesley* v. *Owen*, 40 N. S. R. 600.

Judgment on further directions — Amount in controversy—Judgment for plaintiff with costs—Refusal to give direction as to scale of costs. *Ouellette* v. *Reaume*, 9 O. W. R. 713.

Landlord and tenant—Action to recover possession of demised premises—Dismissal without costs—Discretion — Appeal. *Fenny* v. *Casson*, 12 O. W. R. 722.

Leave to appeal as to—*Ex parte* application—Discretion of trial Judge—Scale of costs. *Hennbecker* v. *McNaughton*, 2 O. W. R. 1064.

Leave to appeal from judgment disposing of. *Dodge Mfg. Co.* v. *Hortop Milling Co.*, 14 O. W. R. 115.

Leave to proceed in forma pauperis—*Defence.*]—When a plaintiff who asks leave to proceed *in formâ pauperis* discloses a good cause of action and shews that he has no means of paying disbursements, leave ought to be granted, even if the defendant alleges facts which should be sufficient to defeat his action.—Upon the motion for leave the Judge cannot be called upon to decide whether the ground of defence alleged is well founded. *Paquette* v. *Pyke*, 16 Que. S. C. 403.

Lien—*Creditors' action to preserve fund.*]—Costs incurred in a creditors' action in preserving for creditors property which had been fraudulently transferred, are a first lien upon the fund recovered, and are allowed as between solicitor and client. *Hood* v. *Tyson, In re Judgments Acts*, 9 B. C. R. 233.

Lien—*Salvage—Partition—Property made insaisissable.*]—The defendant and his mother owned certain immovables in undivided shares. The defendant's undivided portion had been devised to him by his father *à titre d'aliments* and with a clause making it *insaisissable*, and burdened with a substitution. R., the mother's advocate, brought an action of partition of these immovables against the defendant and the curator of the substitution. By the judgment in that action the lands were divided, and three-fourths of the costs were to be paid by the defendant. R., to recover his costs against the defendant, had caused to be seized an undivided third of the immovables which by the partition fell to the lot of the defendant. The plaintiffs, the advocates of the defendant, had made opposition to R.'s seizure, alleging that he had been paid and invoking the *insaisissabilité* clause. R. pleaded that he had not been paid, and that the clause did not apply to his debt, his services having preserved the property to the opposants. The opposition was dismissed, and the undivided third was sold. R. had his costs of the opposition taxed at $125.57, but upon revision the amount was reduced to $54.57. The plaintiffs now sued the defendant for their costs of the opposition which they had made for him and their costs of the motion for the revision of R.'s costs, and obtained judgment for $147.80, under which they caused to be seized the remaining two-thirds of the defendant's portion of the immovables. He made an opposition, invoking the *insaisissabilité* clause. The plaintiffs pleaded to the opposition that their debt was for costs which they had incurred in good faith to protect the first third from R.'s seizure, which made it an alimentary debt; that it mattered not that the opposition to R.'s seizure had been dismissed; and that their debt was a first charge upon all the alimentary property of the defendant:—*Held*, that, as R. did not contest the *insaisissabilité* clause, but only said that it did not apply to his debt, the opposition to R.'s seizure was of no utility as regards the property seized in this action, any more than as regards that seized by R.; that there was no relation between the claim of the plaintiffs for their costs and the property seized in this action; and, therefore, the claim of the plaintiffs was not alimentary nor was it a charge upon property which was *insaisissable*. *Pouliot* v. *Michand*, 20 Que. S. C. 432.

Lunatic—*Action to have supposed lunatic so declared—Lunacy Act, s. 35—Grounds for action and petition—Declaration in favour of sanity of supposed lunatic—Other proceedings.*]—Britton, J., *held*, that petitioner's costs in any of the proceedings reported in 16 O. W. R. 164, 168, 786 and 959, 1 O. W. N. 800, 894, 1105, and 2 O. W. N. 241, should not be paid by Fraser nor out of his estate as it could not be fairly said that petitioner's motive was solely to protect Fraser, the supposed lunatic. *Re Fraser* (1911), 18 O. W. R. 96, 2 O. W. N. 397. Reversed by D. C. See 1911 Digest.

Mechanics' and Wage-earners' Lien Act—*Costs subsequent to judgment.*]—Action to enforce liens under the Mechanics' and Wage-earners' Lien Act, R. S. M. 1902 c. 110. At the trial judgment was given in favour of the plaintiffs, declaring that Humphries was entitled to $240.60, and Philp, another plaintiff, to $81.65. The costs of the plaintiffs down to and including the trial, were taxed at $190.16 and inserted in the judgment. The defendant was ordered to pay the above sums; in default the lands to be sold, with a reference to the Master. The lands were sold and the purchase money paid into Court. The plaintiffs then brought in a subsequent bill of costs covering the proceedings subsequent to the judgment, which bill was taxed at $229.30, inclusive of disbursements. The costs up to judgment and

the subsequent costs together amounted to $419.16, of which $228.75 was costs other than disbursements, while the total amount of the liens enforced amounted to only $322.25. The defendant appealed from the taxation of the plaintiffs' subsequent bill of costs, contending that under the Act the plaintiffs were entitled to costs only to an amount equal to 25 per cent. of the amount of the judgment, besides actual disbursements, and that the amount of costs allowed far exceeded this:—*Held*, that a plaintiff seeking to enforce a lien may do so by an action in the King's Bench, following the ordinary procedure in actions in that Court. Nothing in the Act ousts the general jurisdiction of the Court to enforce a lien. The plaintiff may, instead of following the ordinary procedure, adopt the summary procedure, in ss. 31, 32. In the present case the judgment was drawn up in a very peculiar manner, an attempt being made to adopt the form of judgment upon a summary trial, although the action was set down and tried in the ordinary manner. The sale was carried out by the Master, and the judgment empowered him to tax and add to the plaintiffs' claims the subsequent costs of the proceedings. Under the terms of the judgment the taxing officer properly allowed the ordinary costs of a sale conducted in the Master's office. *Humphries* v. *Cleave*, 24 C. L. T. 374.

Mechanics' lien — *Appeal.*] — Sections 41 and 42 of the Mechanics' and Wage-Earners' Lien Act, R. S. O. c. 153, limiting "the costs of the action under the Act" to twenty-five per cent. of the judgment, besides actual disbursements, do not apply to the costs of an appeal from the decision of the Judge or officer trying the action. — *Semble*, that the costs of such an appeal are within the scope of s. 45. *Gearing* v. *Robinson*, 20 C. L. T. 335, 19 P. R. 192.

Mechanics' lien—Extension of time for payment by terms of contract—Action begun before expiry of extended time—Costs incurred in service of process—Alberta Mechanics' Lien Act, s. 7—Provision of s. 17 as to posting of pay roll—Non-compliance with. *Speers* v. *McAfee* (Alta.), 7 W. L. R. 275.

Mechanics' lien—Tender—Payment into Court—Taxing officer—Practice. *Nixon* v. *Betsworth* (Man.), 2 W. L. R. 570.

Mechanics' lien action—Examination for discovery—Disbursements — Counsel fees —Professional disbursements. *Cobban Mfg. Co.* v. *Lake Simcoe Hotel Co.*, 2 O. W. R. 48, 310, 5 O. L. R. 447.

Mechanics' lien action — *Plaintiff allowed to complete work pendente lite—Payment to be made for work—Defendants' costs of action and appeal deducted from.*]—Plaintiffs brought action to enforce a lien under Mechanics' and Wage Earners' Lien Act. Local Master found plaintiffs had not proved a lien. On appeal to Divisional Court plaintiffs were allowed to complete their work, which was done to the satisfaction of defendants. Then the question of costs of action and appeal was heard by Divisional Court:—*Held*, that plaintiffs should not have brought their action at the time when it was brought and defendants should be allowed to deduct their costs of action and appeal from amount due plaintiffs on their claim.—*Dodge Mfg. Co.* v. *Hortop Milling Co.*, 14 O. W. R. 3, 115, 265, followed.—*Crown Art Stained Glass Co.* v. *Cooper* (1910), 16 O. W. R. 634, 1 O. W. N. 1047.

Mise en demeure—*Advocate's letter—Presentation of draft—Lis pendens.*]—When a debt is payable at the domicil of the debtor, a demand of payment made by an advocate's letter is not a *mise en demeure* sufficient to compel him to pay the costs of it, if he is afterwards sued by his creditor. 2. The presentation at the place of business of the debtor of a bill of exchange drawn by his creditor for the amount of the debt, constitutes a *mise en demeure* sufficient to fix him with the costs of a suit begun against him. 3. A proceeding which has not been entered in Court is not a cause, and cannot be set up in support of a plea of *lis pendens*, if the debtor is afterwards sued for the same cause of action. *Lay* v. *Cantin*, 23 Que. S. C. 405.

Money in Court—Legacy—Mental competency of legatee—Payment out of costs of parties to action — Intervention of Official Guardian. *Ramsay* v. *Reid*, 2 O. W. R. 720, 4 O. W. R. 113, 6 O. W. R. 114.

Mortgage—Action for redemption—Costs of appeal in former action—Attempt to add to claim—Dismissal without costs—Effect of. *Nelson* v. *Nelson*, 2 O. W. R. 956, 3 O. W. R. 884.

Mortgage — Action for redemption—Opposition to—Former foreclosure proceedings. *Plenderleith* v. *Parsons*, 4 O. W. R. 262, 6 O. W. R. 145, 399.

Mortgage action — Depriving mortgagee of costs—Reference—Conduct of mortgagee —Costs awarded to mortgagor—Discretion—Appeal. *Bank of Hamilton* v. *Leslie* (N.W. T.), 3 W. L. R. 401.

Mortgage action — Executors — Trustee—Redemption. *Murphy* v. *Brodie*, 8 O. W. R. 686.

Mortgage action — *Plea—Possession — Discontinuance—Trial.*]—A plaintiff in an hypothecary action cannot, on production of a plea by the defendant that he is not in possession of the hypothecated immovable, file a discontinuance as to his principal demand and move for costs against the defendant, on the ground that, at the date of the institution of the action, the latter was, according to the *cadastre*, the apparent proprietor in possession of the property. This fact must be established in the regular way, and the plaintiff must therefore proceed to trial for that purpose.—Nor can the defendant, by motion, seek a condemnation for costs against the plaintiff who files a discontinuance under the above circumstances. *Pitou* v. *Cantin*, 31 Que. S. C. 51.

Mortgage action — Redemption—Costs of appeal in former action—Attempt to add to claim—Dismissal without costs. *Nelson* v. *Nelson*, 2 O. W. R. 956, 3 O. W. R. 884.

Mortgage sale—Contest as to surplus proceeds. *Smith* v. *Wambolt*, 2 E. L. R. 343.

Mortgagee—*Foreclosure — Solicitor and client costs—Discretion—Misconduct*:—*Held*, that a mortgagee is entitled, in a proceeding for foreclosure or sale under mortgage, to tax against the mortgagor and all subsequent incumbrancers all costs necessarily incident to a suit for foreclosure or sale, including costs as between solicitor and client; and, unless such mortgagee has been guilty of inequitable conduct, the Court has no jurisdiction in its discretion to deprive him of such costs, or any part thereof, properly taxable as between solicitor and client. *Confederation Life Association* v. *Leier*, 8 W. L. R. 343, 1 Sask. L. R. 131.

Mortgagee — Foreclosure — Unnecessary party — Prior incumbrancer. *Union Trust Co.* v. *Duplat*, 7 W. L. R. 459.

Motion for better affidavit on production of documents — Production of document sought — Costs of motion. *Can. Gen. Elec. Co.* v. *Keystone Construction Co.*, 8 O. W. R. 683.

Motion for costs — *Cross-examination of deponents on affidavits filed in answer—Deponents out of jurisdiction.*]—Where the action was no longer either possible or necessary, the amount involved small, and cross-examination of deponents on affidavits filed in answer on motion for order for payment of costs, would prove to be relatively costly, order made as in *Lefurgey* v. *Great West*, 11 O. L. R. 617. *Galley* v. *Core*, 13 O. W. R. 1030.

Motion for judgment on report before confirmation — Appeal from report not contemplated—No costs of motion. *Reinhardt* v. *Jodouin*, 10 O. W. R. 648.

Motion for leave to discontinue without costs — Payment of plaintiff's money claim—Injunction—Rule 430 (4). *Wallace* v. *Munn*, 10 O. W. R. 246.

Motion for prohibition — Division Court—Territorial jurisdiction—Cause of action, where arising—Action for price of goods sold—Plaintiff consenting to transfer of action after motion for prohibition launched. *Re Buchanan* v. *Brown*, 10 O. W. R. 393.

Motion for summary judgment.]—A motion for summary judgment was dismissed, costs to the defendant in the cause, unless otherwise ordered by the trial Judge. At trial, plaintiff obtained judgment with costs, the trial Judge refusing to allow the costs of said motion to plaintiff, who renewed the application before the Master. The Master having no power to vary his own order, the order stands just as if there had been no reservation. *Pringle* v. *Hutson*, 12 O. W. R. 186, 13 O. W. R. 484, 14 O. W. R. 617.

Motion for summary judgment—"*In any event.*"] — A summons for judgment under Order XIV. was discharged with costs, but the question as to whether or not the costs should be payable forthwith was reserved: — *Held*, that if the case is not within the Order, or there are circumstances which render it improper to grant the application, or the plaintiff knew the defendant relied on a contention which would entitle him to unconditional leave to defend, the summons will be discharged with costs in any event, but not payable forthwith. Where leave to defend is given, costs, as a general rule, will be in the cause. It is only in exceptional circumstances that costs will be ordered to be paid forthwith. In Chambers applications, generally, costs are made payable by the unsuccessful party in any event, but not forthwith. *Victoria* v. *Bowes*, 21 C. L. T. 151, 8 B. C. R. 15.

Motion for summary judgment. *Lawrence* v. *Smith*, 2 O. W. R. 521.

Motion to extend time for filing—*The signification of this motion—C. P. 182.*]—The notice of a motion to extend the time to give security for costs made before the expiration of the time fixed by judgment, is sufficient to permit the plaintiff to ask for more time, even though this motion should be made only after the expiration of the time. *Racine* v. *Lewis* (1909), 10 Que. P. R. 339.

Motion to quash by-law of township corporation closing road—Necessity for confirmation by county council—Statutes—Appeal to county council—Exhausting other remedies before moving to quash. *Re Cameron & United Townships of Hagarty, Sherwood, Jones, Richards, and Burns*, 10 O. W. R. 357.

Motion to quash conviction under Provincial Act and to discharge prisoner — Dismissal of motion — Power of Court to award costs to Crown—Costs of motion to vary minutes of order dismissing original motion. *Rex* v. *Leach*, *Rex* v. *Fogarty*, 13 O. W. R. 86, 17 O. L. R. 667.

Motion to quash municipal by-law—Intervention of legislature—Statute validating by-law admittedly bad—Costs ordered against municipality—Statutory provisions as to costs. *Re Alexander and Village of Milverton*, 12 O. W. R. 61.

Motion to quash municipal by-law—Intervening statute validating by-law—Costs left to discretion of Court—Costs in Court of Appeal. *Re Cartwright & Napanee*. *Re Knight & Napanee*, 8 O. W. R. 65.

Motion to set aside judgment—Disposition of costs. *Canadian Bank of Commerce* v. *Syndicat Lyonnais du Klondike and Barrett* (Y.T.), 6 W. L. R. 716.

Motion to stay proceedings upon judgment at trial pending appeal — Costs in cause. *Stonor* v. *Lamb* (Y.T.), 2 W. L. R. 514.

Motion to strike out defence—Counterclaim—Conversion—Pendency of another action. *Smith* v. *McDonald*, 4 E. L. R. 106.

Municipal corporation—Expropriation of land—Payment of money into Court—Arbitration—Costs of — Reference to County Court Judge—Costs of motion for payment out—Power over costs. *Re Scott*, 12 O. W. R. 1162.

Municipal corporation—*Expropriation of land.*]—The city of London has passed a by-law to acquire a certain lot. The arbitrators appointed awarded $1,500 compensation to those interested therein. The junior county Judge at London ascertained those entitled thereto. On application for payment out the question of costs was disposed of thus: costs of arbitration to be dealt with by arbitrators, of ascertainment of shares by junior county Judge, the city to pay costs of and incidental to payment out. *Re Scott*, 12 O. W. R. 1162.

New trial — *Contradictory findings of jury.*]—Where it was held that both parties to the action were entitled to a new trial because of the contradictory findings of the jury, and a new trial was ordered, no costs of the appeal or of the application for a new trial were allowed, and the costs of the former trial were made costs in the cause. *Kirk* v *Chisholm*, 39 N. S. R. 98.

Objection to the jurisdiction of the Supreme Court of Canada was not taken in the manner provided by Rules of Practice; an appeal was quashed without costs. *Price Bros.* v. *Tanguay* (1900), 42 S. C. R. 133.

Offer of costs to defendant—*Refusal —Deposit in Court—New action—Objection that costs of former unpaid.*]—Where the costs of a first action which has been discontinued have been offered to the advocates of the defendant, and deposited in Court, upon the refusal of the advocates to accept them, the defendant cannot object to the institution of a second action by alleging that the costs of the first have not been paid. *Agnew* v. *Gober*, 8 Que. P. R. 217.

Offer to suffer judgment by default —*Time of offer.*]—An action for false imprisonment was entered for trial at the Carleton Circuit, which opened on the 24th April, 1900. The trial actually took place on the 24th and 25th April, the first and second days of the Circuit. On the 17th April, seven days before the trial began, and eight before the jury found their verdict, the defendants filed and served an offer and consent to suffer judgment by default, under 60 V. c. 24, S. 185, for the sum of $75, the same amount as the jury gave as damages in their verdict:—*Held*, that, as the plaintiff, under s. 185, is entitled to ten days to determine whether or not she will accept the offer, if the defendants see fit to delay making their offer until less than ten days before the trial and verdict, they are not entitled to have advantage as to costs of the provisions of s. 184 and therefore the plaintiff was entitled to costs of the trial. *Sharp* v. *Woodstock School Trustees*, 21 C. L. T. 56.

Offer to suffer judgment by default — *Time of offer.*] — The plaintiff, notwithstanding that she had received notice of an offer to suffer judgment by default within the ten days allowed to her by the statute for its acceptance, carried the cause down to trial and obtained a verdict therein for a sum exactly equal to the amount mentioned in the offer. On a motion to review the taxation of the plaintiff's costs:—*Held*, that the making of the offer in no way operated as a stay of proceedings, and the taking of the cause down to trial by the plaintiff was not equivalent to a rejection thereof; and that she was, therefore, entitled to have the costs of the trial allowed to her on taxation. *Quære*, (*per* Tuck, C.J.):—If the verdict had been for a less amount than that for which the offer to suffer judgment was made, could the plaintiff after verdict have accepted the offer and signed judgment for the larger sum? *Sharp* v. *Woodstock School Trustees*, 21 C. L. T. 56, 35 N. B. R. 243.

Opposite party—*Liability of client — Corporation solicitor—Change in by-law.*]—By arrangement between the defendants and their solicitor he was to receive a salary of $1,800 a year, for all services, including the costs of any litigation in which the defendants should be engaged. The present action against the defendants was dismissed with costs on the 14th September, 1901, and the defendants brought in their bill for taxation:—*Held*, following *Jarvis* v. *Great Western Ry. Co.*, 8 C. P. 280, and *Stevenson* v. *City of Kingston*, 31 C. P. 333, in preference to *Galloway* v. *Corporation of London*, L. R. 4 Eq. 90, and *Henderson* v. *Merthyr Tydfil Urban District Council*, [1900] 1 Q. B. 434, that in view of the above agreement with their solicitor, the defendants could not tax their costs against the plaintiffs:—*Held*, also, that the rights of the defendants must be governed by the circumstances which existed on the 14th September, 1901; and a by-law of the defendants subsequently passed could not affect those rights. *Ottawa Gas Co.* v. *Ottawa*, 22 C. L. T. 408, 4 O. L. R. 656, 1 O. W. R. 647, 697, 2 O. W. R. 579.

Opposition — *Seizure — Prior notice of claim.*]—The plaintiff caused certain effects belonging to the claimant to be seized. Before the seizure the claimant, who was the son of the defendant and lived at his house, went to the plaintiff and forbade him, in the presence of a witness whom he had brought with him for the purpose, to make a seizure at the house of the defendant, warning the plaintiff that the effects belonged to him (the claimant), and that he would hold the plaintiff responsible for any expense which he should occasion. In his claim or *opposition* the claimant specially alleged that the plaintiff knew that the effects did not belong to the defendant. The plaintiff did not contest the opposition except as to costs, alleging that he had seized in good faith, and proving that the defendant had asserted that he was the owner of one of the effects seized:—*Held*, that, in these circumstances, the plaintiff must pay the costs of the opposition. *Deschenean* v. *Grandmont*, 2 Que. P. R. 419.

Order for, after judgment—*Mortgage — Disclaimer — Defence.*] — The plaintiff brought an action against the defendant as mortgagee, and asked that the defendant should be ordered to abandon or to pay the debt of the plaintiff, with costs against the defendant personally if he contested the action. The defendant did contest the action; judgment was against him upon his defence; but it only ordered him to abandon or to pay the debt, principal, interest and costs in default of abandoning within the time fixed.

The defendant then abandoned, and the plaintiff made a motion for an order upon the defendant personally for costs:—*Held*, that the plaintiff was entitled to such order, although final judgment had been rendered. *Marchand* v. *Chaput*, 19 Que. S. C. 322.

Order for costs—Action on—Order XL., Rule 24—Order equivalent to judgment—Assignment of costs—Breach of trust—Taxation of costs—Pleading — Amendment — Statute of Limitations. *Russell* v. *McDonald*, 40 N. S. R. 612.

Order for payment by successful party — *Municipal corporations — Recount of ballots.*]—Under s. 372 of the Municipal Act, R. S. O. c. 223, a County Court Judge, on a scrutiny of the ballots cast on the voting for a bonus by-law, cannot award costs against the corporation if it be successful in upholding the by-law. *Aldborough* v. *Schmeltz*, 32 O. R. 64.

Order of revivor—*Reservation till hearing of cause.*]—The costs of obtaining a judgment or order requiring a person to revive a cause will be reserved to be disposed of at the hearing on the merits. *Lecompte* v. *Lanctot*, 9 Que. P. R. 164.

Parties—*Amendment at trial—Apportionment.*]—In an action brought in the name of a married woman for damages for various acts of trespass to land, it became necessary to amend by adding the plaintiff's husband as a party, and an order was granted by the trial Judge allowing the amendment, and allowing the plaintiffs to enter final judgment for damages and costs to be taxed. On appeal from the latter part of the order, the order was amended so as to give the defendant the costs of the trial up to the time of the amendment and of the amendment, if any, and the plaintiff the costs of the action not including the costs of trial; costs to be set off. *Hart* v. *Simpson*, 39 N. S. R. 105.

Parties — *Mis-en-cause.*] — The *mis-en-cause*, who has no interest in the case, has the right to recover from the plaintiff his costs of appearance and declaration, and the plaintiff who succeeds against the defendant may in turn have them taxed against him. *Jacobs* v. *Hagerman Co.*, 8 Que. P. R. 281.

Partnership action—*Account — Misconduct of partner.*]—Where action for an account between partners is made necessary by the misconduct of a partner, he must pay the costs. Plaintiff entitled to costs. *Morice* v. *Hubbard*, 10 W. L. R. 705.

Partnership action — Dissolution — Deduction from assets—Indebtedness of plaintiff to defendants—Set-off. *Bockfinger* v. *Murray* (Y.T.), 1 W. L. R. 260.

Partnership action—*Joint and several liability of defendants — Commercial case — Pleading—Conclusions.*] — The plaintiff sued the defendants, a commercial partnership having a collective name, *en reddition de compte*. The undertaking of the defendants which was the subject of the action was an absolutely commercial affair. Thus the action was itself of a commercial nature, and it necessarily followed that the liability of the defendants was a joint and several one. Nevertheless, the plaintiff did not claim upon a joint and several liability, and judgment was rendered for the plaintiff without any mention of that liability. Some time afterward the plaintiff's attorney issued in his own name as advocate an execution against the defendants for his costs of the action, and, the defendant partnership having no property of its own, he caused to be seized property of two of the defendants for the total amount of his costs, that is to say, without dividing his costs. Each of these two defendants made opposition to the seizure, contending that there was no joint and several liability as to costs, inasmuch as the plaintiff had not alleged such liability, and that it did not exist as regards costs:—*Held*, that in order that there may be joint and several liability among several defendants and claim to this effect, even in commercial causes, where such liability plainly exists, and in spite of the fact that costs are as a general rule the accessory of the action, the plaintiff should have alleged a joint and several liability; in default of an allegation and claim to this effect; even in commercial affairs, there is no joint and several liability as to costs between several defendants condemned to payment of such costs by the judgment in the action. *Beaubien* v. *Rioux*, 21 Que. S. C. 232, 4 Que. P. R. 214.

Partnership action. *Youngson* v. *Stewart*, 2 O. W. R. 112, 270.

Party and party costs—*Right of attorney to payment—Payment to garnishing creditor.*]—The attorney of the party who has succeeded in the cause with costs has the right to receive all these costs, including the fees for his client's witnesses. — Such costs will be regarded as having been paid to the attorney if they are paid to a creditor of his who has attached them in the hands of the party ordered to pay them. *Bégin* v. *Breton*, 35 Que. S. C. 380.

Party entitled—*Summary disposition of by Master in Chambers—Appeal—Jurisdiction of Master—Improper demand—No costs allowed—Stay of action forever—Con. Rules 616, 767—Judicature Act, s. 72.*]—Plaintiff brought action to compel defendant to execute a deed of property willed to him. A deed had been previously executed but forgotten about by plaintiff. The deed demanded was admittedly improper in that it contained personal covenants on part of defendant. Defendant satisfied plaintiff's claim, and plaintiff moved for an order for judgment of costs of action by defendant to plaintiff.—Master in Chambers (16 O. W. R. 945, 2 O. W. N. 47), granted the order asked, but Middleton, J., reversed the order holding that there were circumstances which would indicate that this was the proper result. —Divisional Court, *held*, that had the case gone on for trial, in their opinion it could have been dismissed with costs, therefore plaintiff had no ground of complaint in respect of the disposition of the costs made by above order. Appeal dismissed with costs. *Davis* v. *Winn* (1910), 17 O. W. R. 105, 2 O. W. N. 123, 22 O. L. R. 111.

Payable by which party — *Contested collocation.*]—The costs of a contestation of

a report on distribution will be awarded against the defendant when the circumstances of the case shew that such contestation has been provoked rather by his fault than by the error of the other parties. *Belgarde* v. *Carrier*, 3 Que. P. R. 513.

Payment into Court—*Amount recovered less than $32.*] — Where defendant paid $24 into Court and plaintiff got a verdict for $2.40, together less than $32, plaintiff having applied for certificate for costs, the Court *held*, refusing to certify, that in exercising discretion as to costs, the Court must be guided by the evidence and that in this case the certificate must be refused. Also, that payment into Court does not reduce plaintiff's claim. *Cox* v. *Gaul* (1879), 2 P. E. I. R. 288.

Payment of costs—*Leave to bring new action—Husband and wife—Action for separation — Authorisation.*] — A wife who has brought an action for separation from bed and board, can not be authorised to bring another without having discontinued the first and paid the costs. An application for leave to discontinue an action will only be granted on its being stated that such discontinuance is with costs. *Armiston* v. *Dick*, 7 Que. P. R. 304.

Payment out of Court—Money paid in by company for their own convenience—Railway Act—Lands acquired by company — Vesting order. *Re Toronto and Niagara Power Co. and Webb*, 10 O. W. R. 402.

Persons entitled.]—Plaintiffs sold defendants a grain elevator which turned out to be non-conform of contract. Defendants agreed to keep same if allowed proper deduction for damages sustained:—*Held*, that plaintiff should not have brought action at the time it was, and the acceptance of the elevator on being allowed their damages should not prejudice them on the question of costs. *Dodge Mfg. Co.* v. *Hortop Milling Co.* (1909), 14 O. W. R. 3; affirmed, 115, 265.

Petition—*Moneys deposited in expropriation proceedings.*]—The corporation of the city of Montreal cannot be ordered to pay the costs of a petition to withdraw money from the custody of the prothonotary of the Superior Court, in consequence of an expropriation. *Re Montreal & Collins*, 6 Que. P. R. 264.

Plaintiff partly successful in action—Reference—Discretion. *Bowcher* v. *Clark* (Y.T.), 6 W. L. R. 436.

Pleading—Claim on wrong basis. *Strong Bros.* v. *Gorham*, 40 N. S. R. 600.

Pleading — Guaranty—Denial. *Bradshaw* v. *Cohen*, 9 O. W. R. 51.

Postponement of trial — Powers of Judge in Chambers after trial. *Liddiard* v. *Toronto Rw. Co.*, 8 O. W. R. 222.

Preliminary question of law—*Trial.*] —Under Rule 233 the plaintiff may have a point of law raised on the pleadings disposed of before trial, but there is no duty cast on a defendant to do so, and therefore when a defendant succeeds at the trial on a point of law which could have been so disposed of, he is entitled to the usual costs of trial. *Hall* v. *R.*, 7 B. C. R. 120.

Privileged action — *Lien for costs — Judgment for costs—Res judicata—Distinction—Assignment by solicitor—Action begun in wrong Court — Payment into Court — Transfer to proper Court—Costs of action.*] —The costs of an action to recover a privileged debt are also privileged. A creditor thus has an hypothecary action for the recovery of costs from a third person who has purchased the land affected by the privilege or lien.—A judgment dismissing an action for the recovery of costs, upon the ground that the costs belong to the plaintiff's attorney *ad litem* by virtue of the law of distraction of costs, cannot be set up as *res judicata* in a second action begun by the same plaintiff to recover the same costs by virtue of an assignment from the attorney.—Where an action begun before an incompetent tribunal *ratione materiæ* is transferred to a competent tribunal, the deposit by the defendant of the amount claimed before the transfer does not relieve the defendant of the incidence of costs. *General Hospital* v. *Dufresne*, 30 Que. S. C. 530.

Probate Court. *In re McDonald Estate*, 2 E. L. R. 215.

Promissory note — *Consideration — Title to land in question—Jurisdiction of County Court.*]—*Held*, that as title to land was not brought in question costs are properly taxable on County Court scale. *Dobner* v. *Hodgins* (1909), 14 O. W. R. 265, 593, 1 O. W. N. 12.

Prosecution for theft — Payment by prosecutor of costs of accused—Prosecutor bound over at his own request to prefer indictment—Acquittal of accused — Criminal Code, s. 689. *Rex* v. *Rombough*, 11 O. W. R. 150.

Quashing conviction—*Nominal prosecutors.*]—Where an appeal under the Towns Incorporation Act, 1896, from a conviction by a police magistrate, was allowed, and the conviction quashed on the ground that the magistrate had refused to hear material evidence, the Court refused to make the order without costs against the town of Grand Falls, who took no part in the prosecution, and were only parties by virtue of the Act requiring the prosecution to be in their name. *Turner* v. *Mockler*, 36 N. B. R. 245.

Question of principle — *Right of appeal.*]—A Court of Appeal will not interfere with the judgment of the Court below upon a simple question of costs, unless the Court of first instance has violated a principle or committed a flagrant injustice. *Lauzon* v. *Corporation du Canton La Minerve*, 9 Que. P. R. 255.

Question of principle — *Right of appeal.*]—See *McDowell* v. *Wilcock*, 16 Que. K. B. 459.

Railway — *Expropriation of land—Abandonment.*]—The word "desist" in C. S. C.

c. 66, s. 11, s.-s. 6, has the same meaning as "abandon" in 51 V. c. 29, s. 158 (D.), i.e., to leave off or discontinue. Whether voluntarily or compulsorily makes no difference; if the railway company cease operations to expropriate land and give a new notice as to other operations, that is desistment or abandonment, and the company must pay costs to the land owner. *Widder* v. *Buffalo and Lake Huron Rw. Co.*, 24 U. C. R. 234, applied and followed. *Re Oliver & Bay of Quinte Rw. Co.*, 24 C. L. T. 18, 6 O. L. R. 543, 2 O. W. R. 953, 3 O. W. R. 318.

Railway — *Expropriation of land—Action for trespass — Right to mandamus—Issues—Apportionment.*]—Action for damages for trespass on the plaintiff's land or, in the alternative, for a mandamus directing the defendants to place matters in train to assess the compensation due to the plaintiff for the lands taken for the purposes of the defendants' railway. At the trial, the Judge held that there had been no trespass, but that the plaintiff was entitled to the mandamus asked for:—*Held*, that the plaintiff was entitled to the general costs of the action, notwithstanding the finding against him on the issue of trespass. *Calvert* v. *Canadian Northern Rw. Co.*, 18 Man. L. R. 307, 8 W. L. R. 379.

Railway expropriation—*Counsel fees—C. P. 549; R. S. C., c. 37, s. 2, s.-s. 5, s. 199.*]—The costs of an owner who succeeds in an arbitration under the Railway Act shall be taxed as between solicitor and client.—The tariff of costs prescribed for ordinary litigation may be accepted as a general guide for taxing the costs of such arbitration. *Can. Northern Que. Rw. Co.* v. *Paquin* (1909), 11 Que. P. R. 237.

Railway expropriation—*Counsel fees—C. P. 554.*]—The costs of a successful attorney in a railway expropriation over $10,000, include the sum of $25 for the first sitting at trial, instead of $10, $70 as attorney's fee, $15 hearing fee, $20 for filing factums and an additional fee of $50, the amount of the case being over $10,000; but the sum of $25 for the special trial fee will not be allowed. *Can. Pac. Rw. Co.* v. *Oligny* (1910), 12 Que. P. R. 11.

Receiver—Action by—Costs of successful defendant—Liability of funds in hands of receiver—Priority over receiver's own costs. *O'Brien* v. *Ternan*, 40 N. S. R. 601.

Receiver — Partnership — Advance by partner—Priority. *Merritt* v. *Nissen*, 1 O. W. R. 456.

Recorder's Court—*Landlord and tenant—Fees of advocates.*]—The costs of trial of causes between landlords and tenants before the Recorder's Court do not include the fees of the advocates. *Blouin* v. *Parent*, 7 Que. P. R. 479.

Recovery as damages—*Action induced by conduct of defendant.*]—A plaintiff whose action was dismissed because the defendant, whom he sued as a widow, was in fact a married woman, cannot claim from her as damages the costs which he incurred in the action so dismissed, not even where she allowed herself to be known as a widow. *O'Malley* v. *Ryan*, 23 Que. S. C. 417.

Recovery from opposite party—Relations of municipal corporation with solicitor—By-law—Change in—Retroactivity—Profit costs. *Ottawa* v. *Ottawa Electric Co.*, 3 O. W. R. 65, 588, 796, 4 O. W. R. 190.

Referee's report— *Exceptions.*]—Where exceptions to a referee's report were allowed in part, no costs to either party were allowed. *Lawton Saw Co.* v. *Machum*, 21 C. L. T. 133, 2 N. B. E. R. 191.

Reference for trial—Report—Award of costs — Jurisdiction of referee — Order or judgment—Execution. *McIntyre* v. *Munn*, 2 O. W. R. 694, 3 O. W. R. 41.

Refusal of the Court to give costs *to a party who succeeds—"Special causes" of Art. 549 C. P.*]—Failure of a party to establish one of the means he invokes. The failure of the defendant who succeeds in disproving the claim made against him, to establish one of two or several defences relied on by him cannot be one of the "*special causes*" for which the Court under Art. 549 C. P. may refuse to give him his costs. *Daigle* v. *Noel* (1909), 18 Que. K. B. 573.

Review of a judgment as to costs—*Set-off of costs in Review.*]—The Court of Review may confirm the enacting clause of a judgment, except as to costs, and, according to circumstances, declare set-off as to the costs in Review when both parties fail in their respective pretensions. *Paquin* v. *Miller* (1910), 16 R. de J. 348.

Right of action for — *Fees paid to solicitor — Liability of client.*]—Counsel in British Columbia have the right to maintain an action for their fees.—Where a solicitor, contrary to his client's expectation, does not pay over to a counsel fees received from his client, the client is still liable to the counsel. *B. C. Land & Investment Agency* v. *Wilson*, 9 B. C. R. 412.

Right of plaintiff to recover costs against defendant — Question whether plaintiff liable to his solicitors—Undertaking by third party — Construction—Indemnity. *Calverley* v. *Lambe*, 11 O. W. R. 398, 474.

Right to—Dismissal of action for seduction—Death of plaintiff's daughter—Discretion—Dismissal without costs. *Hiscock* v. *McMillan*, 2 O. W. R. 913.

Second counsel—*Written argument.*]—Where a case is submitted to the Court upon factum by the consent of parties, a second counsel fee will not be allowed, even if, at the time the case is mentioned to the Court and consent given to the factum being put in, the advocate and counsel were both present and robed. *Société of French Canadian Artisans* v. *Hébert*, 5 Que. P. R. 372.

Set-off—Costs in same action—Several defendants. *Pringle* v. *Olshinctsky*, 12 O. W. R. 197.

Set-off — *Solicitor's lien.*]—A defendant is entitled to set-off interlocutory costs in the same cause, payable to him by the plaintiff, against the damages and costs recovered against him in the final result of the cause; notwithstanding the plaintiff's attorney's lien, which only attaches on the general result of the action. *Anderson* v. *Shaw*, 35 N. B. R. 280.

Set-off pleaded as counterclaim — *Judgment to be entered in favour of party to whom balance found ultimately due—Defendant not precluded by form of pleading—Disposition of costs—Question of principle not of discretion.*]—Action for work and labour and materials. Defendant pleaded in his statement of defence and counterclaim: "(1) denial, (2) payment, (3) over-payment, (4) rent due him." Judgment given on motion upon reference for plaintiff for $288.33 with costs, for defendant for $700 with costs as set-off of judgments and judgment to be entered in favour of one to whom balance ultimately found due:—*Held*, on appeal, that there ought to have been judgment dismissing action and judgment for defendant for residue of claim:—*Held*, further, that there had been no exercise of judicial discretion as to costs and costs given to defendant in the Court of Appeal and below. It should make no difference if defendant erroneously shapes his defence on a counterclaim instead of a set-off. *Gates* v. *Seagram* (1909), 14 O. W. R. 182, 19 O. L. R. 216.

Setting aside regular judgment by default—*Terms—Appeal.*]—The defendant was permitted (30 N. S. R. 393), to supplement his affidavits and renew an application to set aside a judgment against him in a County Court for default of plea. He thereupon filed an affidavit disclosing a good defence on the merits, and renewed his application, which the plaintiff opposed. The Judge of the County Court, being of the opinion that the plaintiff, in opposing the application, acted unreasonably and oppressively, set aside the judgment with costs to be paid by the plaintiff:—*Held*, that he erred in doing so; that the order must be so far modified as to give the plaintiff the costs of the judgment, and execution if any, and the defendant the costs only occasioned by the plaintiff opposing the renewed application; that, the judgment having been regularly entered, the defendant's application was to the indulgence of the Court, and could only be allowed on payment of costs thrown away. *Piper* v. *King's Dyspepsia Cure Co.*, 20 C. L. T. 407, 33 N. S. R. 278.

Settlement of action—*Collusion—Depriving plaintiff's solicitor of costs—Chambers order for payment.*]—If the defendants make a collusive settlement of a suit with the plaintiff, without the knowledge of the plaintiff's solicitor and with the object of depriving the latter of his costs, he is entitled, on application to a Judge in Chambers, to an order that the defendants should pay his costs.—*Brunsdon* v. *Allard*, 2 E. & E. 19, *Price* v. *Crouch*, 60 L. J. Q. B. 767, and *Re Margetson and Jones*, [1897] 2 Ch. 314, followed. *Stewart* v. *Hall*, 8 W. L. R. 479, 17 Man. L. R. 653.

Settlement of judgment debt—*Agreement—Construction — Solicitor's costs.*]—An agreement to accept a specified sum in settlement of a judgment debt and costs, means the taxed costs in the suit, and does not include other charges due by the creditor to his solicitors in connection with the debt. *Blackwood* v. *Percival*, 14 Que. K. B. 445.

Several defendants—*Appeal by one — Quantum of costs.*]—If one of two defendants acquiesces in the judgment rendered in favour of the plaintiff by the Superior Court, and the case is taken to appeal by the other defendant, who succeeds in obtaining the dismissal of the action, he can only tax against the plaintiff one-half of the Superior Court costs, plus the costs of judgment, bill and taxation. *Marsan* v. *Guay*, 8 Que. P. R. 162.

Small verdict—*Slander.*]—Where, in an action of slander, the jury returned a verdict for the plaintiff for $1, the trial Judge refused to deprive the plaintiff of costs, his conduct not having been reprehensible, and the small verdict being explained by the condition of the defendant at the time the words were uttered. *Bell* v. *Wilson*, 20 C. L. T. 230, 19 P. R. 167.

Solicitor—Lien or charge—Property preserved—Costs of action—Writ of attachment—Costs of interpleader proceedings—23 & 24 V. c. 127, s. 28 (Imp.)—Manitoba Rule 852—Ratable distribution of moneys realised—Priority — Salvage claim. *Velentinuzzi* v. *Lenarduzzi* (Man.), 4 W. L. R. 226.

Solicitor's letter before action—*Costs of—Tender.*]—Since the passing of 3 Edw. VII. c. 34, s. 9, the debtor who has received a letter demanding payment from his creditor's attorney, must pay the fee therefor fixed by the tariff, and a tender by him to such creditor of the debt only is not sufficient. *Rayer* v. *Bélanger*, 27 Que. S. C. 95, 7 Que. P. R. 97.

Solicitor remunerated by salary.]—This action and an appeal has been dismissed with costs. The solicitor for defendant city was paid a monthly salary under a by-law:—*Held*, that defendants were entitled to tax the usual costs against plaintiff and these went into the general revenue of the city. *Stephens* v. *Calgary* (1909), 12 W. L. R. 379.

Special case in action to recover succession duty—*Costs payable by Crown where unsuccessful.*]—In litigation under the Succession Duty Act express power is given to the High Court to deal with the costs thereof; and where, therefore, the trustees of an estate had paid, or were ready to pay, all the duty which could properly be claimed against it, they were held entitled against the Crown to the costs of a special case and an action by the Attorney-General to recover higher duties; but only one set of costs was allowed to the trustees and beneficiaries. *Attorney-General* v. *Toronto General Trusts Corporation*, 23 C. L. T. 194, 5 O. L. R. 607, 1 O. W. R. 807, 2 O. W. R. 271.

"**Special cause**" — *Denial of facts proved.*]—The denial by a party to an action

of allegations founded on actual facts, resulting in a costly and useless inquiry, is a "special cause" for which the Court may, by the application of Art. 549, C. P., in finding in his favour, refuse to grant him costs. *Lauzon* v. *Corporation du Canton La Minerve*, 33 Que. S. C. 214.

Stated case—Rule 372—*No provision as to costs — Jurisdiction.*]—There was no provision in the stated case as to costs:—*Held*, no jurisdiction therefore to give costs. *Miller* v. *Tew* (1909), 14 O. W. R. 207, 337. See S. C. 14 O. W. R. 1173, 1 O. W. N. 269, 20 O. L. R. 77.

Success of plaintiffs—Failure on allegations of misconduct. *Emerson* v. *Wright* (Man.), 6 W. L. R. 493.

Successful defence — *Failure on one ground.*]—The fact that a successful defendant has not proved one of the defences which he has alleged, such defence not having increased the costs of the trial, is not a ground for refusing to order payment by the plaintiff of the defendant's costs. *Daigle* v. *Noel*, 35 Que. S. C. 341.

Successful defendant ordered to pay costs—*Misconduct — Amendment — Expropriation.*]—In an action for compensation for land taken for railway purposes, the defendants appealed from that part of the judgment of the trial Judge which required them to pay costs of the action and trial to the plaintiff, except costs of the order to amend. It appeared that the defendants were at no time liable in the action, either before or after the amendment, but were entitled to have the action dismissed, and, in the ordinary course, with costs:—*Held*, that the trial Judge, in these circumstances, while he could deprive the defendants of costs, for reasons of misconduct set forth in his judgment, could not make the defendants pay costs to the plaintiff. *Sawler* v. *Chester*, 2 E. L. R. 375, 41 N. S. R. 168.

Successful party not liable for costs—*Indemnity — Vancouver Island Settlers' Rights Act, 1904.*]—In a statute declaring certain settlers entitled to mineral rights on their lands, there was a provision that any action attacking such rights should be defended by and at the expense of the Crown. In an action brought by the plaintiffs to test the statute, judgment was given in favour of the defendant. The plaintiffs appealed, and the appeal was dismissed:—*Held*, as to costs, that the defendant was not in a position to claim any costs against the plaintiffs, as his rights were being asserted by and defended at the expense of the Crown. *Esquimalt and Nanaimo Rw. Co.* v. *Hoggan*, 14 B. C. R. 49, 9 W. L. R. 313.

Successful plaintiff ordered to pay costs—*Fire insurance policies—Proofs of loss —Premature actions.*]—See 14 O. W. R. 261. Plaintiff must pay costs, the actions being premature. *National Stationery Co.* v. *British Am. Assce. Co.; National* v. *Traders Fire Ins. Co.* (1909), 14 O. W. R. 281.

Summary disposal of. *Robertson* v. *Toronto* (1910), 1 O. W. N. 434.

Summary disposition by consent — Costs of motion to set aside default judgment —Costs of action. *Foley* v. *Hallett* (Man.), 6 W. L. R. 259.

Summons for summary judgment.]—Summons for judgment under Order XIV. The right to judgment was not disputed, but it was contended on behalf of the defendants that the plaintiffs were not entitled to any more costs than they could have got by taking judgment in default of defence, as the time for filing the defence had expired before the summons was issued:—*Held*, that the plaintiffs were entitled to the costs of the summons. *Diamond Glass Co.* v. *Okell Morris Co.*, 22 C. L. T. 190, 9 B. C. R. 48.

Supreme Court of Canada—*Execution —Leave.*]—Where a judgment of the Supreme Court of Canada has been certified to the clerk of the Court below, as provided by R. S. C. c. 105, s. 67, it becomes a judgment of the Court below, and it is not necessary to obtain leave to issue an execution to enforce the payment of costs awarded to the applicant by such judgment. *Ex p. Jones*, 20 C. L. T. 87, 35 N. B. R. 108.

Supreme Court of Canada—*Revising minutes of judgment — Mistake—Costs of abandoned defences — Reference to trial Judge.*] — The plaintiffs' action was maintained with costs in the Courts below, but on appeal it was dismissed with costs by the Supreme Court of Canada (37 S. C. R. 546), no reference being made to certain costs incurred by the plaintiffs in respect of several defences which the defendant had abandoned in the trial Court. On motion to vary the minutes, the matter was referred to the Judge of the trial Court to dispose of the question of the costs on the abandoned defences. *Rutledge* v. *United States Savings & Loan Co.*, 38 S. C. R. 103.

Third party — Dismissal of action — Plaintiff ordered to pay costs—Discretion—Appeal. *Russell* v. *Eddy*, 5 O. L. R. 379, 2 O. W. R. 164.

Third party—Indemnity—Extent of liability—Court of Appeal—Time for disposing of costs—Several appeals. *Gaby* v. *Toronto*, 1 O. W. R. 440, 606, 635, 711.

Third party—*Rule 214—Discretion—Appeal.*]—Rule 214 gives power to the Court or a Judge to order a plaintiff whose action is dismissed to pay the costs of a third party brought in by the defendant, as well as the costs of the defendant. Such an order is in the discretion of the Court or Judge, and there is no appeal from it, unless by leave, as provided by the Judicature Act, R. S. O. 1897, c. 51, s. 72. *Russell* v. *Eddy*, 23 C. L. T. 166, 5 O. L. R. 381, 2 O. W. R. 164.

Third party proceedings—Dismissal of action against defendant at trial—Discretion —No costs. *Wood* v. *Brown*, 10 O. W. R. 178.

Transactions involved. *Miller* v. *Archibald*, 40 N. S. R. 611.

Trespass—Frivolous action — Nominal damages. *Melanson* v. *Wright*, 40 N. S. R.

598. See *Nicholson* v. *Peterson*, 8 W. L. R. 750, 18 Man. L. R. 106.

Trespass to land—*Nominal damages—Depriving successful plaintiff of costs—Discretion—Appeal.*]—In an action for damages for breaking and entering the plaintiff's close, and destroying and injuring his grass and crops, and permitting cattle, calves, and other animals to break and enter, &c., the trial Judge found that the trespass committed was a very trifling one, that the action was the result of ill-feeling and of previous litigation, and that no substantial injury to the plaintiff's property was suffered. He found that the plaintiff was entitled to recover, but, in view of all the circumstances, he fixed the damages at $5, and refused the plaintiff his costs of action:—*Held*, that there was no reason for interfering with the discretion of the trial Judge in refusing costs. *Meisner* v. *Meisner*, 37 N. S. R., 20.

Trial—Motion for judgment, *Lachance* v. *Lachance*, 1 O. W. R. 518, 778.

Trover for goods converted—*Return of goods after action begun—Dispute as to identity — Stay of proceedings.*]—After the commencement of an action of trover for the conversion of a threshing engine, the defendants shipped to the plaintiffs an engine which the defendants alleged but the plaintiffs denied to be the one in question. The plaintiffs also asserted that, if it was the same, it was of very much less value than when converted:—*Held*, that the defendants were entitled, on motion, to an order permitting them to return the engine in question upon paying the costs of the action to date, and of the motion within two weeks, and providing that if thereafter the plaintiffs should proceed to trial and should not recover more than nominal damages, they should pay the costs subsequently incurred. *Phillips* v. *Haycard*, 3 Dowl. 362, *Peacock* v. *Nichols*, 8 Dowl. 367, and *Earle* v. *Holderness*, 4 Bing. 462, followed. *Brown* v. *Canada Port Huron Co.*, 15 Man. L. R. 638, 2 W. L. R. 151.

Trover for goods converted — Return of goods after action begun—Dispute as to identity of goods—Motion to dismiss action. *Brown* v. *Canada Port Huron Co.* (Man.), 2 W. L. R. 151.

Unfounded revendication of chattel—*Deposit in Court—Reversal of judgment as to costs.*]—A person who has the right to the possession of a chattel, as pledgee, should not be ordered to pay the costs of a revendication of it, improperly instituted, because he has deposited the chattel in Court with his plea.—2. The Court sitting in review should reverse a judgment which disposes of costs in a manner contrary to law. *Picard* v. *Anderson*, 32 Que. S. C. 355.

Unnecessary action — Administration. *Parker* v. *Greenough*, 40 N. S. R. 599.

Unnecessary action — *Setting aside hypothec.*]—An action to set aside a hypothec resulting from a life rent will be maintained, but without costs, the law giving a means of obtaining such relief without action. *Lafontaine* v. *Lafontaine*, 4 Que. P. R. 170.

Unnecessary cross-action — *Useless proceedings—Incidence of costs.*] — A party, who lost as defendant, and as plaintiff in a cross-action, when the issues could have been determined by means of one action, must pay the costs of both issues.—When a party does not prove the greater part of his allegations, he must bear the expenses of the days of trial occupied by his useless *enquête*. *North American Life Assce. Co.* v. *Lamothe*, 7 Que. P. R. 439.

Unnecessary proceedings — Foreign commission — Pleading—Bona fides—Discretion—Rules of Court. *United States Savings and Loan Co.* v. *Rutledge* (Y.T.), 5 W. L. R. 585.

Warranty — *Costs of original action — Liability of warrantor.*] —. The warrantor, who is only sued in warranty after the judgment in the case wherein he might have been called in warranty has been rendered, is only liable to the costs of the original action incurred up to the time when he might have been called into the case. *Montreal* v. *Montreal Light, Heat & Power Co.*, 8 Que. P. R. 430, 3 E. L. R. 484.

When verdict under $35—*Plaintiff not entitled to costs unless Judge certifies that he had reasonable cause of action for more than $35.*]—Plaintiff and defendant had dealings to the amount of upwards of $2,150. Plaintiff claimed a balance as due him of about $70, brought his action and recovered a verdict for $25 only. Plaintiff applied for certificate for costs:—*Held* (Peters, J.), that plaintiff had reasonable or favourable cause of action for more than $35, and certificate granted accordingly. *Farquharson* v. *Welsh* (1878), 2 P. E. I. R. 277.

Will—*Action to establish — Failure of charges of fraud and undue influence—Costs out of estate.*]—An action to establish a will, defence set up fraud and undue influence, which failed. Probate granted, but owing to the peculiar facts and circumstances which came out during the trial, and considering fairly the conduct of the beneficiary, costs were allowed out of the estate. *Gilbert* v. *Ireland*, 4 O. W. R. 460, 25 C. L. T. 39, 9 O. L. R. 124.

Will—*Action to set aside—Dismissal without costs—Parties—Administration.*]—In an action to set aside a will for undue influence by two of the defendants, one of whom was the executor, the attack failed, and the action was dismissed, but without costs as to these two defendants, there being circumstances which might, unexplained, appear to be suspicious.—The other defendants, two pecuniary legatees under the attacked will, and a religious society to whom land was devised by it, submitted their rights to the Court, but appeared by counsel at the trial, and joined in resisting the plaintiffs' claim.—*Held*, that these defendants were in the position of "interveners" under the English procedure, and were not entitled to costs out of the estate.—*Held*, also, that they were not entitled to costs against the plaintiffs.—*Semble*, that they would be entitled to compensation in the administration of the estate. *Logan* v. *Herring*, 20 C. L. T. 258, 19 P. R. 108.

Winding-up of company—Deficiency of assets—Salvage costs — Contributories — Liquidator — Priorities—Bill of costs—Moderation—Allowance for expenses — Master's fees on reference. *Re Baden Machinery Co.*, 11 O. W. R. 535, 12 O. W. R. 8.

Withdrawal of suit—*Offer of costs—Right of the defendant to judgment following the withdrawal.*]—In a case where the plaintiff has withdrawn his demand with the offer to pay costs to the defendant the latter has a right to enter judgment on the terms of the cessation, and it makes no difference that the offer has been accepted and the costs paid, or that the amount has been taxed. *Turgeon* v. *Sévigny* (1909), 36 Que. S. C. 304.

Witnesses and depositions—*Evidence made available in another action.*]—The consent that the evidence adduced in a case be made available in another case does not deprive a successful party of the right to recover for the full expense of witnesses and depositions, chargeable by the witnesses and stenographers against him, and for which he is liable. *Leclair* v. *Mayrand*, 8 Que. P. R. 248.

Workmen's Compensation Act, 1902—*Case stated by arbitrator—Jurisdiction.*]—14 B. C. R. 15, 9 W. L. R. 20. Where a special case is stated by an arbitrator under the Workmen's Compensation Act, 1902, and determined by a Judge of the Supreme Court, that Judge has power, under Rule 42, to dispose of the costs of the special case; and these costs were allowed to the applicant. *Re Darnley & Can. Pac. Ry. Co.* (1910), 15 W. L. R. 179, 12 W. L. R. 67.

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2. Scale and Quantum of Costs.

Action begun in Court of King's Bench—Increase in jurisdiction of County Courts after action begun—Recovery of sum above previous jurisdiction but below new jurisdiction of County Courts—Certificate for King's Bench costs. *Rosenberg* v. *Tymchorak*, 9 W. L. R. 110.

Action brought in H. C. J.—*Recovered $110—Quantum of costs—Con. Rule 1132—9 Edw. VII., c. 28 — Set-off.*] — Plaintiff brought action in H. C. J. for $5,000 damages for malicious prosecution and slander. He only recovered $110. Boyd, C., *held*, that costs should be taxed on County Court scale under Con. Rule 1132, as affected by 9 Edw. VII., c. 28, as it was not a case for the Judge to give different directions.—Defendant given right to set-off his costs on H. C. scale. *Moffatt* v. *Link* (1910), 16 O. W. R. 984, 2 O. W. N. 56.

Action brought in H. C. J. to recover $1,000 for defamation—*Jury awarded $100—Jurisdiction of County Court—9 Edw. VII., c. 28—Con. Rule 1132—Conduct of defendant—Discretion of trial Judge—Set-off of costs.*]—Plaintiff brought action in H. C. J. for $1,000 damages for defamation. He only recovered $100.—Britton, J., *held*, that plaintiff's costs should be taxed on County Court scale, under Con. Rule 1132, as affected by 9 Edw. VII., c. 28, but directed that no set-off of costs be allowed defendant. *Striker* v. *Rosebush* (1910), 17 O. W. R. 205, 2 O. W. N. 160.

Action for damages — *Amount recovered.*]—Whatever may be the extent of the damages and the opinion of the Court on this subject, if the latter does not think fit to grant damages to an amount greater than $8, *e.g.*, $5, it cannot then allow costs on a higher scale than accords with the amount of damages; therefore a judgment condemning the defendant to pay the sum of $5 damages and the costs of an action of $60 to $100 and the expense of a stenographer should be quashed, the Court not being able, in such a case, to order the party to pay more than $5 costs (Art. 550, C. P.). *Doiville* v. *Ouellette*, 34 Que. S. C. 385.

Action for injury to land—*Value of land — Easement — Disturbance — Damages under $200 — Jurisdiction of County Courts.*]—The defendant, in the course of severing his house from that of the plaintiff, which adjoined it, the two houses being built together as one building, by his negligence damaged the plaintiff's house to the extent of $140, for which he recovered judgment, the property itself being worth over $200:—*Held*, that the value of the property, and not the amount of the damages sustained, was the factor in determining the question of jurisdiction, and that the action was properly brought in the High Court, and the plaintiff entitled to tax his costs on the High Court scale. *Moffatt* v. *Carmichael*, 10 O. W. R. 72, 14 O. L. R. 595.

Action for reduction of alimentary allowance — *Art. 551, C. P.*] — Article 551, C. P., is applicable to actions for reduction or relief from payment of alimentary allowances. In such an action the provisions of Art. 551 are applicable not only to the costs to which the plaintiff would be entitled if he succeeded in the action, but to the costs to which the defendant would be entitled if the action of the plaintiff were dismissed or only in part maintained with costs against the plaintiff. *Moreau* v. *Michaud*, 10 Que. P. R. 184.

Action for resiliation of lease—*Annual value — Damages.*]—In an action for resiliation of a lease of the annual value of $300, accompanied by a claim for damages to the amount of $1,100, the costs of the plaintiff will be those of the first class, if he succeeds in setting aside the lease, even when the question of damages has not been considered. *Fecteau* v. *Vanier*, 9 Que. P. R. 223.

Action in High Court — Payment of $300 into Court—Creditors' claims—Enquiry—County Court costs—Set-off. *Halliday* v. *Rutherford*, 1 O. W. R. 816, 2 O. W. R. 269.

Action in King's Bench—*Subsequent increase in jurisdiction of County Courts—Statute—Retroactive application— Procedure—Certificate for full costs — Set-off.*]—A statute increasing the amount that may be

sued for in a County Court is one relating to procedure and applies to pending litigation, so that a plaintiff who has recovered a verdict in a King's Bench action for an amount then within the jurisdiction of the County Court is not entitled to tax King's Bench costs without getting from the Judge a certificate under Rule 933 of the King's Bench Act, although the amount of the verdict exceeds the amount that could have been sued for in the County Court when the action was commenced.—*Todd* v. *Union Bank*, 6 Man. L. R. 457, followed.—In such circumstances, however, such certificate should be given, preventing, also, any set-off of costs by the defendant. *Rosenberg* v. *Tymchorak*, 18 Man. L. R. 319, 9 W. L. R. 110.

Action in King's Bench for wrongful seizure of goods—*Bailiff—Verdict for $200 damages—Jurisdiction of County Court — Jurisdiction of King's Bench — County Courts Act, s. 43—Discretion of trial Judge — Counterclaim — Promissory note — Assignment of half interest—Validity—Parties — Amendment — Judgment — Interest — Costs—Set-off.*]—In an action in the King's Bench against a County Court bailiff and an execution creditor for a wrongful seizure and sale of the plaintiff's goods under execution against another, the plaintiff recovered a verdict for $200 damages:—*Held*, that s. 43 of the County Courts Act, which, with immaterial changes, has been in every County Courts Act since the first (1879), is not affected by the granting to the County Courts of jurisdiction in claims against bailiffs; and the effect is, that an action of this kind, against a bailiff, is one that can be brought in the King's Bench, or that may properly be brought in the King's Bench irrespective of the amount of damages recovered, subject only to the provision as to costs where the damages are less than $10.—In all actions tried by a jury, costs are in the discretion of the trial Judge (*Shillinglaw* v. *Whillier*, 18 Man. L. R. 149, 12 W. L. R. 128), and, therefore, irrespective of the County Courts Act, the trial Judge has power to grant or refuse costs to either party as he thinks proper; but in deciding whether the plaintiff in this action should have costs on the King's Bench scale, it was proper to take into consideration the fact that, under s. 43, the action could properly be brought in the King's Bench, irrespective of the amount recovered, so long as that amount exceeded $10, and, in the absence of some good reason to the contrary, to allow the plaintiff costs on the higher scale:—*Held*, therefore, that the plaintiff should have costs on the King's Bench scale.—The defendant L., who was the holder of a promissory note made by the plaintiff, after action brought, assigned a half interest therein to his co-defendant, the bailiff, and both defendants counterclaimed upon the note. There was no consideration for the assignment, and the plaintiff disputed the legality if it:—*Held*, that it was not necessary to decide whether the assignment was good, for, if it was not, an amendment should be allowed so as to make the counterclaim by the defendant L. alone; and judgment should be given on the counterclaim for the amount of the note and interest, with costs of pleading it only; the amount of the note, interest, and such costs to be set off *pro tanto* against the $200 damages and costs of action on the King's Bench scale.—Leave to the defendants to appeal to the Court of Appeal on the question of the scale of costs. *Campbell* v. *Joyce* (1910), 15 W. L. R. 29, affirmed 15 W. L. R. 291.

Action in Supreme Court—*Sum recovered within County Court jurisdiction—Supreme Court Act, 1904, sec. 100—M. Rule 976—"Event"—Discretion.*] — The plaintiff sued in the Supreme Court for $2,500, and recovered $160: — *Semble*, that the action should have been brought in a County Court. —But *held*, that, having regard to sec. 100 of the Supreme Court Act, 1904, even if modified by M. Rule 976, the trial Judge had no power (the amount recovered being more than $100) to order that the costs should be taxed on the County Court scale; and costs must, therefore, follow the event and be taxed on the Supreme Court scale. *Young Hong & Quong Sang Co.* v. *Macdonald* (1910), 14 W. L. R. 475.

Action of competence of Circuit Court—*Plaintiff forced to proceed in Superior Court.*]—Where the plaintiff, in order to establish his claim, has been forced by the opposite party to sue in the Superior Court, he has a right to his costs upon the scale applicable to the costs of an action in the Superior Court, although in fact he is actually a creditor only for a sum within the competence of the Circuit Court. *Lafortune* v. *Marchand*, 9 Que. P. R. 36.

Action to quash municipal by-law—*Ultra vires—Issue between plaintiff and intervener—Quantum of costs—One set of costs.*]—The fees in an action to quash a municipal by-law are the same as those of an action of the third class, even where it is alleged that the by-law is *ultra vires*.—Where the defendant submits his rights to the Court, and the contest is between the plaintiff and an intervener, the latter, if successful, has a right to full costs upon his intervention as in an ordinary cause, but not to double fees as if there had been two actions between the parties. *Paul* v. *Sorel*, 9 Que. P. R. 284.

Action to quash municipal by-law.] Where an action to quash a municipal by-law, begun before the Superior Court, is dismissed, the attorney of the defendant corporation has a right to the fees appropriate to an action of the third class in the Superior Court. *Cailloux* v. *St. Félix de Valois*, 8 Que. P. R. 33.

Action to set aside resolution of municipal corporation.]—When a direct action is taken to set aside a resolution of a municipal corporation, the costs should be taxed as in a contested action of the third class, although the disbursements are those of an action of the fourth class of the Superior Court. *Ledoux* v. *St. Edwidge*, 7 Que. P. R. 353.

Amount in controversy — Jurisdiction of County Court—"Good cause" for depriving plaintiffs of full costs. *Fox* v. *Peters* (B.C.), 5 W. L. R. 505.

Amount in controversy — *Jurisdiction of County Court — Counterclaim.*]—Where the defendant in a Supreme Court action counterclaims for an amount beyond the jurisdiction of the County Court, costs on the County Court scale only will not be awarded to a successful plaintiff, even though the action should have been brought in the County Court. *Pacific Towing Co.* v. *Morris*, 11 B. C. R. 173.

Amount in controversy—*Work done by plaintiff at defendant's expense—Cost of.*]—When an action is instituted to compel the defendant to do certain work, and judgment is given ordering that he shall do the work within a specified time, and that, on his default, the plaintiff may do the work at the defendant's expense, the plaintiff's bill of costs should be taxed as in a cause for the amount of the cost of the work ordered to be done. *Bassinet* v. *Collerette*, 7 Que. P. R. 27.

Amount involved—*Attachment of debts —Witness fees.*] — On a contestation of a garnishee's declaration, the class of action is fixed by the amount claimed by the contestant.—2. The fact that the contestation seeks to have the seizure declared binding does not change the class of action.—3. Even if the amount claimed by the contestation is below $100, if the same is tried before the Superior Court, the winning party is entitled to charge stamps and depositions as in a Superior Court case.—4. The debtor, and the manager of the company garnishee, cannot be allowed for on taxation of costs against the contestant, as witnesses. *Sieyes* v. *Painchaud*, 6 Que. P. R. 369.

Amount involved — *Judgment.*]—If an action or an incidental demand is maintained for a certain amount only, with costs, and the judgment declares that the amount granted would have been larger but for the plaintiff's consent, the costs of such action will, nevertheless, in the absence of any adjudication to the contrary, be taxed as in an action for the amount of the condemnation. *Collins* v. *Clare*, 6 Que. P. R. 381.

Amount involved — *Pension.*]—An action to reduce an alimentary pension is classed, as regards the scale of fees, according to the amount of monthly payments of the pension in question. *Lavigne* v. *Pouliot*, 6 Que. P. R. 138.

Amount involved — *Revendication of policies.*]—In an action in revendication for the recovery of insurance policies, where the company appears and *c'en rapporte à justice*, costs should be granted according to the face value of the policies, and not according to the actual value of the policies as title deeds. *McDuff* v. *Metropolitan Life Ins. Co.*, 6 Que. P. R. 133.

Amount recovered — *Ascertainment—Covenant—Amount due under—Deduction by way of payment or set-off—Jurisdiction of Division Court.*]—In an action on a covenant in a deed to pay the plaintiff a specified yearly sum, the amount found to be due the plaintiff was $262.50, from which the trial Judge deducted $60, which the defendant, at the plaintiff's request, had paid to a creditor of the plaintiff, but which was in no way connected with the covenant, thus reducing the amount to $193.50, for which judgment was entered:—*Held*, that the plaintiff was entitled to costs on the County Court scale, the claim not being within the jurisdiction of a Division Court, as the $60 was allowed to the defendant, not by way of payment, but as a set-off. *Oosterhout* v. *Fox*, 10 O. W. R. 157, 247, 14 O. L. R. 599.

Amount recovered—Investigation of accounts involving large sums—Jurisdiction of County Court—Con. Rule 1132 — Set-off. *Ross* v. *Townsend* (1910), 1 O. W. N. 457.

"Amount recovered" — Money paid into Court. *Johnston* v. *Hadden* (B.C.), 8 W. L. R. 526.

Appeal—*Amount involved—Costs below.*] —Where a tutor brings, in his capacity as such, an action for damages, which is dismissed with costs against him personally, appeals, and succeeds in having the personal judgment against him set aside with costs, the amount in litigation in appeal is the amount of costs which the tutor has been adjudged to pay personally, and not the amount in question in the original action. *Garnier* v. *Armand*, 6 Que. P. R. 45.

Appeal—*Amount involved—Costs below.*] —When an appeal is taken by the plaintiff from a judgment dismissing his action, which was one of the first class, but ordering the defendant to return him some effects claimed, the class of action is determined by the amount for which the action was brought. *Armstrong* v. *Beauchemin*, 6 Que. P. R. 51.

Appeal—*Nuisance — Abatement — Penalty.*]—An action in which the claim is, that the defendants be ordered immediately to cease allowing evil odours and smoke to issue from their establishment, or in default that the plaintiff shall be allowed to abate the nuisance by employing necessary means for such purpose, and that the defendants be ordered to pay $100 with costs, is similar, as regards costs in the Court of King's Bench, to a proceeding by writ of prerogative, and is consequently a first-class action. *St. Paul* v. *Cooke*, 6 Que. P. R. 48.

Appeal from judgment of Drainage Referee.] — The costs of an appeal to the Court of Appeal from the decision of the Drainage Referee in a proceeding under the Drainage Act initiated before him should (if awarded to either party) be taxed on the scale applicable to appeals in cases begun in the High Court of Justice. Decision of a Divisional Court, 19 P. R. 188, 20 Occ. N. 329, reversed. *Re Metcalfe & Adelaide & Warwick, Re Colchester North & Gosfield North*, 21 C. L. T. 403, 2 O. L. R. 103.

Appeal under Public Instruction Act.]—In an appeal under Art 482 of the Public Instruction Act, the costs of the advocates must be taxed pursuant to Art. 105 of the tariff of the Superior Court as regards the general fee, and as in an action of the fourth class in the Superior Court as regards the other costs. *Guay* v. *St. Jerome & St. Monica School Comrs.*, 5 Que. P. R. 124.

Assault — *Small verdict—Certificate of trial Judge—Review by Court.*]—The Court has jurisdiction to review the discretion exercised by a Judge in certifying under 60 V. c. 28, s. 74, that there was good cause for bringing the action in the Supreme Court. —Where an action for assault and battery was brought in the Supreme Court, and the jury found a verdict for the plaintiff for only $35, but the trial Judge granted a certificate under the above section, on the ground that the plaintiff's attorney had reasonable grounds for thinking that the title to land would be brought into question:—*Held*, that a sufficient case had not been made out to induce the Court to interfere. *Cormier* v. *Boudreau*, 36 N. B. R. 6.

Attachment of debts — *Amount attached.*]—The costs on an attachment after judgment must be taxed according to the amount sought to be recovered from the garnishee, and do not follow the costs of the principal action. *Latour* v. *Latour*, 5 Que. P. R. 306.

Attachment of debts — *Amount attached.*]—Where a contestation of the declaration of a garnishee is dismissed, the class of action will be fixed by the amount of the judgment which the contestant could have obtained against the garnishee if the declaration had shewn that the latter was indebted to the judgment debtor, and this although a part of such sum was insaisissable. *De Sieyes* v. *Painchaud*, 5 Que. P. R. 363.

Attachment of debts—*Contestation of declaration of garnishee—Amount involved.*]—The fee allowed to a garnishing creditor upon a contestation of the declaration of the garnishee, which has been maintained without the garnishee having replied to it, is the fee applicable to an uncontested action, and not that of a contested action, and is regulated by the sum which the garnishee is ordered to pay. *Ettenberg* v. *Kelly*, 5 Que. P. R. 428.

Attachment of debts — *Saisie-arrêt—Amount claimed.*]—A *saisie-arrêt* is a new cause or proceeding, and the costs of a judgment maintaining the disavowal of the advocate who has issued the *saisie-arrêt*, are to be determined according to the amount for which the writ of *saisie-arrêt* has been issued. *Lafrance* v. *Parent*, 21 Que. S. C. 415.

Bankruptcy and insolvency — *Privileged claim—Amount of.*]—A third person who claims by petition a privilege or right of lien upon certain effects of an insolvent, which have come into the hands of the curator, has a right to the fees appropriate to an action for the amount of his lien. *Maller* v. *Bayley and Wright Manufacturing Co.*, 3 Que. P. R. 152.

Breach of warranty—*New trial—Costs of first trial — First verdict carrying full costs—Second trial carrying one-third costs —Costs of first trial—Costs of second verdict carrying only one-third costs—Costs of both trials to be taxed at only one-third scale—Common Law Procedure Act (P.E.I.), s. 238 —Practice—"Event."*]—At first trial plaintiff recovered a verdict for $145. This on appeal was set aside and on a new trial he obtained a verdict for $45. A verdict of $65 carries full costs less than that one-third costs:—*Held*, that plaintiff is entitled to costs of both trials, but the one-third scale must be applied. *McCallum* v. *International*, 8 E. L. R. 74.

Cancellation of lease—*Class of action.*] —The plaintiff had rented land from the defendant, at an annual rent of $108, payable $9 a month, the lease being for five years, with power to the tenant to terminate it in any year by giving three months' notice. The plaintiff, in the month of August of one of the first years, sued for the cancellation of the lease, and succeeded in obtaining such cancellation with $24 damages, and costs:—*Held*, that, under these circumstances, the lease being a yearly one as regarded the plaintiff, the class of action, as regarded the costs awarded against the defendant, was that of an action for $81, being the balance of rent for the year which, at the time the action began, still had to run. *Chartrand* v. *Ouimet*, 17 Que. S. C. 164, 2 Que. P. R. 418.

Certiorari—*Order—Fee on.*]—The costs of advocates or attorneys in a case of *certiorari* are taxed as in an action of the second class in the Superior Court. 2. No fee is allowed upon a judgment ordering the issue of a *certiorari*. *Arcand* v. *Montreal Harbour Comrs.*, 5 Que. P. R. 410.

Claim and counterclaim—Jury. *Coulter* v. *Sweet*, 2 O. W. R. 1.

Class of action—*Administrator.*] — An action whereby the plaintiff appointed by a foreign tribunal administrator to a decedent estate, seeks to have his quality recognised in this country, against a sequestrator appointed by our Courts to the property situate in this country, will be considered a first class action for taxation purposes, if it appears that the property situated in this country amounts to more than $1,000. *Lavoignat* v. *Mackay*, 3 Que. P. R. 479.

Class of action—*Amount of final judgment—Costs of interlocutory orders.*]—According to art. 554, C. P., for the purposes of taxation the class of action is determined by the amount of the final judgment, and it applies to all the proceedings in the cause, including interlocutory judgments. *Poirier* v. *Ouimet*, 10 Que. P. R. 40.

Class of action—*Contestation of intervention—Original claim.*]—Where, after a *saisie-conservatoire*, a third party intervenes to claim as his own part of the goods seized, and afterwards obtains possession of such part, upon giving security to the plaintiff for his claim, the class of action upon the contestation of the intervention by the plaintiff will be the same or at least not a higher class than that of the original claim of the plaintiff. *Boulet* v. *St. John*, 8 Que. P. R. 139.

Class of action—*Garnishee—Amount of judgment against.*]—When the contestation of the declaration of a garnishee is maintained without hearing, upon default of the garnishee to reply to such contestation, the attorney of the contestant has a right to tax

against the garnishee the fee provided by Art. 4 of the Superior Court tariff; and the class of action is determined by the amount of the judgment rendered against the garnishee. *Ettenberg* v. *Kelly*, 19 Que. S. C. 143.

Class of action—*Interest.*]—The costs on an appeal from a judgment for $200 with interest and costs, which is reversed, the action being dismissed by the Court of Appeal, are costs of an action of the fourth, and not of the third class. *Sauriol* v. *Clermont*, 3 Que. P. R. 477.

Class of action—*Partition and sale—Price obtained—Opposition.*]—When an immovable has been sold in an action for partition and sale for a price exceeding $4,000, the costs of an opposition *à fin de distraire* and of the contestation thereof should be taxed as in an action of the first class, with the additional fee of $30 which the tariff gives in actions for more than $4,000. *Latour* v. *Latour*, 19 Que. S. C. 159, 3 Que. P. R. 418.

Class of action—*Validity of seizure — Amount in question.*]—Upon a contestation as to the validity of a seizure *en mains tierces*, the class of action depends upon the amount seized, and the taxation of the bill according to the class of the original action will be revised accordingly. *Jones* v. *Moodie*, 3 Que. P. R. 354.

Class of action—"*Value in contest*"—*Interest and costs.*]—Neither interest nor costs can be added to the amount in litigation as part of the "value in contest" for the purpose of determining the class of action to regulate the scale of taxation of costs. *Barber-Ellis Co.* v. *Burland*, 10 Que. K. B. 218.

Class of action—"*Value in contest*"—*Judgment.*]—Where the judgment appealed from was against the appellant for a specific amount, and the respondent did not take a cross-appeal, the "value in contest," for the purpose of determining the class for taxation of costs, is the amount for which judgment was rendered against the appellant by the Court below. *McGarvey* v. *Dougall*, 10 Que. K. B. 217.

Class of action—"*Value in contest*"—*Judgment—Costs.*]—In determining the class to which a case belongs for the purpose of taxation of costs, only the amount of the condemnation in the judgment appealed from, irrespective of costs, is to be taken into consideration. *Sauriol* v. *Clermont*, 10 Que. K. B. 219.

Class of action — *Value in contest — Opposition—Dismissal on motion — Absence of appearance—Fee—Scale of.*]—Where an opposition is dismissed upon motion, and the plaintiff's attorney has not filed an appearance in writing to the opposition, he is not entitled to a fee *de comparution*. 2. The fee upon an opposition dismissed upon motion is that of an action dismissed upon preliminary exception. 3. The class of action to which an opposition belongs is regulated by the value of the effects claimed by the opposition, and, in the absence of other evidence, the amount mentioned in the opposition as representing the value of the effects thereby claimed should be regarded as the true one. *Les Curé et Marguilliers de Laprairie* v. *Proulx*, 4 Que. P. R. 33.

Company—*Removal of liquidator — Appeal.*]—The fees in appeals on a petition to remove a liquidator appointed to a joint stock company are the fees of a second-class and not of a first-class action. *Stimson* v. *North-West Cattle Co.*, 5 Que. P. R. 239.

Contestation in garnishment—*Amount in controversy.*]—The fees upon a contestation of the declaration of a garnishee, where it is sought by the garnishment proceedings to avoid a gift of immovables of the value of $800, and to condemn the garnishees each to pay $122, are the fees of an action of the second class. *Brunet* v. *Bergeson*, 4 Que. P. R. 419.

Contestation of opposition—*Original action.*]—The fees taxable upon a contestation of an opposition *à fin d'annuler* are those appropriate to the original action, where the contestation is made by the plaintiff, by another party, or by a third person. *Sun Life Assce. Co.* v. *Pallisér*, 7 Que. P. R. 455.

Controverted municipal election — Local Improvement Ordinance—Taxation—Appeal—Direction as to scale of costs. *Re Clark* (N.W.T.), 4 W. L. R. 316.

County Court — Appeal to Divisional Court of High Court—Dismissal for want of jurisdiction. *Francis* v. *Huff*, 11 O. W. R. 343.

County Court—*Ascertainment of amount—Goods sold.*]—In an action for the price of goods sold, in which the plaintiff recovered $200, it was contended that that amount was ascertained by the act of the parties, and therefore within the jurisdiction of the County Courts, because the goods were sold according to a price list agreed to, and therefore the amount was ascertainable by a simple computation:—*Held*, not so.—*Thompson* v. *Pearson*, 18 P. R. 420, distinguished. *Evans* v. *Chandler*, 20 C. L. T. 260, 19 P. R. 160.

County Court — *Defence arising after action—Division Court garnishment — Payment into Court.*]—On the 5th August, 1899, a creditor of the plaintiff issued a summons out of a Division Court claiming $64 from the plaintiff, and claiming to attach moneys in the hands of the defendant, as garnishee, to answer the plaintiff's debt, and served it on both primary debtor and garnishee on the day of its issue. On the 17th August this action was brought in a County Court to recover $133.40. On the 28th August the garnishee (the defendant in this action) paid $57.50 into the Division Court. On the 6th September judgment was given in the Division Court for the primary creditor against the primary debtor (the plaintiff in this action) for $64, and against the garnishee for $57.50. On the 5th October the plaintiff delivered his statement of claim for the whole $133.40.—*Held*, that the service of the summons was no bar to this action; that the defence that the defendant was discharged as

to $57.50 by his payment into the Division Court was a defence which did not arise until the payment was made and judgment given in the Division Court, and was consequently a defence arising after action brought: and such payment and judgment could not have relation back to the time of service of the summons; and therefore, it having been adjudged in this action that the plaintiff was entitled to the amount claimed by him, less the $57.50, the action was properly brought in a County Court, and the plaintiff was entitled to costs on the scale of that Court. *Pickard* v. *Tims*, 20 C. L. T. 118, 19 P. R. 109.

County Court — *Payment into Court—Amount—Acceptance by plaintiff—Order for set-off—Finality—Appeal.*]—The plaintiff in an action in a County Court claimed $140, the balance alleged to be due upon the sale of a chattel, and the defendant brought into Court $95 in full of the plaintiff's cause of action, which the plaintiff accepted in due time. The Judge of the County Court thereupon made a summary order allowing the defendant to set off his costs incurred in the County Court in excess of such costs as he would have incurred in a Division Court against the costs of the plaintiff, and to enter judgment and issue execution for the excess, if any, of the costs of the defendant over and above the costs of the plaintiff:—*Held*, that the plaintiff was entitled to tax his costs of the action according to the County Court scale, irrespective of the amount paid into Court and accepted by him in satisfaction of his claim and the plaintiff being entitled to his costs by the express provision of Rule 425 (which is not qualified by Rule 1130), they were not subject to the discretion of the Judge:—*Held*, also, that the order of the Judge was in its nature final, and therefore appealable under s. 52 of the County Courts Act, R. S. O. c. 55. *Babcock* v. *Standish*, 20 C. L. T. 329, 19 P. R. 195.

County Courts—*Tender before action—Payment into Court—Recovery of $20 more than sum paid in — "Recovered."*] — The plaintiff claimed $333.19 for certain cattle sold to the defendant, who pleaded tender of $300 and payment into Court, and not indebted as to the remainder of the claim. Judgment for the plaintiff was given for $320. The taxing officer allowed costs on the scale "over $250 to $500:"—*Held*, on review of the taxing officer's ruling, that the amount recovered by means of the action being only $20, the costs should have been taxed on the scale "over $10 to $25." *McLean* v. *Dove*, 7 W. L. R. 365, 13 B. C. R. 292.

County Court action.]—Increased counsel fees allowed in County Court action, under B.C. Rule 589, amount involved being over $500, difficult questions of law being involved. *Blundell* v. *Anglo-Am. Fire Ins. Co.* (1909), 12 W. L. R. 164.

County Court jurisdiction—Ascertainment of amount—Set-off. *Smith* v. *Toronto General Hospital Trustees*, 6 O. W. R. 999.

County Court jurisdiction—*Trespass to land—Amount involved—Title to land.*]—Plaintiffs were owners of the remainder in a farm valued at $1,500, and defendant Reece was life tenant thereof, and defendant Payne a purchaser from her of timber on the farm. The action was for an injunction and damages for cutting and removing the timber. The trial Judge found for plaintiffs (1 O. W. R. 516), and assessed the damages at $400 to be paid into Court and paid out to plaintiffs on death of defendant Reece, who was to have the interest in the meantime. This judgment was varied by a Divisional Court (2 O. W. R. 160, 23 C. L. T. 107, 5 O. L. R. 356), by directing that defendants should at once pay to plaintiffs $180. The defences having raised the question of title to an interest in land of a greater value than $200, and therefore the action would not be maintainable in a County Court by virtue of s.-s. 1 of s. 22 of the Act, therefore plaintiff's costs were taxed on the High Court scale. *Whitesell* v. *Reece*, 4 O. W. R. 465, 9 O. L. R. 182.

Criminal libel—*Criminal Code, s. 835.*]—*Quære*, where costs are taxable under s. 835 of the Criminal Code, on what scale should they be taxed? *Nichol* v. *Pooley*, 9 B. C. R. 363.

Demand for assignment—*Contestation—Examination for discovery—Fee.*]—When a demand of assignment is successfully contested, the costs will be of the class of action of the amount of the debt involved.—An examination on discovery does not justify taxation as in an action settled after inscription for *enquête*, but does equitably justify a fee similar to the one provided by No. 46 of the old tariff. *Imperial Laundry Co.* v. *Hurtubise*, 8 Que. P. R. 209.

Detention of goods—*Judgment for return—Damages.*]—The plaintiff in an action for detention of a horse, alleged to be of the value of $1,000, recovered judgment for its return the $10 damages: — *Held*, against the contention of the defendant, that costs should be taxed as in an action under $100, or on the lower scale of the tariff; that, in the absence of evidence to the contrary, the value alleged in the statement of claim should be treated as the real value for purposes of taxation. *Allison* v. *Christie*, 2 Terr. L. R. 279.

District Court—*Action beyond jurisdiction of County Court—Discretion of District Judge as to scale of costs—Rules of Court—Application of.*]—Where, in an action tried before a District Court Judge, without a jury, there is a recovery for an amount beyond the jurisdiction of the County Courts, the Judge is not compelled, under s. 11 of the District Courts Act, R. S. O. 1897 c. 109, read in the light of the Rules of Court applicable thereto, either to withhold costs altogether or to grant a certificate therefor on the High Court scale. He has a discretionary power, and may certify for costs on the County Court scale only. *Schaeffer* v. *Armstrong*, 12 O. L. R. 40, 8 O. W. R. 564.

Division Court—Title to land coming in question—Removal of action into High Court—County Court costs. *Thurston* v. *Brandon*, 12 O. W. R. 1228.

Division Court jurisdiction — *Ascertainment of amount — Promissory note.*] —

Held, that the debt in this case was not cognizable by a Division Court, the claim being for more than $100 and not ascertained by the signature of the wife (the principal debtor); that the note signed by the husband could not be treated as an ascertainment, it not having been signed by him as her agent, but on his own behalf; and therefore the costs should be on the scale of the County Court in which the action was brought. *Davidson* v. *McClelland*, 21 C. L. T. 188, 32 O. R. 382.

Division Court jurisdiction—*Balance due on contract signed by defendant — Extrinsic evidence.*]—In an action in a County Court for $37.50, the balance due on a building contract of $475, signed by the defendant, where extrinsic evidence was required to shew performance of the contract by the plaintiff, and for $27.35 upon an open account, as against which the defendant was allowed upon his counterclaim $25 for defective work and material:—*Held*, that a Division Court would have had no jurisdiction, and that the plaintiff was entitled to his costs on the County Court scale. *In re Graham* v. *Tomlinson*, 12 P. R. 367, and *In re Sawyer-Massey Co.* v. *Parkin*, 28 O. R. 662, not followed. *Kinsey* v. *Roche*, 8 P. R. 515, approved. *McDermid* v. *McDermid*, 15 A. R. 287, followed. *Kreutziger* v. *Brox*, 21 C. L. T. 139, 32 O. R. 418.

Drainage Act—*Reference.*] — Section 113 of the Drainage Act, R. S. O. c. 226, providing that the tariff of the County Court shall be the tariff of costs under that Act, applies only to actions which ought properly to have been instituted by notice under s. 93, and not to actions referred under s. 94 which might properly have been brought at common law without reference to the Drainage Act, and which are referred to the Referee because the Court thinks they may be more conveniently disposed of by him. *McCulloch* v. *Caledonia*, 20 C. L. T. 95, 19 P. R. 115.

Drainage Act—*Reference.*]—Where an action is brought to recover damages for injury to property by the construction of drainage works, and the claim is within the scope of s. 93 of the Drainage Act, R. S. O. c. 226, under which proceedings before the Drainage Referee may be taken without bringing an action, and an order is made referring the action to the Referee for trial, the costs should be taxed according to the tariff of the County Courts, under s. 113. *Moke* v. *Osnabruck*, 20 C. L. T. 103, 19 P. R. 117.

Fees of arbitrator—*Amount of award.*] —The scale of costs of a motion to tax the costs of an arbitrator is determined by the amount of the award, and not by the amount of the arbitrator's fees. *Provincial Light, Heat & Power Co.* v. *Lafleur*, 10 Que. P. R. 51.

Goods sold—*Amount in controversy — Change pendente lite—Appeal for costs.*]—The plaintiffs brought an action in a County Court for $175.55, the price of goods sold. The defendants had rejected the goods on the ground that they were not up to sample. After delivery of the statement of claim the plaintiffs sold the goods, and delivered an amended statement of claim, in which they gave the defendants credit for the proceeds of the sale, and proceeded with their action for the balance $77.90. The trial Judge found that the goods were equal to sample, and gave the plaintiffs judgment for $77.90.—As to costs he held that by their amended statement of claim the plaintiffs' cause of action became an entirely new one, and solely one within the jurisdiction of a Division Court, and for this reason they were entitled only to Division Court costs, and the defendants were entitled to set off the excess of their costs incurred in the County Court:—*Held*, that an appeal lay to a Divisional Court, notwithstanding that costs only were involved, because the judgment appealed from shewed that the trial Judge had proceeded upon a wrong principle.—*Held*, also that the plaintiffs, having properly brought their action in the County Court, should not be deprived of their costs of such action by what they had done *pendente lite*, and were entitled to costs on the County Court scale. *Grove* v. *Bender*, 20 C. L. T. 95.

High Court action against several defendants — *Judgment against one for $198.15 — Judgment against another for $440.67 without costs—Taxation of costs by taxing officer on High Court scale — Costs should be on County Court scale.*]—Plaintiff recovered judgment against defendant for $198.15 with costs in a High Court action. The taxing officer allowed costs on High Court scale. Defendant appealed on ground that costs should be allowed on County Court scale.—Middleton, J., *held*, that the appeal should be allowed and the bill be referred back to the taxing officer under C. R. 1132, the action being one within the proper competence of the County Court. Costs of appeal and former taxation to defendants. *Jackson* v. *Hughes* (1910), 16 O. W. R. 916, 2 O. W. N. 15.

Increased jurisdiction of County Court — "*As being due.*"] — Action for $300 balance due on contract for building a house. Defence, contract not completed according to plans and specifications. Amount due not ascertained by signature of defendant:—*Held*, on appeal, that costs should be taxed on High Court scale. *Amyot* v. *Sugarman*, 13 O. W. R. 429. Appeal allowed, 924.

Interim injunction—*Municipal by-law.*] —The fees upon a petition for interlocutory injunction in an action to set aside a municipal by-law, are fees of second, not of first-class actions. *Belœil* v. *Jodoin*, 7 Que. P. R. 77.

Interim injunction.]—The costs of an interlocutory injunction will be taxed as in an action of the same class as is the action of which it is incident. *Jodoin* v. *Belœil*, 7 Que. P. R. 222.

Intervention — *Amount in controversy in principal action.*]—The class of an intervention which has been dismissed, is determined by the amount in controversy in the principal action, and not by the amount of the claim of the intervener. *Garipy* v. *Chartrand*, 10 Que. P. R. 155.

Judgment debtor — *Second judgment summons—Motion to set aside—Collection of Debts Ordinance, secs. 11, 13.*]—The costs of a motion upon summons to test the validity of a second summons for the examination of a judgment debtor (2 W. L. R. 216), were *held*, taxable on the scale of costs applicable to any other motion in the original action, and not within the provisions of secs. 11 and 13 of the Ordinance respecting the collection of debts, ch. 6 of 1904. *Brownlee* v. *Eads* (1910), 14 W. L. R. 539.

Jurisdiction of County Court—*Ascertainment of amount—Action for price of goods—Reduction of claim by trial Judge.*]—In an action in the High Court for $340, the balance of a $790 account for logs sold by the plaintiff to the defendant, $450 of which was paid before action, the trial Judge found that the sale was made as contended by the plaintiff, but reduced the amount by $20 for some logs not received by the defendant:—*Held*, on an appeal from the ruling of a taxing officer, that the plaintiff was entitled only to County Court costs, and the defendant to a set-off. The sum of $340 being an ascertained amount, the reduction of it by the trial Judge did not affect the ascertainment. *Brown* v. *Hose*, 14 P. R. 3, distinguished. *Lovell* v. *Phillips*, 23 C. L. T. 114, 5 O. L. R. 235, 2 O. W. R. 119.

Jurisdiction of County Court—Ascertainment of amount—Promissory note—Consideration. *Baldwin Iron & Steel Works* v. *Dominion Carbide Co.*, 2 O. W. R. 6, 170.

Jurisdiction of County Court—Ascertainment of amount. *Williamson* v. *Elizabethtown*, 2 O. W. R. 977, 3 O. W. R. 742.

Jurisdiction of County Court—Ascertainment of amount claimed. *Minerva Mfg. Co.* v. *Roche*, 1 O. W. R. 530, 722.

Jurisdiction of County Court—Ascertainment of amount of money demand. *Bastedo* v. *Simmons*, 2 O. W. R. 866, 955.

Jurisdiction of County Court—*Title to land—Growing grass — Application for King's Bench—Costs.*]—As the title to land was not in question, and the County Court had jurisdiction, plaintiff was refused a *fiat* for King's Bench costs. *Fredkin* v. *Glines*, 9 W. L. R. 393, affirmed, 11 W. L. R. 318.

Jurisdiction of Division Court—Account—Balance—Ascertainment—Settled account. *Taggart* v. *Bennett*, 2 O. W. R. 184, 419, 513.

Lump sum — *Injunction motion.*]—The costs of the advocates of the respondent under a judgment dismissing, after hearing a petition for an injunction, were fixed upon application to the Judge at $50. *National Typographic Co.* v. *Dougall*, 5 Que. P. R. 162.

Miner's Lien Ordinance—*Provisions as to costs—Practice—Discretion—Several lienholders joining in one proceeding.*]—Three lien-holders joined in one action which was dismissed. The union of the claims brought the action up to an amount giving the highest scale of costs:—*Held*, that defendants are entitled to recover costs of one action on the scale of the amount involved in the united action. *Lareau* v. *Olsen* (1909), 12 W. L. R. 465.

Motion for particulars — *Prothonotary.*]—A motion for particulars is an ordinary motion. 2. If an action is discontinued after such a motion, the costs of the defendant's advocate will be those of appearance and motion and not those under art. 7 of the tariff. 3. The fee of the prothonotary is also that of a motion, and not of an exception. *Gingras* v. *Finley*, 5 Que. P. R. 118.

Opposition to sale—*Class of action—Court of King's Bench—Amount in controversy—Insolvent estate.*]—On an opposition to the sale of personal and real property, the fees, in the Court of King's Bench, will be the same as on the original action, that being the limit of the plaintiff's interest, and consequently the value in contest. —2. On an intervention against a demand of abandonment, based upon the fact that a prior abandonment has already been made and a curator appointed thereto, the value in contest is the value of the insolvent estate. *Henderson* v. *Harbec*, 8 Que. P. R. 126.

Order as to—*Jurisdiction of trial Judge.*]—In a Supreme Court action, the trial Judge has no jurisdiction to order costs on the County Court scale on the ground that the action might or should have been brought in the County Court. *Russell* v. *Black*, 10 B. C. R. 326.

Overholding tenant—*Summary proceeding to eject—Landlords and Tenants Act, R. S. M. (1902), c. 93, s. 19.* —*Held*, that the costs of such proceedings are taxable on same scale as an action in the King's Bench. *Re West Winnipeg Development Co. & Smith* (1910), 15 W. L. R. 343. Man. L. R.

Payment into Court—Amount recovered by plaintiff beyond that paid into Court. *Johansen* v. *Elliott*, 7 W. L. R. 785.

Payment into Court—*Inquiry as to creditors' claims—Certificate for County Court costs—Set-off—Discretion.*]—Under 59 V. c. 19, s. 3 (O.), the equitable jurisdiction of the County Courts, which had been taken away by the Law Reform Act of 1868, was restored to that Court, so that it has equitable jurisdiction where the subject matter involved does not exceed $200. An action having been brought to set aside an alleged fraudulent conveyance of certain lands to the defendant, a *lis pendens* was registered, and by a consent order was vacated on payment of $300 into Court, with a provision that creditors should file their claims. Claims were filed to over $200, adjudicated upon by the Master, and fixed at $189.47, the amount found to be due to the plaintiff being $96.20, for which judgment was given with costs on the lower scale; the Master giving a certificate that his ruling was that the plaintiff was entitled to costs on the County Court scale, without any right of set-off:—*Held*, that the Master's order as to costs should not be interfered with. *Halliday* v. *Rutherford*, 23 C. L. T. 200.

Payment of money into Court with defence — *Acceptance in satisfaction — Amount within jurisdiction of inferior Court —Con. Rules 425, 1132, 1133.*]—Where money is paid into Court by the defendant with his defence, and taken out by the plaintiff in satisfaction to all the causes of action, the plaintiff is entitled to tax his costs on the scale of the Court in which the action is brought, even where the amount paid in and accepted is within the competence of an inferior Court.—Construction of Con. Rules 425, 1132, 1133.—*Babcock* v. *Standish*, 19 P. R. 195, and *McSheffrey* v. *Lanagan*, 20 L. R. Ir. 528, approved. Order of a Divisional Court affirmed. *Stephens* v. *Toronto R. W. Co.*, 9 O. W. R. 259, 13 O. L. R. 363.

Petition—*Contestation—Counsel fees.*]—The fees of an advocate upon a petition under Art. 876, C. P., upon which there has been contestation by writing, inscription, examination, and hearing, are the fees of an advocate in an action of the second class, but there can be no fee at the hearing. *Moreau* v. *Gélinas*, 4 Que. P. R. 380.

Petition to appoint sequestrator.]—All the fees on a contested petition to appoint a sequestrator are governed by s. 102 of the tariff, not by s. 12 or 28, and the attorney is entitled to all the fees of a third-class action. *Chalmers* v. *Shoe Wire Grip Co.*, 5 Que. P. R. 73.

Petition to quash municipal by-law — *Interlocutory injunction — Taxation — Items.*]—On a motion for the revision of the taxation of the respondent's costs of a motion for an interlocutory injunction incident to a petition to quash a by-law, made by virtue of Art. 4389, R. S. Q., the Court will allow a general fee of $50, and will disallow a fee *d'audition*; a demand for an injunction grafted on an action of this nature, is itself of the same nature, and the costs thereof ought to be taxed as of the second class; the amount payable to the prothonotary on the answer to an application for an interlocutory injunction is $1, as fixed by art. 24 of the tariff, and not the amount payable on a pleading on the merits; and the Court can not, on a taxation, refuse to allow the fee payable on each affidavit filed in support of the petition or against it. *Cameron* v. *Westmount*, 7 Que. P. R. 58.

Petition to set aside injunction order.]—The costs of an advocate upon a petition to set aside a judgment granting an interlocutory injunction before issue of the writ of summons, not being provided for by the tariff, will, under art. 12 of the tariff, be taxed upon the scale applicable to analogous proceedings; and a petition to set aside a judgment in an ordinary case is an analogous proceeding. *Ozone Co.* v. *Massicotte*, 5 Que. P. R. 176.

Quantum — *Statute limiting — Construction—Interlocutory application and appeal.*]—A motion for an interim injunction is an interlocutory motion or application, and, although an appeal from an order granting it is taken to the Court of Appeal and there allowed with costs, such costs and all other costs of the action payable by the opposite party are limited to $300, and actual disbursements, by s. 1 of the Act 7 & 8 Edw. VII. c. 12.—Section 2 of the Act only applies to appeals to the Court of Appeal from the final disposition of an action or proceeding in the Court of King's Bench, and therefore does not apply to an appeal from an order granting an interim injunction. *Traders Bank* v. *Wright*, 8 W. L. R. 747, 17 Man. L. R. 695.

Record transferred — *Dilatory exception—Fee.*]—If a record is transmitted to another Court, the defendant's fee will be as on a dilatory exception maintained (art. 25), plus a fee for the transference of the record. *Connolly* v. *McCarron*, 8 Que. P. R. 192.

Revendication of insurance policies —*Amount involved.*]—In an action of revendication of insurance policies, which represented the face value of over $200, the costs should be granted according to the actual value of the titles, not according to the value which the titles represented. *Bouchard* v. *Hétu*, 6 Que. P. R. 44.

Scale of costs—Division Court—Appeal to Divisional Court of High Court—Motion to extend time—Jurisdiction—R. S. O. 1897 c. 60, s. 159. *Whalen* v. *Wattie*, 12 O. W. R. 155.

Set-off reducing claim to lower scale. *Starratt* v. *Benjamin*, 2 E. L. R. 35.

Superior Court — *Intervention on appeal.*]—The costs of contestation of an intervention on appeal (to the King's Bench) will be taxed according to the tariff of the Superior Court which would apply to such contestation if it were made in the Superior Court. *McNally* v. *Préfontaine*, 4 Que. P. R. 125.

Supreme Court—*County Court.*] — The costs of an action in the Supreme Court, which might have been brought in the County Court, are not necessarily taxable on the County Court scale. *Royal Bank* v. *Harris*, 8 B. C. R. 368.

Tariff — *Interpretation—Class of action.*]—The allowance of costs, being a matter of statutory declaration and not of right, cannot exceed the limits defined by the text of the statute. Therefore subdivision 7 of the second class of the tariff must apply to the allowance of costs in an action for the rescission of a winding-up order and appointment of a liquidator to a company, although financial interests may be involved in the suit, which, if they formed the subject of the conclusions of the action, would bring it within the first class for the purposes of taxation. *Stimson* v. *North-West Cattle Co.*, 12 Que. K. B. 365.

Taxation — *Set-off.*]—Plaintiff recovered judgment in the Supreme Court of Alberta for $372 with District Court costs:—*Held*, there is no right to the defendant to set-off his costs of S. C. scale. *Little* v. *Whiteley* (1909), 12 W. L. R. 211.

Taxation on County Court scale—Appeal dismissed — Con. Rule 1132 does not apply—Motion for leave to appeal—To Divi-

sional Court—Dismissed with costs—Fixed at $10. *Holmes* v. *Bready* (1898), 18 P. R. 79, is still good law. *McIlhargey* v. *Queen* (1911), 18 O. W. R. 763, 2 O. W. N. 781, 916.

Transfer of action—*Security for costs—Event — Revision of taxation — Jurisdiction.*]—The fee of the defendant's attorney on a declinatory exception which was maintained, the Court ordering the transmission of the record of another district, is that provided for by Art. 7 of the tariff.—2. When a motion for security for costs is granted, costs to follow suit, and the record is subsequently transmitted to another district, the costs will follow the final judgment in the case, and not the judgment maintaining the declinatory exception and ordering the transmission of the record.—3. Where, in an action brought at Montreal, where the transmission of the record to Quebec was ordered, the prothonotary, at Montreal, taxed the defendant's bills of costs, the Judges of the district of Montreal are competent to revise such taxation, notwithstanding the judgment ordering the transmission of the record. *Can. Mutual Loan & I. Co.* v. *Tanguay*, 3 Que. P. R. 436.

Transfer of action.]—Where a cause begun in the Circuit Court is transferred by the Court, of its own motion, to the Superior Court, by virtue of art. 171, C. P., the costs will be on the scale appropriate to the amount in controversy in the action. Item 108 of the tariff has no application, there having been no évocation. *Duval* v. *Moffatt*, 3 Que. P. R. 405.

Trespass — Title to land — Pleading—Division Court jurisdiction—Rule 1132—Set-off. *Burns* v. *Hewitt*, 10 O. W. R. 757.

Trespass to land—*Title — Pleading — Amendment—Terms—Discretion.*]—In an action in the High Court for trespass of land, of greater value than $200, the plaintiff alleged his tenancy and occupation; the defendant, in his statement of defence, denied both, and asserted title and right to possession in himself, and also pleaded leave and license. About two weeks before the trial the defendant gave notice of motion for leave to amend by withdrawing his denial of the defendant's tenancy, and occupation, and expressly admitting both, and withdrawing his own claim to right of possession. Leave to so amend was granted at the trial, terms as to costs being reserved. The jury found against the defence of leave and license, and assessed the plaintiff's damages at $1, for which a verdict was entered:—*Held*, that the original defence raised an issue of title, and it not having been amended until the trial, the plaintiff was obliged to go to trial in the High Court, and was entitled to his costs on the scale of that Court:—*Semble*, also, that as a matter of discretion under Rule 1130, and perhaps also as a term of allowing the amendment, the same disposition of the costs would be made. *Black* v. *Wheeler*, 24 C. L. T. 294, 7 O. L. R. 545, 3 O. W. R. 439.

Trespass to land — *Title — Verdict for $100 — Jurisdiction of District Court.*] — Where an action for damages for flooding and other trespasses to the plaintiff's lands situated in the Parry Sound district was brought in the High Court, and the title to the land was brought in question, and, though no evidence was given as to its value, it could not reasonably be contended that it did not exceed $200, and clause (*d*) of s.-s. 2 of s. 9 of R. S. O. c. 109, giving jurisdiction to inferior Courts, where the land is under such value, not applying to such district, and the Judge at the trial having found for the plaintiff and directed judgment to be entered for him for $100 damages, with the costs of the Court having jurisdiction to such amount, without any set-off, the plaintiff was held entitled to tax his costs on the High Court scale. Decision of Anglin, J., 3 O. W. R. 601, affirmed. *Neely* v. *Parry Sound River Improvement Co.*, 24 C. L. T. 349, 8 O. L. R. 128, 3 O. W. R. 601, 778.

Trespass to land—*Value of land—Payment of $1 into Court — Acceptance by plaintiff.*]—In an action for trespass to land, valued at over $200, in which the plaintiff claimed $1,000 damages, and no question of title to land was raised, the defendant paid $1 into Court, and the plaintiff accepted it:—*Held*, that the plaintiff was entitled to his costs on the High Court scale. *Babcock* v. *Standish*, 19 P. R. 195, followed. *Chick* v. *Toronto Electric Light Co.*, 12 P. R. 58, and *Tobin* v. *McGillis*, *ib.* 60 n., commented on. *McKelvey* v. *Chilman*, 23 C. L. T. 114, 5 O. L. R. 263, 2 O. W. R. 118.

Verdict less than $400.]—In an action tried by Judge and jury, for damages for breach of contract, where plaintiff claims more than $1,000, costs will follow the event if plaintiff recovers substantial damages, although amount of verdict is less than $400, a sum recoverable in District Court. *Potter & McDougall* v. *Grierson* (1909), 10 W. L. R. 610; 2 Alta. L. R. 126.

Will—*Class of action—Tariff.*]—The tariff of advocates includes in the first class of actions, personal, real, and mixed actions where the amount in controversy exceeds $1,000, and in the second class all actions which do not fall within the first class, and as to which no other provisions are made. An action to declare a will void and to establish an earlier will, although the plaintiff, if successful, would indirectly obtain the right to an estate worth $15,000, falls within the second class. *Gaudry* v. *Dubois*, 2 Que. P. R. 403.

Withdrawal of part of claim—*Taxation of costs—Witness fees—Foreign witnesses.*] — The fact that the plaintiff, in an action against the defendants to recover $1,165.28, being $776.85 for the value of goods which had been intrusted to the defendants to be carried, but had not been delivered by them, and $388.46 damages caused by the default to deliver, has filed a retraxit in the course of the suit for $388.73, because the goods have been delivered to him after the commencement of the action, does not take away the right to have his costs taxed as in an action of the first class.—2. The taxation of witnesses subpœnaed out of the jurisdiction may be revised even when no objection has been made when such costs were being taxed, if the total amount of the costs, as taxed, exceeds the cost of a com-

mission to examine such witnesses. *Rothchild* v. *Can. Pac. Rw. Co.*, 21 Que. S. C. 318, 5 Que. P. R. 39.

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3. SECURITY FOR COSTS.

Absence from jurisdiction. *Wallace* v. *Bank of Montreal*, 1 E. L. R. 232.

Absence from Province—*Change of residence.*]—The plaintiff was a non-resident of the province. The defendant applied for an order for a stay of proceedings until security for costs should be given. At the return of the summons, on shewing cause, an affidavit of the plaintiff was read in which she stated that she had, after service of the writ of summons, moved into the province, and intended residing in the province until after the termination of her suit.—*Held*, that the defendant was not entitled to security for costs. *Violette* v. *Martin*, 20 C. L. T. 88.

Absence from Province—*Evidence — Burden of proof—Bailiff's return.*]—Where a dilatory exception was made by the defendant alleging that the plaintiff had left the province since the institution of the action, and asking for security for costs before pleading, the bailiff's return upon a subpœna, to the effect that he was unable to find the plaintiff, and that he had been informed that the plaintiff had left the province, was sufficient, at the hearing of the exception, to throw the burden of proof upon the plaintiff to shew that he was still domiciled in the province. *Beamolt* v. *Barisky*, 3 Que. P. R. 192.

Absent plaintiff — Absence in another province—Return to Ontario—Intention to remain—Evidence — Discretion — Appeal. *Gagne* v. *Can. Pac. Rw. Co.*, 3 O. W. R. 624.

Absent plaintiff — Acquisition of residence in jurisdiction *pendente lite*—Temporary or permanent residence. *Barry* v. *Oshawa Canning Co.*, 3 O. W. R. 190.

Absent plaintiff—*Extension of time—Procuration—Want of authentication — Contestation.*] — The procuration of power of attorney furnished by plaintiff resident out of the province may be allowed to stand although not properly authenticated, if the right of the defendant to contest the veracity of it be saved.—2. The Court may, for sufficient cause, extend the delay first allowed for the furnishing of security *judicatum solvi* and of the procuration *ad litem*. *Berthiaume* v. *Herreboudt*, 13 Que. K. B. 159, 6 Que. P. R. 80.

Absent plaintiff — *Fixed place of abode —Domicil.*]—The plaintiff, an Italian, was engaged at Montreal, in the service of a railway company, until the end of 1904; and, at the time he commenced his action, he worked for this company at Cross Lake, in the province of Ontario. The writ of summons described him as of Montreal; and the place of his domicil or residence before his arrival at Montreal was not shewn. The defendant having, by "dilatory exception," demanded security for costs and procuration: —*Held*, that the plaintiff did not reside at Cross Lake, his being in that place not constituting a residence within the meaning of Art. 179, C. P. C. The residence of a party is the place where he usually and ordinarily dwells and has a fixed abode. *Cills* v. *Cordasco*, 26 Que. S. C. 68.

Absent plaintiff—*Intention to return.*] —The fact that the plaintiff proposes to return to reside in the province of Quebec, while he does not actually reside there, does not withdraw him from the obligation to give security for costs. *Marino* v. *Youngheart*, 6 Que. P. R. 355.

Absent plaintiff — *One of several.*] — Where one of the plaintiffs lives in the United States, he will be ordered to give security for costs. *Kirk* v. *Lamontagne*, 6 Que. P. R. 157.

Absent plaintiff—Property in jurisdiction — Burden of proof—Building society—Terminating shares. *Daniel* v. *Birkbeck Loan and Savings Co.*, 5 O. W. R. 757.

Action against municipal corporation—*Non-repair of highway—Personal injuries.*]—Article 793 of the Municipal Code, which requires a person who sues a municipal corporation, of which he is not a ratepayer, on account of non-repair of the roads and pavements of the municipality, to deposit a sum of $10 with the clerk of the Court at the time of the issue of the writ of summons, as security for costs, applies to actions for damages for injuries caused by non-repair, and not merely to actions for the penalty provided by Art. 793. *Lalonge dit Gascon* v. *St. Vincent de Paul*, 23 Que. S. C. 65.

Action brought by liquidator in name of company in liquidation—Liability for costs—Assets of company—Undertaking of liquidator. *Toronto Cream & Butter Co.* v. *Crown Bank*, 9 O. W. R. 543, 718, 10 O. W. R. 521.

Action by infants resident abroad by next friend—Application refused by trial Judge as being too late—Action dismissed without costs—Appeal to Divisional Court by plaintiffs—New motion by defendants for security dismissed on all grounds without costs. *Belanger* v. *Belanger* (1911), 18 O. W. R. 842, 2 O. W. N. 895.

Action by infant's tutor—*Infant out of the jurisdiction—Tutor within.*]—If an infant is living out of the province of Quebec with his tutor to the person, the tutor to the property, although himself resident in the province, must give security for costs of an action in respect of the infant's rights. *Cullen* v. *Daly*, 9 Que. P. R. 249.

Action by solicitor for libel—R. S. O. 1897, c. 68, s. 10—Criminal charge—Barratry—Action not trivial or frivolous. *Mackenzie* v. *Goodfellow*, 13 O. W. R. 30.

Action for libel—*R. S. M. 1902 c. 97, s. 10—King's Bench Act, Rule 978.*]—Action for libel. Security for costs to the amount

of $300 had been ordered. The trial was abortive, the jury having disagreed. Notice of trial has again been served, and the defendant now applies for further security. The Referee ordered this to be given and an appeal therefrom was dismissed. *Adcock* v. *Manitoba Free Press* (1909), 12 W. L. R. 142.

Action for libel—R. S. O. 1897 c. 68, s. 10—Insolvency of plaintiff—Criminal charge. *Pringle* v. *Financial Post Co.*, 12 O. W. R. 912.

Action for libel in newspaper — 9 Edw. VII. c. 40, s. 12—Property of plaintiff available to answer costs—Unsatisfied execution and chattel mortgage against—Master in Chambers ordered security to be given — Britton, J., affirmed the order—Plaintiff to have four weeks to furnish security—Costs in cause to defendants. *McVeity* v. *Ottawa Free Press Co.* (1911), 18 O. W. R. 146, 2 O. W. N. 613, 703.

Action for slander of married woman — Defences — Denial — Privilege — Financial ability of plaintiff — Burden of proof. *Danard* v. *Moore*, 11 O. W. R. 61.

Actions against magistrate and constable—*R. S. O. 1897, c. 89, s. 1—Intra vires — Criminal Code — Ss. 1131, 1148—1 Edw. VII. c. 12, s. 10.*]—On motions by defendants, magistrate and constable, in an action for trespass and false imprisonment for security for costs, it was objected that above Act and Amending Act were *ultra vires* of Ontario Legislature: — *Held*, no effect could be given to this objection at this stage. Security ordered. *Titchmarsh* v. *Graham*; *Titchmarsh* v. *McConnell* (1909), 14 O. W. R. 277.

On appeal it was held that where a magistrate had jurisdiction over the subject matter and his conviction was set aside on grounds that he had failed to set out certain things in writing, which left the warrant for arrest defective on its face, it was held, that the magistrate was acting within his jurisdiction and was entitled to the protection of R. S. O. (1897), c. 88, s. 9, and therefore entitled to security for costs. *Ibid*, 14 O. W. R. 619, 1 O. W. N. 27.

Affirmed 14 O. W. R. 690, 1043, 1 O. W. N. 208.

See S. C. (1909), 13 O. W. R. 618, 683.

Additional on appeal.]—Plaintiff having set down an appeal to Divisional Court defendants were granted an order for additional securities for costs for such amount as a taxation may shew to be reasonable and proceedings stayed until such security is given. *Stow* v. *Currie* (1910), 15 O. W. R. 250.—Plaintiff appealed from above order of Master in Chambers. The appellant's counsel attack the jurisdiction of the Master to make the order, and at all events in respect of past costs:—*Held*, that the Master had jurisdiction to make the order and that the application was properly made to him. As to the questions whether his discretion was properly exercised, and whether the additional security should be confined to future costs, it was held that the amount of security that may be increased or diminished, and as in this case security has been given to amount to $2,000, that security is for all the costs, past and future, the increase of that amount necessarily makes the security increased applicable to the same costs, and that if the additional security is fixed at $1,000, it is all that the plaintiff should be required to do to entitle him to proceed. The order varied by so providing and by eliminating the stay of proceedings, leaving that to be governed by C. R. 1208. Costs of motion and appeal in the cause. *Bentsen* v. *Taylor*, [1893] 2 K. B. 193, and *Tanner* v. *Weiland* (1900), 19 P. R. 149, followed. *Stow* v. *Currie* (1910), 15 O. W. R. 383, 20 O. L. R. 353.—Motion by the plaintiff for the allowance of a bond filed for additional security for costs pursuant to above orders. The Master was of opinion that the condition of the bond was defective, and directed that a new bond should be filed; but, after that direction, the plaintiff elected to pay $1,000 into Court in lieu of giving a bond, and did so. The only order made was one allowing the plaintiff to remove the bond from the files, and providing that the costs of the motion should be costs to the defendants in the cause. *Stow* v. *Currie* (1190), 1 O. W. N. 525.

Additional security to examine defendant for discovery at New York.]—On motion by defendant for additional security for costs, for execution of a commission to examine defendant at New York for discovery, *held*, that plaintiff must give further security for bond for $3,600 or pay $1,800 into Court, unless plaintiffs' assignors agree to allow the land in question, as between themselves and defendant, to be subject in some way to a lien for defendant's costs, should the action fail. *Colonial Development Syndicate* v. *Mitchell* (1909), 14 O. W. R. 667. See S. C. 14 O. W. R. 819, 1 O. W. N. 134.

Admission that defendant without defence—Counterclaim for malicious arrest. *Blumenstein* v. *Edwards*, 3 O. W. R. 772, 5 O. W. R. 341, 796.

Affidavit—*Agent—Advocate — Relief.*]—Rule 520 provides: "When the plaintiff in an action resides out of the Territories . . . and the defendant by affidavit of himself or his agent alleges that he has a good defence on the merits to the action, the defendant shall be entitled to a summons to shew cause why an order should not issue requiring the plaintiff within three months . . . . to give security for the defendant's costs . . . :"—*Held*, that the agent must be someone having personal knowledge of the facts constituting the defence, and the allegation of the existence of a good defence must be positive. An affidavit by the defendant's advocate that he verily believes the defendant to have a good defence is insufficient on both grounds. *Stimpson* v. *Ross*, 5 Terr. L. R. 485.

Affidavit — *Information.*]—An affidavit in support of a motion for security for costs, in which the deponent does not say that he personally knows that the plaintiff no longer has his domicil in the province of Quebec, but simply that some one has told him so, is insufficient. *Bourassa* v. *Confederation Life Assn.*, 4 Que. P. R. 284.

Affidavit of merits — *Relief — Sufficiency.*]—On a motion for security for costs it is not necessary that the defendant should swear positively as to the merits. A statement that he believes he has a good defence upon the merits is sufficient. *Kerr (O. W.) Co.* v. *Lowe*, 3 W. L. R. 400, 6 Terr. L. R. 361.

Affidavit of merits—*Discretion—Cross-examination.*]—The practice under Rule 520 of the J. O. (C. O. 1898, c. 21), as to security for costs, differs from the English practice in making it obligatory upon the defendant to file the affidavit of himself or his agent alleging he has a good defence on the merits.—*Quære*, whether it is necessary to set out the grounds of defence. This Rule leaves the granting of the security to the discretion of the Judge under the circumstances of each case. The Judge may order the deponent to be cross-examined upon his affidavit as to the nature of the alleged defence before deciding the motion. Under the circumstances of this case the Judge was held to have exercised a proper discretion in refusing security. *Clark* v. *Hamilton*, 21 C. L. T. 323, 5 Terr. L. R. 110.

Amount — Interlocutory appeal to full Court—Consolidation of appeals. *Spencer* v. *Drysdale* (B.C.), 1 W. L. R. 6, 7.

Amount of — Discretion—Reduction on appeal. *House Investors Co.* v. *Lea*, 40 N. S. R. 604.

Appeal — *Chambers orders.*]—An order was made in Chambers allowing the plaintiff to amend his writ, and another order was also made dismissing the defendant's application to set aside the writ. The defendant by one notice appealed from both orders: — *Held*, two separate appeals, and that security for costs as of one appeal was insufficient. *Sehl* v. *Tugwell*, 7 B. C. R. 359.

Appeal—Order LVII., Rule 13—Discretion—Stay of proceedings. *Crowell* v. *Longard*, 40 N. S. R. 617.

Appeal—*Release of — Grounds of petitioner—C. P. 1214 1248.*]—The surety in appeal cannot be released pending the progress of appeal on a petition to that effect, without the consent of the creditor and for the sole reason that he has lost confidence in the debtor. *Cordasco & Can. Pac. Ry. Co.* v. *Frotangelo* (1910), 11 Que. P. R. 390.

Appeal—*Reversal of the judgment—Discharge — Final judgment—C. P. 1214.*]—Security given in appeal is not discharged by the reversal of the judgment of the first instance by the Court of Appeal, if the case is taken to the Supreme Court, and that the security remains available to the interested party until the final judgment. *Bruneau* v. *Genereux* (1910), 16 R. L. n. s. 435.

Appeal — Stay of proceedings—Security for costs already incurred. *Fairgrieve* v. *O'Mullin*, 40 N. S. R. 603.

Appeal — *Varying decree—Calculation of interest.*]—Decree varied by correction of miscalculation of interest. No costs to appellant as a correction should have been made when minutes settled. *McKenzie* v. *McLeod*, 6 E. L. R. 553.

Appeal—*When ought additional security to be given.*]—When the security for costs given to prosecute a suit before the Court of Appeal is declared insufficient, the documents will be sent to the Superior Court in order that additional security may be furnished. *Re Deslandes & St. Jacques* (1909), 10 Que. P. R. 399.

Appeal to Court of Appeal—*Application for increased security—Forum.*] — Application for increased security for costs on an appeal from the High Court, should not be made in the High Court, but to the Court of Appeal or a Judge thereof. *Centaur Cycle Co.* v. *Hill* (No. 2), 4 O. L. R. 493, followed. *Fitzgerald* v. *Wallace*, 24 C. L. T. 60, 6 O. L. R. 634, 2 O. W. R. 1047, 3 O. W. R. 900.

Appeal to Court of Appeal—*Poverty of appellant—Infancy—Divisional Court.*]—Security for costs of an appeal to the Court of Appeal was dispensed with, under the power given by Rule 826, where the appellant was an infant suing by her next friend, and unable, by reason of poverty, to give or procure security, the circumstances being that her action had been dismissed by the Judge at the trial, following a reported decision of a Divisional Court, with which the appellant would be met if she appealed to a Divisional Court, which she was at liberty to do without giving security. *Vahey* v. *Jephcott*, 21 C. L. T. 155, 1 O. L. R. 198.

Appeal to Divisional Court, *Ontario.*]—Rule 825, providing that no security for costs shall be required on a motion or appeal to a Divisional Court, does not preclude a defendant from obtaining an order for security for costs where the plaintiff has taken up his residence abroad after a judgment dismissing his action without costs, from which his appeal to a Divisional Court is pending. *Arnold* v. *Van Tuyl*, 30 O. R. 663, distinguished. *Tanner* v. *Weiland*, 20 C. L. T. 175, 19 P. R. 149.

Appeal to Divisional Court—*Right of unpaid vendor.*]—The plaintiff, after a judgment had been pronounced, 14 O. W. R. 338, dismissing his action, took up his residence out of the jurisdiction, and then appealed to the Divisional Court:—*Held*, that he must give security for costs. *Tanner* v. *Welland* (1900), 19 P. R. 149, followed. *Heatherly* v. *Knight* (1909), 14 O. W. R. 684.

Appeal to full Court—*Delay in applying—British Columbia Order LVIII., Rule 15A. — Discretion.*] — Defendants appealed to the Full Court.—*Held*, that it is in the discretion of the Court whether security for costs will be given. *Piper* v. *Burnett*, 10 W. L. R. 647.

Appeal to full Court, B.C.] — The amount of security for costs on appeals to the full Court not being fixed by the Rules: —*Held*, that in ordinary cases it should be $150 in appeals generally, $75 in interlocutory appeals, both Supreme and County Court, and $100 in County Court appeals not interlocutory. *Rogers* v. *Reed*, 7 B. C. L. R. 79.

Appeal to King's Bench—*Application of security to further appeal.*] — The bond given by a surety for the effective prosecution of an appeal to the Court of King's Bench, and the undertaking therein to pay the amount of the condemnation which may be ordered if the judgment appealed from be confirmed, applies to a confirmation by the Court to which the appeal is made. The obligation of the surety in such case becomes extiact if the judgment be reversed by the Court of King's Bench, and does not revive if the judgment of the Court of King's Bench be subsequently set aside by a higher Court. Judgment in 19 Que. S. C. 571, affirmed. *Guertin* v. *Molleur*, 21 Que. S. C. 261.

Appeal to Privy Council—*Increase in security ordered on account of length of transcript.*]—Sum ordered to be deposited for security of respondents' costs, on allowance of an appeal granted *ex parte;* upon petition of the respondents increased, on account of the length of the transcript of the proceedings in the Court below. *Boswell* v. *Kilburn* (1860), C. R. 3 A. C. 285.

Appeal to Privy Council.]—The appellant, in pursuance of the Canada Act, 34 Geo. III., c. 2, s. 35, tendered his bond as security for the due prosecution of the appeal. The bond, though without sureties, and binding only on the appellant, was, upon a rule to shew cause, duly allowed. Pending the appeal the appellant died, and the same was duly revived against the executors. Application that the executors should give proper and sufficient security, or the appeal stand dismissed, refused—the Judicial Committee being of opinion that the allowance of the security in the Court below precluded the respondents from objecting now to the form of the bond, and that their appearance to the order of revivor prevented the Court imposing terms on the appellant.—*Semble*, the term "proper security," in the Canada Act, 34 Geo. III., c. 2 s. 35, means security with proper securities, and not merely personal. The Court of Appeal in Upper Canada having refused to order the Court of King's Bench to send up the original papers and documents on the nle of the Court, but not part of the record, their decision was affirmed, the Judicial Committee holding that the Court of Appeal was a Court of Error, and governed by the same rules as prevail in Courts of Error in England. *Powell* v. *Washburn* (1838), C. R. 1 A. C. 127.

Appeal to Supreme Court, N.W.T.—*Extension of time for moving for security—Special circumstances — Poverty of appellant.*]—The Judicature Ordinance No. 6 of 1893, s. 504, as amended by Ordinance No. 7 of 1895, s. 7, provides that "No security for costs shall be required in applications for new trials or appeals or motions in the nature of appeals, unless by reason of special circumstances such security is ordered by a Judge upon application to be made within fifteen days from the service of the notice of motion, application, or appeal." The defendants succeeded at the trial. The plaintiff served notice of appeal, and at the expiration of 37 days obtained an *ex parte* order extending the time for filing the appeal books. This order was obtained upon an affidavit of the plaintiff to the effect that owing to poverty he had been till then unable to procure sufficient means to meet the cost of printing. On the following day the defendants took out a summons to extend the time for applying for security for the costs of appeal, and for an order for security. The defendants' application was founded upon the plaintiff's affidavit, and a further affidavit to the effect that the sheriff was prepared to return "*nulla bona*" the execution against the plaintiff for the taxed costs of the action:—*Held*, that, inasmuch as the defendants' delay in applying for an extension of time within which to make their application for security for costs of appeal had not prejudiced the plaintiff, the extension should be granted.—2. That the plaintiff's poverty was a "special circumstance" entitling the defendants to security for the costs of appeal. *Morton* v. *Bank of Montreal*, 3 Terr. L. R. 14.

Application—*Forum.*]—Applications for security for costs of appeal to the full Court should be made to a Judge in Chambers and not to the full Court. *Rogers* v. *Reed*, 7 B. C. L. R. 183.

Application by person not a party to action—Residence abroad—Actor—Costs of motion. *Sparrow* v. *Rice*, 5 O. W. R. 624, 6 O. W. R. 61.

Application for—*Onus — Affidavit—Defence on merits.*] — On an application for security for costs under Rule 520, the plaintiff, to have the summons discharged, must shew affirmatively that the defendant is not entitled to the order.—Where, therefore, the defendant by his affidavit alleged a good defence to the action on the merits, which the plaintiff sought to rebut by cross-examination, he was held entitled to the order, because his answers, though alleging certain facts not within his personal knowledge, shewed that it was not unreasonable to suppose that the plaintiff's claim might have been satisfied. *Griggs* v. *Grais*, 5 Terr. L. R. 501.

Application for—*Preliminary exception — Advocate's fee.*] — If an application for security for costs is made by way of a simple motion, instead of by preliminary exception, the advocate's fee will be that of a motion. *Tisi* v. *Cordasco*, 27 Que. S. C. 36.

Application for—*Service of certificate of deposit.*] — A defendant who files a preliminary exception demanding security for costs and who makes the deposit required by Art. 165 C. P., and Rule of Practice 40, but who does not, at the same time as the notice of motion is served, serve notice on the opposite party of the certificate of the prothonotary setting out the deposit, may be allowed to give this notice to the plaintiff when the latter cannot shew that he has been prejudiced by want of notice. *Wayle* v. *Clunie*, 7 Que. P. R. 22.

Application for—*Time for moving — Deposit.*]—The notice of a motion for security for costs must be given to the opposite party within three days from the entry of the cause. Such motion cannot be heard unless there be served with the notice the certificate of the prothonotary to the effect

that a deposit of the sum fixed by the rules of practice has been made with the clerk. *King* v. *Pelletier*, 27 Que. S. C. 37.

Application for custody of infant —Application out of Ontario—"Proceeding" —Affidavit. *Re Giroux*, 2 O. W. R. 385.

Application for extension of time after dismissal of action. *Hutchinson* v. *Twyford* (N.W.T.), 3 W. L. R. 66.

Application for payment out of Court—Foreign receiver. *Can. International Mercantile Agency* v. *International Mercantile Agency*, 4 O. W. R. 338.

Application to increase amount — *Waiver of objection.*] — A respondent by applying to increase the amount of security for costs upon an appeal waives his right to object that the security was not originally furnished in time. *Re Oro Fino Mines*, 7 B. C. R. 38.

Arrest—*Capias after judgment — Commencement of new action.*]—A *capias* issued after judgment is the commencement of a new cause, and a foreign plaintiff who has already given security for costs of the principal action, may be ordered to furnish fresh security for the *capias*, and will be ordered to pay the costs of a motion for security if he contests it. *Edgerton* v. *Lapierre*, 6 Que. P. R. 347.

Assets in jurisdiction involved in present litigation—*No real security.*]—Defendants moved for increased security for costs, $400 having been paid into Court under *praecipe* orders made before consolidation. Master in Chambers ordered plaintiff to give additional security for $1,000 within three weeks, proceedings stayed in the meantime. —Middleton, J., affirmed above order. Plaintiff's assets within the jurisdiction being involved in the present litigation would not afford any real security. Costs in the cause. *Duryea* v. *Kaufman* (1910), 16 O. W. R. 913, 2 O. W. N. 23.

See S. C. 16 O. W. R. 57, 21 O. L. R. 161.

Assignment by plaintiff for benefit of creditors pendente lite—*Re-assignment by assignee to plaintiff.*]—After action commenced plaintiff assigned for benefit of his creditor. A statement of claim was subsequently delivered but the assignee was not made a party thereto. Defendant then pleaded, but it does not appear he knew of the assignment. The latter now moved to stay or dismiss action or for security for costs. Before motion was heard the assignee re-transferred the judgment on which action was founded and all benefits and advantages to plaintiff.—*Held*, that as the action is good on its face it must go to trial. Section 9, c. 147, R. S. O. 1897, does not apply. *Lawless* v. *Crowley*, 13 O. W. R. 358.

Bond—Sureties — Cross-examination on affidavits of justification—Discretion. *Byron* v. *Tremaine*, 40 N. S. R. 624.

Can defendant, foreclosed from pleading, demand security—*C. C. P. 179.*]—Defendant who has appeared in a suit, but who has been foreclosed from pleading, has a sufficient interest to demand security for costs from a plaintiff who has ceased, since the day the action was taken, to reside in the province. *Forcier* v. *Plante*, 11 Que. P. R. 70.

Claimant — *Revendication — Foreign plaintiff.*]—He who intervenes in an attachment in revendication and claims the thing revendicated as his property, is in the position of a plaintiff, and can not obtain security for costs from a foreign plaintiff. *Binmore* v. *Sovereign Bank*, 6 Que. P. R. 423.

Claimants of fund in Court—Residence out of Ontario—Cross-motions—Stay of proceedings — Consolidation of actions. *Renouf* v. *Turner*, 2 O. W. R. 970.

Companies Act—*Special provision for security—Action by company—Delay in applying—Costs of appeal—Supreme Court Act.*] —The defendants applied under s. 114 of the Companies Act, for security for the costs of the action, which had been decided in their favour, and also for the costs of the plaintiffs' appeal from that decision. The judgment appealed from was given in February, 1905; in March, 1905, the defendants were aware of the plaintiff's inability to pay the costs of the action unless an appeal resulted in their favour. Taxation took place the 27th June, 1906, and the application for security was made on the 30th July, 1906: —*Held*, on appeal, that the application was made too late, the plaintiffs having in the meantime perfected all necessary steps for taking an appeal:—*Held*, as to the costs of the appeal, that s. 110 of the Supreme Court Act, which limits the security that may be required for costs of appeal to $200, governed. *Star Mining & Milling Co.* v. *White Co.*, 12 B. C. R. 355.

Company plaintiff — Residence out of jurisdiction—Assets in jurisdiction. *American St. Lamp & Supply Co.* v. *Ontario Pipe Line Co.*, 11 O. W. R. 734.

Compliance with order—Removal of stay—Payment into Court—Notice—Defence. *Northern Elevator Co.* v. *North-West Transportation Co.*, 6 O. L. R. 23, 2 O. W. R. 525.

Continuance of original security pending appeal.] — The plaintiffs, resident outside the jurisdiction, lodged in Court an undertaking as security for costs. At the trial the plaintiffs succeeded, and the defendants appealed, but before the determination of the appeal the plaintiffs applied for a release of the undertaking:—*Held*, that the security should stand pending the appeal. *Bird* v. *Veith*, 7 B. C. R. 511.

Corporation defendant.] — A corporation is entitled to security for costs under Manitoba Libel Act, s. 10. Under Man. Rules 1508, 982, 983, and 987, the security may be increased or diminished by the Judge. The clause in the order providing for dismissal of the action in case of default in giving security should be struck out. There must be a substantive application for dismissal when not given. *Adcock* v. *Manitoba Free Press* (1909), 12 W. L. R. 362.

Costs of former action unpaid—Instructions — Solicitor — Action brought in name of wrong person — Form of order. *Buckindale* v. *Roach*, 2 O. W. R. 775, 788, 824.

Counterclaim—Plaintiff by counterclaim (defendant in action) out of jurisdiction—Order LXIII., Rules 5, 6. *Raynes* v. *Odell*, 40 N. S. R. 619.

County Courts—*Indian plaintiff.*]—In an action by an Indian plaintiff against a magistrate, he has the same privileges as a white man of furnishing security for costs. *Re Hill* v. *Telford*, 12 O. W. R. 1090.

Curator of absentee.]—A resident who sues as curator to an absentee is bound to give security for costs. *Harvey* v. *Desjardins*, 6 Que. P. R. 144.

Curator of absentee—*Residence.*]—The curator of an absentee will not be ordered to give security for costs of an action brought by him, if he resides in the province of Quebec.—2. Where a plaintiff suing as curator to an absentee describes himself in his proceedings, as of the province of Quebec, and the defendant, in moving the security for costs, by an uncontradicted affidavit, declared that the plaintiff was non-resident, he was ordered to give security. *Tétrault* v. *Rochon*, 6 Que. P. R. 213.

Defamation—Defence—Report of public meeting—Municipal council—Financial ability — Property exigible — Criminal charge. *Parke* v. *Hale*, 2 O. W. R. 1172.

Defamation — Newspaper — Criminal charge—"Provincial crime"—Election Act. *Harman* v. *Windsor World Co.*, 2 O. W. R. 442.

Defamation—Newspaper — Mistake — Apology—Good defence — Trivial or frivolous action. *Evoy* v. *Star Publishing Co.*, 2 O. W. R. 91, 119.

Defamation—Newspaper—Trivial or frivolous action—Defence on merits. *Marsh* v. *McKay*, 2 O. W. R. 522, 614, 3 O. W. R. 48.

Defendant in interpleader — *Time for applying.*]—Under Order 63, R. 5, a person residing out of the jurisdiction made defendant by an interpleader order, may be ordered to give security for costs.—Where a party has been made defendant by an interpleader order, an application for security for costs may be made after the interpleader order has been granted. *Ross* v. *McDougall*, 40 N. S. R. 133.

Defendants out of jurisdiction.]—In this interpleader issue the defendants, the execution creditors, being out of the jurisdiction, were ordered to give security for costs. *Gowan* v. *Kolcheu* (1909), 12 W. L. R. 211.

Delay to put in security in appeal when given by a Judge.]—The prothonotary's certificate establishing want of security on the appeal, and given less than five days after the filing of the inscription in appeal, is premature and cannot have the effect of having the appeal considered as having been abandoned.—A delay for putting in security when granted by a Judge of the Court of Appeal cannot be assimilated with the additional delay granted by a Judge of the Superior Court under the provisions of Art. 1213 C. C. P.; default to furnish security within the prescribed delay cannot be the ground for a motion to dismiss the appeal. *Montreal Rolling Mills Co.* v. *Sambor*, 11 Que. P. R. 45..

Deposit in instalments — *Additional security.*]—Under Art. 227, C. C. P., the Judge is authorised to order the security to meet the costs incurred on a petition in improbation to be deposited in portions from time to time as necessity may arise, and an additional deposit may at any time be ordered where it appears that the sum already deposited is insufficient. *Auclair* v. *Nadon*, 17 Que. S. C. 200.

Deposit in review.]—When the parties have agreed to proceed with the principal action, the action in warranty and an intervention of the warrantor, at the same hearing, and when one judgment has decided all the issues, one deposit is sufficient in Review. *Anderson* v. *Smith* (1910), 16 R. de J., 349.

Dilatory exception — *Deposit—Certificate—Notice—Amendment.*] — A motion for security for costs is a dilatory exception, and cannot be granted unless notice of the prothonotary's certificate attesting that the deposit required by law has been duly made, has been given to the opposite party.—2. The Court cannot remedy such omission by permitting the party moving for security to give notice of the deposit and certificate. *Wistar* v. *Dunham*, 4 Que. P. R. 195.

Dilatory exception—*Notice of deposit.*]—When the deposit required to support a dilatory exception is mentioned in the notice of motion given to the opposite party, the procedure is in accordance with the requirements of Art. 165, C. P. *Leclair* v. *Mayrand*, 8 Que. P. R. 87.

Effect of order obtained while motion pending—Right to enlarge motion. *Stewart* v. *Lawrence*, 1 E. L. R. 163.

Exchequer Court—*Admiralty Rule 228—English Practice—Time.*]—Under the provisions of Rule 228 of the General Rules and Orders regulating the practice and procedure in Admiralty cases in the Exchequer Court of Canada, applying the English practice to cases not provided for by such Rules, an order for security for costs may be granted in Admiralty proceedings on motion of the defendant after the plaintiff has filed particulars of his statement of claim. *Morten, Downs, & Co.* v. *The "Lake Simcoe,"* 25 C. L. T. 147, 9 Ex. C. R. 361.

Executor—*Residence abroad.*] — When several executors, one of whom resides out of the province of Quebec, bring an action as executors representing an action in that province, the defendant cannot exact security from the foreign executor, the estate being the real party, and the heirs represented by

the executors, in the absence of an allegation to the contrary, being considered as resident in the province of Quebec. *Hart* v. *Dubreuil*, 17 Que. S. C. 371.

Extension of time for giving, after expiry—*Mistake of solicitor.*]—An order for security for costs contained the following provision: "That in case default is made in giving security within the time aforesaid, this action be dismissed with costs." After the expiry of the time limited, plaintiff's solicitor moved to have the time enlarged, on the ground that it was by reason of a mistake on his part, that security was not given in time:—*Held*, that notwithstanding the expiry of the time limited in the order, a Judge has jurisdiction to entertain an application on behalf of plaintiff to enlarge the time, to enable him to comply with the order. *Ordway* v. *Le Blanc*, 33 N. S. R. 185.

Foreclosure suit.]—It is not a ground for refusing an order for security for costs, where the plaintiff is resident abroad, that the suit is for foreclosure, upon a mortgage. *Buchanan* v. *Harvie*, 25 C. L. T. 66, 3 N. B. Eq. 1.

Foreign company—*Joint plaintiffs.*]—*Held*, that an extra-provincial company must give security for costs under R. S. B. C. 1897, c. 44, s. 144, notwithstanding it is suing along with a resident of the province and has assets within the province. *McClary* v. *Howland*, 20 C. L. T. 396, 7 B. C. L. R. 299.

Foreign company.]—Summons for security for costs from the plaintiff, a company incorporated in the State of Washington, and having its head office in Seattle. The company owned a steamer running between Seattle and Victoria, and had an office in Victoria managed by a freight and passenger agent, who devoted his whole time to the business of the company in Victoria, and who was paid a salary by the company. Rent and all office expenses were paid by the company, which was not licensed or registered in British Columbia.—*Held*, that the company was a foreign company within the meaning of s. 144 of the Companies Act, and was bound to give security for costs. *La Bourgogne*, [1899] P. 1, [1899] A. C. 431 considered. *Alaska Steamship Co.*, v. *Macaulay*, 20 C. L. T. 448, 7 B. C. L. R. 338.

Foreign corporation—*Place of business—C. P. 179.*]—A company incorporated under the provisions of the law of another province or of a foreign country, where it has its principal place of business, is bound, upon a motion to that effect, to give security for costs, and this even when the company alleges that it has an office, and in fact has one, in this province. *Baynes Carriage Co.* v. *Faucher* (1910), 16 R. L. N. S. 264.

Foreign corporation—"*Residence*" — *63 V. c. 24 (O.)*]—In order to shew that a corporation resides in Ontario (within the meaning of Rule 1198), it should appear that the company is incorporated and has its head and controlling office within the jurisdiction where its business is carried on, and "residence," as contemplated by the practice as to security for costs, is not implied where a foreign corporation has only a constructive residence through agents acting in its business interests and licensed so to do in a comparatively small and transient sort of way, as were the plaintiffs in this action; and the evidence not disclosing sufficient property of the plaintiffs within the jurisdiction, they were ordered to give security for costs. Judgment of a local Master affirmed. *Ashland Co.* v. *Armstrong*, 11 O. L. R. 414, 7 O. W. R. 401.

Foreign intervenant.]—Whatever may be the purpose for which a foreign intervenant seeks to intervene in a pending suit, he can always be bound to give security for costs and produce a power of attorney. *De Martigny* v. *La Société Charitable de l'Asile de Nuit à Paris*, 2 Que. P. R. 394.

Foreign judgment—Action on—Merits of defence. *Joshua Handy Machine Works* v. *Pace* (N. W. T.), 1 W. L. R. 156.

Form of bond—*Affidavit of justification—Real estate.*]—The affidavit of a surety at the foot of his bond need not necessarily be in the first person or divided into paragraphs numbered consecutively. 2. The description of the surety is sufficient if it is contained in the bond preceding the affidavit. 3. A surety *judicatum solvi* is not obliged to justify upon real estate when the amount of the costs is not considerable. *Mahcu* v. *Leclerc*, 6 Que. P. R. 225.

Garnishment.]—Where the garnishor resides out of the province, the garnishee is entitled to security for costs of the proceeding against him in respect of the debt attached (which proceeding is an "action" in which the judgment is sought), and an order will therefore be granted after the garnishee has made his declaration and before it has been contested. *General Importation Co.* v. *Bilodeau*, 3 Que. P. R. 189.

Increase—Inadequacy—Rules. *Dever* v. *Fairweather*, 1 O. W. R. 389.

Increase — Trial practically concluded. *Woodruff* v. *Eclipse Office Furniture Co. of Ottawa*, 35, 114, 2 O. W. R. 35, 114, 691, 4 O. W. R. 165.

Increase in amount — *Costs thrown away by postponement of trial—Amendment.*]—While the practice as to granting additional security for costs has been relaxed in favour of the granting of such security, the plaintiff, however, must not be checked at every stage of the action by security being ordered dollar for dollar for all costs incurred, or which might be incurred, without regard to the conduct of the parties. On the commencement of an action security to the amount of $200 was ordered. After the action had proceeded, $300 further security was ordered; and, on a commission to take evidence being issued, a further sum of $100. On the action coming on for trial the defendants were granted leave to amend their pleadings, and, on the plaintiffs stating that they were not ready to proceed on the amended record, the trial was postponed, the costs of the day being made costs in the cause to the successful party. The defendants

then obtained an order from a local Master directing $600 further security to be given. On an appeal to a Judge, the order was set aside:—*Semble*, that the application for additional security should have been made to the Judge at the trial at the time the postponement was asked for. *Standard Trading Co.* v. *Seybold*, 1 O. W. R. 650, 724, 783, 2 O. W. R. 878, 935, 3 O. W. R. 40, 22 C. L. T. 414, 23 C. L. T. 45, 330, 5 O. L. R. 8, 6 O. L. R. 379.

Increase in amount—Premature application—Leave to renew—Several defendants—One payment. *Fuller* v. *Appleton*, 2 O. W. R. 424, 448, 829, 1083.

Increase in amount—*Several defendants.*]—Security had been ordered for $1,000. Plaintiff gave an approved bond for $2,000. Defendants now applied for increased security. Their solicitor and clients' bills aggregated $3,000:—*Held*, present security ample. *Stowe* v. *Curry*, 13 O. W. R. 997.

Increased security—Amount of—Further application. *Burnside* v. *Eaton*, 2 O. W. R. 412, 3 O. W. R. 77.

Increased security—Contest as to next of kin—Foreign commissions—Administration order—Limited responsibility of plaintiffs for costs. *Hunt* v. *Trusts and Guarantee Co.*, 3 O. W. R. 432, 554, 5 O. W. R. 405, 6 O. W. R. 1024.

Infant plaintiff — Injury to—Action—Joinder of parent—Next friend—Both plaintiffs out of Ontario. *Topping* v. *Everest*, 2 O. W. R. 744.

Infant plaintiff in jurisdiction—*Adult plaintiff and next friend out of jurisdiction—Separate claims—Appearance—Præcipe order.*]—Action by the father of an infant as next friend and also on his own behalf to recover damages resulting to the father and the infant from an injury to the infant for which it was alleged defendants were liable. The father resided in England, and the infant in Ontario, as shewn by Indorsement on writ of summons. Defendants moved for an order for security for costs. Order granted and in default of security being given it directed that the claim of the father be struck out. *Felgate* v. *Hegler*, 4 O. W. R. 439, 5 O. W. R. 91, 9 O. L. R. 315.

Inscription en faux—*Amount of deposit—Increase or reduction.*]—The Court, after having fixed the amount of a deposit to be made by a party who inscribes *en faux* cannot increase or reduce such amount, especially when the cause is before the Court upon such inscription. *Léveillé* v. *Kountz*, 5 Que. P. R. 101.

Inscription for review—*Amount of deposit—Amount involved.*]—Where there is a contest between two creditors of an insolvent as to priority, and judgment has been given declaring one claim prior to the other to the extent of less than $400, the deposit to make when inscribing in review of such judgment is $50, although the two claims aggregate more than $4,000. *Re Cantwell*, 6 Que. P. R. 195.

Inscription in review—*Deposit—Intervention—C. P. 1196.*]—A deposit of $50 with an inscription in review by an intervenant, is sufficient when the amount involved in the intervention is less than $400, and when its object is to have certain effects declared exempt from the attachment for rent placed upon them by the plaintiff, who is the lessor of the leased premises. *Gelinas* v. *Finkelstein & Lafond*, 11 Que. P. R. 154.

Insolvency — *Absent contestant.*]—One who, residing abroad, contests the schedule of an insolvent is obliged to furnish security for costs and to file a power of attorney. *Re Lewis & Murray*, 3 Que. P. R. 145.

Insolvency of plaintiff—*Appeal.*]—On an application made by the defendant for security for costs of an appeal by the plaintiff, it appeared that the action had been dismissed with costs, but that no costs had been paid, and that, to an execution issued therefor, return had been made that the plaintiff had no property, within the jurisdiction or elsewhere, to respond the execution. It also appeared that the plaintiff had made an assignment for the general benefit of creditors, and that, on an examination before commissioners, it was shewn that he had no real or personal property, book debts, or assets, that none of his creditors had been paid, and that anything recovered in the action would belong to his creditors:—*Held*, following the practice laid down in Chitty's Archbold, p. 399, that the case was one in which the plaintiff should be ordered to give security. *Shand* v. *Eastern Canada S. & L. Co.*, 33 N. S. R. 241.

Intent to leave province—*Costs of motion.*]—The mere fact that the plaintiff has stated that he intends to go away to the United States does not justify an order for security for costs; but the costs of a motion for security will be costs in the cause. *Smith* v. *Wiseman*, 8 Que. P. R. 283.

Judgment dismissing action for default of—*Assignment by defendant for benefit of creditors — Admission of claim.*]—An order was made for security of costs to be given within three months. During this period the defendant made an assignment for the benefit of his creditors. The plaintiffs filed their claim with the assignee, and understood, apparently wrongly, that the claim was admitted. Judgment was afterwards signed by the defendant dismissing the action for non-compliance with the order for security. On motion by the plaintiffs the judgment was set aside on terms. *Macpherson Fruit Co.* v. *England*, 5 Terr. L. R. 388.

Libel—Newspaper—Proof of insolvency of plaintiff—Frivolous action—Criminal charge. *Gordon* v. *Star Printing and Publishing Co.*, 6 O. W. R. 887.

Libel—*Newspaper—R. S. O. 1897 c. 68, s. 10—Right of sub-editor to security—Good faith—Frivolous action.*]—When is an editor not an editor? When he is a "sporting" editor. Security for costs refused in a libel action against a sporting editor. The Master seems to think this a faint parallel of the Eatanswill editorial war. *Robinson* v. *Mills*, 13 O. W. R. 606.

Reversed on appeal, *Ibid.*, 763, 853.

Libel action.]—Motion by defendants for security for costs in a libel action:—*Held*, that on the face of the publication complained of, there was nothing that would suggest a criminal charge. To allege that a bench warrant was applied for to bring plaintiff before a magistrate, but refused, cannot be said to impute a criminal offence to plaintiff. Order for security granted. *Titchmarsh* v. *The World* (1910), 15 O. W. R. 362.

"Libel contained in a newspaper."] —The defendant was a country correspondent of the *St. Thomas Times*, and the action was for an alleged libel contained in one of his periodical contributions to the paper. A local Judge having ordered the plaintiff to furnish security for the defendant's costs under R. S. O. c. 68, s. 10, on the ground that the alleged libel was "contained in a newspaper." — *Held*, on appeal, reversing the order, and following *Egan* v. *Miller*, 7 C. L. T. 443, that only the editor, publisher, or proprietor of a paper is entitled to security for costs under s. 10, and not a mere correspondent. *Neil* v. *Norman*, 21 C. L. T. 293.

Long vacation—*Jurisdiction — Opposition.*]—The Court has no jurisdiction, in long vacation, to hear a motion for an order requiring security for costs to be given by an opposant à fin de charge. *Payette* v. *Comic Opera Co.*, 6 Que. P. R. 362.

Merits of defence — *Discretion.*]—The defendant, who was sued on three bills of exchange, moved for security for costs on an affidavit that he had a good defence to the action on the merits, and that he had overpaid the plaintiff, who resided out of the jurisdiction. The plaintiff did not cross-examine the defendant on this affidavit, but filed affidavits shewing admissions of the indebtedness by the defendant. These affidavits were not answered or explained. The Rule of Court in force in the Territories requires an affidavit of merits:—*Held*, that the Judge ought not upon an application for security to try out the merits of the defence, but he may, in his discretion, inquire whether the alleged merits are not a mere pretence; and the defendant in this case having disclosed the nature of his merits, the discretion of a Judge in refusing to order security for costs should not be interfered with on appeal. *Clark* v. *Hamilton*, 21 C. L. T. 323.

Motion for order dispensing with giving security—*Con. Rule 826 — Motion refused.*]—Motion for an order dispensing with giving security for costs of an appeal to the Court of Appeal under Con. Rule 826 or reducing the amount of the security to be given, refused, as the matter was left in too much uncertainty to justify a departure from the rule. Costs in the proposed appeal. *McCarthy* v. *McCarthy* (1910), 15 O. W. R. 827.

Money paid into Court—*Payment out to successful party — Proposed appeal.*] — Money paid into the High Court by the plaintiffs as security for the defendants' costs was ordered by the Master in Chambers to be paid out to the defendants after they had, by the judgment of the Court of Appeal (7 O. L. R. 110), been allowed the costs of the action against the plaintiffs, notwithstanding that the plaintiffs proposed to appeal to the Judicial Committee of the Privy Council. To retain the money in Court would amount to a stay of execution, and if that were desired, the plaintiffs should apply to the Court of Appeal. Rules 827, 832, considered, and the absence of any Rule corresponding to English Order 58, Rule 16, remarked on. *Centaur Cycle Co.* v. *Hill*, 22 C. L. T. 253, 24 C. L. T. 209, 1 O. W. R. 229, 377, 401, 639, 2 O. W. R. 1025, 3 O. W. R. 255, 354, 4 O. L. R. 92, 493, 7 O. L. R. 411, 617.

Motion — *Formalities.*]—A motion for security for costs is a preliminary exception, and must comply with all the formalities required therefor. *Turner* v. *Fee*, 6 Que. P. R. 139.

Motion—*Necessary deposit—Certificate—Service.*]—The service of a certified copy of the prothonotary's certificate of deposit, upon a motion by the defendant for security for costs, is a sufficient compliance with the Code of Procedure in that behalf. *Clifton Manufacturing Co* v. *Montreal Canada Fire Ins. Co.*, 8 Que. P. R. 67.

Motion—*Notice — Certificate.*]—Upon a motion for security for costs, it is not necessary to give notice of the certificate of the prothonotary that the deposit required has been made. *Wilder* v. *Wilder*, 4 Que. P. R. 433.

Motion—*Notice — Certificate—Deposit.*] —Upon a motion for security for costs, it is not necessary to give notice of the certificate of the prothonotary that the necessary deposit has been made. *Tougain* v. *Can. Pac. Rw. Co.*, 4 Que. P. R. 303.

Motion—*Notice — Certificate—Deposit.*] —Where, in the notice of the presentation of a motion for security for costs, no notice is given of the certificate of the prothonotary that the deposit required by law has been made, the motion will be rejected with costs. *Robertson* v. *Cobban Mfg. Co.*, 4 Que. P. R. 345.

See *Tougain* v. *Can. Pac. Rw. Co.*, *ib.*, 284, 303.

Motion — *Stamps—Deposit.*]—A motion for security for costs is a preliminary exception, and the notice of motion must be stamped as such, and accompanied by the deposit required by law. *Williams* v. *Chicoine*, 7 Que. P. R. 411.

Motion — *Time—One plaintiff out of jurisdiction — Costs of contested motion.*] — A motion for security for costs and production of power of attorney, notice of which has been given for the 1st September, may be presented on the 10th September, that being the first day of the sittings of the Court.—2. A co-plaintiff out of the jurisdiction is subject to the obligation of furnishing security and producing a power of attorney. *Semble*, that in such circumstances a plaintiff who contests the demand of security and power of attorney will be adjudged to pay costs. *Slater Shoe Co.* v. *Trudeau* 5 Que. P. R. 120.

Motion by defendants to set aside default judgment — *Defendants out of jurisdiction.*]—Defendants moved to set aside a default judgment obtained against them about a year ago. Plaintiff moved for security for costs of first motion. Order made for security, defendants being out of jurisdiction. *Marks* v. *Michigan Sulphite Fiber Co.* (1909), 14 O. W. R. 83. See S. C. 14 O. W. R. 567, 1018, 1 O. W. N. 208.

Motion for—Action for libel—Defence to motion—Plaintiff has sufficient assets within province — Not substantiated by evidence — Assets heavily encumbered—Unsatisfied executions in sheriff's hands—Order made to give security—Costs of motion in cause to defendant. *Mansell* v. *Robertson* (1910), 17 O. W. R. 601, 2 O. W. N. 337, affirmed 17 O. W. R. 829, 2 O. W. N. 380.

Motion for — *Deposit.*]—It is not necessary to make a deposit at the office of the Court upon a motion for security for costs. *Hylands* v. *Lenz*, 9 Que. P. R. 121.

Motion for—*Deposit—Answer to motion —Proof by affidavit.*]—A motion for security for costs *pendente lite* cannot be considered as a preliminary plea to the action, and a deposit is not required therewith.—The leave given by the Court to answer in writing to an application for security for costs does not carry with it the consequence that the parties are thereafter to proceed to an "*enquête contradictoire*;" the Court may decide that the proof is validly made by affidavit. *Ferrel* v. *Saultry*, 8 Que. P. R. 268.

Motion for—*Deposit—Time.*]—The deposit accompanying a motion for security for costs must be made before service of the motion. *Coates* v. *Sovereign Bank*, 9 Que. P. R. 120.

Motion for—Necessity for stating that appearance entered—Inspection by Judge of Court records. *Fraser & Co.* v. *Dowad* (N. W.P.), 6 W. L. R. 356.

Motion for—*Preliminary exception—Deposit—Residence of plaintiff out of jurisdiction—Affidavit—Leave to appeal—Security—Time.*]—A motion for security for costs is not in the nature of a preliminary exception, as contemplated in Art. 164, C. C. P., and is therefore not governed by Art. 165, respecting a deposit.—2. An affidavit of the party moving for security that "upon search and inquiry he believes the plaintiff to have taken up his residence outside the province," is sufficient, if uncontradicted, to support the order granting the motion.—3. An application for leave to appeal from an interlocutory judgment must be made within thirty days, but no delay is fixed by law within which security in appeal must be given. When the order granting the application does not specify such delay, the remedy of the respondent is to apply, himself, to have it fixed. *Ferrel* v. *Saultry*, 16 Que. K. B. 369.

Motion for, by infant defendant—Partnership—Offer of plaintiff—Refusal to accept. *Matthews* v. *Grindon*, 40 N. S. R. 604.

Motion for further security—Plaintiff given every possible evidence of good faith—Price of adjournment—Plaintiff entitled to know whole terms—Motion dismissed—Costs to plaintiff in cause—Leave to appeal given defendants. *Strati* v. *Toronto Construction Co.* (1910), 17 O. W. R. 330, 2 O. W. N. 221.

Motion for, launched without sufficient enquiry—Solvency of plaintiffs—Dismissal of motion—Costs. *Ing Kon* v. *Archibald*, 9 O. W. R. 540.

Motion to set aside order—Money in hands of defendant—Account. *Allen* v. *Crozier*, 2 O. W. R. 485, 736, 805.

Municipal corporation — *Action against.*]—The deposit of $10, required by Art. 793, C. M., in an action against a municipal corporation, is only as security for costs, and the obligation to make the deposit is not a condition precedent to bringing the action. *Prévost* v. *Ashuntic*, 24 Que. S. C. 408.

Municipality — *Action against — Deposit.*]—In an action for damages against a municipality for injuries from an accident upon a street pavement, by reason of the neglect of the municipality to keep it in repair, the plaintiff, if he is not a ratepayer of the municipality, must deposit in the hands of the clerk of the Court a sum of $10 at the time of the issue of a writ of summons as security for costs. *Lalonge* v. *St. Vincent de Paul*, 5 Que. P. R. 26.

Must the surety justify on real estate?—*What is an insignificant amount?*—*C. C. P. 179; C. C. 1939.*]—When security for costs is given, the solvency of the surety is estimated only with regard to his real property; and this even when there are two sureties if the other party requires it. The sum of $100 is not a small amount within the meaning of Art. 1939 C. C. *Koury* v. *Can. Pac. Rw. Co.*, 11 Que. P. R. 105.

Nominal plaintiff — *Administrator — Fatal Accidents Act.*]—An administrator appointed for the purpose of bringing an action for the benefit of another under s. 3 of the Fatal Accidents Act, R. S. O. c. 166, is not a mere nominal plaintiff bringing such action for the benefit of somebody else, in the sense of the rule which entitles a defendant to security for costs upon shewing that such nominal plaintiff is also insolvent. So *held* by Meredith, C.J., (*dubitante*), and by a Divisional Court, in a case where, if the action had been brought in the name of the person beneficially entitled, he would have been required to give security for costs, because out of the jurisdiction, which gave ground for suspecting that the actual plaintiff was put forward for the purpose of enabling the person beneficially interested to escape liability. *Sharp* v. *Grand Trunk Rw. Co.*, 21 C. L. T. 183, 1 O. L. R. 200.

Nominal plaintiff—Assignee of claim—Financial responsibility—Defence —Counterclaim. *Strong* v. *Spencer*, 11 O. W. R. 100.

Nominal plaintiff — Insolvency—Ejectment—Demise to plaintiff for purpose of en-

abling him to sue—Indemnity. *Gribbon* v. *King and Spohn*, 6 O. W. R. 756, 843.

Nominal plaintiff—Proof of solvency—Onus—Affidavit—Leave to add real plaintiff. *Jalbert* v. *Jensen* (Y.T.), 8 W. L. R. 377.

Nominal plaintiff—*Proof of want of interest—Inference — Perjury.*] — Very clear proof should be given of the lack of substantial interest of the plaintiff in litigation begun by him, before the Court should intercept it at the outset by an order for security for costs. And where, although it was shewn that the plaintiff was without means, it was not established by any legal evidence, but was rather a matter of conjecture and inference, that he was merely a nominal party suing for the benefit of some one outside of the litigation, a motion for security for costs was refused. There may be strong suspicion or even probable inference that the action, if successful, may enure to the benefit of the outsider; but where the contrary is shewn by all the parties to the transaction, the Court hesitates to find perjury for the purpose of ordering security for costs. *Pritchard* v. *Pattison*, 21 C. L. T. 80, 1 O. L. R. 37.

Non-compliance with order—Neglect to indorse order with notice under Rule 329—Notice not applicable. *Thomas* v. *Clark* (Y.T.), 1 W. L. R. 512, 2 W. L. R. 126.

Ontario Rule 528—*Affidavit in support of motion—Good defence on the merits — Cross-examination on affidavit—Rule 292—Security for costs of cross-examination.*] — Upon an application by the defendant for security for the costs of the action, upon the ground that the plaintiff resided out of the jurisdiction, as appeared by the defendant's affidavit and by the indorsement on the writ of summons, the defendant's affidavit further stated, as required by Rule 528, that he had a good defence upon the merits. The plaintiff made no answer by affidavit, but, on the return of the summons, asked that the defendant be cross-examined on his affidavit. Rule 292 provides that "upon any motion, petition, or summons, evidence may be given by affidavit, but the Court or Judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit, and may make such interim order or otherwise as appears necessary to meet the justice of the case:"—*Held*, that the defendant was entitled to his order upon the evidence before the Court, nothing else appearing; the plaintiff was also entitled under Rule 292, to cross-examination on the affidavit; but, as he had not placed himself in a position to ask for any indulgence, because he had not answered by affidavit the allegations of the defendant, he should be required to give security for the costs of such examination; and, upon failure to give such security, that the order for security for costs of the action should issue. *Murdock* v. *Patton* (1910), 15 W. L. R. 283.

Opposition afin de conserver — *Commencement of cause—Foreign corporation—Trustee for persons resident in jurisdiction—Contestants—Practice — Costs of motion.*]—An opposition *afin de conserver* is a proceeding which commences a cause, and when it is instituted by a corporation who have their head office abroad, they must file a procuration and furnish security for costs in accordance with Art. 177, C. C. P. The capacity in which they act (in this case as trustees for persons residing in the province) cannot affect this obligation.—Security and procuration may be demanded by motion, as a preliminary matter, by every creditor interested who intends to contest the opposition, but the costs of the motion must follow the event of the cause. *Morse* v. *Levis County Ry. Co.*, 28 Que. S. C. 42.

Opposition to a confirmation of title —*C. P. 179.*]—A party who is not domiciled in the province of Quebec, files an opposition in an action for confirmation of title, is bound to furnish security *judicatum solvi* to the party seeking such confirmation. *Dohan* v. *Rousseau*, 11 Que. P. R. 250.

Order for—*Failure to give security in time—Penalty—Dismissal of action—Application after time expired to extend time—Practice.*]—An order was made requiring the plaintiffs to give security for costs within three months. The plaintiffs failed to do so, and, after the expiration of the three months, applied for an order extending the time:—*Held*, having regard to the provisions of Rule 520, that the action was dead and could not be revived; and therefore the application must be refused, with leave to the plaintiffs to bring another action, the costs of this action and application being first paid. *Whittier* v. *Hancock*, 3 Q. B. D. 83, and other like cases, followed. *Can. Guarantee & Commercial Agency* v. *Sutter* (1910), 13 W. L. R. 274.

Order for—*Time for furnishing—Default—Dismissal of action—Extension of time.*]—If an order granting a motion for security for costs does not fix the time within which such security is to be furnished, a second motion for the dismissal of the action on the ground of the default of the plaintiff to obey the order, will not be granted, but the Court will allow further time to the plaintiff to furnish the security required by the first order. *Grenier* v. *Jacques Cartier Pulp & Paper Co.*, 5 Que. P. R. 84.

Other pending action or proceeding for same cause—Costs of former action unpaid—Rule 1198 (*c*) and (*d*). *Henders* v. *Parker*, 11 O. W. R. 211, 315.

Partnership — *Non-resident partner — Power of attorney—Costs of motion.*]—In an action by a commercial partnership, a non-resident member will be ordered to give security for costs; but no power of attorney will be required in such case, the resident partner being presumed to have sufficient authority; and the costs of a motion for security for costs which is contested, will go against the contesting party. *Brown* v. *Taylor*, 7 Que. P. R. 155.

Payment into Court—*Rules 419, 420.*]—On motion to set aside *præcipe* order for security for costs, defendant having paid into Court $133.68, amount mentioned in order was reduced one-half. *Michaelsen* v. *Miller*, 13 O. W. R. 422.

Penal action—*Deposit*—C. C. P. 180; 1 Edw. VII. c. 34.]—In a penal action, it is not necessary to make a deposit with the clerk of the Court upon a motion for security for costs. *Lamontagne* v. *Carli Freres*, 11 Que. P. R. 82.

Penalties— Consent of Attorney-General —Unsubstantial plaintiff—Common informer. *Johnston* v. *London & Paris Exchange*, 2 O. W. R. 468, 492, 501.

Penalty—*Qui tam action—Alien Labour Act.*]—The action given to "any person who first brings his action," etc., to recover the penalties imposed by the Alien Labour Act, 60 & 61 V. c. 11, as amended by 1 Edw. VII. c. 13, is a *qui tam* or popular action, and the plaintiff may be required under Art. 180, C. C. P., to give the security *judicatum solvi*. *Laurin* v. *Raymond*, 29 Que. S. C. 101; 7 Que. P. R. 209.

Petition by foreign defendant—*Time for moving for security—Appeal on merits.*]—Where a petition is presented by a foreign defendant at a time when an appeal upon the merits of the action is pending, the time for moving for security for costs will not be extended on this ground. *Baumar* v. *Bailard*, 6 Que. P. R. 62.

Petition by parents for custody of infant—Petitioners out of jurisdiction — Respondents admitting rights of petitioners. *Re Pinkney*, 1 O. W. R. 694, 715, 2 O. W. R. 141.

Petition of right—*Application by Crown —Limited Company—Practice.*]—Section 69 of the Companies Act, 1862, 25 & 26 V. (U. K.) c. 89, provides that, where a limited company is plaintiff in any action, any Judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be sufficient to pay the costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given. By s. 7 of the English Petition of Right Act, 23 & 24 V. c. 34, it is, among other things, provided that the statutes and practice in force in personal actions between subject and subject shall, unless the Court otherwise orders, extend to petitions of right. The practice in the Exchequer Court is in this respect the same as the practice in England. In a proceeding by petition of right in the Exchequer Court application was made for security for costs under the provision first mentioned. There was nothing to shew that it had ever been acted on in a proceeding by petition of right in England:—*Held*, that the question of the application of the provision first mentioned to such cases was not sufficiently free from doubt to justify the granting of the application. *Atlantic & Lake Superior Rw. Co.* v. *Rex*, 23 C. L. T. 101, 8 Ex. C. R. 189; 2 O. W. R. 51.

Petitioner for winding-up order resident out of jurisdiction — Judgment against company — Discretion. *Re Canada Consolidated Mineral Co.*, 11 O. W. R. 380.

Plaintiff ceasing to reside within jurisdiction—*Proceedings after judgment—Procuration.*]—A plaintiff who, after obtaining judgment in his favour, ceases to reside within the province of Quebec, and then proceeds to enforce his judgment by garnishment, may be ordered to furnish security for costs, but not a procuration. *Lavallée* v. *Lavallée*, 7 Que. P. R. 35.

Plaintiff coming into jurisdiction—*Relief—Terms.*]—A foreign plaintiff obliged to furnish security for costs may, if he comes to reside in the province of Quebec before the expiration of the time within which he is ordered to furnish security, be relieved of his obligation on paying the costs of the order and of his motion. *Radford* v. *Brophy*, 5 Que. P. R. 256.

Plaintiff leaving jurisdiction—*Temporary absence.*]—When in the course of a suit the plaintiff leaves the province of Quebec, security for costs will not be ordered unless a change of residence is clearly established, and proof of mere temporary absence will not suffice. *Blood* v. *McDonald*, 5 Que. P. R. 451.

Plaintiff leaving jurisdiction after commencement of action — Defendant's merits—Examination for discovery—Delay in applying — Discretion—Security for future costs. *Gumm* v. *McDonald* (Y.T.), 4 W. L. R. 149.

Plaintiff leaving jurisdiction pendente lite—Application for security after trial—New trial ordered—Delay in applying. *Gyorgy* v. *Dawson*, 8 O. W. R. 422.

Plaintiff ordinarily resident out of jurisdiction. *McLaughlin* v. *Rodd*, 2 O. W. R. 309.

Plaintiff ordinarily resident out of Ontario — Evidence — Rule 1198 (b)— Amount of security—Increase. *Schlund* v. *Foster*, 9 O. W. R. 114.

Plaintiff out of the jurisdiction—*Action on promissory note payable "on demand after date"—Defence — Statute of Limitations — Acknowledgment.*] — In an action upon a promissory note payable "on demand after date," made in 1904, the defendant moved for security for costs, the plaintiff being out of the jurisdiction. It was *held*, 15 W. L. R. 283, that security should be given if, upon examination of the defendant, it could be shewn that any issue was raised which should go to trial:—*Held*, after examination of the defendant, that such an issue was raised, *i.e.*, upon the defence that the action was barred by the Statute of Limitations, the plaintiff contending that the statutory period did not begin to run until a demand was made, and also that the defendant had given an acknowledgment in writing in 1908; that that issue could not be determined upon the motion; and, therefore, that security for costs should be ordered. *Murdock* v. *Patton* (Yuk. 1910), 15 W. L. R. 438.

Plaintiff out of jurisdiction — Affidavit of merits of defence—Information and belief—Solicitor—Practice—Sask. Rule 295. *Canadian* v. *McCellum*, 11 W. L. R. 440.

Plaintiff out of jurisdiction—Assets in hands of defendants—Admissions—Letter *ante litem*. *Stock* v. *Dresden Sugar Co.*, 2 O. W. R. 896.

Plaintiff out of jurisdiction—Assets in jurisdiction—Interest in land under agreement of sale. *Slack* v. *Malone* (N.W.T.), 4 W. L. R. 549.

Plaintiff out of jurisdiction — Both parties out of jurisdiction—Appeal. *Liebler* v. *Harkins*, 3 E. L. R. 537.

Plaintiff out of jurisdiction — *Company having head office outside of province—Assets within province—Effect of license under Foreign Corporations Act—King's Bench Act, Rule 978.*]—1. When a plaintiff company are described in the statement of claim as having their head office out of, and a branch office within, the jurisdiction, the defendant is *prima facie* entitled, under Rule 973 of the King's Bench Act, to a *præcipe* order for security for costs.—*North-West Timber Co.* v. *McMillan*, 3 Man. L. R. 277, and *Ashland Co.* v. *Armstrong*, 11 O. L. R. 414, followed.—2. Such an order should not be set aside by reason of the company having, within the jurisdiction, assets consisting only of some office furniture of small value and premiums of insurance from time to time paid into the branch office for transmission to the head office.—3. The obtaining of a license under the Foreign Corporations Act, R. S. M. 1902, c. 28, to carry on a company's business in the province, has not the effect of making it a domestic corporation or giving it a local residence, so as to free it from the necessity of giving security for costs.—*Ashland Co.* v. *Armstrong*, *supra*, followed. *Can. Ry. Accident Co.* v. *Kelly*, 5 W. L. R. 412, 16 Man. L. R. 608.

Plaintiff out of jurisdiction—*Declinatory exception—Time.*]—A defendant sued by a non-resident plaintiff may await the putting in of security for costs before filing a declinatory exception. *Hodge* v. *Beique*, 8 Que. P. R. 142.

Plaintiff out of jurisdiction — *Delay in applying.*]—The action was begun on the 12th February, 1901; statement of claim delivered on the 10th June, 1901; statement of defence on the 20th June, 1901; and the action was set down for trial at a sittings beginning on the 16th September, 1901. The trial was, by consent, adjourned until the winter sittings, the defendants desiring to examine one C. who was present when the plaintiff was injured. On the 25th September, 1901, the plaintiff came from Pittsburgh to Toronto and submitted himself to examination by the defendants for discovery. He then stated that he was living at Pittsburgh, Pennsylvania, that his family were there, and that he did not intend to return. After the injury on account of which the action was brought, the plaintiff was brought to Toronto, in August, 1900, where he lived until August, 1901, when he went to Pittsburgh. After the examination for discovery in September the defendants issued a commission to Montreal to examine C. as a witness, and he was examined thereunder early in December. In the same month the plaintiff examined the defendants for discovery, and gave notice of trial for a sittings beginning on the 6th January, 1902. The defendants launched a motion for security for costs on the 19th December, 1901:—*Held*, that the delay in moving after the information obtained in September, 1901, was not sufficiently explained by the allegation that the defendants were waiting until after the examination of C., in order that they might be able to swear to a defence on the merits. *Bertudato* v. *Fauquier*, 22 C. L. T. 34.

Plaintiff out of jurisdiction — *Increased security—Appeal to Court of Appeal—Powers of Judge of Court of King's Bench after appeal perfected — Costs of appeal — Costs in Court below for which judgment given—Practice—Order by Court of Appeal.*]—The plaintiff, being out of the jurisdiction, gave security in $300 for the defendants' costs of the action. At the trial the action was dismissed, and the defendants entered judgment for their costs, taxed at $789.85. The plaintiff appealed to the Court of Appeal, and perfected his appeal, after which an order was made by a Judge of the Court of King's Bench, requiring the plaintiff to give $700 additional security to the defendants for their costs of the action, and that all proceedings should be in the meantime stayed:—*Held*, that the Judge had no power to order security for the costs of an appeal to the Court of Appeal, nor to stay proceedings in the Court of Appeal after the case has got into it.—2. That the Judge had no power to order security to be given for the costs of the action in the Court below for which the defendants had secured judgment.—3. The Court of Appeal will itself make an order for security for costs in that Court, and until it is provided by a rule that such matters may be dealt with by a Judge in Chambers, an application should be made in open Court.—*Kerfoot* v. *Yea* (1910), 14 W. L. R. 182.

Plaintiff out of jurisdiction—Interest in land in the jurisdiction—Unsatisfactory security—Nature of defence. *Clark* v. *Fawcett* (N.W.T.), 4 W. L. R. 529.

Plaintiff out of jurisdiction—Moneys in hands of defendants—Failure to shew conclusively. *Hudson's Bay Co.* v. *Stinson*, 12 O. W. R. 571.

Plaintiff out of jurisdiction — "Ordinarily resident"—Roving plaintiffs. *Allman* v. *Yukon Consolidated Gold Fields Co.* (Y.T.), 6 W. L. R. 813.

Plaintiff out of jurisdiction—*Præcipe order—Money paid into Court by defendants for plaintiff—Refusal to accept in satisfaction of claim.*]—Defendants paid $1,000 into Court in satisfaction of plaintiff's claim, which plaintiff refused to accept. There is also a substantial sum in defendant's hands payable to plaintiff out of the residuary estate. *Præcipe* order for security for costs set aside as plaintiff has therefore property and means within the jurisdiction of the Court. *Postlewaite* v. *Vermilyea*, 13 O. W. R. 1146.

Affirmed, 14 O. W. R. 61.

Plaintiff out of jurisdiction — *Property in jurisdiction—Defence on merit.*]—Since action brought plaintiff has removed permanently from Ontario. Security for costs ordered, there being a good defence on the merits and it not being clearly established that there is property in Ontario in defendants' hands or elsewhere available for costs. *Evans* v. *Dominion Bank*, 13 O. W. R. 1031.

Plaintiff out of jurisdiction — *Property in jurisdiction—Proof of.*]—An application under O. 63, R. 5, for security for costs, where the plaintiff was a resident beyond the jurisdiction of the Court, was opposed on the ground that the plaintiff was possessed of real and personal property within the jurisdiction. The Judge *held*, that if this ground would dispense with the necessity for security, the possession of the property must be shewn beyond doubt, and as grave doubts were thrown upon it by the defendant's affidavits, the application for security was granted. An appeal from this decision was dismissed. *McAulay* v. *Trustees of School Section No. 40, Victoria*, 40 N. S. R. 218.

Plaintiff out of jurisdiction — Property in jurisdiction — Shares in company. *Wooster* v. *Canada Brass Co.*, 7 O. W. R. 748, 807.

Plaintiff out of jurisdiction — Property in jurisdiction — Trust property—Incumbrances. *Alexander* v. *Baker*, 40 N. S. R. 603.

Plaintiff out of jurisdiction — Property within jurisdiction—Shares in mining company — Evidence of value. *Howland* v. *Patterson*, 1 O. W. R. 653.

Plaintiff out of jurisdiction — Residence of corporation — Dominion incorporation—Head office. *Delap* v. *Codd*, 2 O. W. R. 790, 849.

Plaintiff out of jurisdiction—*Return —Ordinary residence.*]—The plaintiff was a British subject, and was always a resident of Ontario until his second marriage in 1896, since when he had been living and working part of the time in the State of Michigan and part of the time in Ontario; he had no property or means in Ontario; his wife had a home in Michigan, and after his marriage he made that his place of residence so far as possible, and had no other place of residence. When this action was begun in March, 1901, the plaintiff was at his wife's home in Michigan, and his solicitor endorsed that as his place of residence on the writ of summons. In January, 1902, after delivery of statements of claim and defence, the defendants obtained under Rule 1199, on *præcipe*, an order for security for costs. The plaintiff and his wife had then come to Ontario for the winter and were boarding at an hotel. The plaintiff stated on affidavit that he had come to reside permanently in Ontario: — *Held*, that the plaintiff actually resided out of Ontario when the *præcipe* order was made; but, security not having been given, he might be relieved from that order if he was now actually, and intended to remain, a resident of Ontario. Upon the evidence, however, such was not the case; the plaintiff's place of residence was in Michigan, and was likely so to remain:—*Held*, also, that if the *præcipe* order were set aside, an order under Rule 1198 (*b*) for security for costs, on the ground that the plaintiff's ordinary place of residence was at his wife's home in Michigan, would be properly made. *Nesbit* v. *Galna*, 22 C. L. T. 150, 3 O. L. R. 429, 1 O. W. R. 218.

Plaintiff out of jurisdiction—*Return — Residence — Bona fides.*] — Nothing prevents a person having litigation to pursue in the province of Quebec from becoming *bona fide* a resident therein during such litigation, though such residence commenced only shortly before the commencement of proceedings, if in good faith, although uncertain as to its continuance. *Gober* v. *Agnew*, 8 Que. P. R. 255.

Plaintiff out of jurisdiction—*Temporary residence in jurisdiction.*]—A plaintiff, whose family lives in the United States, and who has only come to Quebec to begin an action, although he works there from time to time in order to supply his needs, is not a resident in good faith in Quebec, but is there only temporarily for the purposes of his action; and he will be ordered to give security for costs. *Chagnon* v. *Auclair*, 8 Que. P. R. 212.

Plaintiff out of jurisdiction—*Trust moneys — Assets in hands of defendants — Administrator.*] — Security for costs was ordered, where the plaintiff resided out of the jurisdiction, in a suit against an administrator for the payment of a sum of money alleged by the bill to have been received by the intestate as guardian of the plaintiff, it appearing that the intestate's estate was insolvent, and there also being no satisfactory evidence of the alleged indebtedness. *Aiton* v. *McDonald*, 22 C. L. T. 37, 2 N. B. Eq. Reps. 324.

Plaintiff out of jurisdiction — Summary proceeding to enforce mechanic's lien—Statement of defence equivalent to appearance—Motion before statement—Undertaking to defend — Waiver. *Busman* v. *Central Trusts Co.*, 2 O. W. R. 1096.

Plaintiff resident out of Ontario—Property in Ontario — Share in father's estate—Claim to—Statute of Limitations—Costs of motion. *McConkie* v. *Fawcett*, 11 O. W. R. 170.

Plaintiff resident out of Quebec — *Temporary sojourn in province — Time for moving for security.*] — Where the plaintiff, described in the writ of summons as living in the province of Quebec, declares in the course of the proceedings that he is there only as a sojourner for the time that the proceedings will last, and that he will then return to a place in the United States, he will be ordered to give security for costs.—2. The delay of 3 days for demanding security applies only when the demand is made by dilatory exception and not by motion. *Houle* v. *Hébert*, 10 Que. P. R. 126.

Plaintiff residing abroad — *Assets within the jurisdiction.*]—The plaintiffs, who were non-residents, had, at the time of an

application for security for costs, assets within the Territories to the amount of $4,000, consisting of live stock and railway plant in use upon contract work for the Canadian Pacific Railway Company, in construction of the Crow's Nest Branch Railway:—*Held*, that this property was not substantial and fixed, but floating, and an order for security for costs was made. *Doidge* v. *Town of Regina* (*No. 1*), 2 Terr L. R. 329.

Plaintiff residing abroad—Discretion —Property in jurisdiction. *Wills* v. *Timmins* (Y.T.), 2 W. L. R. 121.

Plaintiff residing abroad — Property in jurisdiction—Shares in defendant company. *Sub-Target Gun Co.* v. *Sub-Target Gun Co.* (*Ltd.*), 6 O. W. R. 439.

Plaintiff temporarily out of jurisdiction—*Intention to return.*]—Order for security for costs refused. Plaintiff sues for damages claiming that defendants, members of a dental college examining board, misreported his examination papers. He is temporarily in Seattle, his home and personal belongings being in Victoria. *Richards* v. *Verrinder* (1909), 12 W. L. R. 527.

Plaintiff's place of residence during suit—*C. P. 179.*] — Foreign plaintiffs who have established their residence in the province during the pendency of the suit, are not obliged to furnish security for costs.—The law respecting residence does not require conditions involving permanency; and the same person may have several places of residence. *Ramsay* v. *Hitchcock* (1906), 12 Que. P. R. 13.

Police officer—Public officer—R. S. O. c. 89 — Notice of action—Assault—Affidavit. *Lane* v. *Clinkinbroomer*, 3 O. W. R. 613.

Power of attorney—*Plaintiff leaving the province after inscription of the case—C. C. P. 177.*]—The obligation to furnish security resulting from the fact that he does not reside in the province, the plaintiff who leaves the province during the pendency of a suit, even when the case is inscribed for hearing, is similarly bound to furnish security. *Ricciardo* v. *Can. Pac. Rw. Co.*, 11 Que. P. R. 112.

Power of attorney—*Stay of proceedings —Dilatory exception — Certificate — Deposit—Vacation.*] — Although the defendant may apply to a Judge or the prothonotary, out of term, for a stay of proceedings until security be given, he can only invoke the absence of a power of attorney to obtain a stay of proceedings until its production, by means of a dilatory exception, which can only be urged by a motion presented to the Court.—2. Such dilatory exception cannot be presented unless accompanied by a certificate from the prothonotary establishing the deposit in his office of the sum fixed by the rule of practice, and the defendant cannot afterwards apply orally to make such deposit, the making of such deposit not having the effect of making a motion addressed to the Judge or prothonotary a dilatory exception.—3. The Court has no jurisdiction to entertain a motion for security for costs and power of attorney between the 30th June and 1st September. *Mitchell* v. *Meldon*, 5 Que. P. R. 86.

Practice — *Insufficiency of affidavit* — *Attempt to read supplementary affidavit.*]—Upon a motion for security for costs, an affidavit which is defective in not stating the grounds of the deponent's information and belief cannot be strengthened on the return of the summons by a supplementary affidavit. *Kerr* v. *Suter*, 6 Terr. L. R. 255.

Praecipe order—*Rule 987—Application for further security—Practice.*]—Taking out a præcipe order for security of costs is not a bar to a subsequent application for an order for additional security where it could not be said that the defendant ought to have anticipated the necessity for further security when he first applied.—*Standard Trading Co.* v. *Seybold*, 5 O. L. R. 8, followed.—*Charlebois* v. *Great North-West Central Rw. Co.*, 9 Man. L. R. 60, distinguished. *Moore* v. *Scott*, 5 W. L. R. 147, 16 Man. L. R. 428.

Praecipe order—*Waiver.*] — Where it is stated in the writ of summons that the plaintiff resides out of the jurisdiction, the defendant may, even after delivering his defence, obtain the usual præcipe order for security for costs. *Smerling* v. *Kennedy*, 23 C. L. T. 112, 5 O. L. R. 430, 2 O. W. R. 180.

Praecipe order for—*Motion to set aside —Practice—Rule 988.*] — The language of Rule 988 confines it to a case where a foreign plaintiff, whose claim is such that he might move for judgment under Rule 602, is met with an order for security for costs—if he desires to avail himself of his right to move for judgment he may do so, notwithstanding the order for security, upon paying $50 into Court; but he has the right to move to discharge the order for security, without first complying with it; and that right is not interfered with by Rule 988.—Order of the Referee refusing to set aside a *præcipe* order for security for costs reversed. *Copelin* v. *Cairns* (1910), 13 W. L. R. 707.

Preliminary plea—*Deposit.*]—A motion by which a defendant demands security for costs is a preliminary plea, and cannot be made without a deposit. 2. The Court has no right to give to a defendant who has not made such deposit time to make it. *Macdonald* v. *Victoria Montreal Fire Assce. Co.*, 18 Que. S. C. 468.

Preliminary plea — *Deposit* — *Law stamps.*]—A motion for security for costs, even when not accompanied by a demand of procuration, is a preliminary exception, and will be dismissed if made without a deposit and with nothing more than the stamps requisite for a motion. *Taylor* v. *Victoria Montreal Fire Ins. Co.*, 3 Que. P. R. 467.

Principal action and action on a guarantee and on a sub-guarantee — *Principal action dismissed for failure to furnish security for costs—Costs of the action on the guarantee and on the sub-guarantee.*]—A plaintiff who fails on his principal action on account of not furnishing security for "*judicatum solvi*" must pay the costs of the

actions on the guarantee and the sub-guarantee for the simple reason that they arose out of the principal action, without which the Court would be bound to fix their worth. *Houle* v. *Hébert*, 36 Que. S. C. 21.

Probate Act—*Creditor — Security for costs — Staying proceedings.*]—Security for costs not ordered in probate proceedings by a creditor, as it might stay proceedings of everyone, and tie up settlement of estate for months. *Re Priest Estate*, 6 E. L. R. 342, 43 N. S. R. 230.

Proceedings against defaulting witness.]—A witness against whom a rule *nisi* is asked for default of appearing, cannot require a bond as security for costs and power of attorney to be given, such a proceeding not being the institution of an action. *Re May* v. *Ischekawa*, 7 Que. P. R. 107.

Proceedings under the Workmen's Compensation Act, B.C., pending before arbitrator.]—K. was killed while in defendants' employ. Plaintiff, the administrator, is now in penitentiary on a charge of theft. Both he and the estate are insolvent. The arbitrator is still seised of the matter and has not yet ascertained the compensation, if any, to which plaintiff is entitled. The widow is out of the jurisdiction. On application to a Judge for security for costs: —*Held*, that plaintiff is not a nominal plaintiff. Motion dismissed. Application, if made at all, should have been made to the arbitrator at an earlier date. *Re Kruz & Crow's Nest* (1909), 12 W. L. R. 158.

Procuration—*Costs of motion.*]—The defendant is entitled to the costs of his motion if he asks the production of a power of attorney at the same time as security for costs. The costs follow the event of the action where the defendant asks only security for costs without power of attorney. *Steinfeld* v. *Marquis*, 3 Que. P. R. 237.

Procuration — *Exception — Costs of motion.*]—The defendant has a right to his costs, whatever be the event of the cause, of a motion in the nature of a dilatory exception for security for costs and procuration, under clauses 2 and 7 of Art. 177, C. P. C., where the plaintiff resides out of the jurisdiction. *Block* v. *Carrier*, 28 Que. S. C. 49.

Public officer — *Police sergeant — Information.*] — *Held*, that the defendant, a police sergeant, laying an information against a cab-driver for using obscene and grossly insulting language, was an officer or person fulfilling a public duty and acting in the performance of such public duty, within the meaning of R. S. O. c. 88, s. 1, and was therefore entitled under R. S. O. c. 89 to security for costs of an action brought against him by the cab-driver for falsely and maliciously laying such information. *Eaves* v. *Nesbitt*, 21 C. L. T. 190, 1 O. L. R. 244.

Public officers — *Policemen — Action against—Trespass — Warrant.*]—The defendants, police officers, having a warrant to arrest a man, by mistake entered the house of his neighbour, the plaintiff, to execute the warrant, but did not actually arrest the plaintiff, and withdrew on finding their mistake. The plaintiff sued for trespass and assault:—*Held*, that, as the defendants were acting in good faith under a warrant, and had complied with the requirements of s. 2 of R. S. O. 1897 c. 89, they were entitled under that Act to an order for security for costs. *Lewis* v. *Dalby*, 22 C. L. T. 112, 3 O. L. R. 301.

Qui tam action — *Foreign plaintiff — Aliens.*]—The obligation to furnish security for the payment of costs in a *qui tam* action is a formality which is governed by the law of the country in which the demand is made; it will be imposed upon a foreign plaintiff not naturalized who sues a company for an infraction of the law in regard to aliens. *Francq*, v. *Dom. Power Co.*, 8 Que. P. R. 364.

Qui tam action—*Preliminary exception —Deposit—Chambers motion.*]—A motion for security *judicatum solvi* in a *qui tam* action is a preliminary exception which must be accompanied by the deposit required by Art. 165, C. P., even since the amendment by 1 Edw. VII. c. 24.—2. The fact that a motion is brought before a Judge in Chambers does not change the nature of it, and if it is not accompanied by a certificate of the deposit required by law, it will be dismissed. *Raymond* v. *Larouche*, 6 Que. P. R. 39.

Qui tam action — *R. S. Q. Art. 30—Amendment—Crown.*] — The amendment of Art. 39, R. S. Q., by striking out the words, "*as well in the name of the Crown, as*," enacted in 6 Edw. VII. c. 37, s. 1, has not had the effect of taking the actions referred to in the article out of the class of popular or *qui tam* actions. Hence, notwithstanding the amendment, a defendant in such an action may require that the plaintiff be ordered to give security for costs. *Lanouette* v. *Dupuis*, 34 Que. S. C. 13, 9 Que. P. R. 218.

Real Property Act—*Petition—Caveator out of Province—Property in Province — Mortgage—Præcipe—Irregularity.*]—A caveator proceeding under Real Property Act by way of petition to establish a claim to the land after service of notice at the instance of the applicant for a certificate of title must, as a general rule, be treated as the plaintiff in the proceedings, and, if he is resident out of the jurisdiction, must give security for the caveatee's costs. 2. That the caveator's claim in respect of a registered mortgage on the land, upon which he swears there is money owing and unpaid, will not take the case out of the general rule, if the caveatee in good faith disputes that there is anything due or owing on the mortgage. 3. Under such circumstances the ownership of the mortgage within the jurisdiction will not relieve a caveator from the necessity of furnishing other security for costs. *Armstrong* v. *Armstrong*, 18 P. R. 55, distinguished. Objection was taken to the regularity of the *præcipe*, being the first proceeding taken by the caveatee in the matter, for want of the indorsement of his place of residence and description upon it, as required by the practice of the Court:—*Held*, that under Rule 335 of the King's Bench Act, no effect should be given to the objection, as it was purely

technical, and it did not appear that the interests of the caveator had been or could be affected by the irregularity, if it were one. *Lang* v. *Smith*, 14 Man. L. R. 258.

Refusal to stay proceedings.]—It is a matter of discretion in making orders for security for costs whether or not proceedings be stayed. It is unnecessary for the purposes of appealing to draw up the order appealed from. *Wray* v. *Can. North. Rw. Co.* (1909), 12 W. L. R. 14, 2 Sask. L. R. 321. See 12 W. L. R. 726, 3 Sask. L. R. 42.

Rescission of order—*Return of plaintiff—Terms.*]—Interlocutory orders may always be rescinded by the Court when the reasons for them have ceased to exist.—A plaintiff who has been ordered to furnish security for costs and procuration may be relieved from the obligation if he establishes that he has since fixed his place of abode in the Province, where he intends to remain permanently.—A plaintiff so discharged from the obligation of furnishing security and procuration should bear the defendant's costs of obtaining the original order and the costs of the petition for rescission. *Poole* v. *Hogan*, 3 Que. P. R. 197.

Reservation—*Motion for security—Procuration.*]—Costs will be reserved on a motion for security for costs and for the production of a power of attorney. *Vinicoles de Cognac, La Société de Propriétaires de,* v. *Beland*, 8 Que. P. R. 256.

Residence abroad—*Both parties.*] — A defendant who resides abroad can require a plaintiff residing abroad to give security for costs, under Art. 179, C. P. *Robert* v. *Schiller*, 3 Que. P. R. 390.

Residence abroad—*Both parties—Rival claimants of fund.*]—Where both plaintiffs and defendants were resident out of Ontario and both claimed a fund of $500, bequeathed by a will, both were required to give security, each to the other, for the costs of an issue directed to be tried. *In re La Compagnie Générale d'Eaux Minérales*, [1891] 1 Ch. 451, followed. *Re Société Anonyme des Verreries de l'Etoile*, 10 Pat. Cas. 290, and *Re Miller's Patent*, 11 Pat. Cas. 55, distinguished. *Sinclair* v. *Campbell*, 21 C. L. T. 382, 2 O. L. R. 1.

Residence abroad — *Business in province.*]—Plaintiffs residing in the province of Ontario, although having a place of business in the province of Quebec, must give security for the defendant's costs of an action begun in the latter province. *Ross* v. *International Hydraulic Co.*, 18 Que. S. C. 439.

Residence abroad — *Defendant out of jurisdiction—Surrogate Court proceedings—Real actor.*]—The plaintiff applied to a Surrogate Court for grant to him of letters probate as the executor named in a will. The defendant having filed a caveat and entered an appearance, the plaintiff delivered a statement of claim praying the Court to decree probate of the will in solemn form, and the defendant delivered a statement of defence disputing the factum of the will. The plaintiff then obtained an order for the removal of the proceedings into the High Court:—*Held*, that, according to the practice and procedure of the High Court, which was applicable, the plaintiff was not entitled to security for costs from the defendant, who was out of the jurisdiction. *Ward* v. *Benson*, 21 C. L. T. 531, 2 O. L. R. 366.

Residence abroad—*Foreign company.*] —An American steamship company having its head office in Seattle was the lessee of certain premises in Victoria, where applications for freight and passage could be made to an agent:—*Held*, that the company was a foreign company within the meaning of s. 144 of the Companies Act, and was bound to give security for costs. *Alaska Steamship Co.* v. *Macaulay*, 8 B. C. R. 84.

Residence abroad — *Opposition — Contestant.*]—Where an opposition is filed to a seizure in execution of a judgment, the opposant is the person who "institutes a proceeding," within the meaning of Art. 29, C. C., and he is not entitled to ask for security for costs from the plaintiff contesting the opposition on the ground that he resides out of the province. *Chenel* v. *Jobin*, 18 Que. S. C. 393, 3 Que. P. R. 355.

Residence abroad—"*Plaintiff*" — *Claim by defendant against co-defendant.*]—Where a defendant proceeds under Rule 215 to seek relief from a co-defendant which he would not be entitled to upon the pleadings and proofs between the plaintiff and defendant, he is a "plaintiff" within the meaning of Rule 1198, and, if resident out of the jurisdiction, is liable to an order for security for costs. *Walmsley* v. *Griffith*, 11 P. R. 139, considered. *Molsons Bank* v. *Sawyer*, 21 C. L. T. 27, 19 P. R. 316.

Residence abroad—*Return to jurisdiction—Costs of motion.*]—If, between the service of a notice of motion for security for costs and the presentation thereof, the plaintiff becomes a resident of the province, the motion for security for costs will not be granted, but the costs thereof will follow the result of the suit. *Mariel de la Chesnaye* v. *Leduc*, 3 Que. P. R. 385.

Residence abroad—*Temporary residence in jurisdiction.*]—A foreigner usually residing abroad who, before the order for security is granted, has come to reside temporarily within the jurisdiction for the purpose only of prosecuting his action, cannot be compelled to give security for costs. *Violette* v. *Martin*, 20 C. L. T. 88, 35 N. B. R. 74.

Residence abroad—*Test of residence.*] —A plaintiff who works 7 or 8 months of the year outside the province of Quebec, and who does not keep any dwelling-place in his own name during his absence, does not reside in that province, and will be ordered to furnish security for costs. *D'Iorio* v. *Canadian Pacific Rw. Co.*, 7 Que. P. R. 334.

Residence of plaintiff — Absence in foreign country—Return to Ontario—Intention to remain—Delay in moving. *O'Brien* v. *Michigan Central Rw. Co.*, 12 O. W. R. 1227.

Residence of plaintiff—Adoption of permanent residence—Rule 1198 (b)—Burden of proof. *Levy* v. *Manes*, 7 O. W. R. 806.

Residence of plaintiff — "Ordinarily resident" out of the jurisdiction—Rule 1198 (b)—Evidence—Onus—Affidavits. *Dyment* v. *Dyment*, 12 O. W. R. 1265.

Residence of plaintiff — *Place of business.*]—Plaintiffs living in another Province must give security for costs although they have a place of business in the Province of Quebec. *Ross* v. *International Hydraulic Co.*, 3 Que. P. R. 75.

Residence of plaintiff — *Place of business—Costs of motion.*]—Plaintiffs described in the writ of summons as of a place outside the Province of Quebec, and carrying on business as partners in the city and district of Montreal, will be required, upon a motion in that behalf, to give security for costs and produce a power of attorney.—In such circumstances the plaintiffs if they oppose the motion will be mulcted in the costs of it. *Sapery* v. *Gagnon*, 3 Que. P. R. 57.

Residence of plaintiff—*Statement on writ—Deposit.*]—When it appears by the description of the plaintiff upon the writ itself that the defendant is entitled to security for costs and to the production of a power of attorney, it is not necessary to make a deposit with a motion for security. *Roy* v. *Lamontagne*, 3 Que. P. R. 253.

Residence of plaintiffs out of jurisdiction—Affidavit of information and belief—Sufficiency. *Balcovski* v. *Olson* (N.W.T.), 3 W. L. R. 367.

Residence out of Ontario — "*Ordinarily resident.*"]—Rule 1198 provides that security for costs may be ordered, among other cases, in the following: "(*a*) where the plaintiff resides out of Ontario; (*b*) where the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario."—The defendant's affidavit stated that the plaintiff was now residing out of the jurisdiction, and also, that he had no certain place of abode within the jurisdiction; that he had hitherto resided out of the jurisdiction; and at the conclusion of the pending suit intended to reside out of the jurisdiction of the Court. The plaintiff's affidavit stated that he had not for the past year, nor had he now, any fixed or ordinary place of abode either in or out of the Province of Ontario, his occupation requiring that he should be from time to time in England, the Province of Ontario, and the Province of New Brunswick:—*Held*, that the actual residence abroad was still what *prima facie* entitled the defendant to security, and the plaintiff could not answer the application by shewing that he had no fixed residence at all.—*Denier* v. *Marks*, 18 P. R. 465, 19 C. L. T. 229, overruled. *Allcroft* v. *Morrison*, 20 C. L. T. 31, 19 P. R. 59.

Residence out of province—*Family in Province—Business out of.*]—The plaintiff was manager of a joint stock company, carrying on business in Ontario, with his head office at Woodstock. His wife and family resided at Woodstock. He was agent of the company at Detroit, but visited his family once a fortnight, and sometimes once a month, but not as a rule for longer than a day and a half at a time:—*Held*, on motion for security for costs under Rule 1198 (a), that the plaintiff under the above circumstances must be taken to reside in Ontario. *Moffatt* v. *Leonard*, 23 C. L. T. 306, 6 O. L. R. 383, 2 O. W. R. 787, 3 O. W. R. 633.

Residence out of province — *Petition for interlocutory injunction.*]—A motion for an interlocutory injunction made by petition before the issue of the writ of summons, is not an action or a suit or a process, and the party making such motion cannot, even if he does not reside in the province of Quebec, be ordered to furnish security for the costs of the petition. *Ozone Co.* v. *Lyons*, 5 Que. P. R. 238.

Residence out of province—*Plaintiff a judgment creditor of defendant.*]—Where plaintiff, a resident out of the jurisdiction, having a judgment in the St. John County Court against the defendant for $67.75, which was defeated by certain conveyances made by the defendant, brought a suit to have the same set aside as fraudulent and void, he was ordered to give security for costs. *Gould* v. *Britt*, 23 C. L. T. 231, 2 N. B. Eq. 453.

Residence out of province—*Rule 1198 (b).*]—A man of about thirty years of age, who had since childhood lived in the United States, came to Toronto in October, 1902, to inspect for his employers, brokers in New York, a branch office in Toronto. He was then instructed by his employers to act as telegraph operator in the Toronto office. These brokers gave up business in a few weeks, and he then was employed as a telegraph operator by their successors. The business of the successors also came to an end within a few weeks, and in connection with that business the plaintiff was accused by the defendant of fraud, and arrested, this action for damages being brought in consequence thereof. He was an unmarried man, and had been in the habit of living with his mother in Kansas City when out of employment, and he stated on cross-examination that he would return to the United States if he could find employment there:—*Held*, that under these circumstances the defendant was entitled to security for costs of the action. *Kavanaugh* v. *Cassidy*, 23 C. L. T. 224, 5 O. L. R. 614. *S. C. sub nom. Cavanagh* v. *Cassidy*, 2 O. W. R. 27, 143, 303, 391.

Resident out of jurisdiction—"Ordinarily resident" — Roving plaintiffs. *Allman* v. *Yukon Consolidated Gold Fields Co.* (Y.T.), 8 W. L. R. 371.

R. S. O. 1897, c. 89 — *Action against constable for arrest of plaintiff—Defence on merits—Affidavit — Insufficiency—Grounds—Belief—Rule 518—Agent — Solicitor.*]—The provisions of R. S. O. 1897 c. 89, requiring plaintiffs in actions against justices of the peace and other officers fulfilling public duties, to give security for costs, in certain circumstances, must be followed with some approach to strictness, the right given being a variation from the usual course of litigation. —The affidavit filed on behalf of the defendant, a constable, in an action brought against

him for the arrest of the plaintiff, in support of a motion for an order for security for costs under the Act referred to, did not, in the part indicating the nature of the defence, shew the grounds for the belief of the deponent in the truth of the statement made, as required by Con. Rule 518, where facts are stated not within the knowledge of the deponent; and did not in terms state that the defendant had a good defence on the merits, or set out the facts justifying the conclusion that the defendant had such defence, or that the grounds of action were trivial or frivolous:—*Held*, that the affidavit was insufficient; and the motion should be dismissed, but, as it appeared that the defendant acted as an officer of the law, the dismissal should not preclude an application upon better material, on payment of costs.—*Held*, also, that the solicitor for the defendant was an "agent" within the meaning of the statute, and might make the affidavit. *Robinson* v. *Morris*, 15 O. L. R. 649, 11 O. W. R. 361, 431, 559.

Rule 1198 (a)—Plaintiff residing out of jurisdiction—Assets in jurisdiction—Moneys in hands of defendant. *Stone* v. *Stone*, 11 O. W. R. 489, 569.

Rule 1198 (a)—Plaintiff residing out of jurisdiction—Untrue indorsement of residence on writ of summons—Assets in jurisdiction—Sufficiency—Leave to move to vacate order. *McDonell* v. *Can. Pac. Ry. Co.*, 11 O. W. R. 491.

Rule 1198 (c)—Previous action for same cause against another defendant. *Heyder* v. *New Ontario S. S. Co.*, 6 O. W. R. 886.

Rule 1198 (d)—Costs of former action for same cause unpaid—Different defendants. *Gledhill* v. *Opasatica Exploration Co.*, 11 O. W. R. 317.

Rule 1198 (d)—Costs of former proceeding under—Merits—Discretion. *Wendover* v. *Ryan*, 7 O. W. R. 169.

Saisie-arret after judgment—*Plaintiff resident abroad—Continuation of action.*]—A plaintiff issuing a *saisie-arrêt* after judgment is not instituting a new action, but only executing the judgment rendered in his favour; he is not therefore bound to furnish security for costs or to file a procuration, although he resides abroad. *Taylor* v. *Palmisano*, 9 Que. P. R. 145.

Saskatchewan Rule 520 — *Insolvent plaintiff—Onus—Interest of plaintiff in subject matter—Assignee of claims of others.*]—Plaintiff, a creditor of defendant R. and the assignee of 11 other claims against R., brought this action to set aside the transfer of certain properties by the insolvent R. to his co-defendant. Order for security for costs refused, plaintiff having a beneficial interest in subject matter of action. Even if plaintiff insolvent that alone insufficient to require security, but defendant on whom is onus of shewing insolvency has not satisfied same. *Wallace* v. *Reid*, 10 W. L. R. 22.

Several defendants—*Præcipe orders.*]—One of the defendants having obtained on *præcipe* an order for security for costs, the plaintiffs complied with it by paying $200 into Court, after which another defendant, without notice of the previous order or of the payment into Court thereunder, obtained an order on *præcipe* for security for costs on his own behalf:—*Held*, that the plaintiffs were entitled to obtain an order providing that the security given by them should stand as security for the costs of all the defendants, but were not entitled to have the second order for security set aside as irregular. *Syracuse Smelting Works* v. *Stevens*, 21 C. L. T. 441, 2 O. L. R. 141.

Several defendants — Separate orders—Practice—Increased security. *O'Leary* v. *Gordon*, 7 O. W. R. 726.

Several defendants — Separate orders for security—Compliance with—Sufficiency—Further order. *Urquhart* v. *Aird*, 4 O. W. R. 501, 6 O. W. R. 155, 506.

Several defendants — Solicitor defending by partner—Right to profit costs—Increased security—Measure of—Costs of examination for discovery. *Carew-Gibson* v. *Millar*, 3 O. W. R. 417.

Slander—Chastity of plaintiff—R. S. O. 1897 c. 68, s. 5, s.-s. 3—Defence—Admission. *Welburn* v. *Sims*, 10 O. W. R. 524.

Slander imputing unchastity to married woman—Action by husband and wife—Separation of causes of action—Pleading. *Clark* v. *Cameron*, 6 O. W. R. 831.

Stage when ordered—*Exchequer Court of Canada.*]—Under the present practice of the Court an order for security for costs may be made at any stage of the proceedings in a cause. *Wood* v. *R.*, 7 S. C. R. 634, referred to. *Boston Rubber Shoe Co.* v. *Boston Rubber Co.*, 21 C. L. T. 279, 7 Ex. C. R. 47.

Stay of proceedings—Non-payment of interlocutory costs—Dismissal of interlocutory motions with costs payable forthwith—Vexatious or frivolous motions. *Keogh* v. *Brady*, 6 O. W. R. 552, 846.

Stay of proceedings until given — *Authority of solicitor—Time for motion—Deposit.*]—A motion for a stay of proceedings in an action until the plaintiff should give security for costs and until his attorneys should produce a special procuration, is in the nature of a dilatory exception, and it should be made within the time allowed for preliminary pleadings, and accompanied by a deposit, even since the amendment made to Art. 165, C. P., by 1 Edw. VII. c. 34 (Q.), *Singer Mfg. Co.* v. *Young*, 19 Que. S. C. 396.

Sufficiency of surety—Value of shares in company—Cross-examination of surety—Information as to affairs of company. *Still* v. *Alexander* (1910), 1 O. W. N. 622.

Summons—Affidavit on information and belief—Grounds not shewn — Supplementary affidavit filed after summons issued—Inadmissibility—Practice. *Kerr Co.* v. *Suter* (N.W.P.), 5 W. L. R. 256.

Time — *Delay—Deposit.*]—A motion for security for costs can be made *pendente lite*,

upon producing an affidavit stating that, since the institution of the action, the plaintiff has ceased to reside in the Province of Quebec. 2. Such motion will be granted if made within three days after the defendant has been informed of the plaintiff's change of residence. 3. Such motion need not be accompanied by the deposit required by Art. 165, C. P. *Vanier* v. *Hurtubise*, 4 Que. P. R. 53.

Time—*Notice—Surety—Attorney for.*] — If a party required to give security for costs does not furnish it on the day fixed, such party cannot afterwards give it except after a new notice of one clear day to the opposite party. 2. A judicial surety cannot be represented by an attorney for the purpose of giving security. *Delisle* v. *McCrea*, 21 Que. S. C. 419.

Trust company's bond.]—A trust company cannot force a party to accept as security for costs a bond executed by the company for a specific amount, nor force the prothonotary to accept such security. *Ashworth* v. *Montreal & Atlantic Ry. Co.*, 5 Que. P. R. 29.

Workmen's Compensation Act—*Proceeding under.*]—The object of Rule 34 under the Workmen's Compensation Act (Rules of 1904) is to make the proceedings under the Act subject to the same rules as an action; and where the applicant resides out of the jurisdiction, the respondent is entitled to security for costs. *Cizowski* v. *West Kootenay Power and Light Co.*, 12 B. C. R. 63, 3 W. L. R. 515.

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4. TAXATION OF.

Abandoned appeal—*Order.*]—The production of the notice of the abandonment of an appeal will be sufficient authority for the taxing officer to tax the respondent's costs of the appeal, and an order is not necessary. *Fry* v. *Botsford*, 9 B. C. R. 165.

Acquiescence — *Fee on foreign commission—Settlement of action.*]—The receipt of a cheque in payment of fees taxed, and the signature to an acknowledgment thereof, do not amount to acquiescence in the taxation when the cheque has not been presented for payment, the advocate having the conduct of the cause not finding the amount of it sufficient. 2. The advocate of one party who does not join in a foreign commission, nevertheless, has a right to the fee provided by Art. 98 of the tariff, if he has received instructions, examined the documents, etc. 3. A fee upon the hearing is not allowed in a cause declared to have been settled between the parties upon the day on which it has been called for hearing. *Sessenwein* v. *Pillow Hersey Mfg. Co.*, 6 Que. P. R. 320.

Action dismissed as regards one plaintiff—*Several defendants—Defence in law.*]—Where an action brought by two plaintiffs is dismissed, upon defence in law, as to one of them, each of the two defendants is entitled only to half the costs of an action adjudicated after the filing of a plea to the merits. *Major* v. *Paquet*, 6 Que. P. R. 210.

Action dismissed on declinatory exception—*Contested action—Tariff of costs.*]—An action dismissed on declinatory exception in a contested action for the purpose of taxation under the old tariff of advocates' fees, in force at the time of the action. *Hodge* v. *Béique*, 10 Que. P. R. 216.

Action to set aside a contract and involving an amount exceeding $1,000 —*Incidental conclusions for damages—C. P. 554.*]—An action is of the first class when it prays for the setting aside of a contract of an annual consideration exceeding $2,000; the fact that, by incidental conclusions, the plaintiff prayed for damages which have been fixed by the judgment at the sum of $300, does not change the class of such action. *Lucenti* v. *Montreal Brewing Co.* (1910), 11 Que. P. R. 300.

Action to set aside a municipal proces-verbal — *Intervention — Bill of costs—C. P. 50, 554; M. C. 100; Tariff, Art. 2, par. 2.*]—The fees in an action to set aside a municipal by-law, taken under the provisions of Art. 50 C. P. are those of an action of the second class. *Idem* for the fees in an intervention filed in the same case. *Berbier* v. *Corp. of St. Michel* (1910), 11 Que. P. R. 326.

Actions tried together — *Separate fees.*]—Where several actions for damages have been joined for the purposes of examination and hearing, and judgments have been given for different amounts, it cannot be said that the examination and hearing have been absolutely the same in the different actions, and therefore a separate fee may be allowed in each action. *Ritson* v. *Arnold*, 6 Que. P. R. 239.

Actions tried together — *Separate fees.*]—When several issues are united for trial, and there is only one *enquête* and examination of witnesses, one argument, and one judgment on the several issues, the attorney is not entitled to fees of *enquête* and argument as if there had been separate trials. *Demers* v. *Sanche*, 6 Que. P. R. 241.

Affidavits — *Interlocutory motion.*] — Where an interlocutory motion is dismissed upon preliminary objections, the taxing officer has a discretion to disallow to the party opposing it the costs of affidavits filed in answer to it. *Whitewood* v. *Whitewood*, 20 C. L. T. 254, 19 P. R. 183.

Affidavits—*Irregular filing.*]—The costs of affidavits for use on a motion in the Weekly Court, filed with the Clerk in Chambers, instead of in the Registrar's office, as required by Rule 102, should nevertheless be taxed, if otherwise taxable, where such affidavits have been before the Court on the motion and are recited in the order made thereon. *Sturgeon Falls Electric Light & Power Co.* v. *Sturgeon Falls*, 21 C. L. T. 33, 19 P. R. 286.

Affidavits — *Motion for interim injunction.*]—In the absence of any objection of the adverse party or of any remark of the Judge as to the number of affidavits filed in support of or against a petition for an in-

terim injunction, the successful party is entitled to a fee upon each affidavit. *Brault* v. *Lambert*, 6 Que. P. R. 402.

Appeal — *Objections — Solicitor's slip —Setting aside certificate.*]—Notwithstanding the provision of Rule 774 that the taxing officer's certificate of the result of a taxation of costs shall be final and conclusive as to all matters not objected to in the manner provided by Rules 1182 and 1183, the certificate may, in a proper case, be set aside in order to allow objections to be carried in, and the certificate re-signed as of a later date; and this was ordered in a case where the solicitor for the party objecting had himself taken out the certificate, intending to appeal from it, but at the moment not remembering that it was necessary to carry in objections in writing, and had promptly applied for relief. *In re Furber*, [1898] 2 Ch. 538, followed. Order of Magee, J., affirmed. *Robinson* v. *England*, 11 O. L. R. 385, 7 O. W. R. 47, 130.

Appeal—*Ruling of taxing officer—Costs of interlocutory examinations — Rules 767, 774, 1136, 1267—Right of appeal—Time — Extension.*]—*Semble*, that no appeal lies from the decision of the senior taxing officer at Toronto, under Con. Rule 1136, as amended by Con. Rule 1267, as to the allowance of the costs of interlocutory examinations.—*Held*, that if an appeal lies, it must be either under Con. Rule 774 or 767—probably the latter—and, under either, notice of appeal must be given within four days and made returnable within ten days after the decision complained of; and notice in this case not having been given in time, an extension should not be granted, having regard to the character of the decision complained of—a ruling against allowing the costs of examining more than one of the plaintiffs for discovery. *Mann* v. *Crittenden*, 11 O. L. R. 46, 6 O. W. R. 799.

Appeal from interlocutory orders — *Inscription — Factum—Vacations au greffe —Consolidation of actions — Counsel fees.*] —Upon an application for revision of the taxation of three bills of costs in three appeals from orders declaring sufficient the particulars furnished by the respondents, which orders were reversed on appeal:—*Held*, that the appellants were entitled to their disbursements and fees relating to the inscription of the appeals, which is as necessary for interlocutory appeals as for those from final judgments.—2. That they were entitled also to disbursements and fees in respect of factums, if factums were produced.—3. That they were entitled also to fees for day's time at the record office.—4. *Quære*, whether, if several causes have been consolidated for the purpose of pleading and factums, there should be several counsel fees or only one. *Paquet* v. *Taché*, 2 Que. P. R. 380.

Appeal to full Court—*Costs not specifically awarded—Statute.*]—The costs of an appeal may be taxed to the successful party although not specifically awarded by the judgment. Supreme Court Act (1903-4), s. 20, s.-s. 7. *Kickbush* v. *Cawley*, 11 B. C. R. 151, 1 W. L. R. 18.

Appeal to Privy Council — *Costs incurred in Canada — Taxation—Rule 1256—Non-retroactivity.*] — Rule 1256, providing that when the costs incurred in Canada of an appeal to the Privy Council have been awarded, and have not been taxed by the registrar of the Privy Council, they may be taxed by the senior taxing officer, and the taxation shall be according to the scale of the Privy Council, is not to be construed as applying to a case in which the judgment entitling a party to costs was entered before the Rule was made. The quantum of costs, as well as the right to them, is ascertained at the time of the judgment, and the quantum cannot, without the clearest words, be altered by a subsequent change in the tariff, or by the creation of a tariff which had no existence until after the judgment. *Earle* v. *Burland*, 24 C. L. T. 355, 8 O. L. R. 174, 3 O. W. R. 702.

Application of new tariff — *Retroactivity.*]—Where an action was begun when the old tariff was in force, that tariff regulates the costs of the cause, even where the contestation was after the coming into force of the new tariff. *Goold Shapley and Muir Co.* v. *Gervais*, 9 Que. P. R. 290.

Arbitration under Railway Act, 1906 — *Construction of "costs" in s. 199 —Owner's costs—Solicitor and client—Tariff —Commencement of arbitration — Items — Fees of arbitrators—Counsel fees—Witness fees—Costs of taxation.*]—1. Under s.-s. (5) of s. 2 of the Railway Act, R. S. C. 1906, c. 57, interpreting the word "costs" used in s. 199 of the Act, as including fees, counsel fees, and expenses, the costs of an owner who succeeds in an arbitration under the Railway Act should be taxed as between solicitor and client.—*Malvern Urban District* v. *Malvern*, 83 L. T. 326, followed.—2. The tariff of costs prescribed for ordinary litigation may be accepted as a general guide for taxing the costs of such an arbitration; but when, in the opinion of the taxing officer, the fees fixed by that tariff are inadequate compensation for the services necessarily and reasonably rendered, he is not bound by it, and should not follow it.—3. For the purposes of the taxation of such costs the arbitration began when the company served notice upon the owner offering an amount which they were willing to pay, and naming their arbitrator; and items for work done even before that date should be allowed if they were for work that would properly be costs of the arbitration if done after that date; for example, fee perusing the order of the Railway Commissioners giving leave to expropriate, and taking instructions.—4. The owner was entitled to tax the fees paid to the arbitrators on taking up the award.—*Shrewsbury* v. *Wirral*, [1895] 2 Ch. 812, distinguished.—5. Counsel fees allowed by the taxing officer were reduced to $100 per day for first counsel and $75 per day for second counsel.—6. The fees actually paid to expert witnesses should not necessarily be allowed, but only fair and reasonable fees for the time occupied in attending before the arbitrators and in qualifying themselves to give evidence.—7. The costs of the taxation, including a fee of $25 for the argument before the Judge, should be borne by the company. *Re Can.*

North Rw. Co. & Robinson, 8 W. L. R. 137, 17 Man. L. R. 579, 8 Can. Ry. Cas. 244.

Certificate—Mistake in amount — Error in addition — Correction—Powers of Master in Chambers — Rules 312, 640. *King* v. *Toronto Rw. Co.*, 12 O. W. R. 893.

Claim and counterclaim—*Method of taxation.*]—By the judgment herein plaintiffs were given costs to be taxed and defendants, on their counterclaim, were allowed their costs to be taxed.—*Held*, that plaintiffs get costs of suit but not counsel fees or witness fees for contesting the fact found against them. Defendants get counsel fees, witness fees, briefs, pleadings, bills of costs and taxation. No set-off directed in judgment. *Keily* v. *Winnipeg* (1909), 12 W. L. R. 49.

Compensation for lands taken for railway — Arbitration — Claimants severing—Estates under will. *Re Murphy and Lindsay, Bobcaygeon, and Pontypool Rw. Co.*, 6 O. W. R. 361.

Conservatory intervention—*Leave to contest.*] — The original plaintiff, who obtains leave to contest, after inscription *ex parte*, a conservatory intervention, will be ordered to pay the difference between the fees provided by Art. 8, and those provided by Art. 10 of the tariff. *Williamson* v. *Bradshaw*, 6 Que. P. R. 385.

Contestation of claim against insolvent estate—*Amount to be paid in stamps.*] —The amount to be paid in stamps upon the contestation of a claim upon an insolvent estate is the same as that payable according to the amount of the claim in an ordinary action. *Re Dodds Co. & Kent*, 10 Que. P. R. 219.

Copy of shorthand evidence taken in Master's office — Allowance between party and party—Counsel fees—Subpœna—Letters, attendances, and other items. *Plenderleith* v. *Parsons*, 10 O. W. R. 387, 658.

Costs of appeal—*Dismissal as to one party—Half fees.*] — Where an appeal is dismissed upon motion as to one of the parties only, the advocate's fee will be the whole fee fixed by the tariff, and not merely the half of such fee. *Leduc* v. *St. Louis de Gonzague*, 5 Que. P. R. 448.

Counsel and solicitor—*Construction of statute 1 & 2 Edw. VII., c. 77 (Man.)—Contract with city solicitor engaged on salary—Conflict of laws—Costs in Supreme Court of Canada.*]—Section 468 of the charter of the city of Winnipeg (1 & 2 Edw. VII., c. 77), provides that where the city solicitor is engaged at a stated salary, the city corporation have the right, in law suits and proceedings, to recover and collect "lawful costs," in the same manner as if such solicitor were not receiving such salary. The respondents, a city corporation, enacted a by-law appointing their solicitor at an annual salary, and providing that, in addition thereto, he should be entitled, for his own use, to such lawful costs as the corporation might recover in actions and proceedings, except disbursements paid by the city. Upon the taxation of the costs awarded to the respondents on an appeal to the Supreme Court of Canada (41 S. C. R. 18):—*Held*, that the statute and contracts above recited applied to costs awarded on the appeal, and that, on the taxation, the usual fees to counsel and solicitor should be allowed. *Hamburg-American Packet Co.* v. *R.*, 39 S. C. R. 621, distinguished. *Ponton* v. *Winnipeg*, 41 S. C. R. 366.

Counsel fee — *Adjournment of hearing of appeal—Negotiations for settlement.*] — After an appeal was opened, it stood over at the suggestion of the Court in order to give the parties an opportunity to settle; the negotiations for settlement were unsuccessful; and the appeal was ultimately dismissed with costs:—*Held*, that the successful party was entitled: (1) to a counsel fee (under item 224 of the tariff of costs) on the first day's hearing, and (2) to an allowance for costs of the negotiations for settlement under item 81 of schedule No. 4. *Milton* v. *Surrey*, 10 B. C. R. 325.

Counsel fee—*Brief — Summary Convictions Act, s. 73 (8)—Jurisdiction of Judge on case stated.*]—The defendant was convicted before the stipendiary magistrate for an incorporated town of a violation of one of the by-laws of the town. The magistrate having stated a case under the Summary Convictions Act, R. S. N. S. 1900, c. 161, s. 73, an order was made by a Judge at Chambers setting aside the conviction and directing the informant to pay the defendant the costs of the application and below, to be taxed. The bill, as taxed by the taxing Master, included a counsel fee of $50 and an allowance of $30 for brief. On appeal to a Judge at Chambers the amount allowed for brief was reduced to $5, and the counsel fee struck out altogether:—*Held*, Townshend, J., dissenting, that the defendant was entitled to a counsel fee for the attendance at Chambers, and that $7.50 would be a reasonable amount to allow under the circumstances, the question having been but a trivial one and having occupied but a short time, and that the appeal should be allowed to this extent but without costs.—*Quære*, whether a Judge at Chambers, exercising jurisdiction under s. 73 (8), upon a stated case, can be regarded as a delegate of the Court, or is sitting under a special authority independently of the Court and as a person designated by the statute to discharge the duties prescribed by it. *Rex* v. *Dimmock*, 1 E. L. R. 50, 39 N. S. R. 286.

Counsel fee—*Trial or assessment of damages — Interlocutory judgment—Items 152, 153, of tariff of costs.*]—In an action for damages for personal injuries, the defendants entered no appearance and filed no statement of defence. Interlocutory judgment was not signed, and there was no admission of the liability of the defendants. Notice of assessment was served by the plaintiff by posting it up in the office of the Court. Both the plaintiff and defendants issued commissions and took evidence abroad, and the defendants obtained an order for the examination of the plaintiff by medical practi-

tioners. On the opening of the case at the trial (or assessment) counsel for the defendants admitted that they did not intend to contest liability, and the only matter tried out was the quantum of damages:—*Held*, that the plaintiff was not limited, in taxing costs against the defendants, to the counsel fee mentioned in item 152 of the tariff as appropriate upon a mere assessment of damages, but was entitled to a counsel fee as upon a trial, as provided in item 153; the assessment referred to in item 152 being that which follows upon an interlocutory judgment.—*Semble*, *per* Meredith, C.J.C.P., that the paragraphs which follow items 152 and 153 in the tariff are intended to give the taxing officer a discretion to increase the fee for the brief both for the assessment of damages and for the trial. *Hamilton* v. *Hamilton, Grimsby, and Beamsville Electric Rw. Co.*, 10 O. W. R. 197, 473, 15 O. L. R. 50.

Counsel fee on postponement of trial —Item 153 of tariff—Allowed by taxing officer —On appeal, Middleton, J., refused to interfere with officer's discretion—No error in principle or misunderstanding being shewn. *Outwater* v. *Mullett*, 13 P. R. 509; *Conmee* v. *N. A. Rw. Contracting Co.*, 13 P. R. 433, and *Re Ogilvie*, [1910] P. 243, followed. *McDonald* v. *Grand Trunk Rw. Co.* (1911), 18 O. W. R. 561, 2 O. W. N. 748.

Counsel fee on view before trial—*Affidavit of counsel—Witness fees—Witness not called—Practice.*]—Upon review of taxation of the defendant's costs an affidavit made by one of the counsel at the trial and on the appeal, who was present at the taxation, was allowed to be read to shew what took place before the taxing officer; and, it being therein sworn that the applicant had stated to the taxing officer that a view had been had by counsel before the trial to enable him to properly understand the case, and that the view was necessary, the Judge refused to interfere with the discretion of the taxing officer in allowing a counsel fee for the view.—Where a party seeks to tax fees for witnesses not called, the onus is on him to shew their relevancy, etc., which he should do by affidavit establishing: (1) that the witnesses were necessary and material; (2) that they were in attendance; (3) what they were brought to depose to; (4) the reason why they were not examined. A general statement that the witnesses were necessary and material, and the course the trial took made it unnecessary to call them, is not sufficient, as it does not enable the taxing officer to form any independent judgment. *Eastern Townships Bank* v. *Vaughan* (1910), 14 W. L. R. 456.

Counsel fees—*Adjournment of trial.*]—Except as otherwise specially provided, only one counsel fee can be taxed in an action. Such fee must be taxed on the completion of the action, and cannot be taxed before that event is reached. Where on a motion for a continuance, based upon the absence through illness of the defendant, who was alleged to be a necessary and material witness in his own behalf, the continuance prayed for was granted on payment by the defendant of costs of the day:—*Held*, that a counsel fee was improperly allowed as part of such costs; and an appeal from an order reviewing the taxation and striking out the item was dismissed. *Acadia Loan Corporation* v. *Wentworth*, 37 N. S. R. 316.

Counsel fees—*Demand of abandonment —Contestation.*]—The fees upon a contestation of a demand of abandonment are those provided by Art. 125 of the tariff. *Riou* v. *Massé*, 4 Rev. Leg. N. S. 449, followed. *Lynn* v. *Schloman*, 3 Que. P. R. 363.

Counsel fees — *Discontinuance—Trial.*] —If an action is discontinued with costs before the day fixed for hearing, the plaintiff asking and obtaining a certificate of his discontinuance at the time the cause is called for trial, the defendant has no right to the counsel fee *d'enquête* fixed by item 32 of the tariff. *Lee Chu* v. *Carpenter*, 3 Que. P. R. 70.

Counsel fees—*Dismissal of action—Exception — Hearing.*]—When an action has been dismissed upon an exception to the form, in respect of which there has been an *enquête* and hearing, the defendant is entitled to the fees upon an *enquête* and hearing over and above the fee provided by Art. 7 of the tariff. *Lapointe* v. *St. Onge*, 3 Que. P. R. 314.

Counsel fees — *Dismissal of action — Exception as to form.*]—If an action is dismissed upon exception to the form, the counsel fee allowed to the defendant will be that mentioned in Art. 7 of the Superior Court tariff, and not the fee upon a simple motion. *Plourde* v. *Bank of Montreal*, 2 Que. P. R. 496.

Counsel fees—*Exception to the form.*]—The fees of an advocate upon an exception to the form dismissed are those mentioned in item 23 of the tariff of the Superior Court, and not fees appropriate to a simple motion. *Fonderie de Drummondville* v. *Robillard*, 3 Que. P. R. 378.

Counsel fees — Increased fees — Trial of actions—Discretion—Principles governing —Practice in applying to Judge for fiat. *Bryce* v. *Can. Pacific Rw. Co.* (B.C.), 7 W. L. R. 143.

Counsel fees—*Motion to enforce award.*] —The counsel fee upon a motion to enter judgment in terms of an award made by arbitrators of the Grain Market Association of Montreal should not be the fee mentioned in Art. 4 of the tariff of the Superior Court as in the case of judgment rendered in a cause after setting down for hearing on the merits, but the fee mentioned in Art. 28 of the tariff, as upon a motion. *Ward* v. *Goodall*, 2 Que. P. R. 444.

Counsel fees.]—Motion to review taxation of costs of the plaintiff, the wife, taxed as between solicitor and client, to be paid by the defendant, the husband.—The Registrar allowed retainer and other fees to counsel in addition to the proctor, who also acted as counsel:—*Held*, as the case was not one in which second counsel could be considered as reasonably necessary, that the items should be disallowed. *Bell* v. *Bell*, 20 C. L. T. 20.

(See *Robock* v. *Peters*, 20 C. L. T. 421, 13 Man. L. R. 124.)

Counsel fees — *Petition for revision of voters' list.*]—In the case of a petition for the revision of a voters' list which has been granted, the respondent having appeared and cross-examined the petitioner's witnesses, but having neither pleaded in writing nor examined witnesses on his own behalf, the petitioner will not be entitled to a counsel fee as in a contested action, but only to a fee appropriate to a case heard *ex parte*. *Larchevêque* v. *St. Leonard de Port Maurice*, 3 Que. P. R. 293.

Counsel fees—*Preliminary exception.*]—In spite of the fact that preliminary exceptions are now made by motion, the fee provided by Art. 7 of the tariff of advocates in the Superior Court for a case in which the action succeeds or is dismissed after a plea other than a plea to the merits, and without *enquête*, continues in force. *Plourde* v. *Bank of Montreal*, 17 Que. S. C. 291.

Counsel fees — *Review — Motion.*] — When an inscription in review is dismissed upon motion, the fee will be that of an action settled before hearing, and not that of a motion only. *Renault* v. *Gagnon*, 3 Que. P. R. 259.

Counsel fees — *Revising pleadings.*] — The fee allowed by item 230 of the tariff for settling and revising refers to a party's own pleadings, and not to the pleadings received from the opposite party, and the allowance on a taxation of a fee of $10 to the plaintiff on receipt of the statement of defence, as "fee to counsel advising thereon," is improper, but, in a special case, a fee may be allowed under item 229. *Blair* v. *British Columbia Express Co.*, 11 B. C. R. 153.

Counsel fees—*Trial—Class of action—Garantie.*] — A counsel fee at the hearing will not be allowed upon taxation unless there has in fact been a hearing.—2. If an action *en garantie* is dismissed because the plaintiff in the principal action is in default for not proceeding with his demand, the class of the action *en garantie* (brought up on review and dismissed by the Superior Court) will be that of the principal demand, and not that of an action for the amount of the costs that the plaintiff *en garantie* has to pay in consequence of the dismissal of his action. *Walker* v. *La Banque Nationale*, 3 Que. P. R. 47.

Counsel fees paid to partner of litigant—*Affidavit of payment made by counsel — Disallowing costs of — Brief — Correspondence.*]—Where counsel fees were paid by a member of a firm of barristers and solicitors, to his partner for the latter's services as counsel in an action in which the former was defendant, under a prior agreement to pay such fees as would be payable to counsel outside the firm:—*Held*, that such counsel fees should be taxed to the defendant against the plaintiff under a judgment dismissing the action with costs. *Henderson* v. *Comer*, 3 U. C. L. J. O. S. 29, followed. Upon the taxation the defendant made an affidavit of payment of fees to his partner, and the latter also made an affidavit, upon which he was cross-examined:—*Held*, that the defendant was not entitled to tax the costs of or occasioned by the latter affidavit:—*Held*, also, *per* Britton, J., that the discretion of the taxing officer in allowing the defendant the costs of briefing correspondence between the parties, should not be interfered with on appeal, although the correspondence was not used at the trial. *Johnston* v. *Ryckman*, 24 C. L. T. 221, 7 O. L. R. 511, 1 O. W. R. 720, 2 O. W. R. 1088, 1113, 3 O. W. R. 198.

Counterclaim — *Instructions — Brief — Counsel fees — Costs of taxation and appeals.*]—In an action to which the defendant pleaded a counterclaim, the plaintiff was held entitled to the costs of the action, and the defendant to the costs of the counterclaim:—*Held*, that the defendant, as part of her costs, was entitled to tax a counsel fee, and that the fact that there was no reply to the counterclaim was not material, it being the existence of the defence to the action which determined whether it was a case for a counsel fee or not:—*Held*, following *Atlas Metal Co.* v. *Miller*, [1898] 2 Q. B. 506, that the defendant was not entitled to tax "instructions to sue," but was entitled to tax "instructions for counterclaim." With respect to the amount of "brief" and "counsel fee" taxed, the taxing master's judgment ought not to be disturbed, especially after it had been affirmed by a Judge. The "one-sixth rule" (O. 63, r. 23) is imperative, and there being in this case no reason for departure from it, the appeal of each party should have been and should now be dismissed with costs. *Bauld* v. *Fraser*, 36 N. S. R. 21.

Counterclaim — Witness fees — Counsel fees — Subpœnas — Other items. *Welwyn Farmers' Elevator Co.* v. *Byrne* (N.W.T.), 3 W. L. R. 365.

Criminal libel — *Action — Stay — Criminal Code, ss. 823-5.*]—N., after his acquittal (at the third trial) on a charge of criminal libel, proceeded to tax his costs as provided by the Criminal Code, and moved before the trial Judge for the costs of some commission evidence used at the first trial. The motion was dismissed (22 C. L. T. 275, 8 B. C. R. 276, *Rex* v. *Nichol*), and it was decided that the prosecutors were not liable for the costs of the two abortive trials. As there was no appeal from that order, N. abandoned the taxation, and commenced this action for his costs. The defendants applied for a stay of proceedings:—*Held*, that the plaintiff should not be allowed to pursue both remedies at once, but, as in the other proceedings there was no appeal, this action should be allowed to proceed, provided that the plaintiff would undertake to abide by such order as might be made at the trial with regard to the costs of the taxation proceedings thrown away, and in the event of the plaintiff giving such undertaking the taxation proceedings should be stayed. *Nichol* v. *Pooley*, 22 C. L. T. 127, 9 B. C. R. 21, 363.

Crown—*Fees to counsel and solicitor—Salaried officers representing the Crown.*]—As the statutes of Canada defining the duties and salaries of the Attorney-General and his deputy deny additional compensation for services rendered by them in connection with litigation affecting the Crown, it is improper

to allow counsel fees or solicitor's fees in respect of services rendered in such capacities by either of these officers on the taxation of costs awarded in favour of the Crown.—*Jarvis* v. *Great Western Ry. Co.*, 8 C. P. 280, and *The Charlevoix Election Case*, Cout. Dig. 388, followed. *Hamburg-American Packet Co.* v. *R.*, 39 S. C. R. 621.

Defendants' costs of action—Items relating to security for costs—Claim and counterclaim—Judgment for defendants on counterclaim. *Griffin* v. *Ruller* (N.W.T.), 4 W. L. R. 12.

Defendants severing — Right of defendants to separate sets of costs—Separate defences delivered by same solicitor—Discretion of taxing officer — Items of bills—Instructions to defend—Attempted examination for discovery—Conduct money — Attendance of solicitors—Third party notice — Witness fees at trial—Affidavits of defendants. *Union Investment Co.* v. *Pullishy* (Alta.), 8 W. L. R. 530.

Deposition in Circuit Court.] — The costs of a deposition taken, on consent of parties by stenography, cannot be taxed in a Circuit Court. *Lewis* v. *Hudson's Bay Co.*, 6 Que. P. R. 97.

Depositions taken under foreign commission — Admissibility — Practice — Return of commission — Opening by clerk. *Cramer* v. *Bell* (N.W.P.), 6 W. L. R. 382.

Desistment — *Fee on hearing—Inscription.*]—When the plaintiff desists from his demand after inscription for hearing on the merits, the defendants has no right to the fee upon the hearing allowed by Art. 36 of the tariff. *Bigras* v. *Viau*, 6 Que. P. R. 332.

Distribution—Part failure—Jurisdiction of taxing officer—Objection—Waiver. *Pugh* v. *Hogate*, 3 O. W. R. 799, 4 O. W. R. 212.

Distribution of costs—*Several causes of action—Judgment.*]—The judgment in an action for slander provided "that the plaintiff do recover against the defendant in respect of the matters set forth in the 3rd and 5th paragraphs of the statement of claim the sum of $1 and costs to be taxed," and "that the defendant recover from the plaintiff in respect of the matters set forth in the 4th and 6th paragraphs of the statement of claim his costs to be taxed:"—*Held*, affirming the decision of Meredith, C.J., that the taxing officer rightly taxed under the judgment to the plaintiff the general costs of the cause, except so much of them as were occasioned by the causes of action upon which he failed, and to the defendant only the costs of the issues upon which he succeeded, the latter being set off. *Sparrow* v. *Hill*, 7 Q. B. D. 362, 8 Q. B. D. 479, followed. *Davis* v. *Hurd*, 22 C. L. T. 285, 292, 4 O. L. R. 466, 1 O. W. R. 418, 471.

Documents — *Notary.*]—The expense of making a copy of a deed which is part of the title of him who produces it cannot be taxed against the opposite party unless the copy has been made for the express purpose of the suit.—The costs of steps taken by a notary in searching for documents to be produced in the cause cannot be taxed. *Lavoignat* v. *Mackay*, 17 Que. S. C. 382.

Double fees — *Cross-demurrers.*]—The defendant answered the action by a demurrer and by a special plea; the plaintiff demurred to the latter; and the parties were heard upon these two issues of law. The demurrer of the defendant was overruled with costs, and the demurrer of the plaintiff was allowed with costs. The prothonotary allowed the plaintiff, pursuant to Art. 24 of the Superior Court tariff, a fee upon the demurrer of the defendant and another upon the plaintiff's own demurrer, seeing that he had succeeded upon the two issues. This was affirmed upon revision. *Luneau* v. *Luneau*, 19 Que. S. C. 146.

Evidence — Brief of, used by opposite counsel. *Pennington* v. *Honsinger*, 1 O. W. R. 270, 507.

Examination for discovery. *Iddington* v. *Douglas*, 2 O. W. R. 734.

Examination for discovery — Ruling of senior taxing officer—Appeal—Time—Extension—Rules 767, 774. *Mann* v. *Crittenden*, 6 O. W. R. 709, 11 O. L. R. 46.

Examination of party — *Solicitor for party—Fee.*]—Where the attorney of the opposant is present at the preliminary examination of the opponent, and cross-examines him, he is allowed on taxation the fee mentioned in Art. 41 of the tariff. *Lafontaine* v. *Senez*, 8 Que. P. R. 320.

Exhibit — *Specially obtained document.*] —The costs in relation to an exhibit which forms part of the documents of title of the party who files it, should not be included in taxation unless it is stated that such copy has been specially ordered and obtained for the purpose of filing it in the action. *Lavoignat* v. *Mackay*, 5 Que. P. R. 408.

Ex parte cause—*Notice of taxation—Necessity for—Execution—Opposition.*] — In an *ex parte* cause in the Circuit Court it is not necessary to have the bill of costs taxed adversely before issuing execution. An opposition based solely upon want of notice of taxation, without any allegation of overcharge, will be dismissed with costs. *Poirier* v. *Girard*, 4 Que. P. R. 124.

Fee of commissaire-enqueteur.] — A deputy-prothonotary who has been sworn as *commissaire-enquêteur* and as such has taken the examination of a witness, is entitled to the fee therefor; and it will be allowed on taxation to the party paying it. *MacDonald* v. *Migneron*, 3 Que. P. R. 156.

Illegal bond — *Leave to regularize — Costs of adverse party.*]—If a judgment permits an appellant to complete a security bond which has been declared illegal, the costs of the respondent comprise the attendance when the security was given, unless the judgment specifies that costs of motion only are granted. *Gelinas* v. *La Campagnie du Magasin du Peuple*, 7 Que. P. R. 98.

Instructions for affidavit—*Affidavit on production—Order—Review.*]—The following items were allowed to the plaintiff against the contention of the defendant: 1. Instructions for affidavit of writ of "replevin. 2. Two separate affidavits on production by co-plaintiffs, where they resided in different parts of the country. 3. An order postponing trial on the application of the defendant, on terms of payment of costs, taken out by the plaintiff, where the defendant had neglected to take out order. An application by the defendant to have deducted from the bill certain costs of the day, alleged to have been improperly allowed on a previous taxation not appealed from, was not entertained. *Allison* v. *Christie*, 2 Terr. L. R. 279.

Interlocutory costs—*Two separate matters—Separate bills—Charges for preparing—Taxation before final judgment.*] — Where costs have been incurred in respect of two interlocutory matters in an action, a motion for particulars and an inscription in law, it is permissible for the party who has succeeded to draw up two distinct bills of costs bearing the same date and brought in for taxation on the same day.—In such a case charges for drawing the bills and attending upon taxation, as well as disbursements, are allowed in respect of each bill.—It would be otherwise if the taxation of these interlocutory costs were after final judgment, in which case it would be necessary to include the costs in a single bill. *Baron* v. *Benoit*, 8 Que. P. R. 303.

Items—*Copies of interlocutory orders—Rehearing of motion.*]—In the district of Montreal the practice is to put upon the record copies of all the judgments rendered in the course of the pendency of a cause; and the costs of such copies will be taxed. 2. If a motion seeks for a condemnation in a case in which the opposite party has not conformed to an order of the Court, there is ground for presenting anew the motion in the case in which the order has not been executed, and, therefore, to claim a fee for rehearing. *Werthemer* v. *Boulanger*, 5 Que. P. R. 293.

Items of bill — *Jury trial—Evidence—Discovery — Copy of depositions — Witness fees—Witness not called—Review of taxation.*]—If a jury's verdict awards a plaintiff a sum inferior to $400 (in this case, $140), and judgment is rendered according to verdict *with costs*, such costs include the costs of the jury, of the translation of evidence, and the fees and disbursements, as in an action for the amount awarded, on the various motions and proceedings peculiar to jury trials.—2. No fee will be allowed on an examination on discovery which was dispensed with after the issuing of a subpœna.—3. When a party is examined for discovery, the adverse party has no right to charge in his bill of costs, the cost of a copy of such examination.—4. The taxation of a witness who has not been heard, made in the absence of the opposite party, will be annulled, when no evidence is adduced to shew the possible usefulness of such witness.—5. The taxation of witnesses who have been heard, whether it has taken place *ex parte* or after objections by the adverse party, will not be revised by the Judge. *Clough* v. *Fabre*, 9 Que. P. R. 276.

Items of bill—*Plea of puis darrein continuance—Interlocutory injunction—Application of new tariff.*]—No special fee is allowable on taxation for the filing of a plea *puis darrein continuance*. — The existing tariff, which contains an express provision on the subject, item 37, must serve as the rule for taxation of the costs of petitions for interlocutory injunctions presented while the old tariff was in force, which left such taxation to the discretion of the Judge. *Roy* v. *Lord*, 9 Que. P. R. 314.

Items of bill — *Statement of facts — Second trial by jury—Witness fees—Experts —Stenographer—Interpreter.*]—At a second trial by jury made necessary by reason of the disagreement of the first jury, no additional fee will be accorded to the plaintiff's attorney for the statement of facts required under Art. 425, C. P.—2. Witnesses (mechanics) summoned to give expert evidence touching the working of a machine will be taxed at the rate of $4 per day.—3. No fee is allowed the stenographer for reading to the jury a deposition taken out of Court.—4. The case having been settled and withdrawn from the jury immediately after the re-assembling of the Court for the afternoon session, the sum of $10 for one day's session taxed in favour of the interpreter from French into English is reduced to $5. *Mills* v. *Royal Institution*, 9 Que. P. R. 368.

Judgment for default of defence—*Costs of affidavit proving that none served.*] —In order to constitute the delivery of a pleading, it must be both filed and served; default in either will entitle the party to be proceeded against as upon default in pleading; and consequently upon a taxation of a plaintiff's costs of judgment signed for default of defence, the costs of an affidavit proving that no defence was served will be disallowed, where no defence has been filed. *Massey-Harris Co.* v. *Hutchings*, 3 W. L. R. 252, 6 Terr. L. R. 351.

Mortgagee's costs of proceedings under power of sale—R. S. O. 1897, c. 121, s. 30—Proceedings for sale while notice current — Disallowance—Profit costs—Mortgagee's agent not a solicitor. *Re McArthur*, 12 O. W. R. 177.

Mortgagee's costs of sale proceedings — *Jurisdiction — Local registrar.*] — A local registrar is not one of "the taxing officers of the Supreme Court of Judicature" mentioned in R. S. O. 1897 c. 121, s. 30; and, if he is not also a local Master, has no jurisdiction, under that section, to tax a mortgagee's costs of sale proceedings. *Re Drinkwalter and Kerr*, 10 O. W. R. 511, 15 O. L. R. 76.

Mortgagor and mortgagee.]—No appeal lies from the taxation of a mortgagee's costs of proceedings under the power of sale in a mortgage, had under R. S. O. c. 121, s. 30. *In re Vanluven and Walker*, 20 C. L. T. 388, 19 P. R. 216.

Motion to allow preliminary exceptions.]—The fees of the prothonotary and of the attorney upon a motion to allow a preliminary exception (whether in a matter of form, going to the jurisdiction, dilatory, or otherwise), even when such motion is granted and the action dismissed, should be such fees as are taxable upon an ordinary simple motion, according to the class of action: Art. 28 of the tariff of advocates' fees (see Rule of Practice, No. 40). *Vezina* v. *Martin*, 2 Que. P. R. 361.

Motion to dismiss action for want of prosecution — Interlocutory application —Affidavit — Information and brief — Brief and instructions for brief—Counsel fee. *Gibson* v. *Brennan* (N.W.T.), 1 W. L. R. 577.

Motion to review—*Limitation to specific objections — Reference of whole bill to taxing officer at Toronto as upon revision—Erroneous practice—General objection to all items—Declaration of Judge's duty to taxing officer.*]—Defendants, being dissatisfied with a taxation, delivered, pursuant to Rule 1182, to plaintiff and to the taxing officer, objections in writing to the taxation. Besides specifying as objected to, a large number of items in the bill, giving reason therefor, concluded with the following general complaint: "The defendants also complain that the bill generally is exorbitant, that the allowances as a rule are too large, and that altogether too much has been taxed for folios, attendances, etc., etc." The local taxing officer confirmed his previous taxation but did not state his reasons for his so doing. Falconbridge, C.J., in Chambers, referred plaintiff's bill of costs to the senior taxing officer at Toronto to be taxed as upon a revision of taxation and to report. On appeal from this order it was held: A Judge in Chambers, upon an application to him under Rule 774 to review a taxation, has no jurisdiction to delegate the duty which the rule imposes upon him, to a taxing officer at Toronto, or to anyone else. He may take the opinion of that officer as to any and all matters arising upon the application, for his own information, but the parties are entitled to have his opinion, and his alone, in determining the questions raised by the appeal. *Quay* v. *Quay*, 11 P. P. 258, overruled. *Campbell* v. *Barker*, 2 O. W. R. 504, 5 O. W. R. 372, 9 O. L. R. 291.

New trial—*Costs of former trial.*]—The plaintiff had obtained a verdict against the defendants, but not being satisfied with the amount had it set aside and a new trial granted on the ground of insufficiency, costs to abide the event. At the second trial he again obtained a verdict, but for a smaller amount. On taxation of costs defendant's counsel contended that he was not liable for the costs of the first trial:—*Held* (Hensley, J.), that plaintiff having failed to recover a larger amount on the second trial than on the first was not entitled to the costs of the first trial. *McGill* v. *McWade* (1873), 1 P. E. I. R 446.

New tariff.] — Plaintiff taxed in 1896, his costs of recovering judgment, and on appeal it was ordered that there should be a new trial and that the costs of the first trial should follow the event. Plaintiff, finally, in 1901, recovered judgment with costs: —*Held*, that the costs of the first trial were not now taxable under the new tariff, which came in force in 1897, but that the old taxation must stand.—*Semble*, costs incurred before the new tariff came into force are still taxable under the old tariff. *Harris* v. *Dunsmuir*, 9 B. C. R. 317.

Non-payment of costs—*Order to pay—Taxation of costs—Rule nisi—Coercive imprisonment—C. P. 554, 836; Ordinance of 1667, tit. 4, art. 2; tit. 34, art. 10.*]—A rule for coercive imprisonment cannot be declared absolute for costs, if bill of costs has not been served upon defendant and taxed against him. —Demand for imprisonment should be preceded by a demand for payment, with notice that after expiry of 3 months defendant will be obliged to discharge the condemnation under pain of coercive imprisonment.—The new Code of Civil Procedure has not changed provisions of the old Code on this subject. *Landskrowner* v. *Corber* (1910), 11 Que. P. R. 397.

Notice—*Quantum of costs—Intervention —Insolvent estate — Curator.*]—If a party, who has received notice that a bill of costs will be taxed, does not attend upon the day fixed in the notice, but merely urges his reasons against the taxation in a letter addressed to the prothonotary, the party who has given the notice, and who has not had his bill taxed at the time fixed, may have it taxed later, at his pleasure, in the absence of his opponent.—2. Upon an intervention made by the curator of the insolvent estate of the defendants upon a *saisie conservatoire*, and where such curator contests, not the claim of the plaintiff, but only his right to the effects seized, the bill of costs of the curator, whose intervention has been maintained, will be taxed pursuant to Art. 60 of the tariff, and not merely as if it was for costs of a petition to set aside the seizure.—*Semble*, that costs incurred by a curator in litigating a proceeding in the name of an insolvent are payable by the unsuccessful party in such proceeding, and not out of the insolvent estate, except in case of default of the unsuccessful party to pay them. *Auger* v. *Montambault*, 5 Que. P. R. 21.

Notice to opposite party—*Collateral equities—Duty of taxing officer.*]—The taxing officer is bound to tax a bill of costs on production thereof, according to the tariff in force, upon seeing that the opposite party has had notice, and without consideration of any collateral equities which may exist between the parties. *Ross* v. *Ross*, 8 Que. P. R. 300.

Opposition — *Amendment—Fees.*] — If, after contestation filed, the opposant is allowed to file an amendment to his opposition, necessitating the filing of a new contestation, the opposant will not be entitled thereby to two fees on contestation and two additional fees, but only to such fee as the Court will allow him, the costs of the amendment having been reserved. *Canada Industrial Co.* v. *Kensington Land Co.*, 6 Que. P. R. 237.

Opposition—*Dismissal.*] — The fee on a motion to dismiss an opposition is that of an

ordinary motion and not of a preliminary exception. *Giguere* v. *Payette*, 6 Que. P. R. 178.

Opposition—*Dismissal.*]—The fee of the advocate of an execution creditor who obtains upon motion, the dismissal of an opposition, is the fee appropriate to an opposition dismissed upon preliminary exception. *Smith* v. *Lapointe*, 6 Que. P. R. 216.

Partition proceedings — Taxed costs —Special circumstances. *McLaughlin* v. *McLaughlin*, 1 O. W. R. 378, 424.

Peremption — *Appearance — Attendance on taxation.*]—Where a cause is perempted, after the filing of a preliminary exception, its dismissal with costs against the plaintiff, and payment by the plaintiff of the costs thereof, the defendant has a right only to the costs of appearance; he has no right to a fee for attending upon taxation. *Atkinson* v. *Cadieux*, 10 Que. P. R. 100.

Petition—*Useless proceedings.*]—Upon a petition for payment out of money deposited with the Provincial Treasurer pursuant to Art. 1198, R. S. Q., the fee allowed will be that upon a petition, and the bill of costs will not be taxed as in an action.—*Semble*, that motions to debar a party from pleading, to set down the cause, and to place the cause *en delibéré suivant ses errements*, are unnecessary proceedings upon such a petition. *Dauphinais* v. *Bousquet*, 2 Que. P. R. 511.

Petition for revision — *Desistment from taxation.*]—A party who has had a bill of costs taxed to him adversely, may, after a petition for revision of the taxation has been presented and taken into consideration, desist from the certificate of taxation obtained by him, upon paying the costs of the petition for revision. *Bergeron* v. *Brunet*, 5 Que. P. R. 429.

Preparing for trial—*Searches for missing documents — Party and party costs — Tariff.*]—In this action a certain contract and certain plans of material importance were lost, and the plaintiffs employed two of their former solicitors to try and find them, which they succeeded in doing, and they were put in evidence at the trial. For these services a sum of $350 was paid to them:—*Held*, that this expenditure was properly taxable as part of the plaintiffs' party and party costs, though not specially provided for in the tariff. *Toronto* v. *Grand Trunk Rwe. Co.*, 13 O. L. R. 12, 8 O. W. R. 310, 333.

Quashing conviction — Appeal from taxation—Brief and counsel fee in chambers —Mode of preparing bill—Inflating items for taxation. *Rex* v. *Dimmock*, 1 E. L. R. 50.

Railway Act — *Delegation by Judge — Review of taxation—Principle of taxation—Items—Desistment—Arbitration.*]—The usual and convenient course in regard to costs of proceedings under the Railway Act, 51 V. c. 29 (D.), provided for by ss. 154 and 158, is not for the Judge to tax in the first instance, but to relegate the bill of costs to an officer conversant with the practice of taxation to ascertain what has been properly incurred; and his conclusions may be adopted or varied by the Judge. If lands are taken compulsorily the costs should be allowed in larger measure than in ordinary litigation, but in a case of mere desistment, it is enough if the bill is fairly taxed:—*Held*, with regard to items in dispute upon taxation—1. That a consent to take possession was not part of desistment proceedings, and the costs of it were properly disallowed.—2. That costs of steps taken to appoint a third arbitrator were not costs of the land owner; the appointment was a matter to be arranged by the two arbitrators already named.—3. That "instructions for brief" upon arbitration should be allowed.—4. That what was actually disbursed in witness fees to a necessary and material witness as to value should be allowed.—5. That the quantum of the counsel fee upon the arbitration was in the discretion of the taxing officer, and should not be interfered with. —6. That "instructions to move for costs of arbitration" was properly disallowed by the taxing officer, in the discretion given by item 38 of the tariff of the Supreme Court of Judicature.—7. That the costs of a formal order for taxation and its incidents, and not a mere fiat or direction to tax, should be allowed, the liability for costs having been disputed; see 6 O. L. R. 543. *Re Oliver & Bay of Quinte Rwe. Co.*, 24 C. L. T. 296, 7 O. L. R. 567, 2 O. W. R. 953, 3 O. W. R. 318.

Redemption action — *Copy of evidence —Taking mortgage accounts in Master's office—Items.*]—The procuring of a copy of evidence taken in the Master's office for use on the argument before the Master may be taxed and allowed in proper cases.—*Re Robinson*, 16 P. R. 423, discussed.—*Per* Riddell, J.:—The following items in a defendant's bill are taxable in reference to taking of mortgage accounts in the Master's office: (1) attendance by the other party's solicitor on inspection of productions; (2) counsel fee advising on evidence; (3) letter to client to call after service of notice of intention to cross-examine on affidavit; (4) attending and copying entries in books of account produced; (5) attendance of clients going over accounts and surcharge of plaintiff and considering and advising on; (6) attendance of plaintiff's solicitor going over accounts and discussing and making list of such as can and cannot be agreed upon and admitted; (7) the issue of a new subpœna for witnesses to be examined upon a day subsequent to that for which they were originally subpœnaed and brought into the Master's office; (8) attendance by client and advising after arrangement made to proceed with case on a certain day; (9) perusal of accounts and considering and taking instructions for supplemental accounts; (10) counsel fee on reference. *Plenderleith* v. *Parsons*, 15 O. L. R. 397, 10 O. W. R. 387, 658.

Registration of judgment — *Copy — Appeal.*]—*Held*, on appeal from the taxation of the prothonotary, that the party who obtains judgment has a right to have a copy of it made and to have it registered, and the expense forms part of the costs of the cause and may be recovered from the adverse party, if the judgment, as in this case, is confirmed, or if the opposite party does not appeal. *Luneau* v. *Luneau*, 19 Que. S. C. 146.

Rehearing — *Fee on enquête.*]—After a cause has been dismissed at the hearing, and a rehearing has been necessary, the parties are entitled to a fee upon the rehearing, but not to a second fee upon the *enquête*. *Coke* v. *Arnold*, 6 Que. P. R. 238.

Retaxation—Alteration of order. *Boak* v. *Deblois*, 1 E. L. R. 109.

Review — *Abandoned appeal — Briefs—Counsel fee.*]—On the 20th May the plaintiffs gave notice of appeal, to come on at the November sitting of the full Court, from an order requiring them to give security for the costs of the action. On the 3rd June the appeal was abandoned:—*Held*, on a review of taxation, that the respondents were entitled to tax briefs and a counsel fee. Counsel fee under the circumstances fixed at $10. A taxation may be reviewed under Rule 583, as well as under Rule 790. *Fry* v. *Botsford*, 22 C. L. T. 378, 9 B. C. R. 207.

Review — *Evidence.*] — *Held* that an application for review of taxation by the taxing officer must be disposed of on the evidence adduced before the taxing officer, and no further evidence in support of the application will be received in review. *Martin* v. *Smith*, 1 Sask. L. R. 141.

Review—*Irregular proceedings — Insufficient affidavit on production — Several subpœnas.*]—It is not open to a party on taxation of costs to take objections which could or should have been taken by application to set aside the proceedings, or by way of appeal. On this principle costs were allowed as follows: (1) The costs of an order *de bene esse*, irregularly obtained, were allowed to the defendant, where no application had been made to set it aside, and the plaintiff's advocate had attended on the examination; (2) the costs of an insufficient affidavit on production, where an application for a better affidavit had been dismissed and no appeal taken; (3) the costs of an order to examine the plaintiff issued *ex parte* and without notice, where an application to set it aside had been refused, and the grounds of the refusal were not shewn on the review. A subpœna for each of several witnesses may be allowed where they reside in different parts of the country, and the same original cannot be conveniently produced to them all. *Craig* v. *New Oxley Ranche Co.*, 2 Terr. L. R. 277.

Review—*Items—Consolidated actions.*]—Upon review on the part of the plaintiff of the taxation of his costs against the defendant of consolidated actions:—*Held*, that "instructions to defend" the action brought against the plaintiff should have been allowed, although the plaintiff was also allowed "instructions to apply to consolidate."—2. That items for preparing and marking as exhibits to the affidavit used upon the application to consolidate of copies of the writs of summons and statement of claim in the two actions should have been allowed.—3. That a counsel fee of $5, instead of $2, upon the application to consolidate, should have been allowed, it being an application of an essentially special character.—4. That "instructions for the examination for discovery of the plaintiff" should have been allowed to the plaintiff.—*Alexander* v. *School Trustees of Gloucester*, 11 P. R. 157, followed with hesitation.—5. That the plaintiff was not entitled to tax against the defendant the costs of two letters to a sheriff complaining of the insufficiency of a replevin bond, the defendant having replevied the plaintiff's goods.—6. That items for drawing acceptance and attending to obtain an undertaking for the appearance of the defendant for examination for discovery and attending to give acceptance and undertaking for the plaintiff's examination for discovery were properly disallowed, there being no evidence that the work had been done.—7. That the item for attending on inspection and admission of documents by the defendant's solicitors was properly disallowed. —8. That items for preparing and marking copies of the pleadings as exhibits to an affidavit made in support of an application to set the case down for trial, were properly disallowed.—9. That items in regard to a proposed application to vacate the registry of a caveat were properly disallowed. The costs of the application, if made, would not be costs in the cause unless so ordered upon the application. *Newstead* v. *Rowe* (1910), 14 W. L. R. 681; 3 Sask. L. R. 205.

Review—*Rule setting aside order with costs — Items properly taxable thereunder—Practice.*]—The order taken out simply provided for costs. This means the costs of the order set aside and application therefor. Any other costs should have been especially provided for. *Owens* v. *Upham*, 7 E. L. R. 168.

Revision — *Powers of Judge—Witness fees.*] — When a final judgment has been rendered in a case, condemning one of the parties to pay the costs, a Judge in Chambers has no power, on a petition to revise the taxation of one of the bills, to strike from it the costs taxed in respect of one of the witnesses, on the ground that his evidence was of no weight or value. *Cains* v. *Leeder*, 34 Que. S. C. 368.

Right to tax—Interlocutory costs payable "in any event"—Settlement of action. *McDonald* v. *Crites*, 7 O. W. R. 795.

Scale of costs—*Possessory action—Witness fees—Review of taxation—Applicant for — Witness — Time — Surveyor's plan — Discretion of prothonotary.*]—Possessory actions are second class actions, although the value of the immovable is over $1,000, especially when the plaintiff only seeks to be relieved of the disturbance in the enjoyment of his property, which the defendant commits in cutting wood on a part of it.—2. The application for the revision of the taxation of witness fees must be made by the witness himself and not by one of the parties, through his attorney; this application must be made before final judgment.—3. The prothonotary has not the discretionary power to strike the costs of a surveyor's plan from the bill, when the Judge who rendered the final judgment did not do so. *Lefrancois* v. *Morel*, 10 Que. P. R. 89.

Severing defences — *Items — Setting aside judgment—Fi. fa. lands — Examina-*

tion for discovery.] — Where an action is brought against two or more defendants, and any defendant separates in his defence, and the judgment is against all the defendants, the law is, that each of them is liable to the plaintiff for all costs taxed by him as properly incurred by him in the maintenance of his action, except as to costs caused to him by so much of the separate defence of any defendant as is and can be a defence for that defendant only as distinguished from the other defendants. The rule in *Stumm v. Dixon*, 22 Que. B. D. 99, 529, applied to an action on a contract. In an action against two joint makers of a promissory note, who, though they set up substantially the same defence, severed in their defences:—*Held*, that on the taxation of the plaintiff's costs the following items should be allowed as against both defendants: (1) costs of a concurrent writ of summons against one of the defendants; (2) costs occasioned by the separate defences of each defendant; (3) costs of the examination for discovery of one of the defendants, although, as the other defendant had not been notified of the intention to hold the examination, the depositions were not admissible in evidence against him. Where a judgment by default was set aside, and the defendant was given leave to defend on payment of costs:—*Held*, that the defendant was liable to pay the costs of a *fi. fa.* lands issued concurrently with a *fi. fa.* goods. *Lougheed* v. *Parrish*, 4 Terr. L. R. 54.

Several defendants — *Appearance by separate solicitors—Severing in defences—Specific items: instructions, perusals, affidavit of disbursements, third party notice, etc.—Examination for discovery—Solicitor's attendance on—Right of party attending for examination to witness fees and mileage where unavoidably detained — Abandonment of examination.*]—Where an action brought against several defendants is dismissed with costs against the plaintiff, in party and party taxation:—1. Several defendants who have, or may have, separate defences are entitled to separate bills of costs if they defend by separate solicitors.—2. If two or more appear by the same solicitor, it is within the discretion of the taxing officer to allow or disallow separate defences. Consequently where sixteen defendants were sued as joint and several makers of a promissory note:—*Held*, that, on party and party taxation of their costs, the taxing officer had not improperly allowed three different sets of costs; not two separate defences, where two or more defendants had appeared by the same solicitor.—3. A solicitor appearing for two or more defendants, is entitled to charge for instructions to defend from each defendant; but can only be allowed for one perusal of statement of claim.—4. Instructions for pleadings can only be allowed for each separate set of pleadings.—Where one party takes out an appointment for examination for discovery of the other party, who, having been served with a subpœna, is delayed by causes (*e.g.*, snow-blockades or interruption of train service) beyond his control, yet attends and presents himself for examination as soon after as possible, the examining party cannot, by abandoning the examination, escape the liability to pay witness fees and mileage—and, in such circumstances, such fees and mileage, if not paid, are properly taxable on party and party taxation against the examining party, as costs in the cause.—The solicitor for the party being examined is entitled to attend on examination, and charges for his instructions and attendance are proper party and party taxation items.—Costs of a third party notice are not taxable as between party and party, in the absence of an express order.—Only one affidavit of disbursements, which may be made by the solicitor, is to be taxed in respect of each separate bill of costs. *Union Investment Co.* v. *Pullishy*, 1 Alta. L. R. 489, 8 W. L. R. 530.

Several preliminary exceptions filed concurrently.]—If several preliminary exceptions are filed concurrently, and the action is dismissed on one of them, the defendant is not entitled to the costs of the other exceptions, if these have not been urged to judgment.—A motion by plaintiff to have defendant's bill of costs revised accordingly will be granted. *Bomborinais* v. *Lortie*, 11 Que. P. R. 17.

Sheriff's costs of interpleader—*Items 76 and 77 of Sask. Tariff.*]—In an interpleader application the sheriff obtained a copy of the claimant's examination. This was disallowed on taxation. Every interpleader application is not a special one. In this case a counsel fee of $2 allowed. *Cross* v. *Cross* (1909), 12 W. L. R. 433, 3 Sask. L. R. 1.

Solicitor's letter before action.] — A debtor is not obliged to pay the costs of a letter before action received from an advocate. *Rioux* v. *Plaisance*, 21 Que. S. C. 574. *Lay* v. *Cantin*, 23 Que. S. C. 405.

Solicitor's letter before action.] — A debtor who receives a solicitor's letter, cannot, as against the solicitor, or the creditor, be required to pay a fee for such letter. *Robson* v. *Smith*, 5 Que. P. R. 252.

Special fee—*Allowance by Judge.*] — A Judge will not take cognizance of a bill of costs and allow a special fee, until the bill has been taxed by the prothonotary. *Campbell* v. *Montreal St. Rw. Co.*, 7 Que. P. R. 79.

Stenographer's fees — Evidence on reference—Rule 1143—Consent — Certificate of Master. *Murphy* v. *Corry*, 8 O. W. R. 68.

Sums paid witnesses for expense incurred qualifying them to give evidence — *Maps and plans—Manitoba Rules, 4, 963, 964—English Equity Rule—Manitoba King's Bench Act, s. 39 (s).*]—Action on a promissory note given as part payment for timber limit. Counterclaim for damages for misrepresentations. Judgment for plaintiff. Counterclaim dismissed. Plaintiff, on taxation, claimed to be paid expenses for experts examining timber limits. Rule 963 above includes "maps or plans," but appeal allowed from taxing officer who had taxed expenses of witness going to and returning from timber limits:—*Held*, that the successful party in an action cannot have taxed to him, as party and party costs, the expenses incurred in qualifying witnesses to give evidence at the trial.—Sub-section (*s*) of s. 39 of the King's

Bench Act, which provides that, when there is any conflict between the rules of equity and common law, the former shall prevail, refers to matters of substantive law, and not to matters of mere practice, and the equity rule formerly in force in England under which such expenses might have been allowed, is not in force in Man., for by Rule 4 all practice inconsistent with the Act was abolished, and, as to all matters not provided for, the practice is, as far as may be, to be regulated by analogy to the Act and Rules. *Barry* v. *Stuart*, 18 Man. L. R. 614; *Barry* v. *Sullivan*, 10 W. L. R. 640.

Supreme Court of Canada — *Staying taxation.*]—At the trial the plaintiffs' action was dismissed, but the full Court allowed an appeal by the plaintiffs. On appeal the Supreme Court of Canada allowed the appeal of a defendant, W., and ordered the plaintiffs to pay him the costs of that appeal and also all costs in the Court below, except in so far as he was to be regarded as the representative of the mortgagor in an action to realize a mortgage security, which costs were reserved till final decree. By the same judgment the action was dismissed as against W., except in so far as it was considered to be in the nature of a mortgage action for the purpose of enforcing a security:—*Held*, reversing an order staying the taxation of W.'s costs of appeal to the full Court until final decree, that there was no jurisdiction to make the order staying taxation. The application should have been made to a Judge of the Supreme Court of Canada instead. *Merchants Bank* v. *Houston*, 22 C. L. T. 339, 9 B. C. R. 158.

Tariff — *Petition — Bankruptcy and insolvency—Hotel license—Declaration.*]—The fees upon an uncontested petition for a declaration that the petitioner is the owner of a hotel license comprised in an assignment of property of a bankrupt, amount to the sum of $6, in conformity with clause 3 of Art. 76 of the tariff. *Monette* v. *Chartrand*, 8 Que. P. R. 416.

Tariff—*Provisions of—Circuit Court.*] — Where an action is dismissed upon motion for peremption, after the filing of a plea of the merits, Art. 8 of the tariff of fees of advocates in Circuit Court applies to the taxation of the costs, and not Art. 9. *Moody* v. *Lachance*, 6 Que. P. R. 99.

Taxation — Divided success — Apportionment — Scale of costs — Set-off — Rule 1132. *Murphy* v. *Murphy*, 11 O. W. R. 410, 727.

Taxation of defendants' costs against plaintiff — Defendants' solicitor paid by salary. *Liddiard* v. *Toronto Rw. Co.*, 9 O. W. R. 508.

Travelling expenses in appeal.]—In an appeal from a judgment rendered in the district of Iberville, an item of $14 claimed by the attorney of the successful party as his travelling expenses to Montreal, will not be included in the taxed bill of costs, as it appears that the said attorney also practices in Montreal. *Marchand & Forman* (1910), 16 R. de J. 475.

Trial of several actions together—*Effect on costs — Witness fees — Party in interest — Bailiff's fees—Search for absent defendant.*]—The fact that several actions are tried together does not prevent the advocates from receiving the fees on examination and hearing for each of the causes, but only reduces the costs of stenography and witness fees.—2. Witness fees may be allowed for the person declared elected by a judgment sustaining a *quo warranto*, if he is not otherwise a party to the proceeding. — 3. Where the defendant is designated in the writ of summons as absent, the bailiff will not be allowed on taxation for searches for this defendant. *Henry* v. *Sanderson*, 6 Que. P. R. 191.

Triple costs — *Justice of the peace — Appeal — Witness fees.*]—The triple costs which the unsuccessful plaintiff is condemned to pay in an action under Art. 2555, R. S. Q., do not include triple costs of review, nor triple witness fees.—2. The Judge has no discretion to exercise under this provision of the law, and when he adjudges that a penal action against a justice of the peace is not well founded, and dismisses it, he must allow triple costs to the defendant.—3. Where the judgment of first instance dismisses the action with costs, and the plaintiff appeals to the Court of Review, which simply affirms the judgment with costs, triple costs should not be taxed by the prothonotary.—4. But where the judgment of first instance dismisses the action without costs, and the defendant appeals from such judgment and claims triple costs, the Court of Review will grant them to him, and the prothonotary should tax them. *Luneau* v. *Janeau*, 3 Que. P. R. 505.

"Triple costs"— *Meaning of.*]—Where an action begun by virtue of Art. 2556, R. S. Q., has been dismissed with costs, the defendant recovers against the plaintiff triple costs, that is to say, three times the amount of the bill of costs taxed. *Luneau* v. *Luneau*, 2 Que. P. R. 454.

Withdrawal of action.] — When a cause inscribed for hearing on the merits is, during the sitting of the Court, withdrawn with costs, by the plaintiff, the defendant has a right to the same fees as if the action had been dismissed (item 9, tariff C. C.), but without fees of the hearing (items 10 and 11, C. C.), if no witness is present in Court, the defendant having been notified that the action would be thus withdrawn. *Gosselin* v. *Giroux*, 19 Que. S. C. 145, 3 Que. P. R. 370.

Witness fees—*Taxation of. See* WITNESS FEES.

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5. WITNESS FEES.

Advocate—*Experts—Parties.*] — An advocate duly admitted to practice, but whose name is not upon the roll, has the right, nevertheless, when he is called as a witness and his title of advocate given to him upon the subpœna, to be considered an advocate, and upon taxation a professional witness fee will be allowed.—2. If witnesses swear

that they had in a cause the quality of experts and such declaration is not contradicted, expert witness fees will be taxed.—3. The manager of a company, party to the cause, is to be regarded as an ordinary witness if called as such, and a witness fee will be allowed on taxation. *Canada Industrial Co.* v. *Kensington Land Co.*, 3 Que. P. R. 379.

Allowance by trial Judge—*Revision —Special expenses.*] — The Court has no power to revise the taxation of a witness made in open Court at the trial; counsel must then urge their objection, and, if required, seek the remedies available as to judgments of the Court.—2. If a party wishes to recover special expenses incurred in connection with a suit, taxation after judgment is not the proper proceeding therefor. *Buchan* v. *Montreal Bridge Co.*, 5 Que. P. R. 337.

Experts—*Damages.*]—The plaintiff cannot tax as part of the costs of an action the fees of experts called to prove his claim; witness fees in respect of such experts may be taxed, reserving to the plaintiff the right to claim as part of his damages the fees which he has paid. *Crawford* v. *City of Montreal*, 19 Que. S. C. 323.

False affidavit of increase—*Taxation — Setting aside certificate — Affidavit — Information and belief — Refusal to make affidavit — Compulsory examination.*]—The English practice requiring proof of actual payment of witness fees as a condition precedent to their being allowed on taxation of costs, should be followed. Where on an affidavit that witness fees have been actually paid they are allowed on taxation without objection on the ground of falsity of the affidavit, the proper mode of attacking the allowance is by an application by way of motion to the Court, and not by way of review of the taxation. On such an application, an affidavit of information and belief, stating the grounds thereof, is sufficient foundation for a motion to set aside the certificate of taxation and refer it back to the taxing officer to ascertain whether or not at the time of the taxation the witness fees in question had in fact been paid. There is authority under Rule 267 of the Judicature Ordinance (C. O. 1898, c. 21) to order a person who has refused to make an affidavit to attend for examination under oath. *Grindle* v. *Gillman*, 4 Terr L. R. 180.

Female witnesses.]—Witness fees may be taxed in respect of women who are witnesses, at the same rates as men. *Hersey* v. *Chapman*, 6 Que. P. R. 319.

Parties.]—A witness subpœnaed but not called by the party who has subpœnaed him cannot be allowed for on taxation against the opposite party without his consent.—2. A party called as a witness is regarded as an ordinary witness and has the right to tax a fee for himself. *Royal Electric Co.* v. *Dupéré*, 19 Que. S. C. 29.

Revision — *Commissioner — Foreign commission — Fee charged.*] — Taxation of witness fees will be revised on petition to a Judge, if good ground is shewn.—2. There is no tariff of charges for commissioners executing commissions outside of the province.—3. A fee of $50 for a commission in an action of the first class is not excessive. *Hersey* v. *Chapman*, 6 Que. P. R. 273.

Revision.]—Where it is admitted that a witness complained of the insufficiency of the amount of his taxation, and it is established that he was examined as an expert, he is entitled to have his taxation revised after judgment rendered, and this with costs against the party who subpœnaed him, although judgment was in favour of such party. *Guinea* v. *Campbell*, 22 Que. S. C. 262.

Revision — *Professional person.*]—The taxation of a witness by the prothonotary is subject to revision by the Judge in the same way as the taxation of costs.—2. A professional man (*e.g.*, a member of the Bar), not called as an expert witness, is only entitled to $1 a day and expenses. *Gardner* v. *Marchildon*, 5 Que. P. R. 322.

Taxation—*Adjournment.*] — Where one party asks the postponement of the trial of the cause because he is not ready to proceed, the opposite party has the right to tax witness fees for himself as an ordinary witness. *Gagnon* v. *Simard*, 2 Que. P. R. 365.

Taxation—*Briefing evidence — Witnesses not called—Con. Rule 1176.*]—In an action for libel the plaintiff, not having pleaded justification, before the trial gave a notice, under Rule 488, of his intention to adduce, in mitigation of damages, evidence of the circumstances under which the libel was published. To meet such evidence the plaintiff had brought a number of witnesses to the trial, but the evidence was not admitted, and the witnesses were not called in reply:—*Held*, that by implication from Con. Rule 1176, or by analogy to the practice therein prescribed, the costs of procuring the attendance of these witnesses and the briefing of their evidence, etc., should be allowed on taxation of the plaintiffs' costs against the defendant. *Ludlow* v. *Irwin*, 12 O. L. R. 43, 7 O. W. R. 720.

Taxation—*Expert witnesses—Contractors — Professional fees.*] — An expert witness is one who, having acquired a great skill in a science, art, or trade, is called to give to the Court the result of his experience for the purpose of the determination of the facts which are before the Court.—In this case the witnesses in respect of whom the taxation and payment of fees was contested, were contractors; they gave evidence as to the nature, quality, and amount of work done by the plaintiffs; and they were entitled each to $4 a day. *St. Jean* v. *Bergeron*, 10 Que. P. R. 304.

Taxation — *Foreign witness — Employee of party to action — Party as witness.* — $1,000, with $510 for expenses, allowed as witness fees for a Dominion land surveyor, a necessary foreign witness, who came from the Yukon to give evidence at the trial of this action at Sandwich, involving absence from home for 51 days.—The Court refused to allow a similar sum to another witness from the Yukon, who was in the employ of the party litigant calling him; only $630, in-

clusive of expenses, being allowed in his case. —When a party to an action is a necessary and material witness on his own behalf, he is entitled, if the taxing officer is satisfied of such fact, to tax for himself the same witness fees as if he were not a party, but the taxing officer can take no notice of abortive attempts to bring the case to trial. *Boyle* v. *Rothschild*, 16 O. L. R. 424, 11 O. W. R. 648.

Taxation — *Parties — Postponement of trial.*] — The law allows the parties to an action to be witnesses, but ordinarily their fees as witnesses cannot be taxed against the opposite party. However, if one of them obtains a postponement of the trial because he is not ready, the other may tax fees for himself as an ordinary witness. *Gagnon* v. *Simard*, 16 Que. S. C. 336.

Taxation — *Party discretion—Residence abroad.*] — The Court has a discretion to allow on taxation of costs witness fees for a party who testifies on his own behalf. However, if the witness lives outside of the province of Quebec, a larger sum will not be taxed for witness fees than a foreign commission to examine him would have cost. *Kent* v. *Young*, 8 Que. P. R. 235.

Taxation — *Party — Manager of company—Notice—Waiver.*]—Witness fees cannot be taxed in respect of the manager of a company party to the action unless he is subpœnaed as a witness by the adverse party. —2. When a witness has not been allowed for at the time of the trial, he should not be afterwards except upon notice to the party calling him and the adverse party, the latter being interested, especially in the case of a witness who comes from abroad, in keeping down the costs which are charged upon him by the result of the taxation.—3. A witness who is a party to the action is regarded as having renounced his fees if he does not demand them until after judgment rendered against the opposite party. *Vive Camera Co.* v. *Hogg*, 2 Que. P. R. 423.

Taxation — *Taxation equivalent to judgment for witness — Revision.*] — The taxation of a witness being equivalent to a judgment on which he is entitled to sue out execution, a Judge in Chambers has no authority to revise or reduce such taxation after final judgment. *Jouvin* v. *Bonhomme*, 8 Que. P. R. 349.

Taxation — Witnesses in attendance for several days waiting for trial — Witnesses in attendance but not called—Discretion of taxing officer—Appeal. *Campbell* v. *Menard*, 11 O. W. R. 424.

Taxation of — Counsel fees—Delay at trial. *John Abell Co.* v. *Long*, 1 W. L. R. 24.

Taxation of—*Effect of—Action for.*]—The taxation of a witness fee in a cause is equivalent to a judgment in favour of the witness, and such judgment may be enforced against the party who has subpœnaed the witness. A fresh action does not lie to recover the amount; the witness has simply to issue an execution. *Paradis* v. *Labbé*, 4 Que. P. R. 415.

Taxation of—*Execution for—Action by witness.*]—A witness, whose witness fees have been taxed in an action, has, according to Art. 336, C. P., the right to an execution for the amount taxed against the party who subpœnaed him, but he has not the right to bring an action for such amount. *Paradis* v. *Labbé*, 21 Que. S. C. 211.

Taxation of—*Motion to revise.*] — The taxation of a witness being, under Art. 336, C. C. P., equivalent to a judgment on which he is entitled to sue out execution, the Court has no authority to revise or reduce such taxation. *Lessard* v. *Meunier*, 20 Que. S. C. 337.

Taxation of—*Motion to revise—Time.*] —The taxation of the fees of a witness who is heard in open Court, takes place in the presence of the Court, and constitutes a judgment which may be executed in the manner and after the delay prescribed by the Court (Art. 335, 336, 370, C. C. P.) And even if such taxation were considered a judgment by the prothonotary, and not by the Court, in this case the application to revise was made too late, the time for objection being while the taxation was being effected. *Campeau* v. *Ottawa Fire Ins. Co.*, 20 Que. S. C. 239, 4 Que. P. R. 197.

Taxation of—Payment—Affidavit of increase — Travelling expenses — Railway passes. *Kerr* v. *Canadian Construction Co.*, 5 O. W. R. 168.

Taxation of — *Plaintiff coming from abroad to give evidence—Travelling expenses — Subsistence money — Plaintiff remaining after trial.*] — Appeal by defendants from taxation by the deputy clerk of the Crown at Hamilton of plaintiff's costs of the action, in respect of the allowance of plaintiff's travelling expenses from England to Toronto to attend the trial for the purpose of giving evidence on her own behalf and in returning to England, and of the further allowance to her of subsistence money at the rate of $1.25 a day, from 24th September, 1904, to 9th April, 1905, during which time the plaintiff remained in Ontario, so as to be here to give evidence at a new trial, should it be so ordered by the Divisional Court. Appeal allowed as to the travelling expenses of plaintiff in coming from England to give her evidence on her own behalf and of returning to England, and the *per diem* allowance for the time necessarily occupied in doing so, but not for subsistence money after the trial, as there would have been no difficulty in her returning to Toronto in time for the new trial if one had been ordered. *Tattersall* v. *People's Life Assurance Co.*, 6 O. W. R. 284, 10 O. L. R. 537. See also 5 O. W. R. 307, 6 O. W. R. 756, 9 O. L. R. 611.

Taxation of — *Revision.*]—The taxation of a witness constitutes a judgment in his favour which entitles him to execution against either of the parties; it is copied in the bill of costs, but not taxed with it, and cannot be revised on a motion for the taxation of the bill without notice to the witness. *Campeau* v. *Ottawa Fire Ins. Co.*, 4 Que. P. R. 197, followed. *Magann* v. *Grand Trunk Rw. Co.*, 4 Que. P. R. 348, 21 Que. S. C. 72.

Witness from abroad—*Conduct money—Travelling expenses—Alternative of examination of witness on commission.*]—*Held*, on appeal, that $93.10 allowed on party and party taxation for a witness's railway fare and expenses from Ontario to Saskatchewan properly allowed, rather than the taking of witness's evidence in Ontario by a commission. *Hewitt* v. *Boulet*, 10 W. L. R. 21.

COUNCIL.

See MUNICIPAL CORPORATIONS.

COUNCIL OF CONCILIATION.

Default in summoning — *Exception—Statute—Judicial notice.*] — An exception upon the ground of default to summon a council of conciliation, is not answered by the production of defences on the merits. The statute requiring such a council, being of public order, may be invoked at any time, and the Court is bound even to invoke it upon its own motion. *Fortin* v. *Veillancourt*, 6 Que. P. R. 66.

COUNCILLORS.

See ELECTIONS — MUNICIPAL CORPORATIONS.

COUNSEL.

See MINES AND MINERALS.

COUNSEL FEES.

See COSTS—INTEREST—SOLICITOR.

COUNTERCLAIM.

See PARTIES—PLEADING—SALE OF GOODS.

COUNTERFEIT.

See COPYRIGHT—CRIMINAL LAW.

COUNTY BOUNDARY LINE ROAD.

See WAY.

COUNTY COUNCILS.

See MUNICIPAL CORPORATIONS.

COUNTY COURT JUDGE.

Substitute — *Request* — *Jurisdiction.*]—A County Court Judge for one county was requested by a Supreme Court Judge, being the acting County Court Judge for another county, to sit in lieu of himself whenever absent:—*Held*, that the County Court Judge had no jurisdiction to sit by virtue of such request, and that s. 8 of the County Courts Act empowers only a County Court Judge to make such request. *Bell & Flett* v. *Mitchell—British Columbia Mills, Timber, and Trading Co.* v. *Mitchell*, 7 B. C. R. 100.

See ALIENS—APPEAL—ARREST — CERTIORARI—COLLECTION ACT—ELECTIONS — INTOXICATING LIQUORS—MUNICIPAL CORPORATIONS —WATER AND WATERCOURSES.

COURTS.

1. BRITISH COLUMBIA — COUNTY COURTS, 1092.
2. BRITISH COLUMBIA — SMALL DEBTS COURTS, 1095.
3. BRITISH COLUMBIA — SUPREME COURT, 1096.
4. MANITOBA—COUNTY COURTS, 1096.
5. MANITOBA—SURROGATE COURTS, 1098.
6. NEW BRUNSWICK—CITY COURT, 1099.
7. NEW BRUNSWICK — COUNTY COURTS, 1100.
8. NEW BRUNSWICK—MAGISTRATE'S COURT, 1101.
9. NEW BRUNSWICK—PROBATE COURT, 1101.
10. NEW BRUNSWICK—SMALL DEBTS COURT, 1102.
11. NORTH-WEST TERRITORIES — SUPREME COURT, 1102.
12. NOVA SCOTIA—COUNTY COURTS, 1103.
13. NOVA SCOTIA—DIVORCE COURT, 1104.
14. NOVA SCOTIA—JUSTICES' COURTS, 1104.
15. NOVA SCOTIA — MAGISTRATE'S COURT, 1105.
16. NOVA SCOTIA—PROBATE COURT, 1105.
17. ONTARIO — COUNTY AND DISTRICT COURTS, 1106.
18. ONTARIO—DIVISION COURTS, 1108.
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20. ONTARIO—HIGH COURT OF JUSTICE, 1124.
21. ONTARIO—SURROGATE COURTS, 1124.
22. PRINCE EDWARD ISLAND COURTS, 1126.
23. QUEBEC—CIRCUIT COURTS, 1127.
24. QUEBEC—COURT OF KING'S BENCH, 1130.
25. QUEBEC—INFERIOR COURTS, 1130.
26. QUEBEC—SUPERIOR COURT, 1132.
27. SASKATCHEWAN—DISTRICT COURTS, 1146.
28. SASKATCHEWAN—COUNTY COURT, 1147.
29. MISCELLANEOUS, 1147.

1. BRITISH COLUMBIA—COUNTY COURTS.

Action — *Transfer to Supreme Court — Extension of claim.*]—The plaintiff sued in a County Court for $950, and the action was transferred to the Supreme Court under s. 69 of the County Courts Act, the order providing that a statement of claim should be delivered, etc. The statement of claim

when delivered claimed $3,000.—*Held*, that when an action has been so transferred, the plaintiff can extend his claim beyond the sum he originally claimed in the County Court. *Thurston* v. *Tattersall*, 20 C. L. T. 251, 7 B. C. L. R. 160.

Action transferred to Supreme Court —*Order—Time of effect—Notice of trial.*]—An order transferring an action from a County Court to the Supreme Court takes effect as soon as pronounced; and a notice of trial in the Supreme Court, served after the pronouncing of a transferring order but before entry, is regular. *Parrot* v. *Cheales*, 8 W. L. R. 404, 13 B. C. R. 445.

Attachment of debts—*Summons.*]—A garnishee summons in a County Court may be issued based on a default summons as well as on an ordinary summons. *Jowett* v. *Watts*, 24 C. L. T. 36, 10 B. C. R. 172.

County Court Judge — Jurisdiction — Appeal from decision of Court of Revision—Municipal Clauses Act, s. 137 — "County Court Judge having jurisdiction within the municipality"—Judge of another Court acting in absence and at request of regular Judge—Assumption of jurisdiction—Remedy against — Appeal — Prohibition — Costs. *Re Slocan & Can. Pac. Rw. Co.*, 9 W. L. R. 583.

Equitable jurisdiction — *Action for rent—Void lease.*]—It is part of the equitable jurisdiction of the Court to enforce payment of rent when the lease is void, and when the value of such lease, if valid, would exceed $2,500, a County Court has no jurisdiction. *B. C. Board of Trade Building Assoc.* v. *Tupper*, 8 B. C. R. 291.

Jurisdiction—*Discovery — Oral examination.*]—A County Court Judge has no jurisdiction to grant an order for an oral examination for discovery except in the case of a failure to answer interrogatories. *Roberts* v. *Fraser*, 22 C. L. T. 438, 9 B. C. R. 296.

Jurisdiction — *Prohibition — Appeal—Judge acting outside his county — Persona designata—Municipal Clauses Act, s. 137.*]—The Judge of the County Court mentioned in s. 137 of the Municipal Clauses Act is *persona designata*, and the authority conferred upon him by said section may not be exercised by the Judge of another County Court acting on his request and in his absence.—The remedy of an aggrieved party in such a case is by application for prohibition, and not by way of appeal. *Slocan* v. *Can. Pac. Rw. Co.*, 14 B. C. R. 112, 9 W. L. R. 583.

Practice — *Amendment of pleadings — Counterclaim—Withdrawal or abandonment to bring action in Supreme Court—Discontinuance — Discretion.*]—In a County Court action to recover a balance of moneys due under a mining agreement, the defendant filed a dispute note containing a counterclaim setting up breaches of the covenants and conditions of the agreement, and asking for damages. Subsequently the defendant intimated his desire to amend the dispute note and counterclaim, as he had drawn them hurriedly in order to file them for the next sittings of the Court. The plaintiff consented, and stated that, as the dispute note and counterclaim raised new issues which he could not plead as a counterclaim, he wished to amend. The defendant agreed, on condition that he could file an amended defence and counterclaim, but subsequently, on the same day, further intimated that the action ought to be transferred to the Supreme Court, and asked the plaintiff to consent to such transfer. The plaintiff declined, and the defendant forwarded the dispute note, omitting the counterclaim, for which at the same time he issued a writ in the Supreme Court, and sent to the plaintiff a discontinuance of the counterclaim in the County Court. The plaintiff replied that it was on account of the counterclaim that he had amended the plaint and added to the claim a claim for damages. At the trial in the County Court the defendant moved for leave to withdraw the counterclaim, stated he was not prepared to offer any evidence in support of it, and produced the correspondence. The motion was dismissed:—*Held*, that the trial Judge was wrong in that: (1) there was no counterclaim before him to deal with; (2) that the arrangement arrived at was the ordinary consent to amend pleadings as the solicitor may be advised, and that the essence of such an arrangement is that the parties are to begin *de novo*; (3) that the defendant had the right, if he choose, to discontinue the counterclaim and select his own forum; (4) that the proper course, in the circumstances, was that each party should withdraw the amended pleadings and that each should be left to his rights as they existed before the pleadings were delivered.—*Per* Martin, J., (dissenting):—Since the counterclaim was originally properly on the files, it was incumbent upon the defendant to shew that it had been got rid of either by the method provided by the Rules or by consent. *Halpin* v. *Fowler* (No. 1), 5 W. L. R. 222, 12 B. C. R. 441.

Practice—*Setting aside judgment—New trial.*]—A County Court Judge has no power to grant a new trial merely because he is dissatisfied with the verdict; he is to be guided in granting a new trial by the same principles as the full Court:—*Held*, on the facts, that there was evidence to support the verdict, and a new trial should not have been granted. *Hutchins* v. *B. C. Copper Co.*, 23 C. L. T. 340, 9 B. C. R. 535.

Right of Crown to choose forum.]—It is a prerogative right of the Crown to bring a suit in a County Court, even though as between subject and subject such Court would not be open by reason of the defendant not residing or the cause of action not residing within the territory of such Court. *Rex* v. *Campbell*, 8 B. C. R. 208.

Stay of proceedings—*Mining jurisdiction—Prohibition.*] — On an application for prohibition:—*Held*, allowing the application, that s. 34 of the County Courts Act, which provides, *inter alia*, that if in any action of tort the plaintiff shall claim over $250, and the defendant objects to the action being tried in the County Court, and gives certain security, the proceedings in the County Court shall be stayed, applies to proceedings in the

County Court, under the mining jurisdiction of that Court. *Muirhead* v. *Spruce Creek Mining Co.*, 24 C. L. T. 414, 11 B. C. R. 1.

Territorial jurisdiction—*Judgment by default — Application to set aside and for leave to defend—Waiver.*]—In a plaint in the County Court of Yale, it appeared that the defendants resided in Vancouver, outside the county of Yale, and the plaintiff's claim was described as being "against the defendants as makers of a promissory note for $179.12 dated 12th March, 1902, payable two months after date." Judgment for the plaintiff was signed in default of a dispute note, but afterwards the defendants filed a dispute note (what it contained was not shewn), and applied to the Judge to have the judgment set aside and for leave to defend on the merits. On the hearing of the application it appeared that the Court had jurisdiction, as the note sued on was produced on affidavit, and it shewed on its face that it was made and payable within the county of Yale:—*Held*, that County Court process should shew jurisdiction on its face, but the defendants, by filing the dispute note, and applying for leave to defend on the merits, had waived their right to object to the jurisdiction. *Beaton* v. *Sjolander*, 23 C. L. T. 161, 9 B. C. R. 439.

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2. British Columbia — Small Debts Courts.

Jurisdiction — *Judgment debtor—Committal — Notice of motion — Solicitor — Waiver.*]—A notice by a judgment creditor's solicitor of an application to a magistrate of a Small Debts Court for an order to commit a judgment debtor because of failure to pay instalments ordered to be paid on the return of a judgment summons, is a nullity. —A judgment debtor by appearing pursuant to such notice does not waive his right to object at any stage. *Re Waxstock*, 9 B. C. R. 433.

Jurisdiction—*Order for committal—Action for damages for breach of contract — Prohibition—Objection not taken at trial—Appeal launched but not perfected—Want of jurisdiction not appearing on face of proceedings—Manifestation by affidavit.*]—Action for damages for breach of an agreement brought in above Court. Judgment for plaintiff. The defendant launched an appeal but abandoned it. Want of jurisdiction being manifest prohibition must go prohibiting the enforcement of a committal order. *Re Simpson* v. *Widrig* (1910), 12 W. L. R. 643, 15 B. C. R. 5.

Jurisdiction of — *Debt — Mechanics' lien.*]—Appeal to the County Court of Atlin from a decision of a magistrate in a Small Debts Court in favour of the plaintiff in an action to enforce a mechanics' lien, under ss. 26 and 27 of the Mechanics' Lien Act.—*Held*, that an action to enforce a mechanics' lien is not one of debt within the meaning of s. 2 of the Small Debts Act. Appeal allowed. *Dillon* v. *Sinclair*, 20 C. L. T. 428, 7 B. C. L. R. 328.

3. British Columbia—Supreme Court.

Full Court—*Motion for judgment—Reference by trial Judge.*]—At the conclusion of the trial of an action for damages for personal injuries, the trial Judge did not see fit to enter any judgment on the findings of the jury, but left the parties to move the full Court as they might be advised. Both parties accordingly moved the full Court for judgment, the arguments being confined to the question of the liability of the defendant company:—*Held*, *per* Walkem, Drake, and Irving, JJ., that the full Court is an appellate Court and has no jurisdiction to hear a motion for judgment on the findings of a jury referred to it by a trial Judge. *Per* Martin, J. (dissenting), that, as the question of jurisdiction was not raised by counsel nor by the Court, the case should be dealt with on its merits, and that judgment should be entered in favour of the defendant company. *McKelvey* v. *Le Roi Mining Co.*, 22 C. L. T. 42, 8 B. C. R. 268.

Full Court—*Place of sitting.*] — *Held*, Drake, J., dissenting, that special sittings of the full Court may be held either at Victoria or Vancouver to hear appeals in actions, irrespectively of where the writs of summons were issued. *Yale Hotel Co.* v. *Vancouver, Victoria, & Eastern Rw. & Navigation Co., Grand Forks & Kettle River Rw. Co.* v. *Vancouver, Victoria & Eastern Rw. & Navigation Co.*, 9 B. C. R. 66.

Rule nisi to quash conviction — *Forum.*]—The full Court will not hear a motion for a rule *nisi* to quash a conviction: the motion should be made to a single Judge. *Rex* v. *Tanghe*, 24 C. L. T. 198, 10 B. C. R. 297.

Supreme Court of British Columbia has jurisdiction to grant a decree of divorce between persons domiciled in that province, and such jurisdiction may be exercised by a single Judge of that Court. *Sharpe* v. *Sharpe* (1877), 1 B. C. R. 25, and *Sheppard* v. *Sheppard* (1908), 13 B. C. R. 486, approved. Judgment of Clement, J., reversed. *Watts* v. *Watts*, C. R., [1908] A. C. 511.

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4. Manitoba—County Courts.

Dispute note — *Amendment — Statute of Limitations—New trial—Costs.*]—The defendant, having instructed his solicitor to prepare and file a dispute note in a County Court action, setting up the Statute of Limitations and the plea of never indebted, which the solicitor neglected to file in proper time, himself prepared and filed within the time allowed another dispute note, setting up simply the plea of never indebted. At the trial the County Court Judge struck out the dispute note filed too late, refused to allow the other one to be amended, and entered a verdict for the plaintiff:—*Held*, that the dispute note filed too late was irregular, and was properly struck out, but that an amendment of the other dispute note, raising the Statute of Limitations, and a new trial, should be allowed, in the circumstances, upon the defendant paying all costs to date in the

Court below, except those of issuing and serving the writ, and the costs of the appeal, within 10 days after taxation; otherwise that the appeal should be dismissed with costs and the judgment allowed to stand. *Lachapelle* v. *Lemay*, 6 W. L. R. 718, 17 Man. L. R. 161.

Jurisdiction—*County Courts Act, R. S. M. 1902 c. 38, s. 73—Conferring jurisdiction by agreement of parties.*]—It is not competent to the parties to a contract to agree to confer jurisdiction upon the County Court of any judicial division other than the one in which, under s. 73 of the County Courts Act, R. S. M. 1902 c. 38, any action arising out of a breach of the contract may be brought, and, if such an action is brought in any other County Court, the Judge should refuse to try it on the ground of want of jurisdiction.—*Farquharson* v. *Morgan*, [1894] 1 Q. B. 552, followed.—This decision applies only to Courts created by statute and not to Courts of original jurisdiction or to the rights of parties to agree as to the jurisdiction of such last named Courts. *Manitoba Windmill Co.* v. *Vigier*, 18 Man. L. R. 427, 10 W. L. R. 350.

Jurisdiction—*County Courts Act, ss. 60 (d), 61 — Injunction—Attachment of debts — Fraudulent conveyance — Trustee.*] — Under the County Courts Act, R. S. M. 1902, c. 38, a County Court has no jurisdiction to make an order in garnishee proceedings attaching and prohibiting the payment over of moneys owing or accruing due from the garnishee to a person other than the primary debtor, upon the allegation that such moneys would, when paid over, be held by such other person in trust for the debtor in consequence of some transaction alleged to be fraudulent and void as against the creditors of the debtor, or to make an order for the trial of an issue to determine whether such moneys were an asset of the debtor or not. *Donohue* v. *Hull*, 24 S. C. R. 683, followed. *Adams* v. *Montgomery*, 18 Man. L. R. 22.

Jurisdiction—*Title to land—Gravel on highway—Municipal corporations — Costs.*] —1. A claim of a municipality for damages for the taking by a railway company of sand and gravel from alleged highways and allowances for roads in the municipality, not in its actual possession or occupation, if disputed, raises a question of the title to a corporeal hereditament within the meaning of s. 59 of the County Courts Act, R. S. M. c. 33, and the jurisdiction of the County Court to adjudicate on such claim is ousted when such a question of title is *bona fide* raised, notwithstanding the provisions of ss. 615 and 644 of the Municipal Act, R. S. M. c. 100, giving the right of possession of such roads to the municipality and power to pass by-laws for preserving or selling timber, trees, stone, or gravel on any of such roads.—2. Under the enactments substituted for s. 315 of the County Courts Act by 59 V. c. 3, s. 2, an appeal to this Court lies from the decision of a County Court Judge on the question of jurisdiction as well as from all other decisions in actions in which the amount in question is $20 or more. *Fair* v. *McCrow*, 31 U. C. R. 599, and *Portman* v. *Patterson*, 21 U. C. R. 237, followed.—3. Although the action in the County Court failed for want of jurisdiction, the plaintiff should be ordered to pay the costs of it under s. 1 of c. 5 of 1 Edw. VII. and also the costs of the appeal. *Louise* v. *Can. Pac. Ry. Co.*, 22 C. L. T. 124, 14 Man. L. R. 124.

Promissory notes — *Action on—Failure of plaintiffs to prove presentment—Non-presentment not alleged in dispute note.*]—Although a promissory note is payable at a particular place, it is not necessary, in an action upon it in a County Court, to allege presentment at that place in the particulars of claim, or to prove presentment at the trial, unless the defendant has expressly set up non-presentment in his dispute note. *Teague* v. *Scoular*, 8 W. L. R. 199, 17 Man. L. R. 593.

Territorial jurisdiction — *Judicial districts and divisions—County Courts Act —Order of County Court Judge quashing license — Situation of licensed premises — Liquor License Act (Man.), s. 19—Certiorari.*]—An hotel license was sought for premises in township 12 in Rapid City County Court Judicial Division. This township is not in the Northern Judicial District:—*Held*, that the Judge of that district has jurisdiction only in that part of the division which lies in his district. He therefore had no jurisdiction to quash above license. *Re Somerville* (1910), 12 W. L. R. 633.

Transfer of action to King's Bench —*Jurisdiction—Order of County Court Judge —Refusal of previous application by King's Bench Judge — Counterclaim—Amount involved—King's Bench Act, s. 90.*]—The jurisdiction to transfer a cause from a County Court to the Court of King's Bench arises only where the defence or counterclaim of the defendant involves matters beyond the jurisdiction of the County Court: King's Bench Act, s. 90. *Doll* v. *Howard*, 11 Man. L. R. 21, distinguished. A Judge of the Court of King's Bench having refused to make an order of transfer, a County Court Judge, the cause being in essentially the same condition, should not entertain an application for the same purpose. An action for $227.45 money had and received, with a counterclaim for $485, is within the jurisdiction of the County Court. Order of Locke, Co. C.J., reversed. *Emerson* v. *Forrester* (1910), 13 W. L. R. 280.

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5. MANITOBA—SURROGATE COURTS.

Removal of cause into Court of King's Bench—*Notice to parties concerned — Appeal from order removing cause.*] — There is no jurisdiction in a Judge of the Court of King's Bench to order the removal, under s. 63 of the Surrogate Courts Act, R. S. M. 1902 c. 41, of a contested petition from the Surrogate Court to the Court of King's Bench, unless reasonable notice of the application for removal has been given to the other parties concerned, and a son of the deceased, and also of the administratrix of the estate of the deceased, to whom letters had been granted as his widow, is a party concerned in a petition by the sister of the de-

ceased to revoke the letters of administration, on the alleged ground that the administratrix was not the lawful widow of the deceased.—2. Under s. 58 of the King's Bench Act, an appeal lies to the Court *en banc* from an order of a Judge of the Court of King's Bench for the removal of a contentious matter into that Court, under the Surrogate Courts Act. *Doll* v. *Howard*, 11 Man. L. R. 21, distinguished. *Re B. Estate*, 3 W. L. R. 225, 16 Man. L. R. 269.

See EXECUTORS AND ADMINISTRATORS.

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6. NEW BRUNSWICK—CITY COURT.

Application to review judgment—*Time for applying—Affidavit—Notary public—Intituling — Laches — Jurisdiction.*]—An affidavit taken out of the province by a notary public may be read on an application for review under C. S. N. B. 1903 c. 122, s. 6.—Affidavits on review should not be intituled in any Court, but if intituled in a Court, the intituling may be treated as surplusage.—The order for hearing of a review need not be made within thirty days from the date of the certificate of the return. It is sufficient if the application for the order is made within thirty days from the receipt by the applicant of the copy of the proceedings.—The thirty days allowed by s. 6, c. 122, to apply for review of a judgment in a civil cause tried in any inferior Court, after obtaining a copy and minute of the proceedings, does not apply only to a copy obtained under an order of a Judge of the Supreme or County Court, but to any copy applied for and furnished by the trial justice under the section. *Lunt* v. *Kennedy*, 2 E. L. R. 295, 37 N. B. R. 639.

Fees — *Control over, by city council — Commissioner—Servant of Crown.*]—G., having applied to the commissioner of the City Court of Moncton for a summons, was refused unless he first paid the fee for the issuing thereof. Relying upon a recommendation in a report of the finance committee of the city council of the said city, which was received and adopted by the council, G. then moved in Court for a rule *nisi* calling upon the commissioner to shew cause why a *mandamus* should not issue to compel him to issue the summons without the fee being paid or tendered in advance. The recommendation was as follows: "Your committee would recommend that hereafter any and all claims within the jurisdiction of said Court may be sued and judgment therein taken without the payment of costs in advance, but that the same be retained out of the first moneys collected on the judgment:"—*Held*, that, as the commissioner was an appointee and servant of the Crown, and in no way responsible to the city or under its direction or control, it could not by resolution create any duty or obligation upon the commissioner to issue the summons without the fee therefor being prepaid.—2. That the report and its adoption amounted to nothing more than a recommendation to the commissioner, which he was at liberty to act upon or not according to his discretion. *Ex p. Grant*, 35 N. B. R. 45.

Judgment of—*Estoppel by—Review by County Court—Action against bail — Jurisdiction of Supreme Court—Relief of bail.*]—The Supreme Court has jurisdiction to try an action against bail given in a cause originating in an inferior Court, and has power to give such relief to the bail as justice may require. The former practice of the King's Bench in England of refusing to try such actions and of compelling them to be brought in the inferior Court has never been followed in this province.—The judgment of an inferior Court is not conclusive as between the parties and their privies upon the question of jurisdiction; therefore, where an action was brought in the Supreme Court against bail given in a cause, which had been commenced and tried in the City Court of Saint John, and the defendant by plea denied the jurisdiction of that Court, and at the trial gave evidence in support of his plea:—*Held*, that the defendant was not estopped by the judgment of the City Court from offering such proof, and that, as the plaintiff had chosen to rely entirely upon the estoppel, he must fail. The fact that the judgment relied upon by way of estoppel had been affirmed upon review by a County Court Judge made no difference. *Jack* v. *Bonnell*, 35 N. B. R. 323.

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7. NEW BRUNSWICK—COUNTY COURTS.

County Court Judge—*Order on Review from City Court—Certiorari.*]—If an order made by a County Court Judge on Review from a City Court is manifestly wrong, it will be set aside on *certiorari*, notwithstanding that the Judge had jurisdiction. *Rex* v. *Forbes, Ex p. Bramhall*, 36 N. B. R. 333.

Jurisdiction—*Excessive demand—Deduction.*]—The plaintiff in an action in a County Court, where the particulars shew a demand beyond the jurisdiction, may bring the amount within the jurisdiction by proof of payments. *Patterson* v. *Larsen*, 37 N. B. R. 28.

Jury—*Questions — Verdict — Supreme Court Act.*]—Section 158 of 60 V. c. 24 (New Brunswick Supreme Court Act), providing that the Judge, instead of directing the jury to give either a general or special verdict, may submit questions of fact and enter a verdict on the questions answered, applies to the County Courts. *Read* v. *McGivney*, 36 N. B. R. 513.

Jury—*Questions left—Verdict — Duty of Judge.*]—Section 158 of the Supreme Court Act, N. B., 60 V. c. 24, authorising the Judge on the trial of a cause to direct the jury to answer questions submitted, and enter a verdict on the answers given, applies to County Courts. When this course is adopted, it is the Judge's duty to enter the verdict for the party in whose favour the questions are answered. *Steeves* v. *Dryden*, 35 N. B. R. 555.

Motion to set aside verdict—*Grounds—Appeal—Nonsuit.*]—On a motion against a verdict in a County Court, it is not necessary to serve a statement of the grounds of the motion and the authorities relied upon.—The Supreme Court, on appeal, may order a

nonsuit to be entered, though no leave has been reserved at the trial. *Miller* v. *Gunter*, 36 N. B. R. 330.

New trial—*Damages—Consent to reduction.*]—The power of ordering a new trial, unless the plaintiff consents to a reduction of the damages, is vested in the Judges of the County Courts under s. 68 of the County Courts Act. *Vanbuskirk* v. *Vanwart*, 36 N. B. R. 422.

Review from Justice's Court—*Territorial jurisdiction.*]—A Judge of a County Court has jurisdiction to hear a case on review from a Justice's Court though the case was tried in a county for which he is not the County Court Judge. *Rex* v. *Wilson, Ex p. Irving*, 35 N. B. R. 461, explained and commented upon. *Ex p. Graves*, 35 N. B. R. 587.

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8. New Brunswick—Magistrate's Court.

Application to review judgment—*Certiorari—Rule nisi—Time — Delay—Affidavit — Jurisdiction — Order for review.*]—The Court refused to discharge a rule *nisi* to quash an order for review removed by *certiorari* granted in term under the rules of Michaelmas term, 1899, on objection that it did not direct within what time and upon whom the rule and affidavits upon which it was granted should be served; McLeod, J., dissenting:—If an application for review of a judgment in a civil cause tried in an inferior Court be made more than thirty days after judgment, the reviewing Judge may, in the exercise of his discretion, require an explanation of the delay, but such explanation is not essential to jurisdiction to hear the merits; and affidavits explaining the delay may be received at any time during the hearing: *per* Tuck, C.J., Hanington, Landry, and McLeod, JJ.; Gregory, J., dissenting.—*Per* Gregory, J., that the reviewing Judge has no jurisdiction to grant the order for hearing unless the delay is explained at the time the application for the order is made, and affidavits can not be received at a later stage to support jurisdiction.—An order for review setting aside a verdict for the plaintiff and directing that unless the plaintiff bring the cause down to another trial within two months, the verdict entered for the plaintiff be reversed, is a proper order and within the power of the reviewing Judge under the statute: *per* Tuck, C.J., Hanington, Landry, and McLeod, JJ.; Gregory, J., dissenting. *Rex* v. *Wilson, Ex p. Burns*, 2 E. L. R. 442, 37 N. B. R. 650.

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9. New Brunswick—Probate Court.

Powers of Judge — *Order for sale of land to pay debts—Administration of estate—Accounts — Deficiency of personalty—Ascertainment—Appeal—Status of appellant—Order extending time.*]—A Judge of Probate is not warranted in granting a license to sell real estate to pay debts, unless he is judicially satisfied by proof, and finds the amount of the personalty and the amount of the debts, and thus ascertains what the deficiency is. A bald adjudication that there is a deficiency based on a list of attested accounts, and the evidence of the petitioner that they were filed against the estate, is not sufficient. A party aggrieved by a decree of a Judge of Probate may appeal therefrom, although he did not appear in the Court below. An order extending the time for appeal made *ex parte* is not a nullity, and, if not set aside, the Court will hear an appeal taken under it. *Re Welch*, 36 N. B. R. 628.

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10. New Brunswick—Small Debts Court.

Review — *Affidavit — Agent of party—Amount involved — Forum for review—Finality of order.*]—The affidavit that substantial justice has not been done, made on review proceedings from a judgment of the Small Debts Court of Fredericton, may be made by the attorney or agent of the party reviewing under 45 V. c. 15, s. 1. There is no authority under C. S. N. B. c. 60, or amending Acts, to review the finding of a justice or the jury on a question of fact where the amount involved in the suit does not exceed $40 in debt and $8 in tort. The Judges of the Supreme and County Courts are of co-ordinate jurisdiction in matters of review under c. 60, and orders made within their authority are final. *Rex* v. *Wilson, Ex p. McGoldrick*, 36 N. B. R. 339.

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11. North-West Territories — Supreme Court.

Admiralty jurisdiction — *Maritime lien.*] — The Supreme Court of the North-West Territories has concurrent jurisdiction with the Exchequer Court of Canada in Admiralty matters, inasmuch as the Court of Chancery in England had on the 15th July, 1870, concurrent jurisdiction with the Court of Admiralty. *Kelly* v. *Alaska Mining & Trading Co.*, 4 Terr. L. R. 18.

Certiorari—*Where returnable—Motion to quash conviction—Forum.*]—*Held*, following *Regina* v. *Beemer*, 15 O. R. 266, that a single Judge has no jurisdiction to hear and determine a motion to quash a conviction upon a writ of *certiorari;* and that such writs must be issued from the office of the Registrar and be made returnable before the Court *en banc*. *Regina* v. *Smith*, 1 Terr. L. R. 189. But see now the new section substituted for s. 52 of the N.-W. T. Act, by 54 & 55 V. c. 22, s. 7.

Jurisdiction—*Stated case — Lieutenant-Governor.*]—Case stated by the town corporation and the Attorney-General for the North-West Territories for the opinion of the Court, pursuant to s. 250 of the Judicature Ordinance, respecting a matter in difference between the corporation and the Lieutenant-Governor in Council of the North-West Territories as to by-law No. 183 of the town.—*Quære*, whether the Court had power to entertain the stated case, the Lieutenant-Governor in Council not being a proper party to a cause or matter, and there

being no legislation in the Territories casting upon the Court the duty of advising the Executive. *Re Edmonton*, 21 C. L. T. 100.

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12. Nova Scotia—County Courts.

Court of record.]—County Court Judge's Criminal Court is a Court of Record for trial of certain criminal offences, and the Judge thereof for all purposes and proceedings connected therewith and relating thereto, has all the powers of a Court of Record, and a prisoner who elects to be tried before such Court submits himself not to the particular Judge but to the County Court Judge's Criminal Court, which Court does not lose jurisdiction over him until he is tried for the offence for which he is committed.—The mere fact that the Judge of the Court is not present on the day fixed for the trial cannot possibly affect the jurisdiction of the Court, which arises and continues by reason of the prisoner's election to be there tried.—The fixing of a particular day for the trial has nothing to do with giving jurisdiction; it is simply a matter of procedure of a directory character. The fact that the Judge has named a day for the trial, and does not then try the prisoner as intended, in no way prevents or limits his power to fix another day on which the trial takes place. The B. N. A. Act, s. 92, s.-s. 14; R. S. N. S., c. 157, s. 2, Crim. Code 1892, ss. 753-781; R. S. C., c. 146, Part XVIII., ss. 824, 827. *R.* v. *Stewart*, 43 N. S. R. 353, 6 E. L. R. 564, 15 Can. Cr. Cas. 331.

Judge—*Substitute — Authority.*]—Johnston, Co.J., of District No. 1, being unable through illness to attend to his judicial duties, designated Savary, Co.J., of another district, to act in his place and stead, under s. 12 of c. 9 of the Nova Scotia statutes of 1889, which empowers a Judge, when unable to act by reason of illness, etc., to call in and designate any other County Judge, and provides that "such Judge, so called in and designated as aforesaid, shall have the same power as the regular Judge of such Court would otherwise have had." Savary, Co.J., heard the application in this case, and reserved his decision. Johnston, Co.J., died, and after his death Savary, Co.J., gave judgment granting the application:—*Held*, that he had power to do so. *In re Gough*, 21 C. L. T. 92.

Jurisdiction — *Seaman's wages—Statutory remedy.*]—Section 52 of c. 74, R. S. C., which enacts that any seaman may sue in a County Court for wages not exceeding $200, does not impair the seaman's common law right of recovery, and does not, by implication, take away the jurisdiction given by the County Court Act.—The statutory remedy is cumulative, not exclusive. *Beattie* v. *Johannsen*, 28 N. B. R. 26, distinguished. *Eisenhauer* v. *Ernst*, 40 N. S. R. 420.

Transfer of action to Supreme Court —*Affidavit of merits—Insufficiency.*] — The plaintiff, upon affidavit of his own, made application for the transfer of the cause from a County Court to the Supreme Court. As to the merits he simply stated that he had a good cause of action on the merits, without setting forth the facts upon which he based his action:—*Held*, that the requirements of s. 43 of the County Courts Act, R. S. N. S. c. 156, were not complied with, and the application must be dismissed with costs. *Sproule* v. *Ross*, 21 C. L. T. 395.

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13. Nova Scotia—Divorce Court.

Jurisdiction — *Restitution of conjugal rights—Alimony—Court of Appeal—Quorum —Amendment — Powers of provincial legislature—Statute.*] — The Court for Divorce and Matrimonial Causes in Nova Scotia has jurisdiction in respect to a suit for the restitution of conjugal rights, and can order alimony for the wife *pendente lite*.—An amendment altering the quorum of the Court of Appeal, making it unnecessary for the Judge Ordinary to sit as a member, is within the jurisdiction of the provincial legislature.—Such intention is clear from reading the Act, as originally printed (Acts of 1866, c. 13, s. 6), and as reprinted in the appendix to the Revised Statutes (4th series), c. 126, appendix A. *King* v. *King*, 37 N. S. R. 204.

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14. Nova Scotia—Justices' Courts.

Summons for service in another county—*Travelling expenses of defendant—Certificate of justice—Certiorari.*]—A writ of summons issued by a justice of the peace in one county for service in another contained a certificate of the justice "that the money is deposited with me to pay travelling fees of the defendant to the place of trial." On application to a Judge for a writ of *certiorari* to remove a judgment entered against the defendant in default of appearance, it was held that if this was not a substantial compliance with the statute, the defendant should not have ignored the summons, and the application must be dismissed.—On appeal the Court was equally divided, and the appeal was dismissed without costs. *Re Cameron*, 2 E. L. R. 365, 41 N. S. R. 457.

Territorial jurisdiction — *Appeal to County Court—Dismissal of action—Remedy —Certiorari.*]—In an action to recover a small sum in a magistrate's Court, the defendant appeared and contended that the justice had no jurisdiction, inasmuch as the cause of action arose and the defendant resided and was served in another county than that in which the justice was sitting. Judgment having been given in the plaintiff's favour, the defendant appealed to a County Court, the Judge of which dismissed the appeal, on the ground that, as the justice had no jurisdiction to try the case, the Judge of the County Court had none to hear the appeal, and that the proper remedy was by *certiorari*:—*Held*, that, as the Judge of the County Court had jurisdiction to take evidence to establish the question of jurisdiction, he had jurisdiction to determine that the action ought to have been dismissed, and should have given judgment accordingly. *Slipp* v. *Morris*, 2 E. L. R. 218, 41 N. S. R. 87.

15. Nova Scotia—Magistrate's Court.

Jurisdiction — Action on promissory note—R. S. N. S. c. 160, ss. 1, 3—Principal and interest together amounting to more than maximum within magistrate's jurisdiction—Right of plaintiff to reduce amount of claim to sum within jurisdiction — Certiorari — Practice on appeal—Set-off—Costs. *Hall* v. *Veinot*, 4 E. L. R. 374.

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16. Nova Scotia—Probate Court.

Jurisdiction — *Gift — Determination as to—Parties — Evidence—Administration.*]— In settling an estate in the Probate Court the Judge, at the instance of next of kin of deceased, undertook to dispose of the sum of $1,000 which the administrator—a brother of deceased—contended has been given him by deceased, two years before her death, as a gift for his two sons. Evidence was tendered by the administrator to shew that the money had been invested for the two boys, by paying off a mortgage, and that the fact of the investment had been communicated to the donees:—*Held*, that the Judge had power to hear and consider evidence at any time before making his final decree, and that he was wrong in refusing to receive the evidence tendered. *Per* Townshend and Ritchie, JJ., that the Judge went beyond his jurisdiction in dealing with and deciding the question of gift or no gift, where the rights of third parties had intervened who were not before him, and to compel the appearance of whom he had no process; and his decree must be set aside. *In re Ralston Estate*, 2 Thom. 195, and *In re McNutt Estate*, 24 N. S. R. 264, distinguished. *Per* Graham, E.J., and Weatherbe, J., that the administrator's two sons being necessary parties to any litigation to determine whether the amount in controversy belonged to them or not, and the Court of Probate having no jurisdiction over them under the statute relating to that Court, the appeal should be allowed with costs, and the consideration of the accounts adjourned until the ownership of the money was decided in a proper action. *Re Wheelock*, 33 N. S. R. 357.

Jurisdiction — *Order for sale of land to pay deficiencies in legacies—Laches—Statute of Limitations—Executor—Assignee for creditors — Status — "Person interested.*]"—Testator, who died in 1872, by his last will directed the residue of his property, consisting of certain real estate enumerated, to be appraised and sold, and the proceeds divided equally between his two daughters, I. and E., and directed that if said property, when sold, should not realise the sum of £2,000, the difference should be made up from property devised by a previous clause of the will to his son J. H. R., who was named, with two others, since dead as an executor. Portions of the properties referred to were sold and the proceeds paid over to the daughters, leaving a balance due in each case. In December, 1902, J. H. R. made an assignment, under the provisions of the Assignments Act, to F., and in April, 1903, he applied to the Judge of Probate for a license to sell the real estate devised to himself, and covered by the assignment, for the purpose of paying the legatees, I. and E., the balances due them:—*Held, per* Townshend, J., that it was not competent for the Judge of Probate to make the order applied for, more especially after the rights of third parties had intervened, the executor having power to sell under the terms of the will, and it being open to the legatees, in case of his refusal, to compel him by suit in equity to do so; also that the executor could not be permitted, after the property had passed out of his possession, to set up the rights of the legatees in opposition to his own deed; that the rights of the legatees would not be affected by any transfer made by him, but the transferee would take the same right which he himself possessed, including the right to set up the Statute of Limitations as a bar to the legatees' right of recovery; also that, as, at the time the application was made, J. H. R. was not a trustee in possession, but had conveyed to F., who was in possession, he was not within the exception in s. 26 of R. S. N. S. c. 167, of the limitation of actions; also that, in the absence of anything in the terms of the will vesting the property in J. H. R. as a trustee upon an express trust, and there being merely a charge on the share of the estate given to him, and no payment within 20 years, the legatees were barred from resorting to the land in question; also that the legatees, having allowed a period of 30 years to elapse without taking steps to enforce their claims, were guilty of laches, and must be assumed to have acquiesced in the mode in which such claims were dealt with.—*Semble*, that the better course would have been for the assignee to have commenced a suit in the Supreme Court to restrain the sale, but that he was a "person interested" within the meaning of the Act, and, as such, entitled to be heard on the application in the Probate Court:—*Held, per* Russell, J., concurring, that J. H. R. was "a person interested," within the meaning of the statute; that the facts stated shewed the sale applied for to be unnecessary; that there are no words in s. 43 restricting the inquiry as to the necessity for the sale to the circumstances mentioned in s. 42; and that the terms in which the jurisdiction of the Court is defined should not be narrowly construed. Graham, E.J., dissented. *Re Runciman*, 38 N. S. R. 89.

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17. Ontario — County and District Courts.

Appeal from Master's Report in County Court action — Forum—Prohibition. *Re Crossman* v. *Williams*, 4 O. W. R. 14.

Demand for trial by jury—Motion for judgment under s. 116 of the Division Courts Act—Jurisdiction—Prohibition. *Re Tatham* v. *Atkinson* (1909), 1 O. W. N. 183.

Jurisdiction — *Amount involved — Ascertainment "as being due" — Transfer to High Court.*]—On appeal a new trial ordered, and action transferred to High Court, the amount involved being beyond jurisdic-

tion of County Court. *Amyot* v. *Sugarman*, 13 O. W. R. 424, 924, followed. *Brownridge* v. *Sharpe*, 13 O. W. R. 508.

Jurisdiction — Attachment of debts — Assignment of moneys due—Claimant—Issue—Amount involved—Equitable relief—Prohibition—Transfer to High Court. *Re Williams* v. *Bridgman*, 4 O. W. R. 53, 232.

Jurisdiction—Consent—Prohibition. *Re Greenwood* v. *Buster*, 1 O. W. R. 225.

Jurisdiction — Counterclaim — Work and labour — Amount — Deterioration — Damages—Set-off—Costs. *Breese* v. *Clark*, 1 O. W. R. 825.

Jurisdiction—*Equitable relief — Amount in controversy — Judgment creditor—Setting aside chattel mortgage — Prohibition.*] — Where the plaintiff, having recovered judgment for $92.05 and costs against the defendant in a Division Court, brought an action in a County Court to set aside as fraudulent as against him a chattel mortgage for $520 made by the defendant:—*Held*, on motion for prohibition, that the subject-matter involved was the amount due on the judgment—it not being alleged or proved that there were any other debts of the defendant than that due to the plaintiff; and the County Court had jurisdiction by virtue of s. 22 (13) of R. S. O. 1897 c. 55. *Forrest* v. *Laycock*, 18 Gr. 611, followed. *Dominion Bank* v. *Heffernan*, 11 P. R. 504, and *Re Lyons*, 10 P. R. 150, distinguished. *Re Thomson* v. *Stone*, 22 C. L. T. 327, 412, 4 O. L. R. 333, 585, 1 O. W. R. 509.

Jurisdiction—*Recovery of land — Mortgages — Injunction — High Court action—Multiplicity.*] — The plaintiffs, being mortgagees of land, issued out of the District Court for the district in which the land was situated a writ of summons indorsed with a claim to "recover possession" of the land, "and for an order that the defendants do forthwith deliver up possession" thereof, describing the land:—*Held*, that the indorsement was one under Con. Rule 138, and that it was for "the recovery of land situate in the district," within the meaning of R. S. O. 1897 c. 109, s. 9, s.-s. 2 (*d*).—*Independent Order of Foresters* v. *Pegg*, 19 P. R. 80, distinguished.—The fact that the plaintiffs had also brought an action in the High Court for a declaration of right in regard to the same land, in which they might have claimed the same relief as in the other action, was not a ground for enjoining the plaintiffs from proceeding in the District Court. *Central Trust Co. of New York* v. *Algoma Steel Co.*, 23 C. L. T. 329, 6 O. L. R. 464, 2 O. W. R. 875.

Jurisdiction — Title to land—Value of land in question—Trespass confined to small portion. *Fortier* v. *Chenier*, 12 O. W. R. 5.

Jurisdiction of Judges — *Local Judges of High Court—Vendors and Purchasers Act—Costs.*]—*Held*, that the Judges of the District Courts appointed under the provisions of R. S. O. c. 109 are Judges of the High Court for the purposes of their jurisdiction in actions in the High Court, and may be styled "local Judges of the High Court," but that nowhere in any statute or Rule is any power or authority given to such Judges to deal with applications under the Vendors and Purchasers Act, or under the Land Titles Act; and, therefore, in this case the Judge making an order under the Acts had acted without jurisdiction.—An appeal was allowed, but, as the proceedings were taken on the consent of both parties, no costs were awarded. *In re Mitchell and Pioneer Steam Navigation Co.*, 20 C. L. T. 74, 31 O. R. 542.

Order of Judge in County Court action—Jurisdiction — Security for costs—R. S. O. 1897 c. 89—Indian plaintiff—Liability to give security — Privilege — Indian Act—Constitutional law. *Re Hill* v. *Telford*, 12 O. W. R. 1090.

Order of Judge in County Court action—Motion for *certiorari* to remove order into High Court for purpose of quashing—Jurisdiction of County Court Judge—Erroneous finding of fact—County Courts Act, R. S. O. 1897 c. 55, ss. 24, 30, 31, 32. *Re Hill* v. *Telford*, 12 O. W. R. 1056.

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18. Ontario—Division Courts.

Action against executors de son tort—*Ascertainment of amount involved—Jurisdiction—Declaration of representation—Prohibition.*]—Motion by defendants for prohibition to a Division Court. The action was brought against defendants as executors *de son tort*, to recover the amount of $165.97 on an account rendered, and damages against defendants for wrongfully interfering with and selling and otherwise converting the chattels and effects of the deceased:—*Held*, that the defendants had so intermeddled with the estate of deceased, as to render them liable as executors *de son tort*, although acting with good intent and at the request of the widow of the deceased. The amount sued for brings the case within the enlarged jurisdiction of the Division Courts under R. S. O. 1897 c. 60, s. 72, and a question arises under s.-s. (d), "Where the amount, or original amount of the claim, is ascertained by the signature of the defendant or of the person whom, as executor or administrator, the defendant represents:" — *Held*, defendants could not represent deceased until they had been declared by the Court to be executors. It is not the intention of the statute that in one and the same proceeding the declaration is to be made which alone could make a defendant liable, and before that point is reached defendant is not to be clothed in advance with the representative character so as to confer jurisdiction on the Court to make the declaration and pronounce the judgment against him. Order granted for prohibition without costs. *Re Dey* v. *McGill*, 6 O. W. R. 329, 10 O. L. R. 408.

After-judgment summons—*Committal—"Ability to pay"—Prohibition.*] — Judgment was recovered at the trial by the plaintiff in a Division Court action, no order being at that time made for payment in instalments. Subsequently the defendant was examined upon an after-judgment summons,

and was ordered to pay $15 a month. Default having occurred, he was again brought before the Judge on a shew cause summons and committed to gaol for twenty days:—*Held*, that it was to be assumed, in the absence of evidence to the contrary, that there had been a finding on proper evidence of the existence of the conditions justifying the making of an order of committal; and that prohibition would not lie. Judgment of Anglin, J., 3 O. W. R. 725, affirmed. *Per* Meredith, C.J.—"Ability to pay," in s.-s. 5 of s. 247 of the Division Courts Act, R. S. O. 1897 c. 60, covers the case of a dishonest debtor who can by working earn the means to pay the debt, and contumaciously refuses to do anything. *Per* Anglin, J.—An order for committal is not made as punishment for disobedience of a specific order for payment and in the nature of a committal for contempt, but is granted as a punishment of the fraudulent conduct of the debtor in having refused or neglected to pay the judgment debt, though having had the means and ability to pay. It is therefore not necessary before a committal order can be made that there should be an order on after-judgment summons and disobedience of that order. The judgment itself is sufficient foundation for the order to commit. *Re Kay* v. *Storry*, 24 C. L. T. 313, 8 O. L. R. 45, 3 O. W. R. 784.

Assignments and preferences — *Declaration of right to rank.*]—An action for a declaration of the right to rank against an insolvent estate vested in an assignee under the Assignments Act, R. S. O. 1897, c. 147, is not within the jurisdiction of a Division Court. *Re Bergman* v. *Armstrong*, 4 O. L. R. 717, 1 O. W. R. 799, 23 C. L. T. 14.

Attachment of debts — *Interest of debtor under will — Residuary legatee.*]—A primary creditor in a Division Court, by garnishee summons served on the executors, attached the interest of the primary debtor, as residuary legatee, in the estate of a testator who had died within a year of the attachment. A receiver was subsequently in a High Court action appointed to receive his interest. The Judge in the Division Court gave judgment against the garnishee, and an application for a new trial by the garnishee, on the ground that such interest was not attachable, was dismissed, but on an appeal to a Divisional Court:—*Held*, that the residuary legatee's interest was not such a debt as could be attached; and the garnishees were discharged. *Hunsberry* v. *Kratz*, 23 C. L. T. 185, 5 O. L. R. 635, 2 O. W. R. 448.

Attachment of debts—Remuneration of alderman — Public policy—Time of service. *Wickett* v. *Graham*, 2 O. W. R. 402.

Demand for trial by jury — *Motion for judgment—Division Courts Act, s. 116—Jurisdiction—Prohibition.*]—A general enactment is governed by a particular one. Section 116 of the Division Courts Act, allowing a plaintiff to move for summary judgment, prevails over the section under which a party who demands a jury has an absolute right to trial by jury. And a judgment under s. 116 was held to have been properly granted after the defendant had demanded a jury and the case had come on for trial with a jury and had been postponed; and prohibition was refused. *Re Tatham* v. *Atkinson*, 1 O. W. N. 183.

Division Court Act, ss. 84, 92—*Action by bailiff—Debt or damages.*]—Plaintiff was bailiff of 1st Division Court of P. E. county. Defendant resided and cause of action arose within the limits of same division. The action was for damages, and was brought in the adjoining (6th) Division Court. The question was: Had this Division Court jurisdiction to try the action?—*Held*, that the words "debt due," in s. 92, could not be construed as including damages in tort, and that the 6th Division Court had no jurisdiction. Reference to *Re Hill* v. *Hicks*, 28 O. R. 393; *Webster* v. *McDougall*, 26 C. L. J. 85. *Spencer* v. *Wright*, 37 C. L. J. 245.

Division Court judgments in County Court—*No jurisdiction in County Court—Not a final judgment—Law unsatisfactory—Should be carried to Court of Appeal or Legislature should consider the law—Set-off—Costs.*]—Plaintiff brought action in County Court to recover $438.59, the amount of three judgments recovered by plaintiff against defendant in a Division Court. At trial the Co. C. Judge dismissed the action with costs, on the ground that no action lies in a higher Court upon a Division Court judgment. — Divisional Court *held*, that the state of the law was unsatisfactory as to the inability to sue in higher Courts upon Division Court judgments, and, if this case could not be taken to the Court of Appeal, it should be considered by the Legislature as to whether any change should be made in this point. Judgment below to stand, with costs of action and appeal to be set off against the debt of defendant to plaintiff. *McPherson* v. *Forrester* (1853), 11 U. C. R. 362, and *Donnelly* v. *Stewart* (1866), 25 U. C. R. 398, followed with hesitation. *Boyd* v. *Irwin*, 3 Man. L. R. 94, favourably considered. *Crowe* v. *Graham* (1910), 17 O. W. R. 143, 2 O. W. N. 158, 22 O. L. R. 145.

Execution against lands — *Previous nulla bona return — Bailiff — Particular Court.*]—Since the revision of the statutes in 1897 incorporating s.-s. 5 of s. 8 of 57 V. c. 23 (O.) into s. 230 of c. 60 of R. S. O. 1897, it is not necessary to have a *nulla bona* return made by a bailiff of the Division Court in which the judgment was recovered before an execution against lands can be issued—a return of *nulla bona* by a bailiff in such Division Court being sufficient. *Burgess* v. *Tully*, 24 C. P. 549, and *Jones* v. *Paston*, 19 A. R 163, discussed. Judgment of Ferguson, J., 3 O. W. R. 74, reversed. *Turner* v. *Tourangeau*, 24 C. L. T. 350, 8 O. L. R. 221, 4 O. W. R. 12.

Execution against lands — Previous return of *nulla bona*—Transcript from one Division Court to another—Execution issued from wrong Court—Invalidity—Injunction to restrain sale. *Scharf* v. *Fitzgerald*, 7 O. W. R. 267.

Foreign judgment — *Promissory note—Recovery on—Cause of action—Increased jurisdiction—Ascertainment of amount.*]—A party plaintiff suing in this province on a

foreign judgment may sue on the foreign judgment or on the original cause of action, or may combine them both in the same action, and such a judgment may be enforced in this jurisdiction as importing a legal obligation to pay the sum recovered by means of an action of debt as on a simple contract. A judgment debt represents a simple contract debt only, and one not ascertained by the signature of the defendant, even when recovered on a promissory note signed by the defendant; and prohibition was granted to restrain proceeding with a plaint in a Division Court on a Manitoba judgment for $232.37 recovered on such a note, where the plaintiff abandoned $32.37 and sought to recover judgment for $200. *In re McMillan* v. *Fortier*, 21 C. L. T. 501, 2 O. L. R. 231.

Garnishee resident out of province—"*Carrying on business*" *in province—Person transacting business as agent for another—Garnishee submitting to jurisdiction—Assignee of fund garnished intervening—Status of intervener.*]—Appeal by primary creditors in a garnishee matter from order and judgment of the presiding Judge determining that the garnishee, R. A. Newman, who resided in Detroit, Michigan, but was alleged to carry on business at Windsor, Ontario, was not subject to be made a party to garnishee proceedings. The garnishee's wife owned in her own right property in the county of Essex, some of which was rented. The garnishee acted as agent for his wife in managing her property, and he employed a solicitor practising in Windsor to collect rents and superintend repairs, make leases, etc. The garnishee entered into a contract in his own name, with the primary debtor for the building by the latter of a house on the property of the garnishee's wife, upon which $667.09 remained due to the primary debtor. The latter was indebted to a number of persons. The solicitor before mentioned, as solicitor for all these creditors, except one McKee, took garnishee proceedings under s. 190 of the Division Courts Act, and accepted service for Newman, the garnishee. McKee (a creditor having an equitable assignment of the debt from the primary debtor) intervened and contested the right to take these proceedings, on the ground that Newman neither resided nor carried on business within the jurisdiction of the 7th Division Court. The garnishee by his attorney admitted that he carried on business in the said county, and he voluntarily submitted to the jurisdiction of the Court. He also admitted that he was indebted to the primary debtor in a certain sum, and he was willing to abide by the decision of the Judge of the Court:—*Held*, *per* Britton, J., and Falconbridge, C.J., reversing the trial Judge, that McKee had failed to shew "any just cause why the debt sought to be garnished should not be paid over or applied in or towards the satisfaction of the claim of the primary creditor." Appeal allowed with costs. Street, J., dissenting. *Nelson* v. *Lenz*, 6 O. W. R. 21, 9 O. L. R. 50.

Garnishment of married man's wages — *Exemption — Evidence of marriage — Repute — Prohibition.*]—In an action in a Division Court, where the Judge *held* that evidence of repute was not sufficient to prove that a primary debtor was a married man, and so entitled to the $25 exemption provided for by R. S. O. 1897, c. 60, ss. 180, 181:—*Held*, that the Judge did not decide upon a state of conflicting facts, but upon a theory that the best evidence must be given, and that it was a wrong assumption in point of law, and prohibition should be ordered. *Elston* v. *Rose*, L. R. 4 Q. B. 4, followed. *In re Rochon* v. *Wellington*, 23 C. L. T. 69, 5 O. L. R. 102, 1 O. W. R. 805.

Increased jurisdiction — Ascertainment of amount sued for over $200—Signature of defendant to instrument in form of promissory note with additional terms — 4 Edw. VII. c. 12, s. 1—Necessity for extrinsic evidence — Non-negotiable instrument — Provision for resale of goods for which note given. *Bisnett* v. *Schrader*, 12 O. W. R. 656.

Judgment — Notice — Waiver — Acquiescence — Laches — Prohibition — Costs. *Re Bosbridge* v. *Brown*, 2 O. W. R. 863.

Judgment by default — "*Money demand*"—*False representations—Prohibition.*]—An action in a Division Court in which the particulars described the plaintiff's claim as for "money received by the defendants for the use of the plaintiff, being money obtained from the plaintiff by the defendants by false representations," is an action for a "money demand" within s. 113 of the Division Courts Act, R. S. O. c. 60; and a motion for prohibition against proceedings upon a judgment entered in default of a dispute notice was refused. *Re Mager* v. *Canadian Tin Plate Decorating Co.*, 24 C. L. T. 59, 7 O. L. R. 25, 2 O. W. R. 1114.

Judgment, clerical error in — *Jurisdiction to correct—Prohibition—New trial—Consent.*] — Judgment upon promissory note for $70. By a mere slip, the Judge in making his minute of the judgment wrote "judgment for defendant," instead of "judgment for plaintiffs." About three weeks afterwards the Judge's attention was called to the mistake and he corrected it, the solicitors at the trial consenting. Immediately after the trial defendant was notified by his solicitors of the result, and told him that there was not much use in applying for a new trial. Defendant then retained a new solicitor, who without informing himself of the facts of the case, moved for prohibition. Motion dismissed with costs. *Re North American Life Assurance Co.* v. *Collins*, 5 O. W. R. 342, 9 O. L. R. 579.

Judgment debtor—Examination—Committal for fraud—Imprisonment — *Habeas corpus*—Warrant of commitment—Finding of fraud—Sufficiency—Warrant not defective on its face—Habeas Corpus Act, s. 1—"Process." *Re Stickney*, 13 O. W. R. 1203.

Judgment debtor — *Married woman — Committal.*]—The committal of a judgment debtor in a Division Court for wilful default in appearing to be examined is in the nature of process to coerce payment, rather than of a punitive character, as for contempt; and there is no jurisdiction to make an order for the committal of a married woman judgment debtor who refuses to attend for examination upon a judgment summons, even

though her non-attendance amounts to wilful misconduct. *Ex p. Dakins*, 16 C. B. 77, followed. *Re Stewart* v. *Edwards*, 11 O. L. R. 378, 7 O. W. R. 23.

Judgment summons — *Form of affidavit—Prohibition.*]—An affidavit, by a plaintiff in a Division Court action desiring to issue a judgment summons, stating that "the sum of $65.10 of the said judgment remains unsatisfied, as I am informed and believe," the judgment being for more than $65.10, is not such an affidavit as is required by s. 243 of the Division Courts Act, R. S. O. 1897, c. 60, and prohibition will lie to restrain proceedings upon a judgment summons issued pursuant to such an affidavit. *Friendly* v. *Needler*, 10 P. R. 267, distinguished. *Re Barr* v. *McMillan*, 24 C. L. T. 90, 7 O. L. R. 70, 672, 3 O. W. R. 189, 297.

Jurisdiction — *Action against benefit society—Domestic forum — Error of Judge giving jurisdiction.*]—On a motion for prohibition to a Division Court Judge, on the ground that the defendant declined to give any evidence or enter into any defence on the merits, because the plaintiff had not shewn that he had taken the various appeals to the domestic forum provided for by the conditions of a benefit society, and so established jurisdiction in the Division Court:—*Held*, that the Division Court had jurisdiction, and that the question to be decided was not, "In what Court the action should be brought?" but "Can such an action succeed in law?" and that then a High Court Judge has no right to dictate to a Division Court Judge:—*Held*, also, that a finding that the plaintiff "had exhausted every possible means of redress in the domestic forum," could not be interfered with, as a motion for prohibition was not an appeal; and that the Division Court Judge had not given himself jurisdiction by any error, but that any mistake he may have made was made in a matter within the jurisdiction to try.—Prohibition refused. *Re Errington* v. *Court Douglas No. 27, C. O. F.*, 9 O. W. R. 675, 14 O. L. R. 75.

Jurisdiction — Action for declaration of right to rank on insolvent estate—Prohibition. *Re Bergman* v. *Armstrong*, 4 O. L. R. 717, 1 O. W. R. 799.

Jurisdiction — *Action on foreign promissory note — Residence of defendant and of garnishee.*]—An action on a promissory note the amount of which is within Division Court competency, and which at the time the action is commenced is within the province, may be brought in the Division Court in which is situate the place of residence of the garnishee, under s. 190 of the Division Courts Act, R. S. O. 1897, c. 60, when the maker resides in another division in the same county, although the note may have been made and the holder may reside out of the province. *Hopper* v. *Willison*, 16 O. L. R. 452, 11 O. W. R. 980.

Jurisdiction — Amount in dispute—Claim for price of horse—Sale by wrongdoer—Contract or tort—Prohibition. *Re Mount* v. *Mara*, 2 O. W. R. 501.

Jurisdiction—Amount involved — Action for tort—Prohibition—Costs of motion for. *Re Brandon* v. *Galloway*, 1 O. W. R. 677.

Jurisdiction — Amount involved — Balance of unsettled account over $400—Prohibition. *Re Manning* v. *Gorrie*, 5 O. W. R. 788.

Jurisdiction—*Amount over $100—Ascertainment—Necessity for extrinsic evidence—4 Edw. VII. c. 12, s. 1 (O.)—Application of pending action—Prohibition.*] — Motion by defendant for prohibition to a Division Court upon ground that the Court had no jurisdiction, the amount in question being over $100, and not ascertained by the signature of the defendant:—*Held*, that other and extrinsic evidence beyond the mere production of the document and the proof of the signature to it would have to be given to establish the claim of the plaintiff. The amending provision contained in 4 Edw. VII. c. 12, s. 1, must be regarded as being declaratory and inapplicable because these proceedings were launched in the Division Court before the Act was passed. Order made for prohibition. *Re Thom* v. *McQuitty*, 4 O. W. R. 522, 25 C. L. T. 42, 8 O. L. R. 705.

Jurisdiction—*Amount over $100 — Extrinsic evidence — Promissory note — Indorser.*]—Motion by plaintiffs for an order in the nature of a *mandamus* to the junior Judge of a County Court to compel him to try an action in a Division Court. The action was brought against the endorser of a promissory note to recover the amount of the note, which was more than $100:—*Held* (5 O. W. R. 420), that extrinsic evidence would have to be given by plaintiffs to enable them to succeed upon their claim, namely, evidence of dishonour and notice, and that, therefore, the amount sued for (being over $100) was not ascertained by the signature of defendant within the meaning of s. 72 of the Division Courts Act, as amended by 4 Edw. VII. c. 12, s. 1 (O.). Motion refused. Appeal by plaintiffs on grounds that the amending Act is merely a legislative declaration in favour of the narrower interpretation theretofore placed upon s. 72, and that it was not the intention of the legislature to take away the jurisdiction of the Division Court, unless it was necessary for plaintiffs to give evidence of the kind pointed out in *Kreutziger* v. *Brox*, 32 O. R. 418, for the purpose of establishing their claim. Appeal allowed and order made for plaintiffs. *Re Slater* v. *Laberee*, 5 O. W. R. 539, 9 O. L. R. 545.

Jurisdiction — *Ascertainment of amount —Promissory note.*]—*Held*, that the debt in this case was not cognizable by a Division Court, the claim being for more than $100 and not ascertained by the signature of the wife (the principal debtor); that the note signed by the husband could not be treated as an ascertainment, it not having been signed by him as her agent, but on his own behalf; and therefore the costs should be on the scale of the County Court in which the action was brought. *Davidson* v. *McClelland*, 21 C. L. T. 188, 32 O. R. 382.

Jurisdiction — *Ascertainment of amount over $100—Proof of breach of undertaking.*]

—The defendant gave two notes for $75 and $62 respectively on a form which contained an undertaking to give further security, and in the event of default in giving the security that the notes might be treated as due. The plaintiffs demanded further security, and, not receiving any, brought an action on the notes before the time mentioned in them for their maturity had expired:—*Held*, that, notwithstanding the plaintiff had to prove a breach of the undertaking to give security before he could recover on the notes, the Division Court had jurisdiction to entertain the action. *Petrie* v. *Machan*, 28 O. R. 642, followed in preference to *Kreutziger* v. *Brox*, 32 O. R. 418. *McCormick Harvesting Machine Co.* v. *Warnica*, 22 C. L. T. 158, 3 O. L. R. 427.

Jurisdiction — Attachment of debts — Chattel mortgagee — Seizure and sale—Proceeds in hands of bailiff—Prohibition. *Re Tomlinson* v. *Hunter*, 2 O. W. R. 948.

Jurisdiction—*Balance due on contract signed by defendant — Extrinsic evidence.*] —In an action in a County Court for $37.50, the balance due on a building contract of $475, signed by the defendant, where extrinsic evidence was required to shew performance of the contract by the plaintiff, and for $27.35 upon an open account, as against which the defendant was allowed upon his counterclaim $25 for defective work and material:—*Held*, that a Division Court would have had no jurisdiction, and that the plaintiff was entitled to his costs on the County Court scale. *In re Graham* v. *Tomlinson*, 12 P. R. 367, and *In re Sawyer-Massey Co.* v. *Parkin*, 28 O. R. 662, not followed. *Kinsey* v. *Roche*, 8 P. R. 515, approved. *McDermid* v. *McDermid*, 15 A. R. 287, followed. *Kreutziger* v. *Brox*, 21 C. L. T. 139, 32 O. R. 418.

Jurisdiction—*Dividing cause of action—Division Courts Act, s. 79 — Promissory note — Including in larger claim — Proof against insolvent estate.*] — The defendants, becoming insolvent, made an assignment for creditors, and the plaintiffs proved their claim upon a certain promissory note and other notes, and in respect of an open account for goods sold, for a lump sum, upon which they were paid a dividend. The plaintiffs had no security for their claim:—*Held*, that the remedy upon the promissory note in question was not extinguished, and the plaintiffs could sue in a Division Court for the amount of it as a separate cause of action, giving credit for a proportionate part of the dividend paid, without offending against the provisions of s. 79 of the Division Courts Act, R. S. O. 1897 s. 60, forbidding the dividing of a cause of action. *Harvey* v. *McPherson*, 23 C. L. T. 260, 6 O. L. R. 60, 2 O. W. R. 251, 511.

Jurisdiction — Division Courts Act, s. 190 — Action brought in wrong Court as against garnishees—Abandonment at trial of claim against garnishees—Objection to jurisdiction by primary debtor — Saw Logs Driving Act, s. 16—Common law cause of action—Decision of Division Court Judge—Right to review. *Re Boyd* v. *Sergeant*, 10 O. W. R. 377, 521.

Jurisdiction—*Evidence — Nonsuit—Appeal—Termination of action—Mandamus.*]—The plaintiff claimed $212 for wages, and gave credit for payments thereon, suing for a balance of $58. The defendant, by counterclaim, alleged a large account of $744.58, and claimed a balance in his favour of more than $100. The Judge entered a nonsuit after hearing the evidence of one witness, who disclosed the nature of the account:—*Held*, that the Judge at the trial having found that the evidence given shewed that the case was beyond the jurisdiction of a Division Court, and ruled that further evidence should not be given, and the plaintiff having submitted to this and a judgment of non-suit, with costs, having been entered, and the plaintiff having moved to set aside the nonsuit and for a new trial, which motion was refused, an application for a *mandamus* did not lie. *Regina* v. *Judge of Southampton County Court*, 65 L. T. N. S. 320, distinguished. That the plaintiff had no right of appeal in this case under the Division Courts Act might be a defect of legislation, but it did not enlarge the remedy by *mandamus*:—*Held*, also, following *Williamson* v. *Bryans*, 12 C. P. 275, that *mandamus* does not lie where there is nothing pending before the Court below. *Re Ratcliffe* v. *Crescent Hill Timber Co.*, 21 C. L. T. 234, 1 O. L. R. 331.

Jurisdiction — *Foreign defendant—Service on—Form of summons—Prohibition.*]— Section 87 (1) of the Division Courts Act, R. S. O. 1897, c. 60, which provides that an action may be brought in a Division Court, notwithstanding that the residence of the defendant is out of the province, applies as well to foreigners as to British subjects. No practice being provided therefor by that Act, by s. 312, the practice of the High Court under Con. Rules 103 and 312 is to apply. The form of summons issued in this action was held to be a compliance with such rules. Decision of McMahon, J., 3 O. W. R. 585, affirmed. *Re Coy* v. *Arndt*, 24 C. L. T. 336, 8 O. L. R. 101, 3 O. W. R. 585, 658.

Jurisdiction — *Foreign garnishee.*] — The primary creditor and the primary debtor resided within the jurisdiction, but the garnishee resided in British Columbia, and did not carry on business in Ontario. At the hearing the garnishee appeared by his agent, and raised no objection to the jurisdiction. The debtor disputed the creditor's claim, and the jurisdiction, and the Judge on the latter ground refused to proceed:—*Held*, that the Judge was right. The principle upon which a defendant in an action who is not subject to the jurisdiction confers it by appearing, has no application to a garnishee proceeding under the Division Courts Act. Such a proceeding is a species of execution designed to enable a creditor to reach property of his debtor not exigible in the ordinary way, and from the nature of the thing it is to be expected that it would be confined to cases where the garnishee is resident in Ontario or might be sued therein; and, moreover, the language of the Act clearly confines the right to that class of case. *McCabe* v. *Middleton*, 27 O. R. 170, distinguished. *Re Wilson* v. *Postle*, 21 C. L. T. 382, 2 O. L. R. 203.

Jurisdiction — *Interpretation of statute — Public Health Act — Prohibition.*] — Where it is necessary to interpret a sta-

tute in order to find out whether the Division Court should decide the rights of the parties at all, then if the Division Court Judge misinterprets the statute and so gives himself jurisdiction to decide such rights, prohibition will lie but, if it be necessary to interpret a statute simply to decide the rights of the parties, prohibition will not lie, however far astray the Division Court Judge may go. *Re Long Point Co.* v. *Anderson*, 18 A. R. 401, followed. *Re Ameliasburg* v. *Pitcher*, 8 O. W. R. 915, 13 O. L. R. 417.

Jurisdiction—Lease—Covenant to leave in repair—Breach—Damages—Prohibition—Transfer to High Court. *Re Powell* v. *Dancyger*, 1 O. W. R. 63.

Jurisdiction — *Proof of contract—Lease—Company—Prohibition.*]—In an action for breach of contract brought in a Division Court, in order to give the Judge jurisdiction to determine the action on the merits, the fact of the making of the contract and its breach within the jurisdiction, must first be established. Where, therefore, after a valid lease of certain premises held by a company had been duly put an end to, and the key delivered up to the landlord, the company's agent, without any authority from the company, orally agreed with the landlord for the renewal thereof for the year at an increased rent, and received the key, but the company refused to agree to the lease, when the key was handed back to the landlord, and no actual occupation of the premises by the company took place:—*Held*, that no contract was proved, of which a breach had arisen within the jurisdiction of the Court; and prohibition was therefor properly granted. Decision of Anglin, J., 3 O. W. R. 589, affirmed. *Re Wilkes* v. *Home Life Assoc.*, 24 C. L. T. 339, 8 O. L. R. 91, 3 O. W. R. 675, 744.

Jurisdiction — *Rent — Costs.*]—Rent payable under a lease of land is an incorporeal hereditament, and where the right or title to it comes in question, a Division Court has no jurisdiction to entertain an action to recover it, even where the amount in question is only $60; and therefore this action was properly brought in a County Court, and the successful plaintiff was entitled to costs on the scale of such Court. *Kennedy* v. *MacDonnell*, 21 C. L. T. 233, 1 O. L. R. 250.

Jurisdiction—*Splitting cause of action—Mortgage — Interest post diem—Damages—Prohibition.*]—The plaintiffs on the 2nd November, 1901, brought an action in a Division Court for one year's interest due the 1st February, 1901, and for interest on that interest, amounting together to $81.50, due on a mortgage, principal of which was overdue:—*Held*, that the interest sued for, being interest *post diem*, was not due the plaintiff *qua* interest, but was recoverable only by way of damages, and the case did not come within the provisions of s. 79, s.-s. 2, of the Division Courts Act, R. S. O. c. 60:—*Held*, also, that the plaintiffs, if entitled to recover interest from the 1st February, 1900, were entitled to recover as their damages interest down to the date of the issue of the summons, so that the sum to which they were then entitled would be about $140, which sum was divided for the purpose of suing in the Division Court, and that is forbidden by s. 79; and prohibition was granted. *Re Phillips* v. *Hanna*, 22 C. L. T. 209, 3 O. L. R. 558, 1 O. W. R. 245.

Jurisdiction —Territory—Action on two promissory notes — "Contract" — Prohibition—Omission to record evidence. *Union Bank* v. *Cunningham*, 1 O. W. R. 432.

Jurisdiction—Territorial — Cause of action — Contract by telegraph—Prohibition. *Re Glanville* v. *Doyle Fish Co.*, 2 O. W. R. 616, 823.

Jurisdiction—Title to land—Equitable relief — Specific performance — Prohibition. *Re Hamilton* v. *Garner*, 12 O. W. R. 758.

Jurisdiction—Title to land—Occupation rent—Statute of Limitations — Prohibition. *Re McDonald* v. *Richmond*, 7 O. W. R. 844.

Jurisdiction of—*Mandamus to Judge to try action.*]—Plaintiff brought action in the 3rd Division Court of the County of Elgin, to recover upon a promissory note made by defendant, for $140 and interest thereon amounting in all to $145.60. At the trial plaintiff produced and proved making of the note. On his cross-examination it appeared that he had other dealings with defendant and a Mrs. James, that he had an account in his books with them, that the amount of the note formed one of the items of this account, and that he had taken a mortgage from Mrs. James covering the amount of the account. Upon this appearing the Judge stopped the case, holding that the Court had no jurisdiction to pursue the enquiry. The plaintiff moved for a mandatory order to the Judge commanding him to try the action:—*Held*, that the Judge had jurisdiction and order granted as asked. No order as to costs. *Green* v. *Crawford* (1910), 15 O. W. R. 822, 21 O. L. R. 36.

Jurisdiction over actions for money loaned—*R. S. O. 1897, c. 60, s. 79.*]—Plaintiff brought two actions in a Division Court to recover $70 and $100 respectively, being for several loans advanced defendant at various times. It was contended by defendant that the amount of his indebtedness to plaintiff could not be divided, so as to bring the action within the jurisdiction of a Division Court:—*Held*, that each loan was a specific contract to pay, and that they should not necessarily be massed *en bloc* for purpose of litigation. *McKay* v. *Clare* (1910), 15 O. W. R. 334, 20 O. L. R. 344.

Mandamus — *Jury trial — Nonsuit after verdict—Powers of Judge—62 V. c. 11, s. 9 (O.).*]—In a Division Court suit tried with a jury, the Judge reserved judgment on a motion for nonsuit, subject to which he took the findings of the jury, and subsequently granted the non-suit, on the ground that there was no evidence to go to the jury. The plaintiff then applied for a *mandamus* requiring the Judge to enter judgment for the plaintiff upon the findings of the jury:—*Held*, affirming the order of Anglin, J., that under the provisions of 62 V. c. 11, s. 9

(O.), the Judge had jurisdiction to nonsuit the plaintiff, although the jury had rendered their verdict. *Re Lewis* v. *Old*, 17 O. R. 610, not followed, having been decided before the passing of the statute above referred to. *Re Johnson* v. *Kayler*, 18 O. L. R. 248, 12 O. W. R. 770, 837.

Motion for immediate judgment — *Service with summons — Time—Holidays—Enlargement—Waiver.*]—A special summons issued out of a Division Court was served on Friday the 8th November, returnable on the following Tuesday, the 12th, and with it was served a notice of motion for immediate judgment, also returnable on the 12th:—*Held*, that the notice was properly served, for there is nothing in s. 116 of the Division Courts Act, R. S. O. 1897, c. 60, which requires that, before such notice is given, the time for the filing of a dispute notice should have first expired:—*Held*, also, that there was two clear days' notice of the motion, for the King's birthday and Sunday, which intervened, would not be excluded. Con. Rule 343, whereby, where the time is less than six days, Sundays and holidays must be excepted, does not apply to Division Courts, and no similar provision is contained in the Division Courts Act or Rules; but, in any event, the objection was cured by an enlargement procured by the defendants on the return day until the next day, which had the effect of giving the defendants two clear days irrespective of such holiday. *Quære*, whether an order made upon a motion of which two clear days' notice had not been given, would be valid. *Re McKay* v. *Talbot*, 22 C. L. T. 115, 3 O. L. R. 256.

Motion for summary judgment — Notice — Time — "Two clear days"—Division Courts Act, s. 116 (2)—Sunday—Supreme Court Rules and practice—Section 312 — Discretion — Jurisdiction — Prohibition. *Re Stoddard* v. *Eastman*, 12 O. W. R. 226, 674.

New trial—Order for—Jurisdiction—Application for judgment treated as if for new trial—Prohibition. *Follett* v. *Sacco*, 11 O. W. R. 377.

New trial — *Time for moving.*]—Where at the sittings of a Division Court a case was "adjourned for plaintiff on payment of costs within ten days, otherwise judgment for the defendant:"—*Held*, that the two weeks within which a motion could be made for a new trial (costs not being paid) did not commence to run until the expiration of the ten days, for until then there was no judgment. *Thompson* v. *McRae*, 20 C. L. T. 277, 31 O. R. 674.

Order for committal—*Previous order for payment—Affidavit.*]—The plaintiff recovered judgment against the defendant in a Division Court action for a debt contracted before 61 V. c. 15 (O.), and the defendant was at the hearing ordered to pay the amount of the judgment forthwith:—*Held*, that the Court had jurisdiction under s.-s. 5 of s. 247 of the Division Courts Act, R. S. O. 1897 c. 60, upon examination of the defendant on an after-judgment summons, to make an order for her committal without a previous order for payment based upon such an examination and default thereunder. Where it appears that the judgment debtor has been examined before the Judge, his order for committal must, on a motion for prohibition, be treated as a complete adjudication as to that which must be made to appear to warrant the making of an order under s.-s. 5 of s. 247. Semble, that if the affidavit of the plaintiff required by s. 243 to be filed before the issue of the summons were not filed, it would not be open to the defendant, after appearing in obedience to the summons, to raise an objection to the jurisdiction on that ground; and, the defect not appearing on the face of the proceedings, prohibition would not be granted. *Re Hawkins* v. *Batzold*, 21 C. L. T. 579, 22 C. L. T. 14, 2 O. L. R. 704.

Order for committal of judgment debtor — *Power to rescind—Division Courts Act, s. 247—Mandamus.*]—A Judge of a Division Court has no power, under any of the provisions of the Division Courts Act, or otherwise, to rescind an order made by him, under s. 247 of the Act, committing a judgment debtor to gaol, on the ground that it appeared to the Judge that the debtor had incurred the debt for which judgment had been recovered by means of fraud.—A mandamus to the Judge to hear an application to rescind was refused. *Re Wilson* v. *Durham*, 18 O. L. R. 328, 13 O. W. R. 702.

Power to amend—*Evidence—Renewal note obtained by fraud of principal maker—Right to sue on original note.*]—Defendant joined in making a promissory note, as payees, plaintiffs knew, for accommodation of his co-maker. When it became due, the latter brought a renewal note, purporting to be signed by defendant, which payees accepted, and gave up the original note stamped "paid." Primary debtor becoming insolvent and dying, and plaintiffs failing to get payment of the renewal note out of his estate, they sued defendant upon it, in a Division Court, where there was a trial by jury. Defendant swore he never signed the renewal note, but, nevertheless, there was a verdict for plaintiffs. A new trial was then granted, resulting in a verdict for defendant. A further new trial then being granted, the Judge allowed plaintiffs to claim in the alternative upon the original note, as well as claiming upon the renewal note, and to amend their claim accordingly. Jury then returned a verdict for plaintiffs on original note. Defendant applied for a new trial, which was refused, and he then appealed.—*Held*, that the Division Court Judge had jurisdiction to amend plaintiffs' claim, under Rule 4 of Division Courts. *Matthews* v. *Marsh*, 23 C. L. T. 154, 5 O. L. R. 540, 2 O. W. R. 247.

Prohibition—Verification of documents—Affidavit of defendant — Acknowledgments given for liquors drank in a tavern—Discrediting affidavit—Findings of Judge in inferior Court. *Re Peine* v. *Hammond*, 2 O. W. R. 1118, 3 O. W. R. 70.

Removal of plaint into High Court —*Discretion—Res judicata.*]—After a trial and judgment in a Division Court as to the right of a landlord to recover a month's rent

under a lease, another action was brought for three months' subsequent rent, whereupon the defendant applied for an order in the nature of a *certiorari*, which was refused, on the ground that though the case might be of importance as affecting cases of a similar nature, that was not of itself sufficient ground for removing the action into the High Court, no difficult questions of law or fact appearing to be involved.—On appeal the judgment was affirmed, the Court holding that the granting of the order was in the discretion of the Judge, and moreover by the judgment of the Division Court in the first action the matter was *res judicata*. *Re Fraser* v. *Oberndorfer*, 20 C. L. T. 68.

Removal of plaint into High Court—Question involved—Paternity of illegitimate child. *Re Brooks* v. *Hubbard*, 4 O. W. R. 264.

Removal of plaint to High Court—Grounds for—Question raised by claim of set-off—Construction of contract—Other litigation depending on similar contracts—Absence of right of appeal in Division Court case. *Re McGregor* v. *Union Life Ins. Co.*, 7 O. W. R. 423.

Right to jury—*Claim—Counterclaim—Amount—Prohibition.*]—The plaintiff sued in a Division Court for $14 for rent; and the defendant, besides filing a dispute notice, counterclaimed for $60 damages for tort, and asked for a jury, but the County Court Judge refused to place the case on the list for trial by jury. On an application for prohibition:—*Held*, that the filing of the counterclaim did not entitle the defendant to have the plaintiff's claim tried by a jury; but s. 160 of the Division Courts Act, R. S. O. 1897 c. 60, did entitle him to that right in respect to his counterclaim; and prohibition as to the latter was directed to issue, subject to the right of the Judge to order that the counterclaim be the subject of an independent action under Division Court Rule 108. *Re Fraser* v. *Ham*, 24 C. L. T. 233, 7 O. L. R. 449, 3 O. W. R. 447.

School board—*Notice of meeting — Terminating contract with school master—Salary.*]—The plaintiff was the master of a public school. The contract between him and the school board gave either party the right to terminate it on one month's notice. There were eight members of the school board, and at a meeting on the 19th February a resolution was passed instructing the secretary to notify the plaintiff that the contract between him and the board should cease on the 31st March, which he accordingly did. The notice of the meeting given to the members of the board did not state that the matter of determining the plaintiff's contract was to be considered, and some of the members had no knowledge of this fact, nor had the plaintiff any knowledge or notice of the meeting. Only six members of the board attended the meeting, of whom four voted in favour of the resolution, and two against it:—*Held*, that the above resolution and notice to the plaintiff in pursuance of it was not a fair or proper exercise of the power and option to determine the plaintiff's contract contained in it, and the agreement with the plaintiff was not terminated thereby. The plaintiff brought this action under the above circumstances, claiming a balance of salary, and had recovered judgment for $132.03:—*Held*, that the matters of difference between the parties fell within R. S. O. c. 292, s. 77, s.-s. 7, and a Division Court had jurisdiction. *Greenlees* v. *Picton Public School Board*, 21 C. L. T. 520, 2 O. L. R. 387.

Service of summons—*Right of plaintiff to serve—Right of bailiff — Mandamus to clerk.*] — Plaintiff moved for *mandamus* to compel a Division Court clerk to deliver the summons and copy to the plaintiff instead of the bailiff of the Court, to have it served. Motion refused (6 O. W. R. 146) on grounds that plaintiff had no such right in a Division Court case as is accorded to plaintiffs in the High Court and County Courts. Appeal by plaintiff from above order dismissed with costs. *Wilson* v. *McGinnis*, 6 O. W. R. 397, 10 O. L. R. 98.

Solicitors have no lien for their costs in Division Court proceedings. *Arnprior* v. *Bradley*, 39 C. L. J. 81.

Territorial jurisdiction—*Acceptance of goods—Cause of action—Statute of Frauds—Prohibition.*]—In an action for $45, the price of a coat ordered by the defendant in Toronto to be made and sent by the plaintiff to him at Belleville by express:—*Held*, that the plaintiff must prove as part of his case an acceptance of the coat at Belleville, and that certain letters written by him at Belleville to the plaintiff at Toronto, while evidence from which acceptance might be inferred, were not the acceptance itself; and, as the plaintiff failed to prove this, the whole cause of action did not arise at Toronto, within the jurisdiction of the Division Court in which the plaint was brought. —Prohibition ordered. *Re Taylor* v. *Reid*, 8 O. W. R. 623, 763, 13 O. L. R. 205.

Territorial jurisdiction — Action on contract—Provision in contract as to forum for action—Waiver of statute making such provisions illegal—Effect of. *Re Shupe* v. *Young*, 10 O. W. R. 185, 262.

Territorial jurisdiction — Action on lien notes—Provision as to forum for action —Waiver of statute making such provisions illegal—Effect of. *St. Charles* v. *Caldwell*, 12 O. W. R. 1185.

Territorial jurisdiction—*Cause of action—Flooding land—Erection of dam—Prohibition.*]—In a Division Court action the plaintiff's claim was for damages for injuries caused to his lands, which were situate within the limits of the division in the Court of which his action was entered, by reason of their having been overflowed and his crops damaged by waters alleged to have been unlawfully brought by the defendants to and cast upon his lands. The backing of the water was alleged to have been caused by a dam which the defendants had erected on their own lands, situate beyond the limits of such Court:—*Held*, that the erection of the dam was part of the cause of action, and therefore the whole cause of action did not arise within the jurisdiction of the Division Court in which the action was brought; and

prohibition was ordered. *Re Doolittle* v. *Electrical Maintenance & Construction Co.*, 22 C. L. T. 136, 3 O. L. R. 460, 1 O. W. R. 202.

Territorial jurisdiction—*Garnishee — No garnishable debt—Conferring jurisdiction —Costs.*]—Where an action is entered under s. 190 of the Division Courts Act in the division where the garnishee resides, the primary debtor residing in another and disputing the jurisdiction of the Court—there is jurisdiction to give judgment against the primary debtor, even where the action is dismissed as against the garnishee. *In re Holland* v. *Wallace*, 8 P. R. 186, and *In re McCabe* v. *Middleton*, 27 O. R. 170, considered. *Semble*, that if a primary creditor, for the purpose of obtaining a judgment against the primary debtor in a Court of his own choosing, names a friend as garnishee, the Judge may properly take that into consideration under his power over costs under s. 213 of the Act. *Lented* v. *Congdon & C. O. C. F.*, 21 C. L. T. 160, 1 O. L. R. 1.

Territorial jurisdiction — Place where whole cause of action arose—Contract—Correspondence—Construction—Motion for prohibition. *Re McNaughton* v. *Hay*, 12 O. W. R. 858, 1033.

Title to land — Trial — Prohibition — *Certiorari*. *Re Waring* v. *Town of Picton*, 2 O. W. R. 92.

Transfer of action.]—Where an order was made by a Division Court Judge for the transfer of an action to a Division Court in another county, the order being made under the powers conferred by s. 90 of the Division Courts Act, R. S. O. 1897, c. 60, whereas, under the circumstances, it should have been made under s. 91, an order was made prohibiting the Division Court to which the transfer had been made from acting under the order of transfer; but such order of prohibition was to be without prejudice to the right to apply for an order under s. 91. *Re Frost* v. *McMillen*, 21 C. L. T. 532, 2 O. L. R. 303.

Trial of plaint by jury—Motion for nonsuit—Reservation till after verdict—Jurisdiction of Judge—Indorsement of verdict and costs on record—Inadvertence—Judgment —Execution — Stay—Prohibition. *Re McDermott* v. *Grand Trunk Rw. Co.*, 7 O. W. R. 602, 678.

See ATTACHMENT OF DEBTS—JUDGMENT —PLEADING—STATUTES.

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19. ONTARIO — DIVISIONAL COURT.

Arbitration Act—*Divisional Court — Single Judge—Proper forum—Special case— "Opinion."—"Final decision."*]—A single Judge has no jurisdiction to pronounce the opinion of the Court upon a special case stated by arbitrators pursuant to s. 41 of the Arbitration Act, R. S. O. 1897, c. 62. The effect of cl. (*a*) of s.-s. 1 of s. 67 of the Judicature Act, R. S. O. 1897 c. 51, and of Rule 117, is to require that such a case be heard before a Divisional Court, as being a proceeding directed by statute to be taken before the Court, and in which the decision of the Court is final. "The opinion of the Court" is a "decision," though not a binding adjudication as to the rights of parties or a decision amounting to a judgment or order; and it is a "final decision" because it is the end of the proceeding and cannot be reviewed by an appellate Court. *In re Geddes and Cochrane*, 21 C. L. T. 436, 2 O. L. R. 145.

Composition of Divisional Court — Two or three Judges. *Minns* v. *Omemee*, 1 O. W. R. 90, 362.

County Court appeal — *Court of final resort — Independent judament.*] — A Divisional Court, being the final Court of Appeal where the action is begun in a County Court, should give an independent judgment. *Canadian Bank of Commerce* v. *Perram*, 31 O. R. 116, followed. *Mercier* v. *Campbell*, 9 O. W. R. 101, 14 O. L. R. 639.

Reference of motion to Divisional Court — *Power of Master in Chambers — Agreement of parties.*] — The Master in Chambers has no power to refer a motion before him to a Divisional Court, but the Court may properly hear a motion so referred, if both parties agree to its being heard. *Rushton* v. *Grand Trunk Rw. Co.*, 23 C. L. T. 295, 6 O. L. R. 425, 2 O. W. R. 654.

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20. ONTARIO—HIGH COURT OF JUSTICE.

Payment into — Money deposited with bank—Two claimants—Application by bank to pay into Court and have action dismissed as against bank—Order granted—Issue to be tried between claimants—Costs of bank to be costs in the issue as between claimants. *Roetter* v. *Canadian Bank of Commerce* (1909), 14 O. W. R. 1022, 1 O. W. N. 211.

Payment out—*Money to the credit of infant—Paid in under direction of Judge of Surrogate Court.*]—Order granted for payment of the money to the father and testamentary guardian of the infant, as there was no danger of the money being lost or misapplied by him. *Re Dowling* (1909), 14 O. W. R. 1110, 1 O. W. N. 225.

Proper forum—*Application for mandamus to Justice of the Peace—Judge in Court —Divisional Court.*] — The order absolute which may be granted by the High Court under s. 6 of the Act to protect Justices of the Peace and others from Vexatious Actions, R. S. O. 1897 c. 88, is not final, but is appealable, and the application for such order is therefore to be heard before a single Judge, sitting as the High Court, and not before a Divisional Court. *Rex* v. *Meehan*, 22 C. L. T. 133, 3 O. L. R. 361, 1 O. W. R. 136, 248.

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21. ONTARIO—SURROGATE COURTS.

Application to remove cause into High Court—*Will—Undue influence—Value of estate—Importance of issues.*]—Upon an

application under s. 34 of the Surrogate Courts Act to remove a cause from a Surrogate Court into the High Court, the importance of the case and its nature are not to be tried on counter-affidavits; it is enough if it appears from the nature of the contest and the magnitude of the estate that the higher Court should be the forum of trial. Much is left to the discretion of the High Court Judge as to the disposal of each application. —And where the contest was over the will of a widow, whose husband died in 1905, leaving to her an estate valued at over $27,000, which had shrunk at her death in 1907 to $5,850, and the allegation was that she had not been able to protect herself against the undue influence of the chief beneficiaries, her two sons, to whom it was said a large part of her husband's estate had been transferred in her lifetime—an order was made for the removal of the cause into the High Court. *Re Reith* v. *Reith*, 16 O. L. R. 168, 11 O. W. R. 883.

Application to remove cause into High Court—Will—undue influence—Want of testamentary capacity — Special circumstances. *Re Graham* v. *Graham*, 11 O. W. R. 700.

Grant of administration—*Applications in different Courts.*]—Where applications for letters of administration to the estate of a deceased person are made in more than one Surrogate Court, preference will be given to that made by the person nearest in the order in which administration is usually granted; and in this case jurisdiction to proceed was conferred on the Surrogate Court in which application was made by the mother of the intestate, against that on behalf of creditors, in another county. *Re Tougher*, 22 C. L. T. 98, 3 O. L. R. 144.

Guardian—*Passing accounts — Interest.*]—There is no authority in the Judge of a Surrogate Court to pass the accounts of a guardian of an infant appointed by such Court. Section 18 of 63 V. c. 17 (O.) does not apply, such guardian not being a trustee within the meaning of the section:—*Held*, also, that, under the circumstances of this case, six per cent. interest was a fair rate to charge the guardian on the moneys in his hands. *Murdy* v. *Barr*, 21 C. L. T. 526, 2 O. L. R. 310.

Jurisdiction — 5 Edw. VII. c. 14 (O.) —Passing accounts — Finding of Judge — *Res judicata* — Action to recover amounts found due from legatee under will—Retention pending application for leave to appeal from order of Surrogate Court—Successful appeal—Trial judgment—Costs. *Union Trust Co.* v. *Bensley*, 12 O. W. R. 336, 1069.

Jurisdiction—*Reopening order made on passing executors' accounts—Fraud or mistake—Rule 642 — Persona designata.*]—A Surrogate Judge acting as the Surrogate Court has inherent jurisdiction to set aside an order which he has been induced to make by fraud of the applicant; and also to set aside or vary an order which he has made by mistake, though not to correct errors made in the judicial determination by him of any question; thus in this case it was held that he had jurisdiction to vacate an order made by himself upon the taking of executors' accounts and to reopen the accounts and further investigate them without reference to the order made.—The acts of the Surrogate Judge in passing accounts of executors are those of the Court and not of the Judge as *persona designata*.—Consolidated Rule 642, which substitutes a proceeding by petition for the practice of filing certain kinds of bills abolished by the General Order of 1853, does not apply to a petition to a Surrogate Judge to vacate an order made by him on the passing of executors' accounts, but must be confined to cases in which under the former practice such relief as is mentioned in it could be obtained by one or other of such bills. *In re Wilson and Toronto General Trusts Corporation*, 8 O. W. R. 677, 13 O. L. R. 82.

Passing accounts — *Executors and administrators—Trustee — Creditor's claim — Surrogate Courts Act, R. S. O. 1897 c. 59, s. 72—5 Edw. VII. c. 14 (O.).*]—A Surrogate Court Judge on passing the accounts of an executor, administrator, or trustee, under the provisions of s. 72 of the Surrogate Courts Act, as amended by 5 Edw. VII. c. 14 (O.), has no jurisdiction to call upon a creditor of the estate to prove his claim and to adjudicate upon that claim and allow it or bar it. If, however, the executor, administrator, or trustee, has in good faith paid the claim of a creditor before bringing in his accounts, the Surrogate Court Judge has jurisdiction to consider the propriety of that payment and to allow or disallow the item in the accounts. — Order of the Surrogate Court of Elgin barring the claim of a creditor set aside as having been made without jurisdiction. *Re MacIntyre*, 11 O. L. R. 136, 7 O. W. R. 122.

Removal of cause into High Court —Difficulty and importance of questions arising—Value of estate. *Re Wilcox* v. *Stetler*, 7 O. W. R. 65.

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22. Prince Edward Island Courts.

Jurisdiction — *Excess.*]—When transactions exceed $150 in amount and no balance has been struck and acknowledged, the County Court has no jurisdiction. *Dodd* v. *Gillis* (1875), 2 P. E. I. R. 31.

Mandamus — *Motion to quash peremptory mandamus.*]—O'Neill appeared at Court of Revision, and produced evidence of having paid his poll tax on 4th July, and applied to have his name entered on the voters' list; Alley, Judge of County Court, held that to entitle him to have his name entered, he must shew that he had paid his tax before the 18th June, to bring him within the provisions of the statute which required him to produce evidence that he had paid his tax "for the year immediately preceding the first sitting of the Court," and refused to insert his name in voters' list. Supreme Court granted peremptory *mandamus* requiring County Court Judge to insert O'Neill's name. Motion to quash *mandamus*:—*Held*, *mandamus* properly granted. *R.* v. *Alley* (1878), 2 P. E. I. R. 283.

23. Quebec Circuit Courts.

Establishment of new Court—*Pending proceedings—Opposition.*]—Where an action was begun and judgment given in it before the statute of 1893 establishing the new Circuit Court for the district of Montreal, the filing of an opposition to the judgment after that statute should be authorized by a Judge of the New Circuit Court, and not by a Judge of the Superior Court. *Kollmeyer* v. *Donohue*, 19 Que. S. C. 65.

Evocation to Superior Court—*Pleading.*]—An action brought in a Circuit Court upon promissory notes may be evoked by the plaintiff to the Superior Court when the defendant pleads that those notes were given in part payment of a thing sold by the plaintiff, for over $100, and that the sale is null, the thing sold being defective and valueless. 2. Par. 3 of Art. 1130, C. P., is not limitative, but simply provides for a special case. *Tufts* v. *Dalton*, 3 Que. P. R. 523.

Evocation to Superior Court — *Practice.*]—The Superior Court cannot remit a cause to the Circuit Court merely because the party asking to have it brought up to the Superior Court has not inscribed upon his evocation; the evocation must be unfounded. *Barbers' Assoc. of Que.* v. *Lizotte*, 4 Que. P. R. 70.

Exclusive jurisdiction — *Action for taxes—School taxes.*]—In a suit in the Superior Court to recover municipal taxes to an amount exceeding $100, accompanied with a demand for school taxes, a declinatory exception asking the dismissal of that portion of the demand which is for school taxes, on the ground that the Circuit Court has exclusive jurisdiction, will be maintained, notwithstanding Art. 170, C. C. P., it being impossible in such a case to transmit the whole record to the Circuit Court. *Dudswell* v. *Que. Central Rw. Co.*, 19 S. C. R. 116.

Exclusive jurisdiction —*Transfer from Superior Court—Amount in question—Landlord and tenant—Repairs — Cancellation of lease—Damages—Costs.*]—An action between landlord and tenant in which the tenant demands repairs, or in default the cancellation of the lease, and in either event $12.50 for damages, is of the exclusive competence of the Circuit Court, and the incompetence of the Superior Court being *ratione materiæ*, the Court should of its own motion send the cause before the competent tribunal. 2. In this case the action of the plaintiff having been declared ill-founded by the tribunal of first instance, the plaintiff should bear the costs of contestation in the Superior Court as well as the costs of review, although the incompetence of the tribunal was not pleaded. *Lafranchise* v. *Caty*, 19 Que. S. C. 185.

Jurisdiction—*Action to cancel lease — Remission to Circuit Court.*]—An action in which a tenant demands the cancellation of a lease as a rent of $168, and $85 for damages, is of the competence of the Circuit Court, and will be removed to that Court from the Superior Court upon a declinatory exception. *Grosbois* v. *Bienville*, 4 Que. P. R. 409.

Jurisdiction — *Amount in controversy —Addition of taxed costs—Subsequent costs —Fi. fa. lands—Seizure and sale—Hypothecary creditor.*]—The Circuit Court sitting at Montreal cannot prosecute, against immovables, the execution of its judgment for a sum not exceeding $40, and the want of jurisdiction in that respect is absolute and material. 2. The taxed costs of the action allowed by the judgment may be added to the amount recovered so as to make up the sum exceeding $40; but subsequent costs, that is, costs of a *fi. fa.* goods, or the expense of such a writ, or the expense of an execution on growing crops, or the expense of a return of *nulla bona*, may not be added. 3. The clerk of the Circuit Court, in such a case, has no authority to issue a *fi. fa.* lands, and such a writ is therefore void. 4. The seizure and sale of the defendant's immovables, in virtue of such a writ, are void. 5. An hypothecary creditor of the execution debtor, who has had no knowledge of the seizure or sale, and who is prejudiced by it, has a right to obtain, by petition, the avoidance of the sale and setting aside of the writ. *Masson* v. *Dansereau*, 18 Que. S. C. 141.

Jurisdiction — *Cancellation of lease — Damages.*]—An action for cancellation of a lease and for $85 damages is of the exclusive competence of the Circuit Court. *Yon* v. *Vallée*, 17 Que. S. C. 446, 2 Que. P. R. 562.

Jurisdiction — *Single commissioner — Amount in controversy—Date of judgment—Reference to arbitration.*]—A judgment of the Court of Commissioners will not be removed upon *certiorari* upon the ground that the single Commissioner who heard the case rendered the judgment in his own name instead of in that of the Court.—2. The Court of Commissioners has jurisdiction to adjudicate upon a demand for division of wood, where the value of the wood does not exceed $25.—3. Neglect to date a judgment is not sufficient to invalidate it, where the date appears elsewhere.—4. The Court of Commissioners can itself, and without exceeding its powers, refer a cause to arbitration. *Auger* v. *Lamoureux*, 2 Que. P. R 527.

Jurisdiction of Superior Court—*Prohibition.*]—There is no such Court as the Circuit Court of the District of . . ; but there is a Circuit Court for the province of Quebec, of which sittings are held in all the districts and counties by Judges of the Superior Court.—A Judge of the Superior Court, whether sitting in Court or in Chambers, has no power to order the issue of a writ of prohibition to a Judge of the same Court to restrain him, while sitting in the Circuit Court, from proceeding with any suit or action in that Court. *Palliser* v. *Terrebonne Circuit Court*, 28 Que. S. C. 66.

Removal of cause from—*Amount in controversy—Future rights.*]—An action to recover an alimentary pension of $2.25 a week, for 47 weeks, may be removed from the Circuit Court to the Superior Court, the judgment to be rendered in such action being one which will affect the future rights of the parties. *Roach* v. *Duggan*, 4 Que. P. R. 289.

Removal of cause from—*Benefit society—Future rights of member.*]—An action

for the recovery of benefits from a charitable association by one of its members may be removed to the Superior Court, such action having an effect on the future rights and interests of the plaintiff, and deciding for the future his status as a member of the association. *Gagn* v. *Victoriaville Society of St. John Baptist*, 4 Que. P. R. 382.

Removal of cause from—*Jurisdiction of Court — Rescission of lease — Future rights.*]—There may be evocation when a Circuit Court is competent. If it was not competent, there would be no ground for evocation, but for declination. 2. An action by which the plaintiff claims the rescission of a lease, and $99 for damages and rent due, is within the competence of the Circuit Court. 3. Where the lease is of a flour mill, and a saw mill, and the rent is to be paid half out of the products of the mills, and the lease has still three years to run, and it appears in the action that the half of the products which belongs to the defendant for the three years yet to run represents the value of more than $100, the defendant has the right to have the case removed to the Superior Court, inasmuch as his future rights in question are of greater value than $100. *Morneau* v. *Verret*, 20 Que. S. C. 399.

Territorial jurisdiction.] — A Commissioners' Court sitting at Longueuil cannot take cognizance of a suit begun against a person residing in the city of Montreal, where he is served, the Circuit Court at Montreal having sole jurisdiction in such a case. *Lapointe* v. *Viger*, 17 Que. S. C. 376, 3 Que. P. R. 37.

Territorial jurisdiction—*Cause of action—Carriers—Transit.*]—Where a carrier contracts in Montreal to carry a parcel from Montreal to St. Jerome, the freight to be paid at St. Jerome, and it is alleged that the package has been damaged in transit, the action for damages must be instituted in the district of Montreal, where the cause of action originated, and not in the district of Terrebonne, at St. Jerome, where freight is paid. *Petit* v. *Dominion Express Co.*, 16 Que. S. C. 434.

Territorial jurisdiction—*Cause of action—Promissory note.*]—In an action upon a promissory note dated at Montreal, and made payable at Montreal, although really signed at Quebec, where the defendants have their domicil, the whole cause of action arises in the district where the note is made payable, especially where the arrangement by which the note was given in part payment of an anterior debt was entered into at Montreal. *Lévesque* v. *Roy*, 3 Que. P. R. 369.

Territorial jurisdiction—*Cause of action—Sale of goods—Exception to jurisdiction —Costs.*]—A cause of action for goods sold to the defendant domiciled in the district of Terrebonne, by the traveller of the plaintiff, authorised by her to receive payment for her goods, less the freight which the defendant pays upon the goods, arises in the district of Terrebonne, and the record should be transmitted upon exception of the jurisdiction of the Circuit Court of the district of Montreal. —2. The fee of the defendant upon an exception to the jurisdiction sustained and transmission of the record ordered, should be that proper to an action dismissed after contestation. *Montreal Brewing Co.* v. *St. Vincent*, 2 Que. P. R. 363.

Territorial jurisdiction — *Defamation —Place where letter received.*]—An action based upon a letter containing defamatory words sent from the district of Three Rivers to the address of a person living in the district of Arthabaska, where the letter is received and read, may be brought in the latter district. *Marcotte* v. *Thérien*, 22 Que. S. C. 315.

Territorial jurisdiction—*Place of sale of goods.*]—A sale of goods in *genere* is made at the place where the goods have been weighed, counted, or measured, and an action based on a sale may be begun at the place where such operation has taken place. *Gravel* v. *Durocher*, 4 Que P. R. 435.

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24. QUEBEC—COURT OF KING'S BENCH.

Quorum of Judges—*Judgment — Jurisdiction.*]—Article 1241 C. P. Q., permits four Judges of the Court of King's Bench, Quebec, to give judgment in a cause heard before five, when the fifth Judge, after hearing the case argued, excused himself as disqualified: Davies and Nesbitt, JJ., contra. *Angers* v. *Mutual Reserve Fund Life Association*, 35 S. C. R. 330.

See APPEAL.

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25. QUEBEC—INFERIOR COURTS.

Commissioners' Court—*Territorial jurisdiction—Parish—Separation of village.*]—A Court of commissioners established in a parish is competent to adjudicate upon causes which arise in a part of the territory subsequently set apart as a town. *Bussières* v. *Bussières*, 33 Que. S. C. 292.

District Magistrate's Court is a Court of inferior jurisdiction within the meaning of Art. 1003 C. P. and is subject to the control of the Superior Court. *Desormeaux* v. *St, Therese* (1900), 19 Que. K. B. 481.

Jurisdiction — *Cesser — Annexation of city—Petition—Recusation against recorder.*] —A recorder has no right to himself adjudge and dismiss a petition setting forth grounds of recusation against him.—The plaintiff's action having been instituted after the annexation of the city of Ste. Cunégonde to the city of Montreal, the Recorder's Court of the former city had ceased to exist, and had no jurisdiction over property within the previous limits of the same. *Leclair* v. *Goyette*, 8 Que. P. R. 22.

Jurisdiction — *Penalty for offence against municipal by-law.*]—*See Que. Rw. Light & Power Co.* v. *Recorder's Court of Quebec*, 41 S. C. R. 145.

Jurisdiction — *Salary — Forfeiture — Certiorari.*]—The Recorder's Court of the

city of Montreal has jurisdiction to entertain a cause in which salary is claimed, and this although the contract contains clauses providing for forfeiture of a certain amount in case of default in execution of the contract. 2. The Superior Court cannot upon *certiorari* take cognizance of a question of law concerning the retention, as in a case of forfeiture, of a certain part of a salary, the question not having been raised before the Recorder's Court. *Société Anonyme des Théatres* v. *Fouquet*, 5 Que. P. R. 248.

Magistrate's Court — *Jurisdiction — Annulation of resolution of municipal council—Tavern license—Prohibition.* —A magistrate's Court has no jurisdiction to annul, on the ground of illegality, a resolution of a municipal council in respect of a tavern license, except in a case in which the council confirms a certificate in violation of the statute 63 V. c. 12; in all other cases the decision of the council is final. Therefore, the judgment of the Court of first instance, refusing a writ of prohibition to a magistrate's Court, was reversed. *Ste. Thérèse de Blainville* v. *Cour de Magistrat de Terrebonne et Desormeaux*, 9 Que. P. R. 408.

Procedure—*Commissioner sitting during part of hearing—Married woman defendant—Authorisation.*]—Where the husband of a woman separate as to property, being summoned alone before a Commissioner's Court, appears before that Court and pleads not the want of authorisation, but other grounds of defence, his appearance and plea are equivalent to acts of authorisation of his wife as a party before the Court. 2. A cause which has been completely heard by one Commissioner only, can be adjudged only by him, although another Commissioner has also sat through a part of the hearing. *Rex* v. *Warren*, 25 Que. S. C. 78.

Recorder's Court — *Jurisdiction—Municipal by-law—Prosecution—Necessity for notice —Irregular notice—Conviction—Certiorari.*] —The by-law of the city of Montreal (No. 318), in respect to plumbers, drainage, etc., is legal and *intra vires*, being based upon s.-s. 56 of s. 300 of 62 V. c. 58. This by-law does not require that notice of prosecution shall be given to one who violates it; and besides, if notice was necessary and was given irregularly, such irregularity not being in evidence before Recorder's Court, where a conviction under the by-law was made, would not constitute an excess of jurisdiction. *O'Brien* v. *Dupuis*, 9 Que. P. R. 439.

Sale of goods — *Damages for breach of contract — Compensation — Inscription en droit.*] — Mathieu, J., *held*, that damages which cannot be proved except by a long contradictory enquiry are not to be regarded as clear and liquidated, and a plea *opposés en compensation* will be dismissed in law. *Can. Breweries* v. *Yasinowsky* (1902), 4 Que. P. R. 464.

Sessions of the peace — *Jurisdiction—Offence against game laws—Plea of ultra vires—Prohibition.*]—A Court of Special Sessions of the Peace has jurisdiction to hear and determine a complaint in respect of an infraction of the Quebec game laws, and the jurisdiction is not ousted by a plea of the defendants that the provincial statute is *ultra vires*. Prohibition refused. *Révillon Bros.* v. *Pagé*, 33 Que. S. C. 259.

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26. QUEBEC—SUPERIOR COURT.

Action brought in Circuit Court — *Removal to Superior Court—Amount in controversy—Right of appeal.*] — There is no ground for removal to the Superior Court in the first instance of actions or suits for amounts of between $100 and $200—in this case the annual payment of a sum of $120 by the defendant to the plaintiff until the marriage of the latter—when these actions may be brought in the Circuit Court with a right of appeal to the Superior Court. *Hencault* v. *Goulet*, 10 Que. P. R. 300.

Case reserved — *Verdict of jury.*] — *Held*, by Lemieux, J., that the Superior Court in Review has absolute and unrestricted power to judge of the merits of a cause which has been reserved, without regard to the verdict of the jury: Art. 496, C. P. C. *Ferguson* v. *Grand Trunk Rw. Co.*, 20 Que. S. C. 54.

Circuit Court—*Transfer of action from —Validity of—Inscription.*]—When an action is transferred by the Circuit Court to the Superior Court under Art. 171, C. P., an inscription for judgment upon the validity of such transfer cannot be had under Art. 1130, C. P., as on an evocation. *Westmount School Commissioners* v. *Mallette*, 7 Que. P. R. 43.

Inscription in review—*Appeal—Tutors —Authorisation.*]—An application for review in an appeal within the meaning of Art. 396, C. C.; and, therefore, an inscription before the Court of Review made by tutors, without the authorization of a Judge or of the prothonotary upon the advice of a family council, is illegal and void. *Beaumont* v. *Lamonde*, 6 Que. P. R. 6.

Jurisdiction — *Action against executor —Domicil of deceased—Place of service.*]— An action brought in respect of a succession against a testamentary executor, as such, is of the exclusive competence of the Court of the district where the testator had his domicil at the time of his decease, and cannot be brought in the Court of a district where he chanced to be temporarily at the time of his death. The service on the executor should be made in the district where he has his business office. Article 94, C. P. C., applies to purely personal proceedings as to which the Code contains no special or exceptional provision; the proceedings relating to successions are indicated in Arts. 1362 *et seq.*; and, therefore, the tribunal of the place of decease and of the place where the property of the succession is situated has, to the exclusion of all others, save in certain cases here inapplicable, jurisdiction over the proceedings. *Béchard* v. *Bernier*, 17 Que. S. C. 540.

Jurisdiction — *Action against fire insurance company—Head office in Ontario—Property insured in the United States—Territorial jurisdiction—Service of process.*]—An ac-

tion will lie in the Superior Court of this province against an insurance company that has its chief place of business in Ontario, to recover, on a policy issued in the province, a loss by fire of property in the United States, but it must be brought in the district where the company has its chief place of business for this province, and service of process must be effected at such chief place of business. *Mutinier* v. *Traders' Fire Ins. Co.*, 33 Que. S. C. 411, 9 Que. P. R. 189, 4 E. L. R. 431.

Jurisdiction — *Action for negligence — Death of child in another province—Residence of company—Attornment to jurisdiction.*]—The father and mother can in their personal names sue the author of their son's death, either under the laws of Manitoba or under the laws of Quebec. The defendants having a place of business in the city of Montreal, having accepted the jurisdiction and pleaded to the merits, the laws of Quebec must be applied when the question involved relates to procedure. *Boon* v. *Can. North. Rw. Co.*, 7 Que. P. R. 239.

Jurisdiction — *Action for rescission of lease—Landlord's lien.*]—The Superior Court has jurisdiction to entertain an action by a landlord against a tenant, wherein it is alleged that the tenant has not brought sufficient goods upon the demised premises, and that he has taken away certain goods which were subject to the landlord's lien. *Devlin* v. *Robb*, 8 Que. P. R. 417.

Jurisdiction—*Amount in controversy.*]—The plaintiff, a member of a club, sued the club for a declaration that he was not obliged to pay the club the sum of $25 which the club had imposed upon members for one year only:—*Held*, that the action was not to be regarded as one for the recovery of $25, and was not within the jurisdiction of the Circuit Court, but was properly brought in the Superior Court. *Beaudry* v. *Club St. Antoine*, 2 Que. P. R. 484.

Jurisdiction—*Amount in controversy.*]—When it may be found necessary to condemn one or the other of the defendants for such a proportion of the sum asked as will exceed $100, and the conclusions are broad enough to justify such a condemnation, the action is properly instituted in the Superior Court. *Montreal* v. *Arnovitch*, 7 Que. P. R. 351.

Jurisdiction —*Amount involved—Charge on land.*]—An action by which an amount less than $100 is claimed, but in which a claim is also made to have certain immovables charged with payment of that sum, and to have the defendant ordered to give up the lands in default of paying the amount, is an action which must be brought in the Superior Court, whatever be the amount claimed. *Syndics of Parish of St. Paul* v. *Suburban Land Co.*, 6 Que. P. R. 444.

Jurisdiction—*Cause of action—Place of hiring—Wrongful dismissal.*]—Where an employee, hired in the province of Ontario to work in the district of Pontiac, alleged that he had been wrongfully discharged in the latter district, and suffered damage from frost bites, etc., while on his way back from the shanties where he had been working, the whole cause of action did not arise in the province of Quebec. *Landry* v. *Hurdman*, 25 Que. S. C. 378.

Jurisdiction—*Circuit Court—Amount involved—Arrearages of annual settlement.*]—A Circuit Court held at the chief town of a district is not competent to entertain a personal action for $12 for arrearage of an annual settled rent. 2. The Superior Court is competent to entertain such an action, which may, therefore, originate in a Superior Court. *Lebe'* v. *Langlois*, 22 Que. S. C. 239.

Jurisdiction — *Contract—Sale of goods —Place of making.*]—Although offers to purchase goods may be sent by letter or telegram from the province of Ontario, such offers are to be deemed to be made as to the vendor at the place where they are received, and the contract then becomes completed there by their acceptance. Wherefore the Courts of the place of acceptance, which, in this case, was also the place of delivery of the goods, are competent to entertain an action for the recovery of the price of such goods. *Timossi* v. *Palangio*, 26 Que. S. C. 70.

Jurisdiction — *Contract—Where made — Sale of goods by travelling salesman — Necessity for approval of vendor.*] — When goods are sold in the province of Ontario by a commercial traveller, who does not disclose the fact that the sale is subject to the approval of his principal, then the contract of sale is completed there, and no action lies in the district of Montreal, where the principal is living and doing business. *Silver* v. *Holliday*, 9 Que. P. R. 369.

Jurisdiction — *Limitations — Stay of execution—Impossibility of literally obeying judgment.*] — The Superior Court being the common law tribunal for suitors, its jurisdiction is not limited except by statute; it has the power and the right to act in a number of cases not provided for by law.—2. A motion for stay of execution of a judgment will be granted where it is physically impossible to do the act ordered by the judgment—in this case to put a roof on a church during the winter season. *Churchwardens of St. Pie de Guire* v. *Shawinigan Construction Co.*, 9 Que. P. R. 153.

Jurisdiction — *Motion to declare action not competent—Time—Deposit.*]—A motion demanding that it be declared that the Court has no jurisdiction to entertain the action *ratione materiæ*, need not be made within the time allowed for preliminary exceptions, nor be accompanied by a certificate stating the deposit in Court of the sum fixed by the rules of practice. *Bonin* v. *Pagé*, 9 Que. P. R. 177.

Jurisdiction — *Objection by defendant —Tribunal to be applied to—Deposit—Dismissal of action.*]—A defendant who objects to the jurisdiction of the Court may demand the dismissal of the action before the competent tribunal, if such tribunal exists. He may demand the dismissal of the action upon depositing the amount claimed; but, if he asks for the dismissal of the action without making the deposit, his motion will be de-

cleared irregular and dismissed without costs. *McKenzie* v. *Boston & Maine Rw. Co.*, 9 Que. P. R. 389.

Jurisdiction—*Personal action — Amount in controversy—Transfer to Circuit Court.*]—Where an action is purely personal, and the amount in controversy is less than $100, the Circuit Court has exclusive jurisdiction; if such an action is brought in the Superior Court, that Court, being absolutely incompetent by reason of the subject matter, will be bound to transfer the action, even *mero motu*, to the Circuit Court. *Coupal* v. *Beaudoin*, 8 Que. P. R. 327.

Jurisdiction—*Petition to quash resolutions of municipal council—Liquor License Act—Circuit Court.*]—A petition by municipal electors to quash resolutions passed by the municipal council of an incorporated town in regard to a liquor license is of the competence of the Superior Court, and the Circuit Court has no jurisdiction to entertain it, notwithstanding Art. 23 of the Quebec Liquor License Act, as amended by 3 Edw. VII. c. 13, s. 3. *Guay* v. *Mégantic*, 9 Que. P. R. 350.

Jurisdiction—*Real action—Removal of mill-dam — Damages — Circuit Court.*] — An action for $24 damages for injuries caused by a mill-dam, in which the plaintiff asks for a judgment for the removal thereof in default of payment of damages, is a real action, of the exclusive competence of the Superior Court, which cannot be brought in a Circuit Court. *Houle* v. *Ducharme*, 8 Que. P. R. 326.

Jurisdiction—*Replevin of shares in foreign company—Parties within jurisdiction.*]—The Superior Court at Montreal is competent to order a *saisie-revendication* of shares of the capital stock of a foreign company, when the plaintiff and the defendant, as well as a third person who is detaining the share certificates, are domiciled at Montreal; and the foreign company cannot demand, by declinatory exception, the discharge of the seizure. *Kinsela* v. *Kinsela*, 25 Que. S. C. 270, 6 Que. P. R. 137.

Jurisdiction—*Rescission of assignment of patent rights — Territory — Domicile — Election.*]—The Superior Court sitting at Montreal has jurisdiction to try an action wherein process has been served personally on the defendant within the district, to rescind a contract of assignment of patent rights, on the ground that the patent is void, although the defendant had elected his domicile at Ottawa when applying for the patent and never had a domicile in the province of Quebec: Patent Act, R. S. C. c. 61, s. 34.—The impeachment of the patent in such a case is made incidentally, and the Court cannot thereby be ousted of its jurisdiction to try the main issue, the rescission of the contract. Judgment in 7 Que. P. R. 369, reversed. *Shawinigan Carbide Co.* v. *Wilson*, 15 Que. K. B. 240, 8 Que. P. R. 1.

Jurisdiction — *Reversal of interlocutory judgment—Railway company — Crossings—Damages — Board of Railway Commissioners.*]—At the final hearing of a cause, the Court has power to reverse an interlocutory judgment rejecting a declinatory plea, and to dismiss the action for want of jurisdiction.—2. The Superior Court of Quebec has jurisdiction in actions to compel railway companies, within the legislative authority of the Parliament of Canada, to make railway crossings, to pay damages for their neglect to do so, etc., the Railway Act of 1903 having now here taken away such jurisdiction by express words, or necessary implication. *Perrault* v. *Grand Trunk Rw. Co.*, 14 Que. K. B. 245.

Jurisdiction — *Review—Circuit Court—Action en garantie — Principal action — School taxes.*]—The Superior Court sitting in review has no jurisdiction over a judgment rendered by the Circuit Court, sitting at Stanstead, in an action of warranty brought by a defendant against whom the principal action is for the recovery of $124 school taxes; and an inscription for review of such a judgment will be struck out on motion. *Coaticook School Commissioners* v. *Coaticook Electric & Power Co.*, 29 Que. S. C. 264.

Jurisdiction — *Review of decision of Exchequer Court of Canada—Reference of record to that Court.*]—The Superior Court does not possess any superintending, revising, or appellate jurisdiction in respect of the decisions and decrees of the Exchequer Court of Canada, especially when they have been confirmed by the Supreme Court of Canada.—It has no power to refer a record to the Exchequer Court, which is a federal Court. *Hodge* v. *Bélique*, 8 Que. P. R. 142.

Jurisdiction—*Right of habitation—Life interest—Real right—Demand for conversion into money—Circuit Court.*]—The right of habitation is a real right, for life or temporary, established for the benefit of an ascertained person, upon land the property in which is another's. One who demands the conversion of the enjoyment of a right of habitation into the payment of a sum of money, and that during his life, exercises a real right; and such demand not being within the exclusive jurisdiction of the Circuit Court, the Superior Court must entertain it in the first instance. *Niquette* v. *Niquette*, 10 Que. P. R. 68.

Jurisdiction—*Splitting cause of action—Sale of goods—Parts sold and delivered in different districts.*]—Where a part of the goods the price of which is claimed in an action has been sold and delivered in one district, and the remainder in another district, each of the sales gives a separate right of action, and the defendant may be sued in the Court of the place where each of the causes of action arose. *Chapman-Dart Co.* v. *Chevalier*, 8 Que. P. R. 50.

Jurisdiction over foreign defendant—*Property in district—Writ of summons—Absence of allegation of such property — Waiver by plea—Examination of defendant—Questions as to property.*]—A non-resident defendant may be sued in a district where he owns shares of stock, and against residents of which he has claims, such claims and stocks constituting property in that dis-

trict within the meaning of Art. 94, C. P., s. 4.—2. Although the plaintiff should regularly, in order to make the jurisdiction of the Court, by reason of the defendant having property in the district, appear on the face of action as instituted, have set forth in the writ of declaration that the defendant had property in the district, yet if the defendant, by his exception, tenders an issue to the plaintiff as to the existence of such property, by alleging that he does not come under any of the provisions of Art. 94 which would justify the institution of the action before the Court seised therewith, and moreover meets the allegation of the plaintiff's answer, in which it is formally stated that the defendant has property in the district, not by any objection thereto as being made in the answer, but by a denial of its truth, he must be held to have waived any objection based upon the absence of allegation of said fact in the writ or declaration.—3. The defendant has no right to object to cross-interrogatories on a commission *rogatoire*, tending to elicit evidence of property of his in the district. *McCurry* v. *Reid*, 4 Que. P. R. 261.

Order of judge — *Place of making.*]—*Held, per* Blanchet, J., that a notice given to the opposite party of the presentation of a petition to a Judge, elsewhere than at the chief place of the district, and an order made upon such petition, are illegal and void. *Connolly* v. *Stanbridge*, 4 Que. P. R. 186.

Powers of — *Superintending and reforming jurisdiction—Proceedings before Exchequer Court of Canada.*] — The Exchequer Court of Canada is not a Court subject to the superintending and reforming powers of the Superior Court of Quebec. An action in the latter Court to have proceedings had before and judgments rendered by the former Court declared null and void for want of jurisdiction, will not lie. *Hodge* v. *Béique*, 33 Que. S. C. 90.

Powers of trial Judge—*Reformation and reversal of interlocutory orders.*] — See *Montreal-Canada Fire Ins. Co.* v. *Thérien*, 34 Que. S. C. 205.

Removal of action from Circuit Court — *Future rights—Amount involved—Right of appeal.*]—Even if future rights be involved in an action taken in the Circuit Court for an amount under $100, no evocation of the case to the Superior Court will be allowed if the action has not been instituted in the Circuit Court at the chief place of the district, because the case is then subject to appeal. *Bickford* v. *Remington-Martin Co.*, 5 Que. P. R. 354.

Removal of action from Circuit Court—*Future rights.*]—Under Art. 55, C. P., an action for $99 begun in the Circuit Court in respect of matters which might affect future rights, cannot be removed to the Superior Court. *Roy* v. *Ferland*, 23 Que. S. C. 1, 5 Que. P. R. 188.

Removal of action from Circuit Court — *Landlord and tenant — Rental value.*]—A tenant to whose demand his landlord pleads that the rental value of the demised premises is not that alleged in the declaration, cannot have the case removed from the Circuit Court to the Superior Court. *Shearer* v. *Marks*, 22 Que. S. C. 472, 5 Que. P. R. 304.

Removal of action from Circuit Court — *Motion — Declaration — Future rights.*]—There is no ground for removing a cause from the Circuit Court to the Superior Court except in the cases provided for in Art. 49, C. P.—2. When the ground for removal does not appear by the demand, the declaration for removal must allege, and must be accompanied by documents or a deposition establishing *prima facie*, that the action is removable.—3. Removal of a cause is granted only where there are future rights relating to the party who makes the motion for removal. *Corporation D' Aqueduc de Richmond* v. *Johnson*, 22 Que. S. C. 65.

Removal of action from Circuit Court — *Municipal taxes—Appeal—Future rights.*]—There is no appeal from a judgment rendered by the Circuit Court in a municipal matter, and, therefore, a defendant, sued for municipal taxes, cannot, even if his defence effect future rights, have the case removed into the Superior Court. *Nicolet* v. *Imperial Oil Co.*, 5 Que. P. R. 205.

Removal of action from Circuit Court—*Stage of cause.*]—A defendant who wishes to have a suit removed into the Superior Court, must do so before filing his defence on the merits. *Commissioners of Railways* v. *Penniston*, 5 Que. P. R. 445.

Removal of action from Recorder's Court—*Notary—Agent for sale of land.*]—A notary, sued for having acted as agent for the sale of immovables, cannot before the trial demand by *certiorari* the removal of the cause from the Recorder's Court of Montreal to the Superior Court, the proof of the agency for the sale of immovables and the nature of the transaction being within the competence of the Recorder's Court. *Laliberté* v. *Montreal*, 5 Que. P. R. 395.

Removal of action to — *Future rights.*]—Where by the judgment sought in an action begun in a Circuit Court the defendant would be compelled to maintain for all time to come, under a by-law, a road on his property, he has a right to have the action removed into the Superior Court. *Parish of St. Martin* v. *Leblanc*, 7 Que. P. R. 367.

Removal of cause into — *Action for fine—Practising as advocate.*]—A defendant, sued in the Circuit Court by the Bar of Montreal for the recovery of a fine of less than $100 for the illegal exercise of the functions of an advocate, who pleads that he is a member of an association of licensed accountants, and that such association has a tariff for legal collections, may have the cause removed to the Superior Court. *Bar of Montreal* v. *Duff*, 5 Que. P. R. 125

Removal of cause into — *Action for removal—Decision on—Judgment — Inscription.*]—A party may proceed to judgment by way of inscription or motion in causes re-

moved into the Superior Court; but if the party wishes to have a decision upon the validity of the removal, it is always necessary to mention it in the inscription or the notice of motion. *Roach* v. *Duggan*, 5 Que. P. R. 43.

Removal of cause into—*Amount claimed —Mitoyonneté — Future rights.*] — Where a party claims an amount below $100 for work done to a shed built between his property and that of the owner of adjacent land, the defendant may have the cause removed to the Superior Court, if he alleges that the work has relation to the line of separation between the properties, and that the judgment to be given would affect the future rights of the parties. *Perreault* v. *Chopin*, 10 Que. P. R. 102.

Stenographers — *Appointment—Prothonotary — Interference by Court.*]—The prothonotary of the Superior Court is the person who alone has the choice of stenographers to take down the evidence in causes tried before the Superior Court and in apealable causes tried before the Circuit Court, the competence of such stenographers having been first established by examinations taken before a committee of the Bar named by the district council; and the Court has no jurisdiction to interfere in a matter so purely discretionary, and to order the prothonotary to insert upon his list the name of the stenographer to whom the Bar council has granted a certificate of competence. *Perrault* v. *Turcotte*, 23 Que. S. C. 436.

Summary action—*Principal claim—Addition of subsidiary claim — Jurisdiction — Account — Service — Stay of proceedings — Costs — Motion — Dilatory exception.*] —1. Where a principal sum is properly claimed in an action of a summary nature, there may be joined to it the amounts which are only accessories of the principal debt (in this case, the expenses incurred for the registration of a lien for materials) without the action ceasing to be summary.—2. A copy of the detailed account ought to be served upon the defendant, and no proceedings can be taken before such service.—3. In this case, the costs of a motion only and not those of a dilatory exception were allowed. *Légaré* v. *Tranchemontagne*, 10 Que. P. R. 305.

Summary procedure— *Action for wages and damages.*]—An action for the recovery of wages accompanied by a claim for damages sustained by the plaintiff by the loss of his luggage, which was to have been conveyed by his employers, and for damages sustained by the plaintiff on his return from the defendants' timber limits, may be brought under the summary procedure. *Charron* v *Gillies*, 7 Que. P. R. 146.

Territorial jurisdiction—*Action against executor — Domicil of testator—Locus of property.*]—In an action proper for a Superior Court against an executor *en caducité de legs* and *en reddition de comptes*, the only Court which has jurisdiction is that of the district in which the domicil of the testator is situated, or that in which his property is situated; the facts that he died in another district and that the process in the action has been personally served upon the executor in that district, can make no difference as to the jurisdiction of the Court. *Béchard* v. *Bernier*, 3 Que. P. R. 36.

Territorial jurisdiction—*Action against executor—Place of succession.*]—An action against an executor for payment of a legacy and for an account must be begun in the district where the succession was opened and where the property of the deceased is situated. *Bélanger* v. *Paradis*, 9 Que. P. R. 371.

Territorial jurisdiction — *Action for cancellation of deeds — Mis-en-cause—Domicil of parties.*]—An action for the cancellation of certain deeds and for an account of the profits made thereunder, in which the inheritor for life is brought in as *mis-en-cause*, that he may be deprived of the possession of the property in question and ordered to furnish security, or to allow the inheritance to be placed in sequestration, is a mixed action, where the inheritor, *mis-en-cause*, is in reality a defendant, and may be launched indifferently in either the district where the defendant or that where the *mis-en-cause* is domiciled. *Resther* v. *Hébert*, 7 Que. P. R. 89.

Territorial jurisdiction — *Action for moneys advanced to agent.*]—An action by a merchant to recover moneys advanced to his commission agent for purchases which were not made, must be brought in the Court of the defendant's domicil, where the contract was completed and the advances made, and where the purchases were to be made. *Archambault* v. *Laroche*, 7 Que. P. R. 165.

Territorial jurisdiction — *Action for price of goods—Place where order taken by agent—Approval by principal — Completion of contract—Judicial districts.*]—If the scope of authority of an agent is limited to the taking of orders subject to his principal's approbation, the contract of sale is complete only at the vendor's domicil; an action for the price of sale of these goods will, therefore, rightfully be taken at such vendor's domicil. *Morris* v. *McDonald*, 9 Que. P. R. 67.

Territorial jurisdiction — *Cause of action — Award — Publication.*] — The Superior Court at Montreal cannot entertain an action to enforce an award, although the submission, the hearing, and the pronouncing of the award were in the district of Montreal, if the award was published to the defendants in another district, the whole cause of action in such case not having arisen in the district of Montreal. *R. C. Episcopal Corp. of Nicolet* v. *Paquet*, 17 Que. S. C. 447, 3 Que. P. R. 144.

Territorial jurisdiction — *Cause of action — Contract — Domicil of defendant.*] —The plaintiff sued for damages, alleging that the defendant, who lived in Quebec, had induced him to leave his employment in Montreal to go and work for him in Quebec, and had afterwards refused to employ him in accordance with the terms agreed upon:— *Held*, that the cause of action did not arise in the district of Montreal, and the defendant must be sued in the district of his domicil. *Stevens* v. *Valiquet*, 7 Que. P. R. 477.

Territorial jurisdiction — *Cause of action — Contract — Place of making — Sale of goods—Order taken by agent—Acceptance by vendor.*]—When goods are sold through a commercial traveller, whose power as agent of the seller is limited to taking orders from customers subject to the approval of his principal, the contract is only perfected by such approval and acceptance. Hence, when an order is given in Morrisburg, Ontario, and accepted and approved by the seller in Montreal, the contract takes place in the latter city, and an action for recovery of the price from the purchaser will lie there under Art. 94 (5), C. C. P. *Morris* v. *McDonald*, 22 Que. S. C. 507.

Territorial jurisdiction — *Cause of action—Contract—Sale of goods.*]—In an action for the price of goods based upon a sale made by a travelling salesman of the plaintiff, the whole cause of action arises at the place where the sale is made, and not at the domicil of the plaintiff, the merchant who receives the order. *Ferronerie du Canada Cie.* v. *Delorme*, 6 Que. P. R. 215.

Territorial jurisdiction — *Cause of action — Promissory note.*]—An action upon promissory notes dated at Montreal and made payable at Montreal, but really made in the district of Beauce, where the defendant has his domicil and where he has been served with process, is not well begun in the district of Montreal, and the record will be transferred upon exception taken to the jurisdiction, to the Court of the district of Beauce. *Lapierre* v. *Beaudoin*, 3 Que. P. R. 386.

Territorial jurisdiction — *Cause of action—Sale of goods—Place of order and delivery—Judicial districts.*]—When goods are ordered, whether verbally from an agent or by letter mailed from the district of Ottawa, and delivery of the goods is made there, then the whole cause of action arises in said district, and no action will lie in the district of Quebec, where the seller of the goods is residing and doing business. *Amyot* v. *Bélanger*, 9 Que. P. R. 6.

Territorial jurisdiction—*Circuit Court —County of Berthier — Amount involved— Cause of action—Domicil.*]—The chief place of a district of which the county of Berthier forms part by virtue of the statute 61 V. c. 19, is the chief place of the district of Joliette, and not the chief place of the district of Richelieu, in spite of the concurrent jurisdiction which is attributed by the same statute to the Court of the Richelieu district held for the county of Berthier; an action for less than $200, the cause of which has arisen in the county of Berthier, and at a time when the defendant had his domicil there, must be instituted in the Circuit Court of the county of Berthier. *Comtois* v. *Michaud*, 9 Que. P. R. 87.

Territorial jurisdiction — *Contract — Place of making.*]—An agreement that one party will make for the other purchases of fruit during the season which is opening, in consideration of a commission upon the price, to be fixed later, is a contract within the meaning of paragraph 5 of Art. 94, C. P. C. The Court of the district in which the agreement is made is therefore competent to entertain actions arising thereout. *Archambault* v. *Laroche* (1906), 14 Que. K. B. 380. See S. C., 7 Que. P. R. 105.

Territorial jurisdiction — *Contract — Place of making.*]—When a commercial traveller makes a sale on condition that it is approved by his employer, and it is so approved, the sale is to be considered as made in the place where the order is taken and not in the place where it is approved. *Rock City Tobacco Co.* v. *Girard*, 26 Que. S. C. 453.

Territorial jurisdiction — *Contract — Place of making — Agreement for maintenance.*]—When a son in consideration of a conveyance to him of certain land by his father and mother has agreed to support them for the remainder of their lives, a suit against him by one who has performed the obligation in his place, ought, supposing it to be well founded, to be brought at the place where the contract was made, and not at the place where such services were rendered. *Théoret* v. *Brunet*, 7 Que. P. R. 138.

Territorial jurisdiction — *Contract — Place of making—Election of domicil.*]—An action cannot be tried before the Court of the district where the contract was made, if the parties, in their contract, have elected domicil in another district, and agreed that all suits at law arising therefrom should be tried in the latter district. *St. Laurent Laiterie Co.* v. *Coté*, 6 Que. P. R. 153.

Territorial jurisdiction — *Contract — Place of making — Election of domicil.*] — Where a promissory note has been made and signed in the district of Three Rivers, and the contract by virtue of which the note was given was also made there, and the contract contains, besides, an election of domicil in the same district for suits or actions to which it may give rise, an action begun in the district of Montreal will be dismissed upon declinatory exception. *St. Laurent Laiterie Co.* v. *Trottier*, 7 Que. P. R. 428.

Territorial jurisdiction — *Contract — Place of making—Sale of goods by agent—Ratification.*]—A contract between the buyer of goods and the travelling salesman of the vendor is complete, for the purposes of territorial jurisdiction, at the time of its making, even though it is subject to the ultimate ratification of the vendor. *Silver* v. *Pinsonnault*, 9 Que. P. R. 235.

Territorial jurisdiction — *Contract — Sale of goods—Place of making.*] — Action cannot be brought in the Court of the place where the order for goods was accepted, where it appears that the person who accepted on behalf of the defendant had not due authority to do so, and the defendant has repudiated the order, especially if the order did not constitute a complete contract of sale. *Superior* v. *Columbia Phonograph Co.*, 7 Que. P. R. 211.

Territorial jurisdiction — *Contract of correspondence — Sale of goods—Transfer to proper district.*]—A plaintiff complaining that a specific article delivered to him by the defendant, in pursuance of a contract

by correspondence, and forwarded to a customer of the plaintiff, does not conform to the order, cannot bring his action in the district of the domicil of the customer, who refused to accept the article.—2. In a case where an article sold is refused by the purchaser, who puts it at the disposition of the vendor and claims damages from him, such article does not constitute property so as to give jurisdiction to the Court of the district where it is.—3. *Semble*, that, whatever may be the jurisdiction of the Courts in the matter of contracts by correspondence, if the defendant demands the transfer of the record from the district where the article in question is, to that from which the order was sent, such transfer will be granted. *Forman* v. *United Electric Co.*, 4 Que. P. R. 148.

Territorial jurisdiction — *Contract — of hiring—Place of hiring.*]—An action for damages by a day labourer against his employer for wrongful dismissal, loss of salary and time, and suffering, may be begun in the district in which the agent of the employer engaged the plaintiff. *Pepin* v. *Turner Lumber Co.*, 5 Que. P. R. 178.

Territorial jurisdiction — *Domicil of defendant—Locus of subject matter—Reference to competent Court.*] — In a real or mixed action, the defendant can only be summoned before the Court of his domicil, or before that of the place where the thing in dispute is situated.—2. A Court that has no jurisdiction *ratione personæ*, on the face of the action, over a defendant who fails to appear, can neither entertain the suit, nor make the order of reference to the competent Court mentioned in Art. 170 C. C. P. *Can. General Electric Co.* v. *Can. Wood Mfg. Co.*, 29 Que. S. C. 148.

Territorial jurisdiction — *Exception to—Transfer or dismissal.*]—A defendant who objects to the jurisdiction of the Court should ask for the transfer of the action to the competent tribunal, if such exists. He may ask for the dismissal of the action, if he deposit the amount claimed, but if he prays for the dismissal of the action without making such deposit, his motion *déclinatoire* will be declared irregular and dismissed with costs. *Beauport Brasserie Co.* v. *Belisle*, 18 Que. S. C. 433.

Territorial jurisdiction — *Foreign defendant — Administration of foreign estate —Place of service—Property in jurisdiction.*] —A defendant who is a foreigner may be ordered to render an account of the property of an inheritance originating in a foreign country, before the Court of the district where process in the action has been served upon him, and wherein it is alleged he has property. *Debigaré* v. *Debigaré*, 7 Que. P. R. 179.

Territorial jurisdiction — *Judicial districts—Contract—Place of making — Whole "cause of action."*]—A debtor who has his domicil in the district of Montreal, where the contract of sale was signed, cannot be sued in the district of Quebec, where the goods are to be delivered and where payment therefor is to be made.—A cause of action is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment. *Joly* v. *Godbout*, 9 Que. P. R. 93.

Territorial jurisdiction — *Judicial districts — Succession — Domicil — Will.*] — A plaintiff, to recover certain annuities left by a testator who died in Montreal, from a defendant who resides and has been served within the district of Montreal, must sue in said district, where the succession devolved and is administered, and not in the district of Quebec, where the will was modified by an Act of the legislature. *Bourdon* v. *Pratt*, 9 Que. P. R. 128.

Territorial jurisdiction—*Libel—Newspaper—Place of publication—Cause of action—New Code.*]—1. The party alleged to be injured by a libellous article may exercise his remedy in damages in the district in which the journal is published, and in which the injury has been caused, because it is in that district that the injury is done, and it is there that the cause of action arises.—2. The new Code, when it says, "where the whole cause of action has arisen," has not changed the law as to these actions with reference to the right of suing the defendant in a district outside that in which he resides. *Chicoutimi Pulp Co.* v. *Delisle*, 34 Que. S. C. 294.

Territorial jurisdiction—*Place of contract—Mandate — Principal and agent.*]—A mandatory who sues his principal for indemnity against expenses which he has incurred in the execution of his mandate, may begin his action in the district where the contract of mandate was made.—2. When a person instructs another person to intrust a mandate to a third person, the contract of mandate with the third person is considered to have been made, not at the place where the instructions were given, but at the place where the instructions executed and the mandate intrusted to the agent. *McDonald* v. *Rainville*, 24 Que. S. C. 133.

Territorial jurisdiction—*Place of contract — Promissory notes.*] — A plaintiff suing on several promissory notes may bring his action in the district where one of the notes is dated, even when this note is in renewal of a previous note made, like the others sued upon, in a different district, that in which the defendant resides, in payment of the price of goods sold in the latter district. *Guertin* v. *Roy*, 6 Que. P. R. 206.

Territorial jurisdiction — *Place where cause of action arose—Commercial traveller —Sale of goods.*]—A commercial traveller who is supplied with blank forms of bills of sale with his employer's name as seller, is deemed to have full power to sell, and not to be subject to approval, and, as a consequence, his sales are made in the places in which customers sign the bills as purchasers. A subsequent letter by the employer that he accepts "the order and that it will have his attention," is not required and is of no effect as concluding the sale. Hence, the whole cause of action for recovery of the price arises in the district where the bill of sale is signed and not in that from which the letter is written and the goods are forwarded.

Morris v. *McDonald*, 32 Que. S. C. 507, distinguished. *Watterson* v. *Beaudry*, 35 Que. S. C. 450.

Territorial jurisdiction — *Place where cause of action arose—Place of residence of plaintiff — Libel — Newspaper — Place of publication.*]—An action begun in the district of Quebec for damages alleged to have been caused in that district by the publication (circulation) therein of a newspaper, containing a libellous article alleged to have been written in Chicoutimi and printed and published in the said newspaper in Chicoutimi, by the defendant, as editor of said newspaper, to satisfy the alleged hatred and malice of the proprietor thereof for the plaintiff, will, upon motion declining the jurisdiction of the said Court in the district of Quebec, upon the grounds: (1) that the plaintiff and defendant both reside in Chicoutimi, where process in the action was served, and (2) because "the whole cause of action" alleged in the declaration did not arise in the district of Quebec, be referred to the district of Chicoutimi for trial and judgment.—The difference between "right of action" (Art. 34, C. C. P.) and "the whole cause of action" (Art. 94, C. P.), discussed. *Dubuc* v. *Delisle*, 10 Que. P. R. 252, 33 Que. S. C. 456.

Territorial jurisdiction—*Pleading — Exception—Reply to—Motion to strike out.*] —The fact that the cause of action arose in the district in which the action has been begun should appear in the declaration, and, if that is denied, the plaintiff cannot, in his reply to an exception to the jurisdiction, allege additional facts to support the jurisdiction.—*Quære*, whether a motion to strike out a party of the reply to an exception is subject to the same delay and formalities as of the reply to an exception is subject to the same delays and formalities as preliminary exceptions. *Merchants Bank* v. *Graham*, 4 Que. P. R. 55.

Territorial jurisdiction — *Promissory note.*]—An action on promissory notes dated at one place and made at another, cannot be brought, in the absence of other circumstances giving jurisdiction, in the Court of the district where they were dated. *Cardinal* v. *Picher*, 7 Que. P. R. 147.

Territorial jurisdiction — *Right of réméré—Situation of land.*]—An action by which a creditor claims, among other things, to exercise the right of *réméré*, which his debtor, now deceased, had reserved to himself, may be begun in the district in which the immovable which is subject to the right of *réméré*, is situated. *Boisclair* v. *Proteau*, 5 Que. P. R. 81.

Territorial jurisdiction—*Sale of goods —Contract—Place of making — Travelling agent of vendor.*]—Where a writing signed by the agent of the vendor contains not only an order or an offer to buy, but is a veritable contract of sale, an action for the price of the goods sold must be begun in the district in which the writing was signed. *Watterson* v. *Beaudry*, 10 Que. P. R. 84.

Territorial jurisdiction — *Service of writ of summons—Bailiff—Residence of defendants.*] — The service upon a defendant in the district of St. Hyacinthe by a bailiff of such district of a writ addressed to one of the bailiffs of the district of St. Francois, is void.—2. The real defendants cannot be taken away from the jurisdiction of the tribunal to which they are amenable by adding a defendant with the sole object of being able to cite the real defendants before another tribunal. *Gagnon* v. *O'Bready*, 18 Que. S. C. 283.

Territorial jurisdiction—*Succession— Appointment of executor—Judicial districts.*] —The petition for the nomination of an executor to a succession must be presented in the district where the succession devolved. *Ex parte Mignault*, 9 Que. P. R. 15.

Territorial jurisdiction — *Writ of revendication—Place of issue—Forum for petition to remove curator.*] — Where chattels have been revendicated in one district by virtue of a writ issued in another district, a petition to withdraw from the curator appointed to the provisional possession of such chattels must be presented to the Judge of the district in which the writ issued. *Hurteau* v. *Connolly*, 10 Que. P. R. 8.

Transfer of action from Circuit Court—*Future rights—Annual allowance.*]— An action for an annual allowance for maintenance, which is for life, affects future rights, and therefore, by virtue of Art. 49, C. P. C., may be removed from a Circuit Court to the Superior Court. *Deschamps* v. *Deschamps*, 2 Que. P. R. 390.

Transfer of action from Circuit Court—*Future rights—Calls on shares.*]— An action claiming payment of a call on shares in a company may affect future rights within the meaning of Arts. 49 and 1130, C. P., and is therefore, such an action as may be removed from a Circuit Court into the Superior Court, if the fact of subscription for the shares is in dispute; *aliter*, if the defendant, without denying the fact of the subscription, alleges that he has paid the call, or that it has been remitted, or satisfied by set-off. *Dewitt-Langlois Milling Co.* v. *Fateaux*, 16 Que. S. C. 400.

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27. Saskatchewan—District Courts.

Jurisdiction — Action for conversion of cattle — Replevin — Amount claimed — Value of cattle—District Courts Act, ss. 27, 31, 32—Statement of claim—Motion to amend — Practice — Summons — Rules 179, 458. *Desautels* v. *Hebert*, 9 W. L. R. 336.

Jurisdiction—*Action to enforce mechanic's lien—District Courts Act—Judicature Act—Mechanics' Lien Act—Jurisdiction of Supreme Court of Saskatchewan.*] — *Held*, that a District Court has no jurisdiction in an action to enforce a mechanics' lien filed under the provisions of the Mechanics' Lien Ordinance of the North-West Territories before the Mechanics' Lien Act of 1907 came

into force; but such lien must be enforced in the Supreme Court of Saskatchewan. *Craftsmen* v. *Hunter*, 7 W. L. R. 837, 1 Sask. L. R. 88.

28. Saskatchewan—County Court.

Jurisdiction — *Action for conversion — Practice.*] — Plaintiff moved for leave to amend statement of claim. The application should have been made by summons:—*Held*, that action was within jurisdiction of the Court. As defence not delivered plaintiff may amend without leave under Saskatchewan Rule 179. *Desautels* v. *Hebert*, 9 W. L. R. 336.

29. Miscellaneous.

Exchequer Court of Can.—*Review of judgment of another Court.*]—In exercising its jurisdiction in respect of railway debts, the Exchequer Court will not review a judgment of another Court of competent jurisdiction affecting the railway, but will leave the rights of any person to attack such judgment to the determination of the Court which pronounced the judgment. *Royal Trust Co.* v. *Baie de Chaleurs Rw. Co.* (1907), 13 Ex. C. R. 1.

Precedences of justices.] — Where a Judge of a District Court in Canada was removed from that Court to another District Court, and the letters patent appointing him Judge to the latter Court also granted him precedence over the Judges of that Court, whose commissions were of later date than his own:—*Held*, that such grant of precedence was valid, and that the Judge had a right to rank and take precedence accordingly. *In re Bedard* (1849), C. R. 1 A. C. 328.

COVENANTS.

In Contracts.—*See* Contracts.

In Deeds.—*See* Deed—Vendor and Purchaser.

In Leases.—*See* Landlord and Tenant.

In Mortgages.—*See* Mortgages.

Agreement for farming land — *Independent covenants — Breach.*] — In an agreement for farming on shares defendant agreed to plough certain land in the fall free of charge, plaintiff having agreed to furnish a granary for the crop reaped during the previous summer. In an action for damages for failure to plough the defence was failure to build the granary, thereby causing defendant to lose so much time in drawing the grain to where it could be stored that there was no time to plough before frost set in.—*Held*, that covenants were independent, and that the building of the granary was not a condition precedent. *See* v. *Branchflower*, 10 W. L. R. 37.

Breach — *Dissolution of partnership—Use of firm name—Soliciting customers—Advertisement — Colourable imitation—Injunction.*]—On the dissolution of a co-partnership under the name of "M. Bros. & M.," the defendant sold his interest to the plaintiff, including the right to the use of the firm name, and covenanted that the plaintiff should have the right to carry on business under that name, and that he (the defendant) would not interfere with the plaintiff's use of such name. Subsequently the defendant commenced business under the name of "M. Bros. & Co.," and published in an advertisement addressed to his "old customers" as well as to "any new ones who may favour me with their patronage," in which he stated that he had merely sold his interest in the retail store in H., and that he would continue to wholesale pianos, etc., from his warehouse there: — *Held*, that the name adopted by the defendant was calculated to deceive persons into the belief that they were dealing with the plaintiff; that it was a colourable imitation of the name under which the plaintiff was doing business, and that it was a violation of the contract that the defendant would not in any way interfere with the use of such name by the plaintiff; and that the advertisement contained misrepresentations and concealments, and was calculated to deceive the public into the belief that he represented the business of the old firm; and the plaintiff was entitled to an order restraining the defendant from using the name adopted by him, and from soliciting the old customers of the firm. *McDonald* v. *Miller*, 37 N. S. Reps. 46.

Breach—Engaging in business—Carrying on business — Evidence — Onus — Business carried on in name of another. *Kerr* v. *Bowden* (N.W.T.), 1 W. L. R. 28.

Breach—*Injunction—Damages — Waiver —Assignment of covenant.*]—The defendant covenanted with the plaintiff that he would not directly or indirectly engage in the drug business in a certain village, or within a radius of ten miles therefrom, during a term of five years, and that he would not open or have part in a third or further drug store during a term of ten years. The plaintiff sold his share in the drug business to the defendant, and actively promoted a partnership between him and his (the plaintiff's) son which was continued for some months, when the defendant sold out to his son. The plaintiff afterwards acquired the business and sold it to his co-plaintiff, by bill of sale, reciting the covenant, and extended its benefit to the purchaser, and covenanted with him to save him harmless from a breach of the covenant by the defendant. In an action to restrain the defendant from carrying on a third drug store which he had opened:—*Held*, that for the first five years there were two concurrent severable covenants, and that while the plaintiff might by his conduct have waived a breach of the first, not to enter into business during the five years, he had not waived any breach of the second, not to open or have part in a third store:—*Held*, also, that the covenant was assignable, and that the right to enforce it did not terminate by reason of the plaintiff having gone out of business; and an injunction was granted restraining the defendant from opening, carrying on, or having part in, a third store for the ten years. *Berry* v. *Days*, 23 C. L. T. 221, 5 O. L. R. 629, 1 O. W. R. 809, 2 O. W. R. 384.

Carrying on business—Advertising — Breach. *Johnston* v. *McFarlane*, 1 O. W. R. 287.

Construction — "*Good and valid security*"—*Assignment of mortgage.*]—A covenant by the assignor in an assignment of mortgage that the mortgage assigned is a good and valid security does not mean that the mortgage is sufficient security for the debt, but only that it is a mortgage valid in law. *Agricultural Savings and Loan Co.* v. *Webb*, 15 O. L. R. 213.

Construction of covenant—Territorial limit—"In." *Wilcox* v. *Calver*, 2 O. W. R. 108.

Dependent and independent covenants—Construction of contract—Breach — Indemnity—Evidence — Costs. *Twyford* v. *York* (N. W. T.), 2 W. L. R. 348, 3 W. L. R. 74.

Dissolution of partnership — *Agreement not to engage in competing business—Breach—Interlocutory injunction.*]—A partnership existed between members of the plaintiff company and the defendant for the purpose of carrying on a general tobacco business. Upon the dissolution of this partnership the plaintiff company was incorporated, the business being transferred to it, and the former partners binding themselves not to enter in any other business or to compete with the company. Subsequently defendant withdrew from the company, being paid in stock both for his share in the partnership, for his good will, and for his refraining from competing with the company. The defendant afterwards established a small business almost next door to the plaintiff company's place of business, the new business being carried on in the name of his brother, J. Granda, although the latter was at that time in Spain, and knew nothing about the matter until his return. The plaintiff company applied for an interlocutory injunction restraining the defendant from buying tobacco or otherwise taking part in a business of the new concern:—Held, that the defendant had violated his undertaking by making purchases for J. Granda. Interlocutory injunction granted. *Cook* v. *Briscbois*, 2 Que. P. R. 162, followed. *Granda Hermanos y Ca.* v. *Granda*, 23 C. L. T. 118.

Dissolution of partnership—*Continuance of business—Customers—Advertising—Name—Injunction.*]—The plaintiff and defendant carried on business in the city of Halifax, under the firm name of Miller Bros. & Macdonald. In 1902 the partnership was dissolved by agreement, whereby all the interest of the defendant in the firm business was transferred to the plaintiff, "together with the goodwill, firm name," etc., and "including every matter and thing in which the co-partnership money of the said Miller Bros. & Macdonald has been placed or invested." It was also agreed that the defendant should not "carry on business under said name or in any way interfere" with the use of such name by the plaintiff. The defendant subsequently went into business as "Miller Bros. & Co.," and published a circular in the papers advertising the fact "for the benefit of my old customers:"—*Held*, that defendant was not at liberty to appeal to the customers of the old firm, nor to use a name so similar to the one prohibited; and an injunction was granted. *Macdonald* v. *Miller*, 23 C. L. T. 299.

Document under seal creating charge—*Implied covenant to pay debt.*]—The defendant executed under seal an instrument creating a charge on land in favour of the plaintiffs, for the price of an engine bought from them and interest to be paid by specified instalments. The instrument further provided that if notes should be given by the defendant for the several instalments, such notes should not be in satisfaction of the said lien and charge, but the same should continue until payment in full of such notes and any renewals thereof. It contained no covenant or promise to pay the debt:—*Held*, that a covenant or promise to pay the debt could not be implied from the terms of the deed, and that the plaintiffs could not have a personal order for payment of the debt based upon anything contained in it. *Waterous Engine Works Co.* v. *Wilson*, 11 Man. L. R. 287, distinguished. *Abell Engine & Machine Works Co.* v. *Harms*, 16 Man. L. R. 546, 4 W. L. R. 565.

Public policy—Unreasonable restriction—Covenant not to engage in any business in named locality. *Latimer* v. *Fontaine* (N.W. T.), 2 W. L. R. 191.

Restraint of trade—*Breach—Action—Parties.*]—A covenant not to engage or be interested directly or indirectly, either by himself, or with, by, or through any other person, either as principal or agent or otherwise, in the business of a baker within a fixed radius, for a certain term, is broken by the covenantor assisting the owners of a similar business without remuneration.—One of several joint covenantees, in a covenant in restraint of trade, or an incorporated company to whom the interest of the covenantees in the business has been transferred, may, if interested in the good-will, maintain an action for an injunction against the covenant, or for breach of the covenant, notwithstanding that the other covenantees have ceased to be interested in the business. *Parnell* v. *Dean*, 20 C. L. T. 119, 31 O. R. 517.

Restraint of trade—Breach—Evidence—"Interested in" business—Finding of fact—Reversal of Master's finding—Damages—Technical breach—Company—Control of directorate—Application for winding-up order. *Re Dewey and O'Heir Co., Dewey and O'Heir Co.* v. *Dewey*, 13 O. W. R. 32.

Restraint of trade—Breach—Injunction — Damages — Trade name — Competition—Representations. *Davies* v. *Davies*, 7 O. W. R. 211.

Restraint of trade—"Carry on or be engaged in business"—Assisting another in business — Suspicious circumstances—Costs. *Fricker* v. *Borman*, 10 O. W. R. 564.

Restraint of trade — "*Continue to carry on business*"—*Sale of business to company—Covenantee interested in company and acting as manager.*]—The plaintiff and defendant were engaged as partners in the

business of nurserymen and fruit sellers. Upon dissolving partnership, the plaintiff continued the fruit branch and the defendant the nursery branch, each agreeing that for ten years he would not engage in the kind of business to be done by the other. The defendant's covenant was that he would not compete with the plaintiff in the fruit business, provided the plaintiff should "continue for such time to carry on the fruit business:"—*Held*, that this was to be read as a personal engagement for ten years by the defendant that he would not interfere with the fruit business of the plaintiff, provided that the plaintiff should always during that time continuously carry on as proprietor that business, and the plaintiff had ceased to carry on the fruit business by entering into an incorporated company and transferring to that body his plant, property, and goodwill in the business, although he was a shareholder and acted as manager while the company did business, and, when that ceased, resumed the fruit business on his own account; and therefore he was not entitled to restrain the defendant from engaging in the fruit business during the ten years. *In re Sax, Barned* v. *Sax*, 62 L. J. Ch. 688, 68 L. T. N. S. 849, 41 W. R. 584, 3 R. 638, approved and applied. *Carpenter* v. *Carpenter*, 9 O. W. R. 862, 15 O. L. R. 9.

Restraint of trade—*Sale of business—Agreement of vendor not to enter into competing business—Absence of consideration—Agreement made after completion of sale—Parol variation—Evidence.*]—*Held*, that an oral term can only be added to a written agreement by clear and unequivocal testimony.—2. That a memorandum in writing, signed by the seller, not to carry on business in competition with the purchaser, and made after the sale was completed, and not being a term of the original agreement, is not supported by the original consideration, and cannot be enforced. *Mund* v. *Busch*, 7 W. L. R. 305, 1 Sask. L. R. 227.

Restraint of trade—Sale of goodwill of business — Informal document — Admissibility of parol evidence to supplement—Operation of covenant—Time and place—Assignment of covenant—Parties—Injunction—Damages. *Novak* v. *Abrahams* (Y.T.), 8 W. L. R. 922, 7 W. L. R. 299.

Restraint of trade — *Termination of partnership—Covenant not to engage or be interested in competing business—Carrying on business as manager for another.*]—The plaintiff and defendant were partners in a jewelry business carried on in the town of Port Arthur. The articles of partnership provided that the plaintiff should procure her husband to work in the business and to devote his whole time and attention to it; and the plaintiff covenanted that her husband should not, after the determination of the partnership, "carry on or engage or be interested, directly or indirectly, in any business in the town of Port Arthur which shall compete or interfere with the business" of the defendant. After the dissolution of the partnership, the plaintiff's husband entered into the employment of B. as manager of a jewelry business belonging to B., upon premises in Port Arthur situate in close proximity to the shop at which the defendant was carrying on the business which had been carried on by the partnership; and the business of B. was, beyond question, one which competed with the business of the defendant:—*Held*, that what had been done by the plaintiff was a breach of her agreement with the defendant.—Review of the authorities.—Judgment of Mabee, J., 8 O. W. R. 691, reversed. *Anderson* v. *Ross*, 9 O. W. R. 681, 14 O. L. R. 683.

Transfer of land — *Restriction as to business—Sale of intoxicating liquors barred — Violation — Injunction — Agreement for sale—Merger in transfer—Transfer not executed by grantor—Acceptance and registration — Estoppel — Voluntary covenant — Specific performance—Restraint of trade—Public policy — Waiver in similar cases — Laches—Interest of plaintiffs in performance.*]—The defendant entered into an agreement for sale, whereby he agreed to purchase the premises in question, subject to a restrictive covenant (not to sell intoxicating liquors, etc.). Subsequently he accepted a transfer containing a proviso to the same effect, "under protest," but procured the same to be registered, and a certificate of title to be issued, which contained a reference to this proviso in the transfer:—*Held*, that, although the transfer was not executed by the transferee, the agreement was not merged in the transfer—and the transferee (and his successors in title with notice) became bound by the covenant in the agreement.—*Held*, that the transferee, etc., is estopped from denying the existence and effect of the proviso in the transfer, by the registration and issue of the certificate of title.—*Held*, on the evidence, that the transfer was not intended to supersede the agreement.—*Held*, that the Court will enforce against the transferee, and his successors in title, with notice, the restrictive proviso in transfer—whether the original agreement contained such a covenant or not.—*Held*, in the circumstances of this case, that the covenant was not "voluntary," but part of the consideration for the land.—*Held*, that the covenant and proviso were not in restraint of trade.—*Held*, in the circumstances, that the plaintiff was not precluded from enforcing the covenant by injunction, by reason of the fact that he had allowed other purchasers of lots to disregard it. The rule in such cases discussed.—Effect of delay in applying for injunction in such case discussed.—*Held*, that the fact that the plaintiffs did not shew any direct pecuniary damages was no bar to relief by injunction. *International Coal and Coke Co.* v. *Trelle*, 7 W. L. R. 264, 1 Alta. L. R. 170.

Vendor and purchaser—Improvements not to be removed until after payment of purchase money — Sub-purchaser — Notice of covenant—Buildings placed on land by sub-purchaser — Fixtures — Injunction. *Graves* v. *James*, 9 W. L. R. 220.

COW.

See ANIMALS.

CREDITORS.

See BANKRUPTCY AND INSOLVENCY — BILLS OF SALE AND CHATTEL MORTGAGE—COLLECTION ACT, NOVA SCOTIA — COMPANY —FRAUDULENT CONVEYANCE.

CREDITORS' ACTION.

Filing sheriff's certificate — *Necessity for—Affidavit of claim—Locus standi—Statutes.*]—Where a prior creditor has filed a sheriff's certificate under s. 7 of the Creditors' Relief Act, R. S. O. 1897 c. 78, it is not necessary for subsequent creditors to do so.—*Semble*, that the provisions of s. 7 as to filing a sheriff's certificate are directory only and not imperative.—*Semble*, also, that it is not open to another execution creditor to question the sufficiency of an affidavit of claim where the execution debtor does not object. *In re Secord* v. *Mowat*, 12 O. L. R. 511.

See MONEY IN COURT—PARTIES.

CREMATION.

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CRIMINAL CODE.

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CRIMINAL LAW.

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1. CERTIORARI.

Also *see* CERTIORARI.

Appeal and certiorari — *Proceedings taken concurrently.*] — After order absolute for a *certiorari* and order *nisi* to quash were obtained notice of appeal was served so that latest step in the proceedings has been the appeal. Order *nisi* discharged. *Rex* v. *Haines, ex parte McCorquindale*, 6 E. L. R. 374.

Motion for — Intituling of proceedings —Crown Rules—Name of informant—Service on. *Ex p. Harris* (N.W.T.), 4 W. L. R. 530, 14 Can. Crim. Cas. 109.

Motion for certiorari—To remove indictment of general sessions into High Court —Teetzel, J., granted order—No costs. *R.* v. *Atlas* (1911), 18 O. W. R. 638, 2 O. W. N. 800.

Motion to remove into High Court proceedings before certain magistrates —*Code ss. 576 (b), 1126.*]—Prosecutor laid an information before a magistrate that one David Garlow had in his possession a bottle of whisky which was drunk on Indian Reserve, contrary to the provisions of the Indian Act. At the hearing the charge was dismissed and the prosecutor was ordered to pay $14 costs, which he failed to do. About a month later the magistrate issued a warrant for the arrest of said prosecutor and for his imprisonment for 30 days, unless the said costs and further costs were paid. Upon arrest he paid the costs and moved for a writ of *certiorari* to remove all things pertaining to the order in the High Court. Britton, J., *held*, that the rules of the Court had not been complied with as no recognizance had been entered into or filed and no deposit had been made, and dismissed the motion. The Divisional Court *held*, that, in the case of a prosecutor, recognizance and notice is not necessary, and ordered that the *certiorari* should issue.—Judgment of Britton, J., 14 O. W. R. 969, 1 O. W. N. 172, reversed. *Martin* v. *Garlow* (1910), 15 O. W. R. 129, 20 O. L. R. 295.

Recognisance.] — Nova Scotia Crown Rule 28 is a general order of Court as to security for costs on *certiorari* under Criminal Code, s. 1126, and a recognisance given thereunder may be enforced by attachment under Code s. 1096. Section 1126 of Code applies as well to a recognisance required to be given on an application for a writ of *certiorari* as to a recognisance given after return made to writ. If upon former the Court may order that the conviction be quashed on return of writ without further order. *R.* v. *Townshend* (1907), 43 N. S. R. 1, 13 Can. Cr. Cas. 209.

R. G. Mich. Term, 1899—*Removal of stay of proceedings—Practice.*]—The stay of proceedings, in the form of order given by R. G. Mich. Term, 1899, for a *certiorari*, expires on the return of the rule *nisi* to quash. *Ex p. Melanson*, 39 N. B. R. 8.

R. G. Mich. Term, 1899—*Return of writ—Time.*]—An order for *certiorari* granted under R. G. Michaelmas Term, 1899, must make the writ returnable at the term of the Court next following the date of the order. *Ex p. Kay, In re Hogan, In re Hebert, In re Legere*, 39 N. B. R. 54.

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2. CROWN CASE RESERVED.

Academic questions.]—Court of Appeal should not be asked, by a reserved case, to solve questions on which the validity of a conviction does not necessarily depend. *Rex v. Woods*, 23 C. L. T. 220, 6 O. L. R. 41, 2 O. W. R. 338.

Acquittal — *Leave to appeal.*]—Where there has been an acquittal, the trial Judge should leave the prosecutor to apply for leave to appeal, rather than reserve a case. *Rex v. Karn*, 23 C. L. T. 219, 5 O. L. R. 704, 2 O. W. R. 335; *Rex v. James*, 23 C. L. T. 220, 6 O. L. R. 35, 2 O. W. R. 342.

Allowing dog to run at large in public place.]—A stated case under s. 761 of the Criminal Code is an appeal, and can be entertained by the Supreme Court of Saskatchewan with respect to a magistrate's conviction under a provincial Act or city by-law, by virtue of s. 15 of the Magistrates Act, 1906, making applicable the provisions of s. 761 of the Code.—*The Queen v. Simpson*, 2 Can. Crim. Cas. 272, followed.—The defendant was convicted by a magistrate "for that he (the defendant), being the owner of a dog, allowed it to run at large in a public place, to wit, Broad street, in the city of Regina, contrary to s. 3 of by-law 467 of the city. It was objected that ss. 2, 3, 4, and 5 of the by-law were inconsistent with each other:—*Held*, that, in construing by-laws, the Court should strive to give reasonable effect to the object aimed at, and not subject the by-laws to a scrutiny unreasonably rigid, nor quash a by-law simply because of a want of clearness of expression or a difficulty in construing or applying its provisions; by-laws should be supported if possible, and should be benevolently interpreted. —*Kruse v. Johnson*, [1898] 2 Q. B. at p. 99, followed. — And as s. 3 positively prohibited any person allowing his dog to run at large in any public street or place in the city, and no section in the by-law was inconsistent with that positive enactment, s. 3 must be given its full effect.—The evidence was that during the evening of the 25th May, 1910, a brown and white pointer dog was found running at large upon Osler and Broad streets, in the city of Regina, wearing round its neck a collar and tag numbered 204. The city officer in charge of the dog register produced the register at the trial, and testified that he had sold all the dog tags for 1910; that he had, on the 19th March, 1910, sold the defendant dog tags numbers 204, 205 and 206; that tag 204 was given the defendant for a male tan and white pointer; that he knew the defendant; and that the defendant in person got the tags and gave the above description of the dog. The defendant offered no evidence:—*Held*, that the evidence was sufficient to warrant a conviction. — *Regina v. Forsyth*, 5 Can. Crim. Cas. 479, followed.—It was urged that the by-law was *ultra vires* and unreasonable because it required licensed dogs to be led by a chain:—*Held*, that the by-law was within the powers conferred by sec. 184 of the City Act, 1908, and was not unreasonable. *R. v. Johnstone* (1910), 15 W. L. R. 581, Sask. L. R.

Application by prisoner to trial Judge after verdict—*Criminal Code, ss. 1014-1021.*]—Defendant had been convicted of manslaughter and sentenced to imprisonment. Subsequently counsel was heard as *amicus curiae* on application to reserve and state a case for Court of Appeal on admissibility of certain evidence excluded by trial Judge. Application refused. *Rex v. Labrie*, 13 O. W. R. 1145.

Application for "during the trial"—*Criminal Code, s. 1014 (3).*]—By s. 1014 (3) of the Criminal Code either party may "during the trial" of a prisoner on indictment apply to have a question which has arisen reserved for adjudication by the Court of Appeal:—*Held*, that for the purposes of such provision the trial ends with the verdict, after which no such application can be entertained. *Ead v. The King*, 40 S. C. R. 272, 5 E. L. R. 345.

Case reserved at instance of Crown—*Insanity.*]—The defendant was indicted for theft under c. 305 (*a*) of the Criminal Code. The act of theft was admitted, but it was contended that there was evidence of insanity at the time the act was committed. The trial Judge charged the jury that there was no such evidence, and that the case did not come within s. 736 of the Code. The jury having found the prisoner not guilty, two questions were reserved for the opinion of the Court: (1) Whether there was evidence of insanity as required by s. 736. (2) If not, whether there should be a new trial. The Court was moved to quash the case reserved, on the ground that where there had been an acquittal the Crown could not have a case reserved or an appeal:—*Held*, that the motion must be dismissed, and the reserved case proceeded with, to ascertain whether there was evidence of insanity sufficient in law for submission to the jury. *Rex v. Phinney (No. 1)*, 36 N. S. Reps. 264.

Case reserved by police magistrate—Summary trial under Criminal Code, s. 777 —Copy of written "charge." *Rex v. Silverman*, 12 O. W. R. 509, 17 O. L. R. 248, 14 Can. Crim. Cas. 79.

Case stated by County Court Judge — *Jurisdiction of Court of Appeal.*] — A County Court Judge hearing an appeal from a summary conviction by a magistrate has no power to state a case for the opinion of the Court of Appeal. *R. v. McIntosh* (1910), 14 W. L. R. 548.

Charge to jury—*Exception — When to be taken—Application for case.*]—After verdict, but before sentence, it is too late to move for a reserved case.—Section 1014, s.-s. 2, of

the Code provides that the Court before which any person is tried may, either during or after the trial, reserve any question of law arising either on the trial or on any proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the Judge, for the opinion of the Court of Appeal . . . :—*Held*, that this means that any reservation of a case after verdict must be of the Court's own motion. *Rex* v. *Pertella*, *Rex* v. *Lee Chung*, 14 B. C. R. 43, 9 W. L. R. 241, 14 Can. Crim Cas. 208.

Communication with jury—*Question of fact — Jurisdiction.*]—The defendant was indicted and tried for the crime of rape, committed upon the person of a girl a few weeks over the age of fourteen years. The jury found the prisoner guilty, and he was sentenced to imprisonment for the term of one year. Before sentence there was a motion on behalf of the prisoner to reserve a case, upon affidavits of two of the jurors to the effect that while they were deliberating in their room they called the sheriff in and asked him "whether they could report that there had been sexual connection, but with consent, and recommend the prisoner to mercy," to which the sheriff replied, "no, that they would be obliged to report the defendant guilty or not guilty, and that if they found him guilty with a recommendation to mercy, the Judge would give him a light sentence." This was denied by the sheriff, who swore that all he said in reply to the question asked him was, "Whatever your verdict is, bring it into Court:"—*Held*, *per* Townshend, Meagher, and Drysdale, JJ., that, as the case as reserved called upon the Court to first decide the question of fact whether anything was said to the jurors by the sheriff to which objection could be taken, the Court for this reason had no jurisdiction to deal with the question.—*Per* Graham, E.J., and Russell, J., that the conviction should be quashed. *Rex* v. *Barnes*, 42 N. S. R. 55, 4 E. L. R. 234.

Conduct of jury—Improper communication with sheriff—Affidavits by jurors—Practice. *Rex* v. *Barnes*, 3 E. L. R. 539.

Criminal information — *Libel.*] — A party seeking a criminal information against another must himself be free from blame. *R.* v. *Whalen* (1863), 1 P. E. I. R. 223.

Deputy Attorney-General of Saskatchewan has no authority to prefer a charge under Code s. 937 (a) without the written consent of the Judge or the Attorney-General or by order of the Court. *R.* v. *Duff* (1909), 12 W. L. R. 290.

Enforcing conviction after affirmance on appeal—*Commitment—Irregularities—Amendment—Period of imprisonment—Costs of appeal and subsequent costs — Commitment by clerk of appellate Court — Imprisonment for failure to pay costs.*] — The proviso in s. 3, c. 148, R. S. C. 1906, that no time during which a party convicted is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced, applies to cases of release on bail in appeal, under s. 750c Cr. C. Hence, when the appealing convict has been out on bail and the conviction has been affirmed, it may be enforced by the appellate Court, although, when originally made, it contained no express direction that it should be suspended by an appeal. Section 1023 Cr. C. A commitment for a time in excess of that order in the conviction, is not bad on that ground, which is merely an irregularity that may be cured by amendment under ss. 1121 and 1124 Cr. C. When a conviction is affirmed and the appellate Court further condemns the convict to pay the costs of appeal, a commitment signed by the clerk of the Court commending the gaoler to detain the convict, during the period ordered in the conviction, and, further, until he shall have paid the costs of appeal, of the distress, of the commitment, and of the conveyance to gaol, is valid. A commitment for the period ordered in the conviction and, further, until certain costs are paid, is wrong as to the latter part, in not specifying the period of detention in default of payment. This, however, is not a ground for quashing the commitment, but an irregularity that may be cured by amendment under ss. 1121 and 1124 Cr. C. *R.* v. *Collette*, 19 Que. K. B. 124.

Extension of time for notice of appeal —*Order after expiration of time for service of notice—Jurisdiction.*] — The power given by s. 1024 of the Criminal Code, R. S. C. 1906 c. 146, to a Judge of the Supreme Court of Canada, to extend the time for the service on the Attorney-General of notice of an appeal in a reserved Crown case may be exercised after the expiration of the time limited by the Code for the service of such notice. —*Banner* v. *Johnston*, L. R. 5 H. L. 157, and *Vaughan* v. *Richardson*, 17 S. C. R. 703, followed. *Gilbert* v. *The King*, 27 C. L. T. 158, 38 S. C. R. 207.

Extradition after conviction in foreign country — *Indeterminate sentence—Flight of prisoner when at large on parole after preliminary incarceration—Trivial offence.*]—The petitioner having been convicted of larceny in Indiana and sentenced to imprisonment, he was paroled a few months afterwards under an engagement whereby he was to work for a named person at a specified service and should report to the State Prison Board during the remainder of his sentence, power being reserved to the Board to order his reincarceration. The petitioner fled to Canada and the Board made an order for reincarceration. The petitioner was arrested in Montreal and having been committed to await extradition, was brought up on *habeas corpus*:—*Held*, 1. That the prisoner had not undergone the whole of his punishment, and the demand for extradition was for the offence of larceny and not for a mere violation of the parole agreement, which latter would not be an extraditable crime. *In re Calberla* (1907), 2 K. B. 861, and *In re Awera*, *ib.*, p. 157, cited, and, 2. That the objection made to the effect that the offence was trivial, might be well founded in cases under the Fugitive Offenders Act of Great Britain, but is not well founded in extradition matters. *In re Duders*, alias, *Guerin* (1910), 16 R. de J. 475.

Form of charge—*Theft—County Court Judge's Criminal Court — Jurisdiction.*] —

The Supreme Court of Nova Scotia, composed of a quorum of four Judges only, has jurisdiction to hear and decide a Crown case reserved stated by the Judge of a County Court sitting in his Criminal Court. The prisoner was charged with unlawfully stealing goods, but the charge did not allege that the offence was committed fraudulently, and without colour of right:—*Held*, affirming the decision appealed from, that the offence of which the prisoner was accused was sufficiently stated in the charge. *George* v. *Rex*, 35 S. C. R. 376.

Grand jury—*Bringing in bill in Orange riot cases—Not disqualified—Indictment — Notice to quash—Orange riots—Orangemen on grand jury.*]—Defendant was indicted for riot during which the Orange Lodge in Charlottetown had been attacked and damaged. On the grand jury which found the bill against defendant were some Orangemen, though it did not appear that, beyond being members of the association, they had any personal interest in the hall. The case for the Crown was closed when defendant's counsel moved to quash the indictment on the ground that the Orange grand jurors were disqualified to act on the grand jury in a case where the defendant was charged with riot causing damage to property in which Orangemen were interested:—*Held*, that the Orangemen, as such, were not disqualified to act as grand jurors. *R.* v. *Collins* (1878), 2 P. E. I. R. 249.

Grounds — *Misapprehension of jurors—Statement by.*]—It is no ground for stating a reserved case, after a trial and conviction, that two of the jurors who joined in the verdict of guilty did so under a misapprehension; and, it is contrary to principle to allow the statements of jurors, even under oath, to be used for the purpose of an application for a reserved case. *Rex* v. *Mullen*, 23 C. L. T. 169, 5 O. L. R. 373, 2 O. W. R. 181.

Insanity—*Acquittal of prisoner—Weight of evidence.*]—Prisoner was indicted for theft and was acquitted on the ground of insanity:—*Held*, following *R.* v. *McIntyre*, 31 N. S. R. 422, that the trial Judge cannot reserve a case depending upon the weight of evidence, and that the question reserved, whether there was evidence of insanity as required by s. 736 of the Code, was within the principle decided; that the question of the weight of evidence is entirely for the jury; and that the provision for granting a new trial, where the verdict is against the weight of evidence, cannot be invoked on the part of the Crown. *Rex* v. *Phinney* (No. 2), 36 N. S. Reps. 288.

Leave to appeal from conviction—*Refusal of Judge to reserve case—Direction to state case.*]—On granting leave to appeal to the Court of Appeal under s. 1015 of the Criminal Code, the Court of Appeal may direct that the Court below shall state a case as if the questions had been reserved. *Rex* v. *Sam Chak* (No. 1), 42 N. S. R. 372.

No proper case reserved—*Power of magistrate.*]—The prisoner, with his own consent, was tried summarily before the stipendiary magistrate for the city of Halifax, under s. 786 of the Criminal Code, and was convicted of the offence of stealing property of the value of less than $10. At the trial, the magistrate, at the request of the prisoner, reserved a question for the opinion of the Court, under s. 742 and following sections of the Code: — *Held*, that, under s. 742 and following sections, a reserved case can be stated only by a Court, or a Judge, having jurisdiction in criminal cases, or by a magistrate in proceedings under s. 785:—*Held*, that, as s. 785 had no application to the case in question, and the provisions of s. 900 of the Code had, admittedly, not been complied with, there was no proper case before the Court upon which the Court had authority to give an opinion. *Regina* v. *Hawes*, 33 N. S. Reps. 389.

Prisoner's right to be tried summarily or by jury.]—Motion to discharge prisoner on ground that he was not given an opportunity to elect to be tried by jury on a charge of extorting money by threats. He was tried under s. 452 of the Code by the police magistrate at Sudbury, and an interpreter was necessary. The magistrate swore that he told the interpreter to ask defendant whether he would be tried summarily or by the jury, and he understood the interpreter to answer summarily. Prisoner swore that interpreter did not ask him that question:—*Held*, that no case had been made for the discharge of the prisoner. Motion refused. *R.* v. *Sciarrone* (1910), 15 O. W. R. 211.

Question of fact—*Gaming.*]—The Court of King's Bench, sitting as a Court for the hearing of cases reserved by Criminal Courts, has jurisdiction only to pronounce upon a question of law, under facts proved, and mentioned in the reserved case. Consequently, where the question stated in the reserved case was whether the use of a particular apparatus constituted a mixed game of chance and skill, or only a game of skill, and did not submit the question whether, under facts proved, and stated in the reserved case, the game was one which came within the prohibition of the Criminal Code, the Court declared that it was without jurisdiction in the matter. *Rex* v. *Fortier*, 13 Que. K. B. 308.

Question of law — *No trial.*] — The accused was a letter carrier, and, being suspected of retaining letters containing money, a fictitious one was prepared, which, it was alleged, was afterwards found in his possession. He was arrested, and after a preliminary inquiry was committed for trial. At the trial counsel for the accused contended that the charge laid was not founded on the evidence adduced at the preliminary trial, inasmuch as the proof then taken did not shew that the document stolen was a post-letter which had been deposited in the post office, within the meaning of the amendment to the Post Office Act, 52 V. c. 20, s. 2, s.-s. 1, or of s. 326 (c) of the Criminal Code. The trial did not take place, but the trial Judge reserved the question thus raised for the opinion of the Court:—*Held*, that a question of law can only be reserved when there has been a trial and conviction. *Rex* v. *Trépanier*, 21 C. L. R. 248, 10 Que. Q. B. 175.

Trial—Motion for reserved case after verdict—Time for moving—Criminal Code, ss. 1014, 1021—Objections to charge. *Rex* v. *Lee Chung*, 9 W. L. R. 241.

Trial — *Refusal of trial Judge to reserve case—Application not made at trial—Discretion of trial Judge.*]—On the trial of the accused before a Judge without a jury, his counsel objected that the accused was entitled to be tried by a jury, but the objection was overruled and the trial proceeded, no application being made for a reserved case. The accused was convicted and sentenced, and two days afterwards an application was made to the trial Judge to reserve a case for the Court of Appeal. The application was refused:—*Held*, that an appeal from the refusal of the trial Judge to reserve a case on a question of law arising during a criminal prosecution lies only when the application is made at the trial; and, although after the trial the Judge might still, in his discretion, reserve a case, yet if he refused, no appeal lay. *Rex* v. *Toto*, 6 Terr. L. R. 89.

Trial of accused — Application by accused to magistrate to adjourn trial to enable him to procure counsel and prepare defence—Magistrate's refusal — Conviction — Right of magistrate to impose fine exceeding with costs $100—Case directed to be stated for opinion of Court of Appeal on above points. *R.* v. *Garrett* (1910), 16 O. W. R. 546, 1 O. W. N. 959.

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3. EVIDENCE.

Accomplice—Corroboration—Direction to jury—Conviction. *Rex* v. *Reynolds* (Sask.), 9 W. L. R. 299.

Admissibility — *Confession — Employment of detectives to obtain.*]—The prisoner being suspected of having been guilty of the murder of G., but not being under arrest, detectives associated with him, worked themselves into his confidence, and, by representing to him that they were members of an organised gang of criminals engaged in profitable operations, induced him to seek for admission to their ranks. They then intimatd to him that he must satisfy them that he was qualified for such admission by shewing that he had committed some crime of a serious nature, whereupon, according to their evidence, he asserted that he had killed G. as the result of an altercation. The detectives were not peace officers, no charge was then pending against the prisoner, nor did he know that the detectives were such:—*Held*, that an inducement held out to an accused person in consequence of which he makes a confession must be one having relation to the charge against him, and must be held out by a person in authority, in order to render evidence of the confession inadmissible; that both these grounds of objection were wanting in this case, and that, therefore, the evidence of the confession was rightly received. *Rex* v. *Todd*, 21 C. L. T. 417, 13 Man. L. R. 364, 4 Can. Cr. Cas. 514.

Admissibility — *Conspiracy — Previous acts of accused.*]—The accused were charged with having conspired to fraudulently obtain from the Merchants Bank of Halifax various sums of money by certain false pretences. The Crown called as a witness the manager of another bank to prove that at the same period the accused obtained other sums from that bank in the same manner. Counsel for the accused objected to the admission of this evidence as being irrelevant, and as tending to prejudice the minds of the jurors by proving the prisoners to have committed a crime other than that with which they were then charged:—*Held*, that acts similar to those charged, but committed against other persons, might be proved in order to shew that at the time of the commission of the offence charged the accused knew that they were acting unlawfully. *Regina* v. *McCullough and McGillis*, 21 C. L. T. 306.

Admissibility — *Perjury—Judge's notes of perjured evidence.*]—*Held*, that, on the trial of a charge of perjury, the production of a book purporting to contain full notes of the evidence taken by the trial Judge (who was proved to have actually taken notes) in the case in which the perjury was alleged to have been committed, and proved to be in the Judge's handwriting, and to be signed by him, afforded, in view of the N. W. T. Act, R. S. C. c. 50, s. 69, proper and sufficient evidence of the statement in respect of which the perjury was assigned. *Regina* v. *Mills*, 11 C. L. T. 28, 1 Terr. L. R. 297.

Admission of prisoner — *Admissibility—Onus—Statement improperly obtained—Repetition—Prisoner's counsel—Waiver.*]—The defendant, while confined in gaol awaiting trial on a charge of murder, was visited by a detective who had been sent by the Provincial Government to inquire into the case, and who, without preliminary warning or caution of any kind, succeeded in obtaining from the defendant an admission that a statement made by her previously was untrue.—Shortly afterward the same admission was made to the prosecuting officer in the presence of the defendant's counsel: — *Held*, that, in the absence of evidence to rebut the presumption that the second statement was made under the operation of the same influence as the former one, the trial Judge erred in receiving evidence of it, and that the defendant, who had convicted, was entitled to a new trial; also, that the burden of shewing that the influences under which the first statement was made had been dispelled when the second statement was obtained rested upon the Crown; also, that the prisoner's counsel, who was present when the second statement was made, could not assent to or waive anything to the prisoner's prejudice, and that in a case where the prisoner herself could not make a waiver or admission, such waiver or admission could not be made through the agency of her counsel. *Rex* v. *Hope Young*, 38 N. S. R. 427, 10 Can. Cr. Cas. 466.

Admissions of prisoner — *Admissibility.*]—The Court of Appeal held that a prisoner's confession or admission was rightly admitted in evidence even if when it was to some degree influenced by a mis-statement of a police officer to whom it was made. *Rex* v. *White*, 13 O. W. R. 144, 18 O. L. R. 640, 15 Can. Cr. Cas. 30

Admissions of prisoner—*Confession—Constable—Caution.*]—The prisoner was arrested on a charge of stealing S.'s gun, and in answer to questions put to him by a constable, who did not caution him, he made certain statements; he was afterwards charged with the murder of S., and on his trial the Crown sought to put in evidence his answers:—*Held*, not admissible. *Rex* v. *Kay*, 11 B. C. R. 157, 9 Can. Cr. Cas. 403.

Answers tending to criminate witness—*Claiming privilege.*]—The prisoner, being a manager of a branch store for the sale of goods supplied by a factory of his employers, arranged with the checker at the factory to load certain goods on a waggon going to the branch store, without keeping the usual check on them which his employers' system demanded, and had the goods delivered to a customer of his branch:—*Held*, that he was properly convicted of theft as defined by the Criminal Code. If a witness when called upon to testify does not object to do so upon the ground that his answers may tend to criminate him, his answers are receivable against him (except in the case provided for by s. 5 of the Canada Evidence Act, 1893, as amended by 61 V. c. 53), in any criminal proceedings against him thereafter, but if he does object he is protected. *Rex* v. *Clark*, 22 C. L. T. 90, 3 O. L. R. 176, 5 Can. Cr. Cas. 235.

By-law — *Copy — Costs—Time for payment—Justice of the Peace.*]—A by-law of a town council which is not authenticated in accordance with the provisions of Art. 4380, R. S. Q., cannot be admitted in evidence, and a copy which does not import that the original has been signed by the president and the secretary-treasurer cannot be made the basis of a prosecution. 2. A conviction by a justice of the peace which gives only eight days to a party to pay the costs which he is adjudged to pay, in contravention of Art. 4598, R. S. Q., will be quashed upon appeal to the Superior Court. *Tasse* v. *Beaubien*, 4 Que. P. R. 372.

Canada Evidence Act, 1893—*Husband and wife—Competency of witness—"Communication"—Statute — Privilege — Directions by legal adviser—Reference to Hansard debates — Method of interpretation.*] — Under the provisions of the Canada Evidence Act, 1893, the husband and wife of a person charged with an indictable offence is not only a competent witness for or against the person accused, but may also be compelled to testify: Mills, J., dissenting. Evidence by the wife of a person accused, of acts performed by her under directions of his counsel, sent to her by the accused to give the directions, is not a communication from the husband to his wife in respect of which the Canada Evidence Act forbids her to testify; Mills, J., dissenting. *Per* Girouard, J., (dissenting). The communications between husband and wife contemplated by the Canada Evidence Act, 1893, may be *de verbo, de facto*, or *de corpore*. Sexual intercourse is such a communication, and in the case under appeal neither the evidence by the accused that bloodstains upon his clothing were caused by having such intercourse at a time when his wife was unwell, nor the testimony of his wife in contradiction of such statement as to her condition, ought to have been received. *Per* Mills, J. (dissenting):—Under the provisions of the Canada Evidence Act, 1893, and its amendments, the husband or wife of an accused person is competent as a witness only on behalf of the accused and may not give testimony on the part of the Crown. *Per* Taschereau, C.J.:—The report of debates in the House of Commons are not appropriate sources of information to assist in the interpretation of language used in a statute. *Gosselin* v. *Rex*, 23 C. L. T. 210, 33 S. C. R. 255.

Character of defendant.]—Where defendant offered no evidence of good character, Denton, Co.C.J., discharged the jury and traversed the case to the next sessions, because Crown Attorney asked witness for defence whether accused had been in gaol for a year in a foreign city, holding that it was inadmissible for the Crown to give evidence of a prior conviction unless the defence offered evidence of good character, and that the suggestion implied in the question was likely to prejudice the accused with the jury and a miscarriage of justice result. *R.* v. *Atlas* (1910), 16 Can. Cr. Cas. 35.

Confession — *Admissibility — Inducement—False statements.*] — Evidence of an alleged confession made to a constable, by the prisoner, who was charged with stealing letters from a post office box, was held not admissible, inasmuch as it appeared that the alleged confession was induced by the statements of the constable that "decoy letters have been put in the box" (which was false), "and you must not think they were not watched," and "you may as well tell us as have it come out in a Court of law." *Regina* v. *McDonald*, 3 Terr. L. R. 1.

Confession—*Admissibility — Inducement—Person in authority—Indian agent—Onus—Privilege.*]—If upon a proposal to give evidence of an alleged confession the question is raised whether it was made by the accused to a person in authority, and induced by a promise of favour or by menaces or under terror, the onus is on the Crown to shew affirmatively that it was not so induced.—*Regina* v. *Thompson*, [1893] 2 Que. B. 12, followed.—An Indian agent, an *ex officio* justice of the peace, under general instructions to advise the Indians of his reserve, who was in fact in the habit of interviewing Indians of the reserve charged with offences with a view to aiding them in their defence, is, *quoad* the Indians of his reserve, a person in authority. —*Quære*, whether a confession by an Indian to the Indian agent of the reserve to which the Indian belonged, would not be a privileged communication. *Regina* v. *Charcoal*, 3 Terr. L. R. 7.

Confession — *Admissibility—Statement to person in authority.*] — Several church choir boys were implicated in an alleged assault on a Chinese boy, and a few days later the rector of the church held an inquiry, and calling the boys separately into the vestry from another room where they were detained in charge of the verger he told them they were to speak the truth and that their statements were to be used for the purpose of

that inquiry only. He took their statements in the presence of the bishop and the choirmaster. One of the boys was afterwards tried for assault:—*Held*, on the trial, that the rector was a person in authority, and the statement was not voluntary and so not admissible in evidence. *Rex* v. *Royds*, 24 C. L. T. 283, 10 B. C. R. 407, 8 Can. Cr. Cas. 209.

Confession obtained by trick — *Admissibility—Prisoner deluded into belief that he was speaking to agent of his counsel — Other persons present unknown to prisoner—Privilege.*]—1. Statement made by a prisoner in a cell to a person whom he reasonably supposed to be an agent sent by his counsel to interview him regarding the defence are as much privileged as would be statements made to the counsel himself.—2. Where persons concealed themselves outside the cell in a position to overhear such statements, in pursuance of a scheme previously planned, the interview should be treated as one with several persons who had fraudulently adopted the character of the counsel's representatives, and the cloak of privilege should be applied to what was heard by the listeners without, as well as the one within, the cell. *Rex* v. *Choney*, 7 W. L. R. 537, 17 Man. L. R. 467, 13 Can. Cr. Cas. 289.

Corroboration — *Forgery.*] — The prisoner was charged in the first count with forging the name of a superintendent of the N. W. M. Police to a requisition for transport; and in the second, with uttering the same knowing it to be forged:—*Held*, that the superintendent was not "a person interested, or supposed to be interested," within the meaning of the Criminal Procedure Act, R. S. C. c. 174, s. 218, and that therefore, his evidence did not require corroboration. *Regina* v. *Farrell*, 1 Terr. L. R. 166.

Corroboration—*Seduction under promise of marriage — Criminal Code.*] — Where a statute requires that evidence shall be corroborated in some material particular, the corroboration required is in some material respect that will fortify and strengthen the credibility of the main witness and justify the evidence being accepted and acted upon.—The prisoner was charged with having seduced and had illicit connection with an unmarried female of previously chaste character under 21 years of age, contrary to s. 182 of the Criminal Code. It was shewn that a couple of months prior to the connection he had told her brother that "he always thought enough of A. to marry her," and about a month before he and she had their photographs taken together. Subsequent to the connection he told her parents "that he always intended to marry A.":—*Held*, (Osler, J.A., dissenting), sufficient corroboration of the girl's evidence that he had had illicit connection with her under promise of marriage.—*Per* Osler, J.A.:—There was no corroboration as to the illicit connection on the occasion in question; the admissions and conversations sworn to had reference to a later occasion. Even the girl's evidence did not shew seduction and illicit connection, or that the seduction, if any, was under promise of marriage. *Rex* v. *Daun*, 12 O. L. R. 227, 8 O. W. R. 173.

Conspiracy — *Hypothetical testimony—Fraud.*]—On a trial for conspiracy to defraud a railway company by fraudulently obtaining information of the secret audits about to be made and furnishing the same to conductors of cars to enable them to be prepared for the audits, proof that information of this nature might be given by one conductor to another for purposes other than to defraud the company, was properly excluded, because such evidence would be merely hypothetical, and could not disprove the object of the conspiracy, or throw any doubt on the evidence which had been adduced to shew the object which the parties had in view. Judgment in 12 Que. K. B. 368 affirmed. *Rex* v. *Carlin*, 12 Que. K. B. 483.

Comment on Judge of failure of accused to testify—*Canada Evidence Act, R. S. C. 1906 c. 145, s. 4 (5).*]—A statement made by a Judge, in charging the jury in a criminal case, that the evidence of a witness for the Crown is wholly uncontradicted, is not a comment on the failure of a person charged to testify within the meaning of the Canada Evidence Act, R. S. C. 1906 c. 145, s. 4 (5). *Rex* v. *Guerin*, 18 O. L. R. 425, 14 O. W. R. 5, 14 Can. Cr. Cas. 424.

Depositions at preliminary inquiry—*Absence of magistrate.*]—Depositions taken at a preliminary inquiry, in the absence of the magistrate before whom the case is proceeding, have no legal value whatever; and therefore the commitment by the magistrate of a prisoner for trial, the bill of indictment founded on his illegal commitment or on the illegal depositions, and the true bill and indictment reported by the grand jury, are null and void. *Rex* v. *Traynor*, 10 Que. Q. B. 63.

Deposition on preliminary hearing—*Prisoner not represented by counsel—Death of deponent before trial.*] — The Criminal Code, s. 687, provides for cases in which and the conditions under which depositions taken on preliminary examinations can be used on the trial in the event of the deponent's death, and supersedes the common law procedure as to this matter.—Where the accused was not assisted by counsel when the deposition was taken:—*Held*, that it could not properly be received in evidence against him, and, as there was no other evidence, nothing was to be gained by requiring another trial. *Rex* v. *Snelgrove*, 1 E. L. R. 107, 39 N. S. R. 400, 12 Can. Cr. Cas. 189.

Depositions on trial of another—*Reception of — Consent of counsel—New trial.*] —Even if a mistake is made by counsel at a trial, that does not relieve the Judge in a criminal case from the duty to see that proper evidence only is before the jury.—At the trial of a prisoner, the prosecuting counsel put in a letter, addressed to the Crown Attorney, from a counsel who had been retained to act for the prisoner, as follows: "I find that I will be unable to go on with this trial on the 28th December. . . . Would you kindly see the Judge and ask him if he can take it on Saturday the 6th January. . . . I am quite willing to accept the evidence of the family, in particular those who gave evidence at the H. trial, so that it would not be necessary for you to call them." The trial was proceeded with on the 29th Decem-

ber, the prisoner then being represented by another counsel, when, in addition to the letter, the depositions of two witnesses taken at the trial of H., who were not members of the family, were put in without the consent of, or objection to on the part of, the prisoner's counsel:—*Held*, that, even assuming the consent in the letter, which seemed to be a concession for the proposed postponement of the trial to the 6th January, wide enough to authorize the admission of the specified depositions, the depositions of the two witnesses, not members of the family, were improperly received.—Conviction quashed and a new trial granted. *Rex* v. *Brooks*, 11 O. L. R. 525, 7 O. W. R. 533, 11 Can. Cr. Cas. 188.

Depositions taken according to law in legal form need not be transcribed and authenticated before the accused has been called upon to plead, the latter suffering no prejudice thereby. *R.* v. *Rouleau* (1910), 12 Que. P. R. 1.

Depositions taken at preliminary enquiry not signed by the presiding magistrate, are not authenticated, and, consequently, there is no record of any preliminary enquiry in the case, and a commitment based upon such enquiry may be quashed upon motion. *R.* v. *Robert* (1910), 12 Que. P. R. 7.

Depositions taken at preliminary inquiry — *Incomplete cross-examination — Waiver.*]—At a preliminary inquiry before a magistrate on a charge of indecent assault on a female, the latter's depositions were taken, the prisoner being represented by counsel, but before her cross-examination was concluded the proceedings were adjourned to a fixed date on account of her illness. Meanwhile, after consulting the county Crown attorney, the magistrate determined to send the case to Sarnia, and so telegraphed to the prisoner's counsel, asking a reply whether he would come up or not. Counsel replied that if the magistrate intended to send the prisoner to trial at any rate, it would be no use his coming, and accordingly he did not further attend the proceedings. On the day to which adjournment had been made, the magistrate went out to the residence of the witness, and obtained her signature to her depositions as already taken, neither the prisoner nor his counsel being present, and afterwards resumed the inquiry at his own office, the prisoner being present, but not the witness, and on the evidence already taken the prisoner was committed for trial. At the trial the witness was proved to be too ill to attend, and her depositions taken as above were tendered by the Crown and admitted:—*Held*, that, in view of s. 687 of the Criminal Code, the depositions were improperly received in evidence, the prisoner's counsel not ever having had a full opportunity of cross-examining the witness, and not having waived that right, as contended by the Crown. *Rex* v. *Trevanne*, 22 C. L. T. 385, 4 O. L. R. 475, 1 O. W. R. 587, 6 Can. Cr. Cas. 124.

Foreign language — *Translation — Documents—Extracts from registers — Evidence of bad character.*]—A conviction for murder will not be set aside because the evidence of witnesses for the prosecution, given in a language of which the defendant was ignorant, was not translated to him, where he was defended by counsel speaking and thoroughly acquainted with the language of the witnesses, and where neither the defendant nor his counsel asked that the evidence be translated. 2. Section 19 of the Canada Evidence Act, 1893, which requires that ten days' notice shall be given to the prisoner before the trial, of the intention to produce certain documents, does not apply to certified extracts from the registers of acts of civil status, which were produced merely to explain the alias of the person killed. Such extracts are admissible without notice. 3. Evidence of bad character or of misconduct of the prisoner, not relevant to the issue before the Court, can only be introduced by the Crown in reply or rebuttal. The admission of such evidence as part of the case for the prosecution, before any evidence of good character has been adduced for the defence, is improper, irregular, and illegal, and constitutes sufficient ground for setting aside the conviction. The illegality is not covered by the failure of the prisoner or his counsel to object to the evidence at the time, or by the fact that his counsel cross-examined the witnesses on their statements. 4. Even after evidence of the prisoner's good character has been made by the cross-examination of Crown witnesses, the prosecution is only entitled to prove his general reputation and not particular acts of misconduct. *Rex* v. *Long*, 11 Que. K. B. 328, 5 Can. Cr. Cas. 493.

Indictment quashed because agent of prosecutor on the grand jury.] — The defendants were indicted for conspiracy to prevent C. from recovering his rents. W., agent of C., was on the Grand Jury, which found the bill. A motion was made to quash the indictment because of W.'s presence on the Grand Jury, it being urged that his position was such as to prejudice him against the accused, and, therefore, to render him incompetent to be on the Grand Jury.—*Held*, Peters, J., that W. was incompetent, and that the indictment must be quashed. *R.* v. *Gorbet* (1866), 1 P. E. I. R. 262.

Information — *Amendment — Liquor License Act — Amending Act — Consuming liquor in local option district—Jurisdiction of magistrate — Prohibition.*]—An information under s.-s. 32 of s. 30 of 7 & 8 Edw. VII., amending the Liquor License Act, R. S. M. 1902, c. 101, for consuming liquor in territory under a local option by-law, discloses no offence unless it alleges that the liquor was purchased and received from some person other than a licensee under s. 30; and it becomes a new information if amended by adding such allegation.—If such amendment is not make within 30 days from the date of the offence, the magistrate has no jurisdiction to proceed under the information, and prohibition should issue to prevent him from doing so.—*Rex* v. *Cuertin*, 10 Man. L. R. 33, 15 Can. Crim. Cas. 251, 11 W. L. R. 98, followed. *R.* v. *Speed* (1910), 15 W. L. R. 19.

Insanity of prisoner—*Committed to an asylum—Prisoner unable to conduct his defence by reason of his insanity—Convicted by magistrate—Invalidity of conviction — Habeas corpus—Discharge of prisoner.*]—No

person can be rightly tried, sentenced or executed while insane. *See* Criminal Code, (1906), s. 19.—If there be sufficient reason to doubt whether an accused person is unable, on account of insanity, to conduct his defence, the question whether by reason of such insanity he is unfit to take his trial should first be tried. *See* Criminal Code (1906), s. 967, and *R.* v. *Berry*, 1 Q. B. D. 447. *R.* v. *Leys* (1910), 16 O. W. R. 544, 1 O. W. N. 958.

Issue as to sanity of prisoner charged with murder—Evidence of physician—Improper statement after ruling of trial Judge—Effect on jury—Discharge. *Rex* v. *Grobb* (Man.), 6 W. L. R. 727.

Joint indictment of husband and wife for murder — *Evidence—Admission or confession of wife implicating husband —Admissibility in whole—Caution to jury— No evidence against husband—Counsel representing Attorney-General — Right of reply where prisoners adduce no evidence.*]—Two prisoners tried jointly for murder of their infant son. The matron of the gaol gave as evidence the confession of the wife in the police station after being cautioned. Argued, the evidence could not be given at their joint trial as the husband was not there when confession was made. Falconbridge, C.J., admitted the evidence at the trial, but informed the jury it was not evidence against the male prisoner. At the request of the male prisoner the case was reserved for the opinion of the Court of Appeal upon the following questions: 1. Was the alleged statement of the female prisoner to the witness, the gaol matron, properly admitted as evidence, when the prisoners were tried together? 2. No evidence being adduced by either prisoner, had the counsel for the defence the right of reply? Falconbridge, C.J., ruling at trial that the counsel for the Crown, who claimed to be acting on behalf of the Attorney-General, had the right of reply:—*Held*, as to the first question, that the evidence was properly admitted, and as to the second question, until Parliament sees fit to withdraw the right of reply, the Crown, through its representative, can assert the privilege. And it must be left to counsel, in the judicious exercise of his discretion, to decide whether he will claim it. *Rex* v. *Martin*, 5 O. W. R. 317, 9 O. L. R. 218.

Jury de mediatate linguae.]—If the right to a jury *de mediatate linguæ* ever existed in P. E. Island it is abolished by the Island Jury Act. *R.* v. *Thompson & Walsh* (1863), 1 P. E. I. R. 226.

Murder — *Admission of accused—Tacit avowal elicited by police agent — Improper admission — Misdirection—Jury — Unqualified person improperly included—Verdict set aside.*]—Evidence that a person accused of murder remained silent or answered "Absolutely nothing" to a police agent who detained him under arrest and who asked him what he had to say to the affirmation of the widow of the victim upon being confronted with him, that it was he (the accused) who had killed her husband, is inadmissible. And, therefore, it is misdirection for the trial Judge to tell the jury that the fact thus proved forms a link in the chain in the evidence of guilt which the jury have to weigh; and a verdict of "guilty" rendered upon such evidence admitted and such direction given to the jury, was set aside.—The swearing in and including in the jury a person assigned by error as a juror, but whose name was not inscribed on the jury panel, and who has not the legal qualification of a juror, is illegal, and a verdict rendered by a jury which includes such person is void, and should be set aside. *Rex* v. *McCrae*, 16 Que. K. B. 193.

Murder—*Dying declaration — Expectation of death—Threats—Improper admission of evidence—No substantial wrong or miscarriage—Criminal Code, s. 1019.*]—Upon the trial of the prisoner for the murder of a foreigner, the evidence shewed that the deceased was found lying on the floor of a bedroom in his house. He was lifted up and laid upon the bed, when it appeared that he had received a wound from a pistol bullet, and it was subsequently shewn that this wound was the cause of his death. A man testified that shortly afterwards he entered the room and asked the deceased, "Who cut you?" to which the deceased answered, "No cut, Jake shoot." The witness then said to the deceased that he would send for a doctor, and the deceased answered, "No doctor, Billy, me die":—*Held*, that the statement of the deceased, "Jake shoot," that the prisoner shot him, as related by the witness, was properly received in evidence as a dying declaration, the words "No doctor, me die," being sufficient to shew that the deceased spoke under a belief without hope that he was about to die from the wound that had been inflicted upon him, and it made no difference that the words incriminating the prisoner preceded the words shewing the expectation of death:—*Held*, also, that there was no reason for excluding testimony proving quarrels between the deceased and the prisoner and threats made by the latter.—Evidence of threats made by the prisoner in respect of another person was improperly admitted, but, in the circumstances, no substantial wrong or miscarriage of justice was occasioned on the trial by reason of the evidence, and therefore, under s. 1019 of the Criminal Code, which declares that "no conviction, shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted . . . unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial," the conviction should not be set aside or a new trial directed. *Rex* v. *Sunfield*, 10 O. W. R. 1010, 15 O. L. R. 252.

Murder — *Statements of deceased—Admissibility—Res gestæ—Subsequent statement —Presence of accused—Judge's charge—Reserved case—Dissenting Judge — Appeal.*]—Evidence of statements made immediately after an assault of a person, since deceased, under apprehension of further danger and requesting assistance and protection, is admissible as part of the *res gestæ*, even though the person accused of the offence was absent at the time when such statements were made. *Regina* v. *Beddingfield*, 14 Cox C. C. 342, *Regina* v. *Foster*, 6 C. & P. 385, and *Aveson* v. *Kinnaird*, 6 East 188, followed.—Statements not coincident, in point of time, with

the occurrence of the assault, but uttered in the presence and hearing of the accused, and under such circumstances that he might reasonably have been expected to have made some explanatory reply or remark in reference to them, are admissible as evidence.—On the trial of an indictment for murder, the evidence was that the deceased had been killed by a gun-shot wound inflicted through the discharge of a gun in the hands of the accused, and the defence was that the gun had been discharged accidentally: — *Held*, that, in view of the character of the defence and the evidence in support of it, there could be no objection to a charge by the trial Judge to the jury that the offence could not be reduced by them from murder to manslaughter, but that their verdict should be either for acquittal or one of guilty of murder.—Two questions were reserved by the trial Judge for the opinion of the Court of Appeal, but he refused to reserve a third question, as to the correctness of his charge, on the ground that no objection to the charge had been taken at the trial. The Court of Appeal took all three questions into consideration, and dismissed the appeal, there being no dissent from the affirmance of the conviction on the first and third questions, but one of the Judges being of opinion that the appeal should be allowed and a new trial ordered upon the second question reserved. On an appeal to the Supreme Court of Canada, the majority of the Court, being of opinion that the appeal should be dismissed, declined to express any opinion as to whether or not an appeal would lie upon questions as to which there had been no dissent in the Court appealed from:—*Held*, however, *per* Girouard, J., that the Supreme Court of Canada was precluded from expressing an opinion on points of law as to which there had been no dissent in the Court appealed from. *McIntosh* v. *The Queen*, 23 S. C. R. 180, followed. *Viau* v. *The Queen*, 29 S. C. R. 90, *Union Colliery Co.* v. *The Queen*, 31 S. C. R. 81, and *Rice* v. *The Queen*, 32 S. C. R. 480, referred to.—Judgment of the Court below. *Rex* v. *Gilbert*, 5 W. L. R. 295, 6 Terr. L. R. 396, affirmed. *Gilbert* v. *Rex*, 27 C. L. T. 240, 38 S. C. R. 284, 12 Can. Cr. Cas. 127.

Perjury — *Indictment—Description of offence — Improper admission of criminating answers before judicial tribunal—Coroner.*] —A count alleging perjury before a coroner—omitting any reference to the coroner's jury—was held sufficient in view of s. 611, s.-ss. 3 and 4, and s. 723, of the Criminal Code. A new trial was granted on the ground of the reception of evidence of an admission made by the accused in answer to questions put to him as a witness on the inquest before the coroner's jury, it being held that s. 5 of the Canada Evidence Act, 1893, compelled the witness to answer, and protected him against his answers being used in evidence against him in any criminal proceeding thereafter instituted against him other than a prosecution for perjury, in giving such evidence, and this without the necessity for the claim of privilege on the part of the witness. (But see now 61 V. c. 53, s. 1). *Regina* v. *Thompson*, 2 Terr. L. R. 383.

Perjury in civil action—*Depositions—Indictment—Form.*]—A person charged with perjury committed in a civil action is entitled to have in evidence those parts of his testimony in the civil action which may be explanatory of the statements in respect of which the perjury is charged. Where the indictment did not follow the statutory form, and laid the charge in an involved manner, but contained the essential averments, it was held sufficient, the unnecessary matter being considered surplusage. *Rex* v. *Coote*, 24 C. L. T. 257, 10 B. C. R. 291.

Possession of stolen goods — *Reasonable account given.*] — A Crown case was reserved to determine the question whether, when stolen goods are found in the possession of a prisoner, and he gives to those who find him a reasonable account of how he came by the goods, it is incumbent upon the prosecution at the trial to shew that the prisoner's account is untrue:—*Held*, that, in the absence of any evidence to shew that such account was in fact given, the Court was not in a position to determine the question reserved. *Regina* v. *McKay*, 34 N. S. R. 540, 6 Can. Cr. Cas. 151.

Proof of alibi — *Misdirection.*]—Where the defence to a criminal charge is an alibi, it is misdirection to tell the jury that the onus is on the prisoner to prove it to their entire satisfaction, and to shew beyond all question or reason that he could not have been present at the commission of the crime. *Rex* v. *Myshrall*, 35 N. B. R. 507.

Rape—*Complaint—Interval of 7 days—Action for damages.*]—On a trial for rape, the fact that the injured person made a complaint, and the particulars or details of the complaint, are admissible as evidence in chief for the prosecution to confirm the testimony of the injured person and disprove consent on her part; and among the particulars the name of the person whom she accused of the offence may be stated.—2. While the injured person should make her complaint as soon as possible after the commission of the offence, yet no specific time being fixed therefor by law, evidence may be admitted of a complaint made to her mother seven days after the offence; but the jury may and should weigh the interval which elapsed before complaint was made, when considering the probability of its truth.—3. Evidence that civil suits for damages based on the commission of a rape have been instituted by the tutor of the injured person on her behalf, and by her mother, is properly excluded as irrelevant on the trial for rape, unless it be first proved that the injured person and her mother had stated, or let it be inferred, that the prisoner was innocent of the offence charged, and they had appeared to be desirous of extorting money from him. In such case the fact that civil actions had been instituted would be corroborative evidence. — 4. Evidence of a quarrel or wrangle between the injured person and her mother a week after the alleged offence, and of an assault committed by the daughter upon her mother, was properly excluded. *Regina* v. *Riendeau*, 9 Que. Q. B. 147.

Reading over evidence.] — Provisions of Art. 684, Criminal Code (1906), respecting reading over of the evidence of witnesses do not apply in cases in which the evidence was

taken in shorthand before the magistrate, but only when such evidence is written in ordinary long handwriting. *R.* v. *Rouleau* (1910), 12 Que. P. R. 1.

Right to re-examine witness.]—The right to re-examine follows upon the exercise of the right to cross-examine, and, even if inadmissible matter be introduced in cross-examination, the right to re-examine remains, and the rule holds good where the witness volunteers the statement. If it be desired to avoid re-examination upon such matter, it must be expunged at the instance of the party cross-examining while it remains as part of the testimony, the right to re-examine upon it also remains. Ruling of Meredith, C.J., at the trial, reversed, and a new trial ordered. *Rex* v. *Noel*, 23 C. L. T. 293, 6 O. L. R. 385, 2 O. W. R. 488, 776, 7 Can. Cr. Cas. 309.

Seduction of girl under 16—*Corroboration — Acquittal—Appeal by Crown — New trial—Criminal Code.*]—Section 684 of the Criminal Code, 55 & 56 V. *c.* 29 (D.), which enacts that a person accused of offences of the nature therein indicated, *inter alia* of having illicit intercourse with a girl of previously chaste character, is not to be convicted upon the evidence of one witness unless such evidence is corroborated in some material particular, does not make it necessarily incumbent upon the Crown to adduce testimony of another or other witnesses to the acts charged. It is enough if there be other testimony to facts from which the tribunal trying the case, weighing them in connection with the testimony of the one witness, may reasonably conclude that the accused committed the act with which he is charged.—New trial ordered after a case stated at the instance of the Crown under s. 743 of the Criminal Code, and the propriety of so doing discussed. *Rex* v. *Burr*, 8 O. W. R. 703, 13 O. L. R. 485, 12 Can. Cr. Cas. 103.

Several charges—*Hearing evidence on second before deciding first—Conviction.*]—The prisoners were tried before the County Court Judge on two separate charges of receiving on two separate days, stolen goods knowing them to be stolen, and of housebreaking and stealing on the second of two days. At the close of the case for the Crown on the first charge, on the 23rd December, the Judge found a *prima facie* case of receiving, and adjourned the case a week to let in evidence for the defence. Meanwhile he proceeded with the trial of the second charge, and remanded the prisoners for sentence. On the 30th December he tried them on the third charge, and acquitted them on it. On the 31st December he sentenced them on the first two charges. The Judge certified that he came to his finding on the first charge before hearing the second, and was not conscious of having been biased on the latter, by the evidence given on the first:—*Held*, that, inasmuch as the circumstances of the three charges were altogether different as to time and place, and the only identity was in the persons charged, and in respect to the principal witness—and in view of what the learned Judge stated, and notwithstanding the expediency of not mixing up criminal charges—the convictions should be upheld. *Rex* v. *Bullock and Stevens*, 24 C. L. T. 9, 6 O. L. R. 663, 2 O. W. R. 436, 901.

Signature of accused — *Statement at preliminary hearing—Forgery.*]—The signature of the accused to his statement at the preliminary hearing may be tendered as evidence against him at his trial for forgery. *Rex* v. *Golden*, 11 B. C. R. 349, 10 Can. Cr. Cas. 278.

Statements made to constable at time of and after arrest—*Admissibility —Inducement.*] — The constable, when arresting the accused, said, "I arrest you for assaulting old man McGarvey," and proceeded to handcuff him. Accused asked to be permitted to go to the office to get some money, and inquired, "How much will the fine be?" to which the constable replied that he did not know anything about that. Subsequently the accused asked to have the handcuffs removed, as he had no intention of escaping, to which the constable answered that he was taking no chances, and that he "had not much sympathy with a man who would kick an old man and bite him:"—*Held*, that these remarks of the constable were not an inducement to the accused to speak. *Rex* v. *Bruce*, 13 B. C. R. 1, 12 Can. Cr. Cas. 275.

Testimony of accused—*Cross-examination — Previous convictions.*] — An accused person, who on his trial for an indictable offence is examined as a witness on his own behalf, is, except so far as he may be shielded by some statutory protection, in the same situation as any other witness as regards liability to and extent of cross-examination, and may be cross-examined as to previous convictions. *Rex* v. *D'Aoust*, 22 C. L. T. 228, 3 O. L. R. 673, 1 O. W. R. 344, 5 Can. Cr. Cas. 407.

Testimony of accused — *Handwriting.*] —A prisoner on trial, called as a witness on his own behalf, cannot be compelled to furnish a specimen of his handwriting. *Rex* v. *Grinder*, 11 B. C. R. 370, 10 Can. Cr. Cas. 333.

Testimony of wife of accused.] — A wife on the trial of her husband for an indictable offence is a competent though not a compellable witness for the Crown. *Gosselin* v. *Rex*, 15 Que. K. B. 498.

Theft — *Second trial—Testimony of juryman at first trial as to condition of exhibit when in jury-room—Admissibility.*]—An application for leave to appeal from a conviction of the defendants for theft, the trial Judge having refused to state a case, was made to the Court of Appeal. The following were the circumstances. The defendants had been previously tried, and the jury had failed to agree. A purse found in the bedroom of one of the defendants, which, the Crown alleged, was one of the articles stolen by the defendants, was made an exhibit at the first trial, and was taken by the jury into the jury-room when they were considering their verdict. At the second trial two of the men who formed part of the jury at the first trial were called as witnesses for the Crown, and

deposed that, when they examined the purse in the jury-room, they observed several barley-ends in it. The Crown alleged that the purse had been stolen from W., and his evidence at both trials was that he had been threshing in the country, and had the purse with him, and that he brought the purse into the city, and it was stolen from him. The defendant in whose room it was found claimed the purse as his own property. The ground of the application for leave to appeal was that the evidence of the two jurymen was improperly admitted. The Court refused the application. *R.* v. *Roso* (1909), 15 W. L. R. 17.

Theft of cattle—*Obliteration of brands —Evidence of similar acts—Admissibility.*] —The prisoner was charged with the theft of certain cattle, the brands upon which had been obliterated:—*Held*, that evidence that the brands upon other cattle had been similarly obliterated, and that the prisoner had in his possession branding irons adapted to causing the obliteration of the character found, was admissible; Rouleau, J., *dissentiente*. *Regina* v. *Collyns*, 3 Terr. L. R. 82.

Trial—*Extorting money by accusing a person of an offence—Admissibility of documents as part of res gestæ—Sufficient statement of offence.*]—On the trial of a charge for extorting money by threatening to accuse of an offence, a letter written to a third party by the person threatened at the time of the threats and at the instigation of the accused, but not read by him, is not admissible in evidence as part of the *res gestæ* or otherwise.—A summons issued by a justice of the peace citing the accused to appear and answer a criminal charge is a "document containing an accusation" within the meaning of s. 406 (c) of the Criminal Code, 1892. —A summons issued as above need not have been issued at the instigation of the informant with the intent aforesaid, but the offence is complete if the summons is used by a third person for the purpose of extortion.—A charge that A. B. "did unlawfully abuse a mare, the property of C. D., contrary to the statutes of Canada, s. 512," is sufficient. *Rex* v. *Cornell*, 6 Terr. L. R. 101.

Trial — *Improper statement of witness after ruling—Effect on jury—Discharge.*]—Although a witness at a trial before a jury volunteers evidence which the trial Judge has already ruled to be inadmissible and which might have weight with the jury in arriving at a verdict, yet the Judge should not for that reason immediately discharge the jury and empanel a new jury to try the issue. *Rex* v. *Grobb*, 6 W. L. R. 727, 17 Man. L. R. 191.

Verdict against evidence — *New trial —Jury—Evidence of accused.*] — Leave to move before the Court of Appeal for a new trial, upon the ground that the verdict is contrary to the whole of the evidence, will only be granted, under s. 747 of the Criminal Code, when the verdict amounts to a denial of justice; and that cannot be said of a verdict because the jury in rendering it have not taken into account the uncorroborated evidence of the accused of facts tending to shew that he is not guilty; the jury is at liberty to refuse it credence. *Rex* v. *Molleur*, 15 Que. K. B. 1.

Wife of prisoner — *Indian marriage — English law.*]—The North-West Territories Act, R. S. C. c. 50, s. 11, provides that, with some limitations, the laws of England, as the same existed on the 15th July, 1870, should be in force in the Territories in so far as the same are applicable to the Territories:—*Held*, that the laws of England relating to the forms and ceremonies of marriage are not applicable to the Territories—certainly *quoad* the Indian population, and probably in any case.—On the trial of a prisoner, an Indian, on a criminal charge, the evidence of two Indian women, M. and K., was tendered for the defence. M. stated "that she was the wife of the prisoner; that he had two wives, and that K. was his other wife; that she, M., was his first wife; that she and the prisoner got married Indian fashion; that he promised to keep her all her life and she promised to stay with him, and that was the way the Indians got married; that he married the other woman last winter; that he and the other woman lived with each other and that he took her for a wife, and that was all about it;"—*Held*, that the evidence quoted was sufficient evidence of a legally binding marriage between M. and the prisoner for the purpose of excluding the evidence of M. as being neither a competent nor a compellable witness against the prisoner on a criminal charge. See now 56 V. c. 31, s. 4 (D.) *Regina* v. *Nan-e-quis-a-ka*, 1 Terr. L. R. 211.

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4. Habeas Corpus.

Also *see* Habeas Corpus.

Application for second writ—*Jurisdiction—B. N. A. Act—Res judicata—Ontario Rule 117.*]—On an application to another Divisional Court for defendant's discharge from custody it was held that if there was no direction by a Judge making the motion returnable before a Divisional Court there was no power to hear the application. Judicature Act, R. S. O. 1897, c. 51, s. 67; R. S. O. 1897, c. 83, s. 8; Con. Rule 117, and, even if the Court in this case had jurisdiction to grant a motion made to it for the issue of a second writ the matter was *res judicata* by the judgment of the Court on a motion to discharge the prisoner upon the first writ, see 19 O. L. R. 125, 14 O. W. R. 149. *Taylor* v. *Scott* (1899), 30 O. R. 475, followed. *Rex* v. *Miller* (No. 2), (1909), 14 O. W. R. 202, 19 O. L. R. 288, 15 Can. Cr. Cas. 156.

Arrest in one province on warrant issued in another—*Jurisdiction to inquire into facts—Abuse of process of magistrate's Court in other province—Right to decide—Discharge of prisoner.*]—Defendant had been arrested in Alberta upon a warrant issued in Saskatchewan and endorsed by a magistrate in Alberta. On *habeas corpus* proceedings,—*held*, that a Judge has a right (1) to enquire if magistrate had a right to issue the process, (2) to enquire if proceedings before magistrate were "an abuse of the process" of the magistrate's Court, and (3) and

when so found the Judge has a right to discharge the prisoner. Prisoner discharged. *Rex* v. *Galloway*, 11 W. L. R. 673, 2 Alta. L. R. 258, 15 Can. Cr. Cas. 317.

Conviction by County Court Judge—*Defendant held pending hearing of reserved case—Court of Appeal not holding session at usual time — Application for discharge.*]—Prisoner was found guilty but was not sentenced and was legally remanded until 22nd November, 1909. Some questions of law having been reserved for the Court of Appeal, the appeal was launched to come on for hearing on 2nd November, when the Court of Appeal was to hold its first session. On 12th November, on the return of a *habeas corpus*, the prisoner's discharge was asked for on the grounds that there was no Court of Appeal in existence under the Statutes of British Columbia and no Judges appointed to sit therein. Motion refused as there would be no miscarriage of justice. *R.* v. *Prasiloski*, 12 W. L. R. 162.

Conviction by Court of Record. *Rex* v. *Harrison*, 10 O. W. R. 35.

Conviction of foreigner — *Return of valid conviction and warrant of commitment —Right to review evidence — Prisoner not understanding proceedings at trial—Interpreter — Capacity — Question for magistrate—Rights of foreigner on trial.*]—Upon a motion to discharge a prisoner, upon the return of a writ of *habeas corpus*, the proceedings should not be conducted as upon an appeal from the magistrate's findings; the most that can be done is to see if there is evidence upon which the magistrate could pass and find as he did. All questions as to admissibility of evidence, method of conducting examinations, etc., are in the power of the trial tribunal; and such questions cannot be raised upon a motion to discharge.—In this case the return was good upon its face, shewing a warrant of commitment which recited the conviction of the defendant for unlawfully committing an act of indecency in a public place; and there was ample evidence to support the conviction; but the defendant attempted to shew by affidavits that, not understanding English, he did not know that he was on trial, and did not understand the evidence given. This was contradicted by one who was sworn as an interpreter at the trial, and by a policeman:—*Held*, that the capacity of the interpreter and all matters connected with the interpretation of the evidence were questions for the magistrate, and his finding could not be attacked in this way.—*Semble*, that there is no inherent right in any foreigner that the proceedings taken in the Courts of this province shall be made wholly intelligible to him, even though he should be charged with crime. Cases in which a contrary doctrine is laid down turn upon some statutory or constitutional provision. *Rex* v. *Mecceklette*, 18 O. L. R. 408, 13 O. W. R. 1039.

Discharge of prisoner—*Certiorari.*]—The discharge of a prisoner can only be obtained by an application for a writ of *habeas corpus*, and not by a *certiorari*. *Rex* v. *Weir*, 8 Que. P. R. 405.

Discharge of prisoner — *Condition of not bringing action against magistrate—Inability to impose—Jurisdiction of Divisional Court to remove.*]—Where a prisoner is entitled to his discharge, under a writ of *habeas corpus*, by reason of no offence being disclosed in the material under which he was committed, such discharge cannot be made conditional on no action being brought against the magistrate or other person in respect of the conviction, or anything done thereunder; and a Divisional Court has jurisdiction on appeal to declare that the term of the order of discharge is nugatory. *Rex* v. *Lowery*, 10 O. W. R. 755, 15 O. L. R. 182, 13 Can. Cr. Cas. 105.

Discharge of prisoner—Order—Protection to all persons concerned in imprisonment —Amendment of order by limiting protection to gaoler. *In re Dart*, 40 N. S. R. 624.

Escape of prisoner—*Recapture—Issue of writ — Waiver — Voluntary return — Sheriff.*]—If a prisoner who has applied for a writ of *habeas corpus* escapes after the issue of such writ and pending the argument upon its return, and thus himself puts an end to the detention, he thereby waives all right which he might have had under the writ, and no order can be afterwards made for his release, even though he may have meanwhile again come into the custody of the same sheriff.—If, however, in such a case he is recaptured or surrenders himself again into custody, the Court is not precluded from granting him another writ of *habeas corpus* under proper circumstances, and where there has not already been an adjudication upon the merits.—*Ex p. Lamirande*, 10 L. C. Jur. 280, specially considered. *Rex* v. *Robinson*, 10 O. W. R. 338, 14 O. L. R. 519, followed. *In re Bartels*, 10 O. W. R. 553, 15 O. L. R. 205, 13 Can. Cr. Cas. 59.

Extradition — *Requisition from foreign government — Extradition treaty with Russia, Arts viii and ix—Extradition Act, R. S. C. (1906), c. 155, ss. 3, 10.*]—By the Extradition Treaty with Russia printed in *Can. Gaz.* 1887, p. 1918, Arts viii and ix, a requisition from that government for surrender of a fugitive is provided for as preliminary to any proceedings for arrest of the fugitive. —*Held*, that any proceedings taken without such requisition were a nullity and the fugitive should be discharged upon *habeas corpus* even after committal for extradition by a Judge. Prisoner discharged accordingly. — *Re Lazier* (1899), 26 A. R. 260, 3 Can. Cr. Cas. 167, distinguished on ground that there is no such provision in the Extradition Treaty with U. S. A. *Re Federenko* (No. 2) (1910), 20 Man. L. R. 224.

Fugitive Offenders Act, R. S. C. 1906, c. 154, s. 8—*Prisoner charged with embezzlement — Arrested on warrant issued in Ireland—Enquiry before Toronto police magistrate — Committal to await return — Habeas corpus and certiorari in aid—Application for discharge—Warrant not properly endorsed—In lawful custody.*]—Prisoner was arrested in Toronto on a charge of embezzlement, under a warrant issued in Ireland, and, after an enquiry, the Toronto

police magistrate committed him to await his return under provisions of the Fugitive Offenders Act, R. S. C. (1906), c. 154. Prisoner moved, on return of a *habeas corpus* and *certiorari* in aid, for his discharge, on the ground that the warrant was not endorsed by the Governor-General or by a Judge of the High Court as required by s. 8 of the Act, and that, therefore, the police magistrate had no jurisdiction to enter upon the enquiry mentioned in s. 12, or to commit the prisoner. — Meredith, C.J.C.P. (17 O. W. R. 505, 2 O. W. N. 271), endorsed the warrant and *held*, that the application should be refused and the warrant of commitment, granted by the police magistrate, should be confirmed.—Court of Appeal *held*, that the police magistrate's warrant of committal was invalid, and defendant was entitled to be discharged under the writ of *habeas corpus*. *R.* v. *Wishart* (1910), 17 O. W. R. 967, 2 O. W. N. 491, O. L. R. , Can. Cr. Cas.

Imprisonment in default of payment of fine and costs—*Tender to deputy keeper of gaol—Reasonable time—Rule of prison as to hour of receipt of fine—Effect of—Discharge of prisoner.*]—A warrant of commitment commanded the keeper of a common gaol to receive the defendant into his custody in the common gaol, there to imprison him for 30 days unless the amount of a fine and costs were sooner paid to the keeper. The defendant was apprehended under this warrant and received by the gaoler on the 12th March. His agent, on the 14th March, at 10 minutes before 8 o'clock in the afternoon, tendered the proper amount of the fine and costs to the person in charge, the deputy keeper, who refused to receive the money, on the ground that there was a rule of the gaol that no person would or could be released, on payment of the fine after 5 o'clock in the afternoon, until the next morning:—*Held*, that there was no power, statutory or common law, to make such a rule, and that the tender having been made at a reasonable time and to the proper person, the prisoner should have been released; and having been improperly detained after the tender, he was entitled to be discharged upon *habeas corpus*. *Rex* v. *Colahan*, 9 O. W. R. 661, 14 O. L. R. 379.

Issue of two writs—*Regularity of second—Subsequent arrest — Prisoner allowed out on recognizance—Sentence—Expiry of— "Escape" — Discharge — Protection — Order.*]—The prisoner was convicted of an offence on the 17th January and sentenced to 4 months' imprisonment, but, instead of being imprisoned, his recognizance was taken by the magistrate to appear when called upon, and he was allowed to go free. On the 27th March, without any notice, a warrant was issued, and he was arrested and put in gaol. A writ of *habeas corpus* was granted, and motion for his discharge was made on the 26th April and refused, and papers being on their face regular, but leave was reserved to move for a new writ on the expiry of 4 months from the day of sentence. A new writ was granted on the 25th June, and motion made for his discharge on the 27th:—*Held*, that there was a right to issue the second writ, the first being premature, and there having been no adjudication upon the matter. *Taylor* v. *Scott*, 30 O. R. 475, distinguished.—*Held*, also, that the term of imprisonment having begun on the day of passing sentence, the full terms had expired; that the prisoner when out on his recognizance had not been guilty of an escape; and that he was not "at large . . . without some lawful cause;" and an order was made for his release. — Order for protection of magistrate made on terms. *Rex* v. *Robinson*, 10 O. W. R. 338, 14 O. L. R. 519.

Liquor License Act — *Conviction for second offence—Imprisonment—Habeas corpus and certiorari in aid—Right of Court to go behind regular conviction—R. S. O. 1897 c. 83, s. 5—Police magistrate — Territorial jurisdiction—Warrant of commitment—Clerical error — Depositions before magistrate—Absence of proof of previous conviction—Affidavit of magistrate—Defendant not allowed reasonable opportunity to make defence—Discharge.*]—On a motion upon *habeas corpus* for the discharge of a person imprisoned under a conviction regular on its face, the Court will not rehear the case or weigh the evidence or sit in appeal, but will examine the depositions returned upon *certiorari* granted in aid of the *habeas corpus*, to see if there is any evidence to sustain the conviction, and, if none is found, will discharge the prisoner; this is required by the language of R. S. O. 1897 c. 83, s. 5.—2. The police magistrate for the town of Brampton has jurisdiction, at the request of the police magistrate for the township of Toronto, to try a person accused of an offence committed in the township.—3. A prisoner will not be discharged because the warrant of commitment returned, by a clerical error bears a date before that of the conviction upon which it is founded.—4. The conviction of the prisoner returned purported to be for a second offence of selling intoxicating liquor without a license, contrary to the Ontario Liquor License Act, and the sentence was 4 months' imprisonment as for a second offence. By s. 99 of the Act the magistrate is required to reduce to writing the evidence of the witnesses, which is to be read over to and signed by them. The depositions returned failed to shew any proof of a previous conviction:—*Held*, that the magistrate's affidavit that proof of the previous conviction was in fact properly given could not be accepted on the motion for discharge of the prisoner, and no evidence being returned to warrant the conviction for a second offence, which was essential to support the adjudication of imprisonment for 4 months, the prisoner was entitled to his discharge.—5. The prisoner was also entitled to his discharge on the ground that he was not allowed fair or reasonable opportunity to make his defence; he was served with a summons to appear the next day after service, to answer the charge; he did so; the information was then amended so as to charge an offence upon a day other than either of those mentioned in the summons; and he was refused an adjournment; all of which, as well as other things in the proceedings before the magistrate, was contrary to natural justice. *Rex* v. *Farrell*, 10 O. W. R. 790, 15 O. L. R. 100.

Practice—Grounds of objection to prisoner's detention not to be stated in writ—

Rule not necessary—Notice to committing magistrate and prosecutor sufficient—Notice to Attorney-General not necessary—Amended commitment after fiat for writ—Intoxicating liquors—Prohibition Act—Offence in county outside Charlottetown—Jurisdiction of magistrate sitting in Charlottetown — Imprisonment in default of payment of fine. *Re McMurrer*, 2 E. L. R. 436.

Warrant addressed to one of a class of which prosecutor is a member—Not void if prosecutor took no part in arrest. *In re McMurrer* (No. 2), 2 E. L. R. 466.

5. JUSTICES OF THE PEACE AND MAGISTRATES.

Appeal from conviction—Case stated by justices—Request to justices—Non-compliance with provisions of code — Waiver—Jurisdiction. *Rex* v. *Earley* (N. W. T.), 3 W. L. R. 189.

Appeal from conviction—Case stated by justices—Request to justices—Non-compliance with provisions of code — Waiver—Jurisdiction. *Rex* v. *Earley* (No. 2), (N.W. T.), 3 W. L. R. 193.

Appeal from conviction by two justices under Part LV., Criminal Code—Right of appeal—Jurisdiction of Judge of Supreme Court. *Rex* v. *Pisoni*, *Rex* v. *Taylor* (N.W.T.), 4 W. L. R. 527.

Case stated by magistrate—Criminal Code, s. 761—Criminal matter — Exclusive jurisdiction of Dominion Parliament—Lord's Day Act—Offence against—Sale of "candies," etc., on Sunday—Licensed restaurant keeper —Municipal by-law — Sale of food — Bona fides. *Rex* v. *Weatheral*, 11 O. W. R. 946.

Conviction—Agreement to quash. *McCabe* v. *McCabe*, 3 E. L. R. 56.

Conviction—*Appeal and certiorari—Concurrent remedy—Criminal Code, ss. 707, 708—Attendance of justices to give judgment.*]—The defendant, on the 15th May, 1908, gave notice of appeal to a County Court from a summary conviction. The conviction was signed by two justices, but on the day fixed for delivering judgment one justice read the conviction, the other not attending. An order for *certiorari* was taken out and served on the 20th May, and on the 27th May the defendant served a notice of his grounds of appeal:—*Held*, that under s. 1122 of the Criminal Code *certiorari* would not be allowed after appeal taken. *In re Kelly*, 27 N. B. R. 553, followed.—*Per* Gregory, J.:—under ss. 707 and 708 of the Criminal Code, both justices must attend to give judgment, and it is not sufficient for one to attend and read a conviction signed by both. *Rex* v. *Haines*, *Ex p. McCorquindale*, 39 N. B. R. 49, 6 E. L. R. 374, 15 Can. Crim. Cas. 187.

Conviction — *Disqualification of magistrate—Authority of sitting magistrate—City of Moncton Incorporation Act.*]—The City of Moncton Incorporation Act, 53 V. c. 60, s. 65, provides that a sitting magistrate may act for the police magistrate for the city of Moncton when he is temporarily absent or ill or "is in any way disqualified by being a witness, or from relationship or otherwise:"—*Held*, that a conviction by a sitting magistrate stating that he was acting for the police magistrate, "he being disqualified," and not alleging the grounds of disqualification, is sufficient on its face. *Rex* v. *Steeves*, *Ex p. Gallagher*, 39 N. B. R. 4.

Conviction — Evidence returned on *certiorari* taken down by stenographer not sworn —Invalidity of conviction—Jurisdiction — Seal. *Rex* v. *L'Heureux* (Y.T.), 8 W. L. R. 975, 14 Can. Crim. Cas. 100.

Conviction — *Heading — "Special sessions"—Warrant of arrest—When issued—Vagrancy—Sentence — Costs—Imprisonment for default in payment.*]—1. The rubric or title "Special Sessions," at the head of a conviction for vagrancy, pronounced by a Judge of sessions of the peace, is not a defect in form which renders it void.—2. Warrants of arrest are issued by virtue of s. 655 of the Criminal Code, on the complaint or information of the prosecutor, without it being necessary more particularly to examine himself and his witnesses and to take their depositions under oath.—3. A sentence of imprisonment, payment of a fine, $6 of costs, and three months additional in gaol in default of paying these, is valid. *Ex p. Tierney*, 17 Que. K. B. 486, 14 Can. Crim. Cas. 194.

Conviction—*Imprisonment—Hard labour in default of distress—Criminal Code, s. 739 (2).*]—Under s. 872 (c) of the Criminal Code, 1892 (now s. 739 (2)), the imposition of hard labour upon an imprisonment in default of distress is authorised only where imprisonment with hard labour in the first instance might have been imposed in addition to a fine with imprisonment in default of distress or payment. *Rex* v. *Riley* (N.S.), 14 Can. Crim. Cas. 346.

Conviction — *Information — Nature of offence not disclosed—Habeas corpus — Discharge of prisoner.*]—In drawing an information, or indictment, under s. 517 of the Criminal Code, it is not sufficient to allege that the accused "did unlawfully, in a manner likely to cause danger to valuable property without endangering life, or person, *do any unlawful act*," without giving some particulars shewing in what the alleged unlawful act consisted; and such an information, or indictment, is bad as not disclosing any offence.—A person undergoing imprisonment following a conviction worded in the same way will be entitled to be discharged upon *habeas corpus*. *Rex* v. *Porte*, 18 Man. L. R. 222, 9 W. L. R. 98, 14 Can. Crim. Cas. 238.

Conviction—*Jurisdiction — Certiorari—Criminal Code, 1892, s. 887—Appeal from summary conviction.*] — 1. The jurisdiction of an inferior Court must appear on the face of the proceedings, or it will be presumed to have acted without jurisdiction. Therefore, summary conviction under the Liquor License Act does not state where the offence was committed, or even that it was committed in Manitoba, should be quashed.—2. Notwithstanding s. 887 of the Criminal

Code, 1892, *certiorari* proceedings may be maintained, although there has been an appeal from the conviction, upon any ground which impeaches the jurisdiction of the magistrate. *Regina* v. *Starkey*, 7 Man. L. R. 43, followed. *Johnston* v. *O'Reilly*, 4 W. L. R. 569, 16 Man. L. R. 405.

Conviction—*Jurisdiction — Omission to read evidence over to witnesses—Certiorari—Objections to evidence—Affidavit to vary return—Statement of grounds for certiorari—Procedure.*]—The provision of s. 721, s.-s. 3, of the Criminal Code, requiring the evidence to be read over to the witnesses on the trial of an information or complaint, is a matter of procedure, and its omission does not go to the jurisdiction of the magistrate. *Ex p. Gallagher*, 38 N. B. R. 498, followed.—The Court will not hear an affidavit contradicting the return of a magistrate as to what matter was put in evidence at the trial before him. —*Per* Barker, C.J. — Under the rule of Michaelmas Term, 1899, the grounds for *certiorari* must be stated specifically, so that the other party may know the exact points relied on. *Rex* v. *Kay, Ex p. Steeves*, 39 N. B. R. 2, 15 Can. Crim. Cas. 160.

Conviction—Liquor License Act—Weight of evidence—Review on motion to quash—Conduct of magistrates—Costs. *Rex* v. *McArthur*, 8 O. W. R. 694, 14 Can. Crim. Cas. 343.

Conviction — *Motion to quash — New procedure—8 Edw. VII. c. 34 — Certiorari—Right taken away—Ontario Summary Convictions Act, s. 7, s.-s. 2—Right of appeal—Liquor License Act, s. 118—Adequate remedy —Jurisdiction of magistrate.*]—The right to take the new procedure for the quashing of convictions, etc., substituted by 8 Edw. VII. c. 34 (O.) for *certiorari* and proceedings founded thereon, must be confined to cases in which, prior to that Act, the defendant would have been entitled to a writ of *certiorari;* and where the right to *certiorari* is taken away the new procedure is not applicable.—A motion made under the new procedure to quash a magistrate's conviction for an offence against the Ontario Liquor License Act was dismissed, except as to one ground, it being considered that the other objections to the conviction were not such as, if substantiated, would oust the jurisdiction of the magistrate, and also that in respect of them the defendant would have an adequate remedy by the appeal given him by s. 118 of the Liquor License Act; and, in these circumstances, the right to *certiorari*, and therefore the right to move under the new procedure, was taken away by s. 7, s.-s. 2, of the Ontario Summary Convictions Act, as enacted by 2 Edw. VII. c. 12, s. 14, amended by 4 Edw. VII. c. 10, s. 23.—It cannot be said that, because defects in the proceedings before the magistrate may be cured by the appellate tribunal, therefore an appeal does not afford an adequate remedy. *Rex* v. *Cook*, 18 O. L. R. 415, 12 O. W. R. 829.

Conviction by two justices—*No jurisdiction—Imprisonment under their order—Habeas corpus with certiorari in aid—Application for discharge refused—Ordered to be removed back and a preliminary hearing had.*]—Prisoner was convicted by two justices of the peace and sentenced to the Central Prison for issuing a false cheque. The offence being indictable is not triable by two justices. They should have only held a preliminary enquiry and sent prisoner to gaol to await trial or bail. When prisoner was taken to Central Prison he moved before Clute, J., for his discharge on the return of a writ of *habeas corpus* with *certiorari* in aid.—Clute, J., quashed the warrant of commitment to Central Prison, but instead of discharging him from custody, ordered him to be removed back to Cochrane and brought before the two justices for a preliminary hearing upon the charge, as provided by s. 1120 of the Code, as amended by 7 & 8 Edw. VII. c. 18, s. 14.—Court of Appeal dismissed prisoner's appeal. *R.* v. *Frejd* (1910), 17 O. W. R. 991, 2 O. W. N. 486.

Conviction for keeping bawdy house —*Criminal Code, ss. 207, 208 — Warrant of commitment—Jurisdiction—Habeas corpus—Amended warrant — Reception on appeal — Form of conviction—Statement of offence.*]—The prisoner was convicted before three justices of the peace for being the keeper of a disorderly house, bawdy house, or house of ill-fame, or house for the resort of prostitutes —following the words of s.-s. (*j*) of s. 207 of the Criminal Code—and was committed to gaol for six months under a warrant signed by two of the justices. She obtained a writ of *habeas corpus*, and upon the return of it moved for her discharge, which was refused by a Divisional Court. She then appealed to the Court of Appeal, and, after the appeal had been argued and judgment reserved, the justices returned a further warrant of commitment signed by all three justices, which was received by the Court of Appeal. The offence was stated to have been committed in a city, for which there was a police magistrate. The warrant returned to the Court of Appeal was signed by all three justices, under their respective seals, and set forth a conviction by them, all acting in the absence of, and one at the request of, the police magistrate:—*Held*, that under s. 208 of the Criminal Code, as amended by 57 & 58 V. c. 57, one justice had jurisdiction to adjudicate upon the charge, and by R. S. O. 1897 c. 87, s. 7, had authority to act in the city in the absence of the police magistrate; and if authority be given to one justice it may be executed by any greater number, and the fact that others join in making the conviction does not invalidate the proceeding.—*Held*, also, that the conviction and commitment, following the language of s.-s. (*j*) of s. 207 of the Code, properly set out and disclosed the offence: s. 846 (2) of the Code (63 & 64 V. c. 46). Order of a Divisional Court affirmed. *Rex* v. *Leconte*, 11 O. L. R. 408, 7 O. W. R. 189, 11 Can. Cr. Cas. 41.

Conviction for keeping bawdy house —*Jurisdiction of justices—Criminal Code, s. 786—Form of conviction—Offence committed after issue of summons—Information — Amendment — Certiorari — Security — Condition.*]—Two justices dealing with a charge of keeping a house of ill-fame will be deemed to be acting under Part LV. of the Criminal Code, 1892, if they adopt the form of conviction provided by s. 786, and the form

of conviction QQ.—A defendant cannot be convicted of an offence alleged to be committed after the date of the issue of the summons, even though the information is amended and resworn.—*Semble*, that if, with a deposit of cash as security in proceedings to quash a conviction, a writing is filed, the condition should be that the applicant will prosecute the motion to quash the conviction, not merely the application for the writ of *certiorari*, and that such writing is bad if the condition is to prosecute such motion or writ of *certiorari*. *Rex* v. *Early*, 3 W. L. R. 567, 6 Terr. L. R. 269, 14 Can. Cr. Cas. 10.

Conviction for selling intoxicating liquors without license—*Summary trial—Cross-examination to credit—Discretion of magistrate—Criminal Code, s. 786—Review of finding.*]—On a charge of selling intoxicating liquor without a license on a certain afternoon, there being another charge pending against the accused for doing the same during the forenoon, and similar charges against other hotel keepers for doing the same during the forenoon and afternoon of the same day:—*Held*, that the magistrate had a discretion as to allowing counsel for the accused to ask witnesses on cross-examination whether they had been in the defendant's hotel during the forenoon, and whether they had been in one of the other hotels that forenoon and afternoon, notwithstanding s. 786 of the Criminal Code, R. S. C. 1906, c. 146.—*Held*, also, that on a motion to quash the conviction there could be no review of the finding of the magistrate that there was a sale of intoxicating liquor. *Rex* v. *Butterfield*, 18 O. L. R. 347, 13 O. W. R. 542, 616.

Conviction under Indian Act by two justices of the peace—*Appeal—Notice of appeal served on one justice only—Jurisdiction—Condition precedent—Costs—Criminal Code, ss. 2 (18), 750, 755.*]—By the Indian Act, R. S. C. 1906, c. 81, s. 135, jurisdiction to try offences against the Act is given to two justices of the peace. Section 750 of the Criminal Code provides that notice of appeal shall be given by serving the respondent or the justice who tried the case with a copy thereof. By s. 2 (18), of the Criminal Code, "Justice" includes two or more justices if two or more justices act or have jurisdiction:—*Held*, therefore, where a conviction for an offence against the Indian Act was made by two justices of the peace, and notice of appeal from the conviction was served upon only one of the justices, that there was no jurisdiction to hear the appeal, the provisions of s. 750 being imperative, and compliance therewith being a condition precedent which could not be waived; and the appeal was dismissed, but without costs, because, by s. 755 of the Code, costs should only be allowed upon proof of notice of the appeal having been given to the person entitled to receive the same.—Review of the authorities. *R.* v. *Edelston* (1910), 15 W. L. R. 279.

Conviction under statute—*Penalty prescribed—Departure from—Imprisonment according to law — Conviction void — Habeas corpus.*]—Where a penal statute fixes the whole penalty to which the offender may be condemned, it is illegal for the Court to condemn him otherwise than according to the very terms of the statute.—The statute in question in this case (29 & 30 V. c. 57, s. 23) fixed the condemnation in determining the amount of the fine, and prescribing the obligation of payment of costs, and in default of payment imprisonment for six months at hard labour; therefore a conviction which condemns the offender to pay a fine and costs, and in default of such payment to imprisonment for six months *according to law*, is void and will be quashed upon application as in like cases provided, *i.e.*, upon writ of *habeas corpus*. *Poulin* v. *Quebec*, 33 Que. S. C. 190.

Indictable offence — *Summary trial—Jurisdiction of magistrate—Offence committed in another county.*] — If a person is brought before a justice of the peace charged with an offence committed within the province, but out of the limits of the jurisdiction of such justice, the latter, in his discretion, may either order the accused to be taken before some justice having jurisdiction in the place where the offence was committed (Criminal Code, 1892, s. 557, Criminal Code, 1906, s. 665), or may proceed as if it had been committed within his own jurisdiction.—S. was brought before the stipendiary magistrate for the city of Halifax charged with having committed burglary in Sydney, C.B.: —*Held*, that the stipendiary magistrate could, with the consent of the accused, try him summarily under Criminal Code, 1892, s. 785, as amended in 1900 (Criminal Code, 1906, s. 777). *Re Seeley*, 41 S. C. R. 5, 14 Can. Crim. Cas. 270.

Jurisdiction—*Delay in issuing summons—Liquor License Act—Criminal Code—Prohibition—Certiorari.*]—By s. 95 of the Liquor License Act, R. S. O. 1897, c. 245, an information for an offence must be laid within 30 days of the commission thereof, and by s. 559 of the Criminal Code, the justice upon receiving any complaint or information "shall hear and consider the allegations of the complainant, and, if of opinion that a case for so doing, is made out, shall issue a summons," the form of summons given in the schedule referring to the offender as having "this day" been charged. The offence was committed on the 21st, and the information laid on the 24th October, but the summons, though dated the 24th October, was not issued until the 14th January, following. After notice of motion for prohibition had been served on the magistrate, he made the conviction, and on the return of the motion it was agreed that the motion should be deemed as asking in the alternative for a writ of *certiorari*: — Anglin, J., refused to grant prohibition. And a Divisional Court affirmed his judgment, but directed a writ of *certiorari* to issue.—Subsequently the rule *nisi* granted on the return of the *certiorari* was discharged. *Rex* v. *Hudgins*, 9 O. W. R. 298, 376, 14 O. L. R. 139.

Jurisdiction of justice—Adjournment —Commencement of "hearing"—Waiver—Irregularity—*Habeas corpus*—Refusal to discharge—Appeal—Divisional Court. *Rex* v. *Miller*, 14 O. W. R. 149.

Jurisdiction of magistrate—*Warrant of commitment—Habeas corpus.*]—A warrant stated in the recital that the prisoner was convicted before the undersigned, one of His Majesty's Justices of the Peace in and for the said County of Westminster. This was signed by the magistrate who put after his name the initials "S. M." Commitment held bad, as not shewing jurisdiction of magistrate. He is described as a justice of the peace, whereas he had jurisdiction only as stipendiary magistrate for the district. It cannot be inferred from the letters "S. M." appended to his signature that he was stipendiary for that district. *Rex* v. *Hong Lee*, 10 W. L. R. 376.

Justice of the peace—Charged with two offences before another J. P.—No action taken on information by latter J. P.—Motion for order *nisi* under R. S. O. (1897), c. 88, s. 6—Order granted — No opinion on merits. *Re R.* v. *Graham, Ex p. Titchmarsh* (1910), 17 O. W. R. 660, 2 O. W. N. 326.

Justice of the peace—*Disqualification of—Bias—Prohibition.*] — A justice of the peace is not disqualified from hearing a charge of assault on the ground of bias and prejudice, because (a) the justice had been removed from the position of police magistrate of N. some five months before and the defendant appointed in his stead, and (b) some two months before the justice had been charged with a criminal offence before the defendant acting as such police magistrate, and by him committed for trial. *Ex p. Peck; Re Stuart* (1908), 39 N. B. R. 131, 6 E. L. R. 274.

Justice of the peace — *Jurisdiction—Committal for trial of foreign seaman on British ship—Admiralty—Consent of Governor-General—Criminal Code, s. 591—Imperial Territorial Waters Jurisdiction Act, 1878, s. 4.*]—On return of a *habeas corpus* for release of a foreign sailor sent for trial by a justice of the peace on charge of having committed an indictable offence on board a British ship off the coast of British Columbia within the jurisdiction of the Admiralty of England, it was held, that proceedings before the justice of the peace may be taken before the consent of the Governor-General is given under s. 591 above. *Rex* v. *Tano*, 10 W. L. R. 522.

Keeping disorderly house—*Specification as common gaming or betting house—Summary trial under Part XVI.*]—The defendant was charged before a magistrate for that he did on a day and at a place specified "unlawfully keep and maintain a disorderly house, to wit, a common gaming or betting house." The magistrate dealt with the matter summarily under Part XVI. of the Criminal Code, relating to "Summary Trial of Indictable Offences."—The charge was read to the accused, and he was asked whether he was guilty or not guilty, and he pleaded guilty thereto, and he was thereupon convicted and sentenced to be imprisoned with hard labour for 6 months, and, in addition, to pay a fine of $100. The conviction and warrant of commitment were in the terms of the information. Upon an application for a *habeas corpus* and a *certiorari* in aid:—*Held*, upon the evidence, that the proceedings were not bad because of the defendant, who was a foreigner, not understanding the nature of the charge and not making his plea with a knowledge of its meaning; the evidence shewed that he understood and was fully advised.—The charge was laid under s.-s. 1 of s. 228 of the Criminal Code, as amended by 8 & 9 Edw. VII. c. 9:—*Held*, Lamont, J., dissenting, that the information, conviction, and commitment were not bad by reason of the offence being double or by reason of the acts which make up the offence being stated in the alternative. Section 854 of the Criminal Code applies to proceedings under Part XVI.; the word "count" in that section includes a charge reduced to writing by the magistrate and to which the defendant is called upon to plead, as provided by s.-s. 3, of s. 778 of the Code; the charge is a "pleading" within the definition in clause 16 of s. 2 of the Code, as amended by 6 & 7 Edw. VII. c. 8. *R.* v. *Mah Sam* (1910), 15 W. L. R. 666, Sask. L. R.

Magistrate — *Adjournment to consider judgment—Fixing date for judgment—Notification of parties—Criminal Code, s. 722.*]—Falconbridge, C.J.K.B., *held*, that a magistrate has no power to adjourn a case for the purpose of delivering judgment, without fixing a date and notifying the parties when judgment will be delivered. *R.* v. *Quinn* (1897), 28 O. R. 224, 2 Can. Cr. Cas. 153, followed. *R.* v *Haith* (1911), 18 O. W. R. 509.

Magistrate's conviction—Evidence returned on *certiorari* taken down by stenographer not sworn—Invalidity of conviction —Jurisdiction — Seal. *Rex* v. *L'Heureux* (Y.T.), 8 W. L. R. 975.

Magistrate's conviction — Information —Nature of offence not disclosed—*Habeas corpus*—Discharge of prisoner. *Rex* v. *Porte*, 9 W. L. R. 98.

Magistrate's conviction — Motion to quash—Plea of "guilty"—Denial of accused —Evidence that accused so pleaded—Notice of motion—Refusal to allow new ground to be set up—Date of offence. *Rex* v. *Campbell*, 12 O. W. R. 1061.

Magistrate's warrant of commitment —Imprisonment under—Failure to recite conviction—*Habeas corpus*—Motion for discharge —Application by Attorney-General for *certiorari* in aid—Right to writ, *ex debito justitiæ*—Adjournment of motion for discharge—Practice—Amendment of warrant according to conviction returned in answer to *certiorari*—Criminal Code, s. 1123—Liquor License Act, R. S. O. c. 245, s. 105 (1)—Discharge of defendant—No terms imposed. *Rex* v. *Nelson*, 12 O. W. R. 1063.

Motion to quash conviction—New procedure under 8 Edw. VII. c. 34—*Certiorari* —Right to, taken away—Liquor License Act, s. 118—Right of appeal—Adequate remedy—Objections to jurisdiction of convicting magistrate—Absence of evidence of offence charged. *Rex* v. *Cook*, 12 O. W. R. 829.

Motion to quash conviction—8 Edw. VII. c. 34, s. 1—Recognisance—Necessity for —Infant defendant. *Rex* v. *Reid*, 12 O. W. R. 1037.

Practice — Preliminary investigation — Warrants not stamped—Discharge of accused —Refusal of a justice to state a case—Leave to appeal. *Rex* v. *Hamelin*, 3 E. L. R. 279.

Refusal to adjourn—*Refusal to allow full defence—Evidence.*]—On a motion to quash a conviction for selling liquor without a license on the ground that the magistrate had refused the defendant an adjournment, it was *held*, that the evidence shewed that the defendant had been given a fair trial, and that any further delay would not have assisted the defendant. Motion refused. *Rex* v. *Lorenzo* (1909), 14 O. W. R. 1038, 1 O. W. N. 179, distinguished. *Rex* v. *Luigi* (1909), 14 O. W. R. 1041, 1 O. W. N. 182.

Refusal to adjourn—*Refusal to allow full defence—Evidence.*]—On a motion to quash a conviction for selling liquor without a license on the ground that the magistrate had refused the defendant an adjournment, it was held that the evidence shewed that the defendant had adopted an ingenious effort to evade the law, and even if he had been corroborated as to the form that was gone through the transaction would still retain the character of evasion of the statute. *Rex* v. *Lamphier*, 17 O. L. R. 244, especially referred to. *Rex* v. *Major* (1909), 14 O. W. R. 1111, 1 O. W. N. 223.

Refusal to adjourn—*Refusal to allow full defence—Evidence.*]—Where defendant appeared before the magistrate and pleaded not guilty, to a charge of selling liquor without a license, and asked for an adjournment, which was refused:—*Held*, that the conviction should be quashed on the ground that when defendant denied that he was guilty and gave evidence on his own behalf denying his guilt, but required reasonable time to produce other witnesses who could probably be speedily procured, re sonable time should be allowed him. A defendant should be duly summoned and fully heard. *See* Paley on Summary Convictions, 8th ed., pp. 118, 119. *Rex* v. *Lorenzo* (1909), 14 O. W. R. 1038, 1 O. W. N. 179.

Right of magistrate to commit witness for contempt. *In re Hugh Morrison*, 3 E. L. R. 154; *In re Sims*, 3 E. L. R. 157.

Selling intoxicating liquor to railway employees — Information — Offence against Ontario Railway Act—Employees of Dominion railway corporation—Scienter — Quashing conviction — Costs. *Rex* v. *Treanor*, 12 O. W. R. 1175.

Stipendiary magistrate — *Indictable offence committed outside of territorial jurisdiction—Summary trial by consent—Jurisdiction—Habeas corpus.*]—A prisoner arrested in the city of Halifax, in the province of Nova Scotia, charged with unlawfully breaking and entering a store situate at Sydney in the said province, may be tried at Halifax by a stipendiary magistrate having jurisdiction within the city of Halifax, if he consents to be tried summarily without a jury under s. 785 of the Criminal Code, 1892, as amended by the Criminal Code Amendment Act, 1900. *Rex* v. *Warden of Dorchester Penitentiary, Ex p. Seeley*, 38 N. B. R. 517, 3 W. L. R. 259.

Stipendiary magistrate for county—*Jurisdiction—City acting at request of police magistrate in city—Offence against Criminal Code—Application of provincial statutes—Ss. 206, 777 of Code.*]—Accused was charged under s. 206 of the Criminal Code and was convicted by the stipendiary magistrate of Vancouver county acting for and at the request of the police magistrate for Vancouver. The conviction was made under s. 777 of the Code:—*Held*, that the magistrate had no jurisdiction under s.-s. 2 of that section as he is not a stipendiary magistrate for the city of Vancouver. *Rex* v. *Nar Singh*, 10 W. L. R. 523.

Summary conviction — *Information — Statement of offence—Warrant in first instance—Hearing—Absence of accused—Copy of warrant — Failure to serve — Motion to quash conviction—Canada Temperance Act.*] —A sworn information containing a positive statement that the party charged had committed an offence triable under the Summary Convictions Act is sufficient to authorise the issue of a warrant in the first instance without an examination of the informant or his witnesses. *Rex* v. *Mills, Ex p. Coffon*, 37 N. B. R. 122, distinguished.—Where the parties charged are arrested on a warrant and give bail, and a time is fixed in their presence for the hearing, and they do not appear at the time so fixed, the justice may under s. 722 of the Criminal Code, R. S. C. 1906, c. 146, proceed with the hearing, in their absence, to judgment and sentence.—Failure to serve a copy of the warrant issued in the first instance, at the time of the arrest, is no ground for setting aside a conviction under the Summary Convictions Act, for an offence against the Canada Temperance Act. *Rex* v. *Hornbrook, Ex p. Madden, Ex p. McCormick*, 38 N. B. R. 358, 4 E. L. R. 509.

Summary Convictions Act—*Conviction by stipendiary magistrate — Appeal — Case stated.*]—Notwithstanding s. 127 of the Summary Convictions Act, which makes the conviction final "except as in this chapter otherwise provided," an appeal lies from a conviction or order of a stipendiary magistrate to the Supreme Court, by way of case stated, where the point sought to be raised is not frivolous, and is of an arguable character. *Rex* v. *McNutt*, 42 N. S. R. 180.

Summary trial—*Election by accused—Failure of magistrate to hold preliminary inquiry or to inform accused as to Court for trial.*]—The omission by the magistrate to hold the preliminary inquiry as provided in s. 789 of the Code, to enable him to decide whether or not the case should be disposed of summarily, invalidates the conviction:—*Held*, further, that the omission to inform the accused as to the probable time when the first Court of competent jurisdiction would sit, was also fatal. *Rex* v. *Williams*, 11 B. C. R. 351, 2 W. L. R. 410.

Summary trial—*Jurisdiction—Criminal Code, 1892, s. 783—Summary trial—Appeal.*] —Since, before 1895, two justices of the peace in the North-West Territories had jur-

isdiction to try offences under paragraphs (*a*) and (*f*) of s. 783 of the Criminal Code, 1892, and there was no appeal from their decision, the extension in that year of this jurisdiction to two justices in any province, subject to appeal where the trial was had before them by virtue only of the new enabling clause, did not extend the right of appeal to the North-West Territories.—The Alberta Act, since it continued the law theretofore in force, made no change in this respect. *Rex* v. *Pisoni*, *Rex* v. *Taylor*, 6 Terr. L. R. 238, 4 W. L. R. 527.

Summary trial by police magistrate — *Jurisdiction — Conviction — Sentence — Habeas corpus—Lesser offence—Election.*]—1. A prisoner's right to *habeas corpus* in Manitoba depends on the *Habeas Corpus Act*, 31 Car. II. c. 2, s. 2, and the writ cannot be taken out on behalf of a prisoner under sentence of conviction by a police magistrate, exercising the extended jurisdiction to try indictable offences summarily, conferred by s. 777 of the Criminal Code, unless an absolute want of jurisdiction is shewn. *Re Sproule*, 12 S. C. R. 141, followed.—2. A police magistrate for a city or incorporated town, who is also a police magistrate in and for the whole province, when acting under s. 777 of the Code, may try offences committed anywhere in the province.—3. Such police magistrate at the summary trial of an indictable offence may, under s. 951 of the Code, convict the accused of any offence included in the offence charged, although the whole offence charged is not proved, without again offering the prisoner an election as to the mode of trial. *Rex* v. *McEwen*, 7 W. L. R. 364, 17 Man. L. R. 477.

Territorial jurisdiction of justice—Summary conviction—Presumption—Evidence—Judicial notice of local geography. *Rex* v. *Can. Pac. Ry. Co.*, 8 W. L. R. 825, 1 Alta. L. R. 341, 14 Can. Crim. Cas. 1.

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6. Particular Offences.

Abduction—*Divorced father enticing child away from custody of mother—Validity of foreign divorce—Criminal Code, s. 316.*]—Court of Appeal *held*, that a foreign divorce awarding the custody of a child to the mother is of such validity in Canada as to render the father liable, under s. 316 of the Criminal Code, for taking or enticing away the child with intent to deprive the parent (mother) of the possession of said child. *R.* v. *Hamilton* (1910), 17 O. W. R. 809, 2 O. W. N. 394, O. L. R. .

Abduction—Five-year-old son—In possession of mother—Taken by father—By aid of third party—Parents living apart—Who is lawfully entitled to possession of child?—Evidence—"Not guilty." *R.* v. *Cowan & Collins* (1910), 17 O. W. R. 553.

Abduction of girl under 16—*Conviction—Motion for leave to appeal—Evidence to sustain conviction — Criminal Code, s. 315.*]—Prisoner was convicted on a charge of unlawfully taking an unmarried girl out of the possession and against the will of her mother, then having lawful care and charge of her, she being under the age of 16 years, contrary to Criminal Code, s. 315. On an application for leave to appeal on ground that the conviction was against the evidence and the weight of evidence and for an order requiring the trial Judge to state a case for the opinion of the Court of Appeal, it was *held*, that there was evidence of an unlawful taking of the girl out of the possession and against the will of her mother; that the object or intention with which the girl was taken was immaterial. Application refused. *R.* v. *Yorkema* (1910), 16 O. W. R. 54, 21 O. L. R. 193, 16 Can. Cr. Cas. 189.

Abduction of girl under 16—*Criminal Code, s. 315—Conviction—Girl under control of father but not living with him — Taken against will of father.*]—On a case stated, *held*, that there was evidence to warrant the conviction. A husband had deserted his wife and children. His wife and children now lived with the prisoner, the former acting as his housekeeper. The eldest daughter under 16, was going to school and against the father's wish, although with consent of both mother and daughter the defendant took her from their boarding-house to his own home. *R.* v. *Holmes* (1909), 14 O. W. R. 419.

Abortion—*Attempt to procure—Indictment—"Operate"—Conviction—Crown case reserved—Form of questions submitted.*]—The accused had been charged with an offence under s. 303 of the Code, which enacts that "everyone is guilty of an indictable offence . . . who, with intent to procure the miscarriage of any woman, whether she is or is not with child . . . unlawfully uses on her any instrument or other means whatsoever with the like intent," the first count charged that the accused, with the intent to procure a miscarriage, etc., did unlawfully use upon the person of the woman an instrument, etc.; the second count charged that with like intent the accused did unlawfully "operate" on the said woman. The evidence submitted by the Crown was directed solely to proof of the fact of the performance of an operation by the use of an instrument, substantially negativing the use of the hand or finger alone for the alleged purpose. The jury, however, were charged—after they had intimated that they were not satisfied that the evidence established the use of an instrument—that the use of the hand or finger might be considered in dealing with the second count. The jury found the accused not guilty on the first count, but guilty on the second count:—*Held*, that the second count might not unnaturally be regarded as a mere repetition in another form of the gravamen of the first count, and that by the finding of not guilty on that count the whole case against the accused failed, and the finding on the second count, therefore, could not be supported. Conviction quashed. *Rex* v. *Cook* (1909), 19 O. L. R. 174, 13 O. W. R. 826, 15 Can. Cr. Cas. 40.

Abortion — *Counselling a woman in Canada to submit to an operation outside the jurisdiction of Canada—Corroboration of evidence.*]—*Held*, where the defendant counselled

a woman in Vancouver to submit to an operation in Seattle, to procure her miscarriage, —that no act beyond the borders of Canada can be an offence against the law of Canada, unless made so by statute, and to counsel the commission of an act, which if performed in Canada would be a crime in Canada, is not an offence against the laws of Canada: —*Held*, also, where the Supreme Court of British Columbia had ordered a new trial of the defendant—that the Privy Council would be very slow to interfere, at the instance of the prosecution, with a new trial directed by a Court of Appeal, in favour of an accused. Judgment of the Supreme Court of British Columbia, granting defendant a new trial, confirmed. *Rex* v. *Walkem*, C. R. [1908] A. C. 197. See 14 B. C. R. 1, 8 W. L. R. 857, 14 Can. Crim. Cas. 122.

Abortion — *Defence — Lawful operation —Evidence in reply of previous criminal act —Unlawful intent—System — Inadmissible evidence—New trial.*]—Upon an indictment of the defendants (P., a physician and surgeon, and T. a boarding-house keeper), for procuring an abortion, the case for the Crown was that the defendants had performed an unlawful operation upon a certain woman, for the purpose of procuring a miscarriage. Of this there was evidence to go to the jury. The defence was then entered upon, and the defendant P. swore that the operation was performed for a lawful purpose, and without any criminal intent. He was cross-examined as to whether he had not, some few weeks previously, performed an operation upon a person then in Court. He denied having done so, and all knowledge of having treated her at all. This person and the man whom she had subsequently married were, against objection, called in reply, and gave evidence that P. had been employed to operate and had operated upon her so as to procure a miscarriage. It was contended that this evidence was admissible, as tending to rebut the evidence of P., or in other words to prove the unlawful intent:—*Held*, that the testimony of these witnesses was improperly admitted, there being no evidence of a system which would let in proof of a single prior criminal act as part of it. *Rex* v. *Bond*, [1906] 2 K. B. 389, discussed. The conviction of the defendants was set aside, and a new trial was directed under s. 1018 (*b*) and (*d*) of the Criminal Code. *Rex* v. *Pollard and Tinsley* (1909), 19 O. L. R. 96, 14 O. W. R. 399, 15 Can. Crim. Cas. 74.

Abortion—*Evidence of accomplice—Corroboration — Verdict of guilty — Judge's charge.*]—The accused was tried on a charge of procuring abortion, the only evidence being that of the woman, who swore that she went to the accused and asked him to perform the operation, she herself being a consenting part thereto. The trial Judge directed the jury that they should not convict upon the uncorroborated evidence of the woman, who was *particeps criminis*. The jury brought in a verdict of guilty, and the Judge, on the application of the accused, reserved a case for the opinion of the Court *en banc*:—*Held*, that the evidence of an accomplice, even though uncorroborated, is legal evidence and sufficient to support a conviction, but the trial Judge should advise the jury not to convict upon such evidence. *Rex* v. *Reynolds*, 1 Sask. L. R. 80, 9 W. L. R. 209, 15 Can. Crim. Cas. 209.

Adulteration of milk — *British Columbia Public Health Act—Regulations—Interpretation—Conviction—Adulteration Act, s. 26.*]—The full Court sustained an order quashing a conviction of the defendant for having milk in his possession intended for sale which was below the standard prescribed by the Provincial Board of Health under the Public Health Act. It is not an offence to be in possession of impure milk intended for sale. *Rex* v. *Garvin*, 11 W. L. R. 218.

Advertising medicine intended to prevent conception—*Evidence to support conviction—Functions of Judge and jury — Acquittal—New trial.*]—The evidence of the Crown, upon an indictment for an offence against s. 179 (c) of the Criminal Code, shewed that the defendant conducted a large business in various proprietary medicines, including a certain emmenagogue or medicine for stimulating or renewing the menstrual flow. This medicine was put up in boxes, in the form of tablets, and sold under the terms of an agreement, duly proved, between the defendant and the manufacturer. A box was produced as made up for the purpose of sale, with a brief printed description of the contents on the outside, across which a warning in red ink and large type was printed, not to use the tablets during pregnancy. Inside the box was a printed sheet or circular giving full directions for the use of the tablets; and a separate advertising circular referring to the tablets and describing their purposes and operation was also proved. In the "directions" there was this statement: "Thousands of married ladies are using these tablets monthly. Ladies who have reason to suspect pregnancy are cautioned against using these tablets." The Judge at the trial directed an acquittal, reserving a case for the Crown upon the question whether the evidence offered would support a conviction. A verdict of not guilty was accordingly returned:—*Held*, that the jury could have legitimately inferred from the language used that the tablets were thereby represented as a means of preventing conception; and therefore it would have been right to have left the case to the jury; and a conviction might have been supported. It is for the Judge to determine whether a document is capable of bearing the meaning assigned to it, and for the jury to say whether, under the circumstances, it has that meaning or not. The Court declined to direct new trial. *Rex* v. *Karn*, 23 C. L. T. 219, 5 O. L. R. 704, 2 O. W. R. 335.

Aiding deserter — *Conviction — Uncertainty—Penalty — Costs.*] — The prisoner was convicted under s. 73 (*b*) of the Criminal Code, which is as follows:—"Everyone is guilty of an indictable offence who . . conceals, receives, or assists any deserter from Her Majesty's military or naval service, knowing him to be such deserter." The penalty on summary conviction is "not exceeding $200, and not less than $80 and costs," and in default of payment, imprisonment for any term not exceeding six

months. The magistrate imposed a penalty of $100, and in default of payment four months' imprisonment:—*Held*, that the words of the Act do not each describe a separate offence, but are merely an amplification of language to cover all shades or description of the same kind of offence—that of giving aid to a deserter.—*Regina* v. *Gibson*, 29 O. R. 663, distinguished.—At any rate s. 907 of the Code would cure any uncertainty.—2. That the penalty must be disposed of under ss. 927 and 928 of the Code, and was properly directed "to be paid and applied according to law."—3. That it was not necessary to award costs against the defendant; the words of the statute meaning that $200 was the highest penalty, and "$80 and costs" the lowest penalty. The fine was fixed at $100 and no costs, and the magistrate acted within his discretion in not awarding costs. *Re Baker*, 20 C. L. T. 16.

Aiding prisoners to escape from insane asylum—*Acquitted on murder charges—Confined by order of Lieut.-Gov.—Conviction for aiding in escape—Under sentence of imprisonment for less than life—In lawful custody—Criminal Code, s. 192—Evidence to support conviction—Corroboration.*]—Defendant was convicted upon a charge of having assisted two persons to escape from an insane asylum, while there confined by order of Lieut.-Gov., after having been tried and acquitted upon charges of murder, upon juries finding them insane.—Court of Appeal sustained the conviction.—*R.* v. *Frank*, 16 O. W. R. 50, 21 O. L. R. 196, followed on the point as to corroboration. *Rex* v. *Trapnell* (1910), 17 O. W. R. 247, 2 O. W. N. 174.

Allowing escape—*Lieut.-Gov. may pardon prisoner, but his mere order to discharge would not justify jailor in permitting an escape—Plaintiff must prove damage—Nonsuit.*]—This was an action against H., keeper of Queen's County Jail, for an escape. W. was committed for trial on a charge of stealing plaintiffs' watch. The defendant discharged him under an order from the Lieut.-Gov., but there was no pardon. The questions raised were: (1) Did the Lieut.-Gov.'s order justify the defendant? (2) If not, would an action lie at the suit of a private person, the committal being for a criminal offence? (3) If so, must plaintiff prove the watch was taken by the prisoner, before he could recover:—*Held*, Peters, J., that the Lieut.-Gov. had no power to discharge the prisoner and that his order would not justify the jailor.—That the action would lie against the jailor—That plaintiff must prove his watch had been taken by the prisoner, and not having done so must be nonsuited. *Mitchell* v. *Harvie* (1852), 1 P. E. I. R. 64.

Altering or erasing names on voters' lists—*Criminal Code, 1892, s. 503—Wilful acts—Dominion Elections Act, 1900, ss. 21, 22, 23, 41—Franchise Act, 1898, s. 10—Polling divisions.*]—When a returning officer, appointed to hold a Dominion election for an electoral district in Manitoba, selects one of the copies of lists of voters sent to him by the Clerk of the Crown in Chancery, pursuant to s. 21 of the Dominion Elections Act, 1900, as the one which he will certify and forward to the deputy returning officer, as required by s. 41, for use at one of the polling subdivisions, that copy so selected becomes a voters' list within the meaning of s. 503 of the Criminal Code, 1892, and it is an offence under that section for the returning officer wilfully to erase names of voters from it, either before or after he certifies it and forwards it to the deputy.—2. Such returning officer has no authority, under the Dominion Election Act, 1900, to create the voters' lists upon which the election is to be held, or under ss. 22 and 23 of the Elections Act, to make a new division of the constituency into polling subdivisions and re-arrange the names of the voters for each, when there are in fact polling divisions already established and used at the last provincial election for the same territory, whether or not such polling divisions had been established in strict accordance with the requirements of the provincial statutes.—3. The returning officer who wilfully makes such erasures from a voters' list cannot escape punishment on the ground that he had to make them in consequence of having made new polling sub-divisions which he had no authority to make.—4. The fact that the heading of the list of voters in question contained the words "Registration District No. 3," instead of "Polling Division No. 3," did not justify the returning officer in believing, if he did believe, that there were no polling divisions, since the territory of No. 3 was accurately described in the same heading. The Court, having held that the trial Judge had erred in withdrawing the case from the jury and directing a verdict of not guilty, ordered a new trial. *Rex* v. *Duggan*, 4 W. L. R. 481, 16 Man. L. R. 440.

Alternative offences — *Summary trial—Jurisdiction — Place of imprisonment.*]—On application to discharge the defendant upon a writ of *habeas corpus*, it appeared that he was tried before the stipendiary magistrate for the city of Halifax, under the provisions of the Code relating to summary trials, and was convicted of the offence of stealing a quantity of whisky, of the value of $9, "in and from a certain railway building, to wit, a certain building," and was adjudged, for his said offence, to be imprisoned in the city prison, in the said city of Halifax, for the space of nine months. Under the Code, s. 351, every one is guilty of an indictable offence, and liable to 14 years' imprisonment, who steals anything in or from any railway station, or building, &c.:—*Held*, that there was but one crime charged, and that the place of detention was a proper place within the meaning of the law; Weatherbe, J., and Graham, E.J., dissenting. *Rex* v. *White*, 21 C. L. T. 310, 34 N. S. R. 436.

Arson—Intent to defraud insurance company—Evidence — Previous fire. *Rex* v. *Beardsley*, 5 O. W. R. 584, 805.

Assault — Imprisonment for 60 days — Statutory maximum two months. *Rex* v. *Brindley*, 2 E. L. R. 45.

Assault — *Intent — Jury.*] — The prisoner was indicted, *inter alia*, under s. 415 of the Criminal Code, for being unlawfully in the house of P. with intent to committing an assault on D. The jury in effect found

that the prisoner was unlawfully in the house, and committed an assault on D.:—*Held*, that the intent to commit the assault was involved in the committal of it; that the jury could not find the prisoner guilty of committing the assault without finding that he had the intent to commit it, and, as the being in and the intent concurred in point of time, the offence was complete. *Rex* v. *Higgins*, 38 N. S. R. 328, 10 Can. Cr. Cas. 456.

Assault — *Teacher and pupil—Criminal Code—Punishment—Excess.*]—The Criminal Code, s. 55, authorises parents, persons in the place of parents, schoolmasters, etc., to use force by way of correction towards any child, etc., under his care, "provided such force is reasonable under the circumstances," but by s. 58, "everyone by law authorised to use force is criminally responsible for any excess." The defendant, a teacher in one of the public schools, was charged before a magistrate with assaulting, beating, and illusing J. O., one of the pupils under his care, and was acquitted on the ground that there was no evidence of malice on his part or of permanent injury to the child:—*Held*, that the only question properly before the magistrate was whether the punishment was reasonable in the circumstances, or, in other words, whether there was excess:—*Held*, that there is no warrant in the Code for the test applied in the American case of *State* v. *Pendergrass*, 31 Am. Dec. 365, and adopted by the magistrate, that it is necessary for the prosecutor to prove either that the person inflicting the punishment was actuated by malice or that his act resulted in permanent injury to the child. *Rex* v. *Gaul*, 24 C. L. T. 135, 36 N. S. R. 504.

Assault on peace officer in execution of duty—Attempt to arrest without warrant—Absence of offence justifying arrest. *Rex* v. *Cook* (B.C.), 3 W. L. R. 553.

Assaulting police officer — *Arrest of suspect—Resisting—Warrant.*] — Where the defendant, arrested by a provincial constable, who believed that a robbery had been committed, and that the defendant was one of the persons who committed it, and who, being asked to shew his authority, produced and read a warrant against F. E. and others, for breaking and entering a shop and stealing a quantity of goods therefrom, seeing that his name was not mentioned in the warrant, resisted arrest, and in so doing assaulted a constable, and was tried and convicted for assaulting a police officer in the discharge of his duty, with intent to resist lawful arrest, it was held that the arrest could be justified under the statute, notwithstanding the insufficiency of the warrant. *Rex* v. *Sabeans*, 37 N. S. R. 223.

Attempt to commit rape—*Evidence—Identity of accused—Description—Criminal Code, s. 107—Rebuttal—Discretion—Lesser offences—Non-direction—New trial—Substantial wrong or miscarriage—Criminal Code, s. 746.*]—It is the duty of the Judge on a criminal trial to exclude illegal evidence, and its admission is a ground for a new trial whether objected to or not on the trial.—Whether or not the conditions required by s. 107 of the Criminal Code to justify the admission of rebuttal testimony contradicting a witness who has denied making an alleged statement to a third party at variance with her testimony, have been fulfilled, is a question for the presiding Judge, and, if his discretion has been reasonably exercised, there is no ground for a new trial on a case reserved:—per Tuck, C.J., Hanington, Landry, and Gregory, JJ.; McLeod, J., dissenting.—On the trial of an indictment for an attempt to commit rape, statements of the person assaulted, and of her companion present at the beginning of the assault, made to police officers, some 4 hours after the assault, that they had given a description of the assailant, but not stating what the description was, and evidence of the officers that in consequence of such description they had looked for the assailant, were properly received, although statements of a like character had previously been made to other persons.—Where the victim of the assault on cross-examination had been asked if she had given a description of her assailant in the presence of her father, and if in consequence of such description, he had not suspected a person other than the prisoner, the Crown was properly allowed to prove by the father what the description was that his daughter had given in his presence: per Tuck, C.J., Hanington, Landry, and Gregory, JJ.; McLeod, J., dissenting.—Failure to point out to the jury on the trial of an indictment to commit rape, the only issue involved being the identity of the prisoner, that on such an indictment the law permits the finding of a lesser offence than the one charged, is not error or non-direction for which a new trial will be granted.—If material evidence, which may have influenced the jury, is properly admitted, a new trial must be granted, although the Court should be of the opinion on the whole evidence that there has been no substantial wrong or miscarriage within the meaning of s. 746 of the Code: per McLeod, J.; Tuck, C.J., *contra*. *Rex* v. *Clarke*, 2 E. L. R. 327, 38 N. B. R. 11.

Attempt to dissuade person from giving evidence — *Court of Revision — Charge—Motion to quash—Criminal Code, s. 154—Attempting to obstruct justice.*]—The prisoner was charged on two counts with (1) having attempted to dissuade a witness, B., by a bribe, from giving evidence before a Court of Revision held in connection with a contested provincial election; (2) with having attempted to obstruct the course of justice by giving to one B. $10 to induce him to abstain from attending such Court of Revision. B. was the person whose vote had been objected to and appealed against:—*Held*, on a motion to quash the charge, that, it being charged that B. was dissuaded as a witness, not as a party, the first charge fell properly within clause (*a*) of s. 154 of the Criminal Code, 1892; but that the second charge was defective, at all events in omitting to state that B.'s absence from the Court of Revision would lead to a defeat of justice. *Rex* v. *Lake*, 3 W. L. R. 244, 6 Terr. L. R. 345, 11 Can. Cr. Cas. 37.

Attempt to dissuade person from giving evidence—*Witness at preliminary trial — Corrupt attempt to dissuade from giving same evidence at final trial—Mens rea —Criminal Code, s. 189 (a).*]—*Held*, Mere-

dith, J.A., dissenting, that it is an offence against s. 180 (a) of the Criminal Code to attempt to dissuade a witness by corrupt means from giving at the final trial the same evidence that was given by him at a preliminary trial, although the accused honestly believes that the evidence is untrue, and although his object is to get the witness to tell at the final trial what the accused believes to be true. *Rex* v. *Silverman*, 12 O. W. R. 509, 17 O. L. R. 248, 14 Can. Crim. Cas. 79.

Attempt to have unlawful carnal knowledge of a child—*Reserved case—Evidence of child—Corroboration—Code ss. 302, 1003.*]—Defendant was charged under Code s. 302 with having attempted to have unlawful carnal knowledge of a child under the age of 14 years, to wit, of the age of 7 or 8 years. The trial Judge granted a reserve case as to whether there was sufficient corroboration of the girl's statement to comply with Code s. 1003 (2): And was the Judge right in holding that there was sufficient evidence to justify finding the defendant guilty? The Court of Appeal answered both questions adversely to defendant and confirmed the conviction. *Rex* v. *Bowes* (1909), 14 O. W. R. 1214, 1 O. W. N. 253, 20 O. L. R. 111.

Bawdy house — *Accessory — Lessor.*]—A person who leases his house to another to be used for purposes of prostitution, or who leases his house knowing that it is to be so used, make himself, under the provisions of s. 61 (b) of the Criminal Code, a party to and guilty of the offence of keeping a disorderly house, committed by his lessee subsequently to the lease of the premises, although the lessor was not himself the keeper; and he can be prosecuted, tried, convicted, and punished for such offence in the same manner as the actual keeper. *Regina* v. *Roy*, 9 Que. Q. B. 312.

Bawdy house — *Frequenting — "Habitual frequenter"—Conviction—Omission of averment of not giving satisfactory account of himself.*]—The prisoner was convicted of being on a specified occasion "a frequenter of a house of ill-fame," it not being stated that he was in the "habit of frequenting," under ss. 238, 239 of the Code, or was an "habitual frequenter," under s. 773 of the Code, and without anything appearing in the conviction to shew that he was asked to give, or failed to give, a satisfactory account of himself:—*Held*, that no offence was shewn in the conviction and the prisoner was discharged on *habeas corpus* proceedings. *Rex* v. *Lamothe*, 18 O. L. R. 310, 12 O. W. R. 772, 1160, 13 O. W. R. 154.

Bawdy house — Inmate or frequenter—Evidence. *Rex* v. *Misse*, 7 W. L. R. 934.

Bawdy house — Keeping — Conviction —Absence of proper evidence—Illicit intercourse on premises—Knowledge of accused not shewn—Evidence of reputation. *Rex* v. *Carroll*, 9 W. L. R. 119.

Bawdy house — Keeping — Conviction —Evidence to sustain—Woman sole occupier of house—Criminal Code, s. 225—Amending Act, 6 & 7 Edw. VII. c. 8. *Rex* v. *Margaret Smith*, 12 O. W. R. 80.

Bawdy house — *Keeping — Conviction for keeping a disorderly house—Habeas corpus—Statement of offence—Counsel for defendant—Refusal of adjournment to procure —Discretionary power of magistrate—Jurisdiction—Criminal Code, ss. 238 (j), 715, 722.*]—The defendant was convicted before two justices of the peace for being the keeper of "a disorderly house of prostitution or house for the resort of prostitutes," and was sentenced to six months' imprisonment in gaol. On application being made for her discharge upon a writ of *habeas corpus*, it appeared by her affidavit, which was not contradicted, that the magistrates had refused to adjourn the trial to enable her to procure counsel, but it did not appear that any injustice was caused by the refusal of the adjournment:—*Held*, affirming the order of Meredith, C.J.C.P., that the conviction was not in the alternative, specifying two offences, but properly set out one offence under s. 238 (j), of the Criminal Code.—*Rex* v. *Leconte*, 11 O. L. R. 408, followed.—2. The defendant, under s. 715 of the Criminal Code, had the absolute right to the assistance of counsel if she could obtain it, but was not entitled as of right to an adjournment for the purpose of enabling her to do so. That was a matter within the discretion of the magistrates under s. 722, and their refusal to adjourn did not affect their jurisdiction so as to enable the defendant to quash the conviction in a *habeas corpus* proceeding. — *Regina* v. *Biggins*, 5 L. T. N. S. 605, followed. *Rex* v. *Irving*, 18 O. L. R. 320, 12 O. W. R. 816.

Bawdy house — Keeping — Evidence — One prostitute resorting to hotel—Knowledge of keeper of house—Criminal Code, R. S. C. 1906, c. 146, s. 238 (j)—Amendment of 1907 — Effect of—Conviction—Penalty—Character of house—Fine. *Rex* v. *Mercier*, 7 W. L. R. 922.

Betting on streets.]—A person, having no regular place of business, who makes his living by taking bets on the street with individuals on his own behalf, and, if he loses, pays the bets himself, is not a loose, idle, or disorderly person or vagrant within the meaning of the Criminal Code, s. 238 (1). *R.* v. *Ellis* (1910), 14 O. W. R. 195, 20 O. L. R. 218.

Bigamy — *Defence—Dissolution of former marriage — Decree of foreign Court — Validity — Domicil.*]—Upon an indictment of the defendant for bigamy the defence was, that she had been divorced from her husband by the decree of a foreign Court:—*Held*, that the marriage being a Canadian one, and the domicil of both parties being in Canada, and not having been changed, although they both resided for a short time in the foreign country previous to the making of the decree, the marriage was not dissolved, and the defence failed. *Magurn* v. *Magurn*, 3 O. R. 570, 11 A. R. 178, and *Lemesurier* v. *Lemesurier*, [1895] A. C. 517, followed. *Rex* v. *Woods*, 23 C. L. T. 220, 6 O. L. R. 41, 2 O. W. R. 338.

Bigamy—*Foreign divorce — Domicil — Mens rea—Constitutional law — Criminal Code, s. 295—R. S. C. 1906 c. 146, 307, s.-s. 4.*]—A woman, married in Canada in 1897

to a person who was at the time and always remained a domiciled Canadian, in 1903 went to the State of Michigan, intending to separate from her husband and thenceforth to make her home there, and in 1906 obtained a divorce in Michigan, her husband, however, not being served with any notice of the divorce proceedings nor taking any part therein:—*Held*, that the divorce was of no validity or force in Ontario.—Shortly afterwards the husband, having obtained a copy of the divorce decree, and legal advice that the same was valid, and that he was at liberty to marry again, went through a form of marriage with another woman in Detroit, in the State of Michigan, having left Canada to do so:—*Held*, that he was guilty of bigamy under s. 295 of the Criminal Code, 55 & 56 V. c. 29 (D.).—*Held*, also, that paragraph (*a*) of s.-s. 1 of s. 295 of the Criminal Code, which defines bigamy as the act of a person who being married goes through a form of marriage with another person in any part of the world, is *intra vires* of the Dominion Parliament, when read with the limitation imposed by s.-s. 4, that no person shall be so convicted in respect of having gone through a form of marriage in a place not in Canada, unless such person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage.—*In re Criminal Code Sections Relating to Bigamy*, 27 S. C. R. 461, held binding. *Rex* v. *Brinley*, 9 O. W. R. 457; *Rex* v. *Brinkley*, 14 O. L. R. 434.

Breach of Gold & Silver Marking Act — *Guaranteeing to wear for specified time.*]—Defendant was convicted of a breach of the Gold and Silver Marking Act, 7-8 Edw. VII. c. 30, s. 16 (*b*), which enacts that "everyone is guilty of an indictable offence who being a dealer within the meaning of this Act. . . . (*b*) makes use of any written or printed matter or advertisement or applies any mark to any article of any kind referred to in s. 13 or in s. 14 of this Act or to any part of such article guaranteeing or purporting to guarantee by such matter, advertisement or mark, that the gold or silver on or in such article or such part thereof will wear or last for any specified time." Defendant appealed to Court of Appeal by way of stated case.—Court of Appeal *held*, that above s.-s. was *intra vires* of the Dominion Parliament. Conviction confirmed. — *La Compagnie Hydraulique de St. Francois* v. *Continental Heat and Light Co.*, C. R., [1909] A. C. 49, followed. *R.* v. *Lee* (1911), 18 O. W. R. 845, 2 O. W. N. 933.

Burglary — *Possession of stolen property — Inference of guilt — Lapse of time — Jury — Verdict — Dissent of juror—Reconsideration — Judge's charge — Comment on failure of prisoner to testify.*]—The jury in a criminal trial may be sent back for further deliberation when, upon being polled, one of the jurors dissents from the verdict of "guilty" announced by the foreman; and a subsequent unanimous verdict of "guilty" may properly be accepted.—Upon the trial of the prisoner for burglary and burglariously stealing property, the Judge in his charge to the jury remarked that if they did not believe the evidence of a certain witness, they were "brought face to face with the fact that the prisoner is found in possession of a pouch which was stolen . . . and that he has not given a satisfactory explanation of how he came into possession of it:" —*Held*, that the Judge did not thereby suggest to the jury that the prisoner might have given evidence in his own behalf, or that an inference unfavourable to him might be drawn from the fact that he had not done so.—The burglary was on the 18th or 19th December, 1903, and the prisoner was arrested on the 16th February, 1904, with one of the articles stolen upon his person:—*Held*, that the Judge could not properly have ruled, in all the circumstances of the case, that the lapse of time was so great as absolutely to repel any presumption that the prisoner was concerned in the burglary; and that the possession of the article and other circumstances warranted the jury in drawing an inference of guilt. Leave to appeal was refused, and rulings of Street, J., at the trial, were affirmed. *Rex* v. *Burdell*, 11 O. L. R. 440, 7 O. W. R. 164.

Carnal knowledge — *Girl under 14—Between 14 and 16—Two offences tried together—Second charge withdrawn from jury —Found guilty on first charge—Evidence—Admissibility — Corroboration — Child exhibited to jury—Likeness to prisoner—Criminal Code, ss. 211, 301, 856, 857, 1140.*]—Defendant was charged with an offence against s. 301 and a subsequent offence against s. 211. After all the evidence was in the trial Judge withdrew the second charge from the jury. He was convicted of the offence against s. 301. At the trial there was no objection made to the two counts being tried together. The prosecutrix exhibited her child and alleged it to be the child of defendant. The similarity of the child to defendant was pointed out and offered as evidence. Defendant asked for a stated case, but the trial Judge refused. Defendant then moved for leave to appeal to Court of Appeal, and for an order directing the trial Judge to state a case.—Court of Appeal *held*, that defendant had failed to make out a case that would justify the order asked, and dismissed the motion. *R.* v. *Hughes* (1910), 17 O. W. R. 651, 2 O. W. N. 307, O. L. R. , Can Cr Cas.

Carnal knowledge of girl under 14 —*Testimony of girl—Knowledge of nature of oath—Instruction for purposes of trial.*]—Upon a stated case, the question was whether the complainant, a girl under 14, appeared sufficiently to understand the nature of an oath to justify the magistrate in receiving her testimony. The magistrate stated that on examination of the girl he found that she did understand, and there was nothing in her answers as reported to indicate otherwise. It appeared, also, that she had been attending school, and the handwriting of her signature to the depositions was good:—*Held*, that the magistrate was right in receiving the girl's evidence under oath, and that the fact that she had been instructed on the subject of the nature and meaning of an oath a few days before the trial, afforded no sufficient ground for holding otherwise. *Rex* v. *Armstrong*, 10 O. W. R. 508, 15 O. L. R. 47.

Carnal knowledge of young girl—*By prisoner on his own premises—Knowledge of age of girl—Onus of shewing on Crown—Criminal Code, s 217.*]—Court of Appeal *held*, that it is necessary for the Crown to prove that the accused knew the girl was under the age of 18 years in order to support a conviction under s. 217 of the Code.—That above section does not make it an offence for the owner of premises to have illicit connection upon his premises with a girl within the prescribed age.—*R.* v. *Karn* (1909), 14 O. W. R. 1215, 20 O. L. R. 91, 15 Can. Cr. Cas. 301, distinguished. *R.* v. *Sam Sing* (1910), 17 O. W. R. 1043, 2 O. W. N. 493, O. L. R. , Can. Cr. Cas.

Causing injury to persons and property—*Can. Rw. Act, s. 415, repealed—Code ss. 283, 1014.*]—Defendant, an engineer in the employ of the C. P. R. Co., was convicted of negligence in not closing a switch on the railway, contrary to the regulations made by the company, thereby causing injury to person and property. The conviction was made under s. 415 of the Can. Rw. Act, which was repealed. The magistrate reserved, for the opinion of the Court of Appeal, the following among other questions: Should the conviction be allowed to stand under s. 238 of the Code?—*Held*, that the conviction should be quashed. *Rex* v. *Corrigan* (1909), 14 O. W. R. 1219, 1 O. W. N. 248, 2 O. L. R. 99.

Charging crime—*Sufficiency of charge—"Unlawfully did steal."*[—The prisoner was summarily tried on the charge that he on a certain day "unlawfully did steal one piece of Oregon pine wood, of the value of $5.40, the property of His Majesty the King." The prisoner having been convicted, a case was reserved as to whether the charge on which he was tried was bad by reason of the omission to charge the offence as having been committed "fraudulently and without colour of right:"—*Held*, Weatherbe, J., dissenting, that the words "unlawfully did steal," in the charge, meant and included everything necessary to constitute the offence of theft or stealing as defined by s. 305 of the Code, and that the conviction, so far as this question was concerned, was right. *Rex* v. *George*, 35 N. S. R. 42.

Circumstantial evidence—*Crown case reserved — Nature of weight of evidence — New trial.*]—The defendant was tried and convicted on a charge of theft upon evidence shewing that the prosecutor's money had been stolen; that the defendant was employed upon the same ship and slept in the same "square;" that the defendant had asked the prosecutor for a loan of money a day or two before and had been refused; that the defendant was seen with money in his possession on the day the prosecutor's was stolen; but no attempt was made to identify the money seen in the defendant's possession with that stolen, nor was it shewn that the defendant knew where the prosecutor kept his money; the defendant, however, made to a third person a false statement as to the source from which he got the money he had:—*Held*, Weatherbe, J., dissenting, that there was some evidence to support the conviction.—2. That a question reserved for the Court, "Whether the convicting Judge was justified in drawing from the facts stated a presumption sufficiently strong to justify him in adjudging the defendant guilty," was not a proper question to reserve; such a question could only come before the Court on a motion for a new trial. —3. *Per* Graham, E.J., that the case was one in which the Court should exercise its power under the Criminal Code, s. 746, to order a new trial. But *per* Meagher, J., that the remedy by case reserved and that by motion for a new trial were not open to the accused at the same time. *Regina* v. *McIntyre*, 31 N. S. R. 422; *Regina* v. *MacCaffrey*, 33 N. S. R. 232.

Coal Mines Regulation Act—*Master and servant—Wages—Deduction—Penalty—Company — Conviction — Imprisonment — "Person aggrieved" — Repeal of section of statute—Appeal.*]—Under the provisions of the Coal Mines Regulation Act, R. S. N. S. 1900 c. 19, s. 29, "The wages or salary of any employee in a mine shall not be paid otherwise than in money current in the Dominion of Canada;" and by s. 30, "The owner . . . who contravenes or fails to comply" (with the foregoing provision) "shall . . . be guilty of an offence against this chapter and liable to a penalty of not less," etc. The defendant company, in making payment to one of their employees of an amount due him for wages, deducted therefrom a small sum on account of indebtedness incurred by him for goods purchased at the company's store:—*Held*, following *Williams* v. *North Navigation Collieries*, [1906] A. C. 136, that the defendants were within the provision recited respecting the penalty, and were liable.—A penalty can be enforced against a company under the Summary Convictions Act, and the fact that the form of conviction under the Act provides for imprisonment in default of distress, which would be inapplicable to corporations, does not displace the remedy under the Act.—A magistrate in making a conviction and distributing the penalty cannot direct the penalty to be paid to "the person aggrieved" when the provision enabling such payment to be directed has been repealed before the information is laid.—An appeal lies to the Supreme Court from the judgment or decision of a Judge of a County Court in respect to orders, judgments, and convictions of justices of the peace taken by way of appeal to the County Court. *Rex* v. *Dominion Coal Co.*, 2 E. L. R. 267, 41 N. S. R. 137.

Common gaming house.]—The prisoner was lessee of a room to which the public had free access, and in which several people congregated and played a game called "black jack." There was no constant dealer, and the lessee got no benefit. The dealer (who is chosen on commencing by cutting the cards) has an advantage, and as a rule can keep the deal five or six minutes.—The prisoner was convicted, under s. 196 of the Code, of keeping a common gaming-house, and the Court of Criminal Appeal confirmed the conviction, holding that, as the dealer (banker) had an advantage over the other players, the game came under the provisions of s. 196. *Regina* v. *Petrie*, 20 C. L. T. 250, 7 B. C. L. R. 176.

Common gaming house — "*Gain*" — *Evidence.*]—In order to obtain, under s. 198 of the Criminal Code, a conviction of a person for keeping a disorderly house, to wit, a common gaming-house, as defined by s. 196 (*a*), the Crown must shew by satisfactory evidence that the person charged is deriving some gain or profit from keeping the house, room, or place, and allowing games of chance to be played therein.—And where it was shewn that the only source of profit to a person in whose room a game of cards was played for money stakes was a small deduction made (with the consent of the players, and not as a matter of right or a condition of any one being admitted to the game) from the total stakes upon the table at various times, for the ostensible purpose of paying for the refreshments provided, and it was not shewn that the total sum derived from such deductions was more than sufficient to pay for the refreshments, the Judge refused to convict. *Regina* v. *Sanders*, 20 C. L. T. 213.

Common gaming house — *Keeping—Conviction by police magistrate—Summary trial — Excessive fine—Power of Court to amend conviction.*]—The defendant was summarily tried before the police magistrate for a city and convicted for that he did unlawfully keep a disorderly house, to wit, a common gaming house, at (specifying the place) and sentenced to pay a fine of $200 and "costs of the Court," and, in default of payment, to 4 months' imprisonment. The conviction having been removed into the Court of Appeal by *certiorari*:—*Held*, that the penalty imposed was beyond the statutory authority of the police magistrate; and that Parliament had not conferred on the Court the power to amend the conviction by lessening the amount of the fine; and the conviction was quashed, but on condition that no action should be brought by or on behalf of the accused in respect of the proceedings.—Construction and interpretation of ss. 226, 228, 721, 773, 774, 777, 781, 1124, of the Criminal Code. See the amending Act, 8 & 9 Edw. VII. c. 9.—*The Queen* v. *Randolph*, 4 Can. Crim. Cas. 165, and *The Queen* v. *Spooner*, *ib.*, 209, followed. *R.* v. *Shing* (1910), 15 W. L. R. 714, 20 Man. L. R. 214.

Concealment with intent to escape —*Attempt to commit offence not disclosed—Plea of "guilty" struck out.*]—Where the accused was indicted for "concealing himself with intent to escape from the penitentiary:" —*Held*, that, as the criminal act consists in an attempt to commit an offence, doing something with intent to commit the offence is not necessarily sufficient to constitute an attempt.—Where the accused pleads guilty to a charge, and it is disclosed that the indictment alleges only a fact which might or might not, according to the circumstances, be sufficient to prove an offence, the plea of "guilty" will be struck out. *Rex* v. *Labourdette*, 8 W. L. R. 402, 13 B. C. R. 443.

Conspiracy—Illegal trade combination—Criminal Code, s. 520 — Incorporated companies—Acts preceding incorporation—Adoption after incorporation — Evidence as to agreements to enhance prices and stifle competition—Sentence — Substantial fine. *Rex* v. *Master Plumbers' & Steam Fitters' Co-operative Assoc., & Central Supply Assoc.*, 7 O. W. R. 213.

Conspiracy—Illegal trade combination—Criminal Code, s. 520—Individual members of trade association—Convictions on pleas of guilty — Sentences — Extenuating circumstances—Solicitors' advice — Duty of solicitors—Fines—Suspended sentences. *Rex* v. *McGuire*, 7 O. W. R. 225.

Conspiracy — *Indictment.*] — The defendants were indicted for unlawfully conspiring and agreeing together and with each other to deprive one W. G. of the necessaries of life, to wit, proper medical care and nursing, whereby his death was caused:—*Held*, that this count did not charge the defendants with a conspiracy to commit any indictable offence known to the law, and should have been quashed.—A second count charged that the defendants did unlawfully conspire and agree together and with each other to effect the cure of W. G. of a sickness endangering life, by unlawful and improper means, thereby causing the death of the said W. G.:—*Held*, that this count was equally bad, and was properly quashed. *Rex* v. *Goodfellow*, 11 O. L. R. 359, 7 O. W. R. 92.

Conspiracy — *Offence committed in one county and tried in another—Venue—Jurisdiction—Criminal Code, R. S. C. 1906, c. 146, ss. 577, 653.*]—On an information laid in the county of York, the accused were charged with numerous offences against the election law alleged to have been committed in the "county of York, and in the county of Middlesex, and at other places in the province unknown." None of them resided, nor were found, nor apprehended in the county of York, but they were brought into that county solely by process issued under the information. Before the sitting of the assize Court in the county of York the accused surrendered to the sheriff of the county, and elected to be tried before the County Court Judge.—The grand jury returned a true bill against them. The offence, however, found to be established, and on which they were convicted, was a conspiracy wholly entered into and wholly carried out in the county of Middlesex, with no overt acts outside that county:—Held, on a case reserved, that there was no jurisdiction to try the case in the county of York, and that the conviction should be quashed notwithstanding, s. 577 of the Criminal Code. *Rex* v. *O'Gorman*, 18 O. L. R. 427, 13 O. W. R. 1189, 15 Can. Crim. Cas. 173.

Conspiracy — Preventing person from working at his trade — Sufficiency of evidence — Refusal to admit to trade union — Notification to employer—Discharge of workman. *Rex* v. *Day*, 6 O. W. R. 479, 577.

Conspiracy — *Restraint of trade.*]—Defendant was charged with conspiracy with members of the Western Lumber Dealers' Association and others in restraint of trade in lumber. On one count he was found guilty and fined. An appeal was dismissed. Under

the various sub-sections of s. 498 of the Criminal Code it was unnecessary to allege in the charge or prove an unlawful act as the object of the conspiracy. The trial Judge refused to order particulars and tried the twelve counts together:—*Held*, that this was discretionary on his part, and there is nothing to indicate that his discretion was not properly exercised, or that defendant was in any way prejudiced. A charge of conspiracy with certain named persons and other unknown, or some or one of them, is not too indefinite.—The conviction of this defendant will not be quashed because others are not convicted. As to objection that some of the evidence was inadmissible, there being 1,000 pages of it, the Court held there was evidence on which the judgment could reasonably be supported. Meaning of "unduly to prevent competition" considered. *Rex* v. *Clarke*, 9 W. L. R. 243, 1 Alta. L. R. 358, 14 Can. Crim. Cas. 46, 57.

Conspiracy—*Restraint of trade—Illegal combination—Criminal Code, ss. 496, 498 — "Unduly prevent or lessen competition" — Public policy—Trial — Numerous counts in indictment — Particulars — Amendment — Conviction — Appeal — Evidence.*]—The offences enumerated in s.-ss. (*a*), (*c*), and (*d*) of s. 498 of the Criminal Code are not governed by the definition in s. 496, and it is not necessary where a charge is laid under any of these sub-sections, to allege or prove an "unlawful" act.—It is within the discretion of the trial Judge to order particulars or not, and, where there are several counts, to direct whether they shall be tried together or not.—A charge that the accused "did conspire with certain persons (naming them), and others unknown, or some or one of them," is not too indefinite.—Where there are several counts in a "charge" or indictment for conspiracy, and the accused is convicted on one count only, the conviction will not be quashed merely by reason of the fact that some evidence had been received that would have been inadmissible if the charge or indictment had been confined to the single count under which the conviction was made.—In any event the appellate Court can review the evidence to determine whether there was evidence on which the judgment can reasonably be supported.—Discussion of meaning of words "to unduly prevent or lessen competition," and application to the special circumstances.—*Semble, per* Stuart, J., that, if inadmissible evidence bearing upon the particular count of the indictment under which the conviction is made is improperly received, the conviction would be bad; but, as the appeal under s. 1012 of the Criminal Code is in the nature of a rehearing, the Court, disregarding all such evidence, and looking only at the evidence clearly admissible, may form its own judgment on the guilt or innocence of the prisoner, and affirm or quash the conviction accordingly. *Rex* v. *Clarke*, 9 W. L. R. 243, 1 Alta. L. R. 358.

Conspiracy—Returning officer at provincial election—Defrauding candidate from being returned as member—Defrauding electors and public by illegally obtaining return of member—Charge — Particulars — Indictable offence—Criminal Code, ss. 394, 527. *Rex* v. *Sinclair* (N.W.T.), 4 W. L. R. 374.

Conspiracy — *Trade combination — Criminal Code, s. 498—Construction—"Undue" restraint—Conditions governing grain trade—Grain dealers' associations—By-laws, regulations, and agreements — Restraint of trade—Regulation of prices—Pooling receipts —Commission rule—Evidence—Books of elevator companies—Rejection.*]—1. Section 496 of the Criminal Code, R. S. C. 1906 c. 146, must be read along with s. 498, and, notwithstanding the absence of the word "unduly" from s.-s. (*b*) of s. 498 and its presence in s.-ss. (*a*), (*c*), and (*d*), it is only such combinations as contemplate the doing of unlawful acts that are punishable criminally under s. 498 (*b*), although they may to a limited extent restrain or injure trade or commerce in relation to a commodity which is a subject of trade of commerce, and the statute condemns only those restraints which are not justified by any personal interests of the combining parties, but are mere malicious restraints unconnected with any of their business relations.—*Gibbons* v. *Metcalfe*, 15 Man. L. R. 583, *Mogul Steamship Co.* v. *McGregor*, [1892] A. C. 25, *Hopkins* v. *United States*, 171 U. C. R. 594, and *United States* v. *Joint Traffic Association*, *ib.* 568, followed.—2. Regulations made by the members of a grain exchange intended, and primarily operating, for the proper carrying on of their trade and for the reasonable benefit of the members, are not a crime or an illegal conspiracy, even though indirectly, to some extent, they do restrain trade.—*Swaine* v. *Wilson*, 24 Q. B. D. 252, followed.—3. None of the by-laws, rules, and regulations following, adopted and enforced by the members of a grain exchange, although more or less in restraint of trade or commerce in wheat, can be said to be undue restraints so as to render the members punishable under the Code: —(*a*) A by-law prohibiting the members from charging, on the purchase or selling of grain, less than one cent. per bushel as commission.—(*b*) A by-law prohibiting members from employing agents to buy grain at points where the volume of business was not sufficient to enable them to pay a salary of $50 per month.—(*c*) A regulation forbidding members from buying track wheat at country points during the market hours on the Exchange (9.30 a.m. to 1.15 p.m.)—(*d*) An agreement amongst the elevator companies that, during a portion of each year towards the close of navigation, they would not have more than 5,000 bushels of purchased wheat in any one interior elevator at any one time. —(*e*) An agreement between elevator companies for the pooling of receipts at certain points where, from a variety of causes, there was more elevator capacity than the trade required, and the companies found it necessary, in order to cut down expenses and avoid raising the elevator charges, to adopt that agreement. — 4. The above mentioned regulations and acts complained of by the Crown, taken in connection with their surrounding conditions, made on the whole for a mere stable market at the fullest values than if totally unregulated competition had prevailed, and so were for the public good. —5. The trial Judge properly rejected as evidence the books of elevator companies with which the accused did not appear to be connected. *Rex* v. *Gage*, 18 Man. L. R. 175, 6 W. L. R. 19, 7 W. L. R. 564.

Conspiracy — *Trade combination — Criminal Code, s. 520—Evidence—Incorporated companies—Acts preceding incorporation —"Person."*]—*Held* (Osler and Meredith, JJ.A., dissenting), that upon an indictment of two incorporated trade associations for conspiracy in restraint of trade under s. 520 of the Criminal Code, the defendants were to be judged and condemned, if condemned at all, upon the acts proved to have been committed by them after incorporation, but in weighing and estimating such acts the Court might look at the immediately or proximately antecedent acts of the individuals now comprising the corporation and directing its operation; and that, in this case, the acts occurring after incorporation were, in view of their history, origin, and apparent purpose, sufficient to support a conviction.—*Held, per* Garrow, J.A., that it was not a sound objection to the indictment that it would not lie against any corporation except those named in s. 520, nor that there must be at least one natural person as distinct from a corporation indicted as a co-conspirator.—*Held, per* Meredith, J.A., that the conviction was bad because there was no evidence of any concluded agreement, legal or illegal, on the part of one of the associations; and also because such association was not within the provisions of s. 520, not being one of the corporations named; and the word "person" was there used in its ordinary sense, and not as including a company. *Rex* v. *Master Plumbers & Steam Fitters Co-operative Assoc.*, 9 O. W. R. 450, 14 O. L. R. 295.

Conspiracy — Trade combination — Criminal Code, s. 520—Illegal agreements — Prices—Preference—Members of associations — Preventing competition — Conduct and participation in illegal agreements—Conviction — Penalty — Fine — Costs. *Rex* v. *McMichael*, 10 O. W. R. 268.

Conspiracy — *Trade combination — Preventing or lessening competition — Criminal Code, s. 520 (d)—"Unduly"—Conviction — Evidence justifying — Association of traders—Constitution and by-laws—Limitation of time for prosecution—Continuing offence—Appeal from conviction—Cross-appeal by Crown.*]—Defendant was president of the Ontario Coal Association, an organisation having as its object the protection of its members against the shipment of coal direct to consumers by producers. Members agreed not to sell coal for less than certain fixed prices, and not to buy nor sell with dealers in coal who sold direct to consumers, or who refused to maintain the prices fixed by the association. A claim for 50 cents per ton might be made against any member who made any irregular sales of coal, and the member was to be expelled from the association on refusal to pay the penalty so fixed. A membership list and a non-membership list were published by the association, which was sent to their wholesale friends so they might be on the lookout so as to guard against irregular shipments. There was evidence that coal dealers in Buffalo had refused to sell coal wholesale to non-members of the association in Ontario. Defendant was convicted under s. 520 (*d*) of the Criminal Code, which enacts that every one is guilty of an indictable offence, etc., who conspires, combines, etc., to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation, or supply of any article or commodity which may be a subject of trade or commerce. Defendant appealed to the Court of Appeal in the manner provided by s. 5 of 52 V. c. 41; and the Crown cross-appealed, seeking a conviction upon the other counts:—*Held*, (1) defendant was rightly convicted. The plain object of the association was to restrict and confine the sale of coal by retail to its own members, and to prevent anyone else from obtaining it for that purpose from the operators and shippers. (2) The objection that the prosecution was too late, and was barred by s. 930 of the Code failed, as the offence was a continuing one (and if applicable to indictable offences it did not apply):—*Held*, the cross-appeal of the Crown should be dismissed, as s. 5 of the Act only applied to an appeal from a conviction. *Rex* v. *Elliott*, 5 O. W. R. 163, 9 O. L. R. 648.

Conspiracy in restraint of wholesale grocery trade—*Not guilty.*]—This was a prosecution under s. 498 of the Code for an alleged conspiracy connected with trade and commerce. The indictment charged that defendants did unlawfully conspire one with the other and with some 208 named persons, firms and corporations, and with the several officers and members of the Dominion Wholesale Grocers' Guild; (1) to unduly limit the facilities in producing, manufacturing, supplying and dealing in sugar, tobacco, starch, canned goods, salt and cereals and other articles and commodities, being articles and commodities which are the subject of trade and commerce; (2) and to restrain and injure trade and commerce in relation to such articles and commodities; (3) and to unduly prevent, limit and lessen the manufacture and production of such articles and commodities; (4) and to unreasonably enhance the price of such articles and commodities; (5) and to unduly prevent and lessen competition in the production, manufacture, purchase, barter, sale, and supply of such articles and commodities against the form of the statute in such case made and provided, and against the peace of Our Lord the King.—The evidence shewed that the object of the Guild in seeing the manufacturers was to try to get, if possible, sufficient profit to deliver or market their goods without drawing upon the profits of other portions of their business. There was no evidence of the enhancing of prices, no complaint by any consumer, no complaint by any retail dealer, but rather approbation:—*Held*, that (1) the defendants did not, nor did any of them intend to violate the law; (2) nor did they or any of them intend to maliciously injure any persons, firms or corporations, nor to compass any restraint of trade unconnected with their own business relations; (3) they were actuated by a *bona fide* desire to protect their own interests and that of the wholesale grocery trade in general. As far as intention and good faith, or the want of it, are elements in the offence, the evidence was entirely in their favour. Defendants are not, nor is any of them guilty as charged, but it is of the essence of the innocence of defendants

that the privileges which they seek to enjoy should be extended to all persons and corporations who are strictly wholesalers, whether they choose to join the Guild or not. *R.* v. *Beckett* (1910), 15 O. W. R. 449, 20 O. L. R. 401, 1 O. W. N. 167.

Conspiracy to defraud—*Indictment — Overt acts—Name of person defrauded — Preliminary proof—Witness — Discrediting.*]—In an indictment charging a conspiracy to defraud, it is not necessary to set out overt acts done in pursuance of the illegal agreement or conspiracy, nor is it necessary to name the person defrauded or intended to be defrauded. Before the acts of alleged conspirators can be given in evidence, there ought to be some preliminary proof to shew an acting together, but it is not necessary that a conspiracy should first be proved. A party may not introduce general evidence to impeach the character of his own witness, but he may go on with the proof of the issue, although the consequences of so doing may be to discredit the witness. *Rex* v. *Hutchinson*, 11 B. C. R. 24.

Conspiring to defraud by falsely increasing weights — *Reserved case — Question of corroboration—Criminal Code, ss. 1014, 1015.*]—Prisoner was convicted on a charge of conspiring with one Morden by deceit and falsehood to defraud the Hamilton Steel & Iron Company, by falsely increasing the weight of scrap iron sold to the company. The trial Judge stated a case under ss. 1014, 1015, of the Criminal Code for the opinion of the Court of Appeal. The questions reserved were: (1) Had the Judge power to convict the prisoner on the evidence of an accomplice alone? (2) If not, was there sufficient corroborative evidence?—*Held*, that the questions should be answered adversely to the defendant and the conviction sustained. *In re Meunier*, [1894] 2 Q. B. 415, and *R.* v. *Tate*, [1908] 2 K. B. 680, 21 Cox 693, followed. *R.* v. *Warren* (1909), 2 Cox 194, 25 T. L. R. 633, not approved. *R.* v. *Beckwick* (1859), 8 U. C. C. P. 274, specially referred to. *R.* v. *Frank* (1910), 16 O. W. R. 50, 21 O. L. R. 196.

Conversion of chattel by finder.—*Pawning—Criminal intent — Question for jury.*]—The prisoner was convicted of stealing a watch. The evidence shewed that he found the watch, and a few hours afterwards on the same day pawned it for a small advance. The Judge told the jury that, if the prisoner found the watch, and afterwards disposed of it to his own use, he was guilty of theft; it made no difference whether he discovered the owner or not. He also told them that the raising of a temporary loan on anything found constituted a theft. The following questions were reserved for the opinion of the Court:—1. If the prisoner found the goods and afterwards disposed of them to his own use was he guilty of theft? 2. Does the raising of a temporary loan on anything found constitute theft? In answer the Court said: "Not necessarily as a matter of law. Whether or not the conversion by the finder to his own use of goods found by him is a guilty conversion is a question for the jury, upon consideration of all the circumstances. . . . The direction of the Judge to the jury in this case was equivalent to a direction that as a matter of law the accused was guilty; the finding was therefore rather a finding by the learned Judge than by the jury, and for that reason cannot be upheld." *Regina* v. *Slavin*, 21 C. L. T. 54.

Conviction for murder — *Refusal of trial Judge to state case for Court of Appeal — Intoxication of prisoner — Leading questions—Charge to jury—Motion for leave to appeal.*]—Prisoner convicted of murder made application to trial Judge to reserve questions for the opinion of the Court of Appeal as to the effect of the alleged state of intoxication of prisoner when he committed the deed, and as to alleged leading questions; also as to other matters arising from the charge to the jury. Trial Judge *held*, 14 O. W. R. 988, 1 O. W. N. 187, that the application should be refused. Prisoner then moved for leave to appeal to the Court of Appeal: —*Held*, that all the objections relied upon were groundless and the motion must be refused. *Rex* v. *Spinelli* (1909), 14 O. W. R. 1237, 1 O. W. N. 245.

Conviction for murder—*Reserved case —Evidence.*]—Prisoner was convicted of murdering one Sinioff. Motion was made for the discharge of the prisoner on a reserved case by Riddell, J. The questions reserved were: "Was the evidence of statements made by the prisoner at the police station properly admitted?" And, "should there be a new trial because of wrongful admission of the said evidence, or any part thereof?"—*Held*, that the questions should be answered adversely to the prisoner and the conviction affirmed. *Rex* v. *Steffoff*, 14 O. W. R. 1233, 1 O. W. N. 250, 20 O. L. R. 103.

Conviction of minor — *Recitals — Religious faith — Place and term of imprisonment.*]—The defendant was convicted before a magistrate for theft, and was sentenced to be imprisoned in the Halifax Industrial School for three years. By the Criminal Code, s. 10, the punishment for such an offence when the accused is under sixteen is imprisonment for not more than three months in the common gaol; but by 53 V. c. 37, s. 34 (D.), any boy, being a Protestant and a minor apparently under sixteen, convicted in Nova Scotia and liable to imprisonment, may be sentenced to be detained in the school for not less than two and not more than five years:—*Held*, that it was not necessary in the conviction to recite the age of the defendant or the opinion of the magistrate as to his age; the power of determining the apparent age being given exclusively to the magistrate, it should be assumed that he has exercised it; the age of the accused and whether he is or is not a Protestant need not be inquired into on the trial of the offence, but would form a subject of inquiry after conviction and before sentence. *Regina* v. *Brine*, 33 N. S. R. 43.

Defrauding creditors — Evidence — Admissions—Depositions of defendants on examination in aid of execution—Admissibility —Order for examination—Privilege—Canada Evidence Act. *Rex* v. *Van Meter* (N.W.T.), 3 W. L. R. 416.

Dissuading witness from giving evidence—Court of revision—Charge—Amendment—Criminal Code — Attempting to obstruct justice. *Rex* v. *Lake* (N.W.T.), 3 W. L. R. 244.

Distributing obscene printed matter —*Criminal Code, s. 179 (a)—Knowledge of contents—Meaning of "obscene."*]—Case reserved under s. 743 of the Criminal Code. Prisoner was indicted under s. 179 (*a*) for distributing obscene printed matter, "To the Public; The Evil Exposed; The Plot against Prince Michael Revealed." The Judge found the offence proved as charged, and reserved the following points for the opinion of the Court of Appeal: 1. Is the printed matter complained of obscene within the meaning of s. 179 (*a*) of the Criminal Code? 2. Did the prisoner, without lawful excuse, distribute such obscene printed matter?—*Held*, affirming the conviction, that the word "obscene," as used in s. 179 (*a*) means the doing of any indecent act in a public place; s. 179 (*b*), publicly exhibiting any disgusting object; and s. 180 (*c*), transmitting by post any letter or circular concerning schemes devised or intended to deceive the public, or for the purpose of obtaining money under false pretences. This part of the Code strikes at conduct involving sexual immorality and indecency, and it is in that sense that the word is used in s. 179. The whole of the printed matter, disgusting as it is, is set forth in *United States* v. *Mabs*, 51 Fed. Rep. 41. *Rex* v. *Bearer*, 5 O. W. R. 102, 9 O. L. R. 418.

Disturbing public meeting — *Municipal election—Criminal Code.*] — Article 173 of the Criminal Code, which declares it an offence to disturb, interrupt, or disquiet any assemblage of persons met for religious worship, or for any moral, social, or benevolent purpose, by profane discourse, by rude or indecent behaviour, or by making a noise, does not apply to a meeting of electors called by one of the candidates during a municipal election. Articles 2946 to 2964, R. S. Q., sufficiently provide for the preservation of order at public meetings other than those mentioned in Art. 173, Criminal Code. *Rex* v. *Lavoie*, 21 Que. S. C. 128.

Disturbing religious meeting — *Conduct amounting to.*]—A person who enters a hall, leased by a religious association or body, while a meeting for religious worship is being held in it, under the direction of officers of the association, and addressing himself to the assemblage, says he is a Catholic and a French Canadian, as most of them are, that they should not stay where they are, and calls upon them to leave, is guilty of the offence of disturbing a religious meeting under s. 173 Criminal Code. *Moore* v. *Gauthier*, 14 Que. K. B. 530.

Drunk and disorderly—*Breaking windows—Conviction — Fined $80 and costs—Magistrate exceeded jurisdiction—Conviction quashed—Criminal Code, ss. 238, 239, 539—Amendment — Costs.*] — Magistrate fined defendant $80 and costs for being drunk and disorderly by breaking windows.—Britton, J., *held*, that magistrate exceeded his jurisdiction, for, under the Code, s. 238, the fine is only $50, and under s. 529, the fine is only $20, and a further sum not exceeding $20 as reasonable compensation for damages. Not a case for amendment. Conviction quashed. No order as to costs. *R.* v. *Lawson* (1911), 18 O. W. R. 162, 2 O. W. N. 648.

Embezzlement—*Case stated as a procedure—Power of Judge to amend—Trial at one time of several charges—Code ss. 852, 853, 854, 856, 834, 839, 854.*]—Defendant was brought to trial before the Judge of the County Court for District No. 2, charged with having, between certain dates, while acting as cashier in the freight and express office of the Halifax and South Western Railway, received various sums of money for which he was bound to account, and pay over, but as to which he unlawfully and fraudulently converted the same to his own use.—Objection was taken on the part of defendant, that each taking constituted a separate offence, and the prosecuting counsel thereupon, by leave of the Judge, amended by substituting separate charges covering the amount specified in the original charge. — Defendant pleaded not guilty to each of said charges, and was tried upon the first charge and found guilty of fraudulently not accounting, but acquitted as to so much of the charge as related to failure to pay.—The prisoner was sentenced to one week's imprisonment on the first charge, and the hearings of the remaining charges were adjourned until the 27th November, when the learned Judge directed the prisoner to be tried at the same time upon the 16th 29th, and 38th charges:—*Held*, overruling objections taken on the part of the prisoner that the charge was sufficiently and legally set forth, it being clear that it was the object of the Code, (Code s. 852, s-ss. 2, 3; s. 853, s-s. 2; s. 854 and form 64) to do away with all technical objections of this character, and that the count or charge should be valid provided it was sufficient to indicate to the accused clearly, the offence with which he was charged:—*Held*, also, that in view of ss. 834, 839, 854, and other sections conferring upon the Judge ample power to amend and to substitute other charges, the trial Judge had power to amend the original charge in the manner above set out:—*Held*, also, that the rules in the Code regulating procedure under the Speedy Trials Act, so far as applicable, give the procedure in trials before the County Court Judge especially as regards the sufficiency of the charges and the evidence, and in that view the provisions of section 856 and following sections on the subject must govern him:—*Held*, also, that in the present case, the Judge had full authority to try the whole 63 charges together, and that section 857 merely restricted his power in cases of theft except for special cause when alleged to have been committed within six months:—*Held*, also, that as the charges numbered 16, 28 and 38, shewed on their face that they were in no respect identical with the first charge upon which the prisoner was tried and convicted, but were for the theft of a different sum at a different date, the pleas of *autrefois acquit* and *autrefois convict*, which were disallowed by the Judge, could not have in any way availed the prisoner:—*Held*, also, that the three several charges upon which the prisoner was tried were to be regarded only as separate counts of one

general charge, namely, the continuous embezzlement of money from the one corporation during a specified period, and that it was therefore competent for the Judge to try the prisoner upon all at the same time. *R. v. Cross*, 43 N. S. R. 320, 6 E. L. R. 414, 14 Can. Crim. Cas. 171.

Extortion — *Accusation — Information.*]—The word "accuses" in s. 405 of the Criminal Code, providing for the punishment of any one who, with intent to extort or gain anything from any person, accuses that person or any other person of certain offences, includes the accusing of a person by laying an information under s. 558 of the Code. *Regina* v. *Kempel*, 20 C. L. T. 176, 31 O. R. 631.

Extradition — Fugitive Offenders Act—Forgery—Theft—Evidence—*Prima facie* case—Presumption—Identification—Judicial notice of statute. *Re Rowe*, 2 O. W. R. 962.

Extradition—Parent stealing his child—Foreign law—Divorce—Collusion—Contempt of Court. *Re Watts*, 1 O. W. R. 129, 133, 3 O. L. R. 279, 308.

False pretences — *Evidence — Admissibility.*]—On an indictment charging the accused with having obtained goods by false pretences from a company named, with intent to defraud, so soon as it has been proved that he did the act charged, evidence of false representations made to persons other than the president and general manager of such company, on other and distinct occasions, is admissible, to shew that the accused, at the time he made the false representations to the president and general manager of the company, on whose information the prosecution was brought, was pursuing a course of similar acts, and to prove guilty knowledge of the falsity of the pretence charged in the indictment and the intention with which the act charged was done. *Rex* v. *Komiensky*, 12 Que. K. B. 463, 7 Can. Cr. Cas. 27.

False pretences — *Fraudulent intent — Demand by third person.*] — A person who does not otherwise make a false representation himself, but who is present when it is made, knows it to be false, and gets part of a sum of money obtained by such false pretence, is guilty of obtaining such sum of money by false pretences. *Regina* v. *Cadden*, 20 C. L. T. 185, 4 Terr. L. R. 304.

False pretences — *Fraudulent intent — Demand by third person.*]—O'K., in the presence of the prisoner, made a statement to the complainant as to the amount due by her upon an execution, which was false to the knowledge of both O'K. and the prisoner, and was made with the fraudulent intent on the part of both to induce the complainant to act upon it, and by reason of this statement the complainant paid O'K. in the prisoner's presence a sum of money, part of which O'K. gave to the prisoner:—*Held*, that the statement was a false pretence within the meaning of s. 358 of the Criminal Code, and that the prisoner was liable to conviction for it, although he did not actually make it himself. *Regina* v. *Cadden*, 20 C. L. T. 185.

False pretences — *Obtaining execution of "valuable security"—Lien note.*]—An ordinary "lien note" is a "valuable security" within the meaning of s. 360 of the Criminal Code. *Rex* v. *Wagner*, 5 Terr. L. R. 119.

False pretences — *Obtaining goods unlawfully—Sale of hired goods—Nature of offence.*]—Where the defendant hired a bicycle of the value of $20, representing that he wished to use it to go to L., for the purpose of visiting his sister, and, instead of returning the bicycle, sold it to C.:—*Held*, that evidence which shewed these facts was not sufficient to support a conviction for having "unlawfully, and by false pretences, obtained from L. one bicycle, of the value of $20," the prosecutor not having been induced and not intending to part with his right of property in the goods, but merely with the possession of them, and there being no representation as to a present or past matter of fact. *Rex* v. *Nowe*, 36 N. S. R. 531.

False return—*Bank Act — Indictment.*]—In an indictment under the Bank Act, 53 V. c. 31, ss. 85 and 99, for making a wilfully false and deceptive statement in a return, it being sufficient in indictments to charge in substance the offence created by the statute, and clerical errors or faulty grammatical construction not vitiating the indictment, the allegation that the defendant unlawfully made and sent to the Minister of Finance and Receiver-General a monthly report of and concerning the affairs of the bank, adding, by way of paraphrase, to characterize the term "monthly report," the words, "a wilful, false, and deceptive statement of and concerning the affairs of the said bank," and finally, that such monthly report was made with intent to deceive and mislead,—sufficiently sets forth the ingredients of the offence; and the indictment was maintained. *Regina* v. *Weir*, 8 Que. Q. B. 521.

False swearing — *Statutory declaration —No allegation of intention to mislead — Amendment of charge—Authority to make declaration—Withdrawal of election to be tried by jury — Preliminary inquiry on several charges against different defendants — Admissibility of statement of accused made upon oath.*]—The defendant was charged for that in a certain statutory declaration he did falsely, wilfully, and corruptly declare to the truth of certain facts, setting them out. Upon objection before plea the charge was amended, on the application of the Crown, by adding an allegation that the defendant was duly authorised to make the declaration, but there was no allegation that it had been made with intent to mislead:—*Held*, that no allegation of intention to mislead was necessary; that the amendment was properly allowed; and that the charge was sufficient in point of form:—*Held*, further, that s. 26 of the Canada Evidence Act, 1893, authorised the making as well as the taking of the declaration.—The defendant pleaded to the charge before amendment, and elected to be tried by a Judge with the intervention of a jury. Upon being called upon to plead to the charge as amended, he sought to alter his election and to be tried by the Judge alone. This was refused:—*Held*, that the refusal was justified.—The declaration in question had been made by four persons, commencing,

"We," and setting out the names of the declarants, but there was no statement that it was made jointly and severally:—*Held*, that, the defendant having signed it, there was no reason why he should not be taken to have made it of his own personal knowledge. —The evidence at the preliminary investigation was taken on an information against the defendant at the same time as upon separate informations against two of his co-declarants:—*Held*, that the defendant was properly charged upon such evidence. — The defendant at the preliminary investigation, after being cautioned, requested that he should be sworn, and made his statement upon oath:—*Held*, that such statement was properly receivable against him at the trial. *Regina* v. *Skelton*, 3 Terr. L. R. 58.

False trade description.]—The defendants by an advertisement in a newspaper described certain tea-sets as "quadruple plate," stating that the regular price thereof was $12 a set, but that they would be sold for $6. The purchaser of one of the sets, before making his purchase, inquired, and was informed, that it was one of the tea-sets advertised, and that the advertisement could be relied upon:—*Held*, that the use of the words "quadruple plate" in the advertisement was an application of a false trade description, in that such goods could not properly be described as such; and that there was evidence to shew that the advertisement applied to these goods. *Regina* v. *T. Eaton Co.*, 20 C. L. T. 3, 31 O. R. 276.

Falsifying bank return—*Bank Act, s. 153—Knowledge of falsity—Presumption.*]—A local manager of a bank was prosecuted under s. 153 of the Bank Act for signing a false statement in the government returns:—*Held*, that it must appear that the accused knew that he was signing a false statement and the signing does not afford a presumption *juris et de jure* of wilful intent or guilty knowledge. *Rex* v. *Browne*, 14 Can. Crim. Cas. 247.

Forcible entry—*Absence of actual force —Evidence — Previous contradictory statements — Relevancy of.*]—*Held*, that, on a charge under s. 89 of the Criminal Code, 1892, it is not necessary to shew that actual force was used in effecting the entry:—*Held*, (Harvey, J., *dissentiente*), that evidence of a previous contradictory statement by a witness cannot be given where the matter with which such statement deals is merely collateral to the issue. *Rex* v. *Walker*, 4 W. L. R. 288, 6 Terr. L. R. 276.

Forcible entry—*Criminal Code, s. 103—Absence of violence.*]—The gist of the offence of "forcible entry," under s. 103 of the Criminal Code, is not the making of such an entry as would constitute merely a trespass, but consists in the entry being accompanied by circumstances of violence or terror likely to cause a breach of the peace or reasonable apprehension thereof; and where it appeared by the evidence that the accused effected an entry into the premises alleged by the complainants to be in their occupation as tenants, but that such entry was effected without any circumstances of terror or violence which would constitute a forcible entry within the meaning of the Criminal Code, he was acquitted. *R.* v. *Campey* (1910), 15 W. L. R. 656. Alta. L. R.

Forgery — *Application for reserved case —Absence of juror—Comment by trial Judge —Evidence of other forgeries—New trial— Substantial wrong or miscarriage.*]—On the trial of the defendant on an indictment charging him with the forgery of two promissory notes, the defendant having been found guilty, a reserved case was applied for on the following grounds:—(*a*) Because one of the jurors was absent from the Court room at a time when a witness gave evidence of having seen the defendant at a previous trial write a number of names on a sheet of paper. (*b*) Because in the course of his address to the jury the trial Judge commented upon the failure of the defendant to produce a witness, S., and said that in the interests of truth and justice he should have done so. (*c*) Because certain notes other than those set out in the indictment having been received in evidence, for certain purposes, the trial Judge did not tell the jury that these other notes could only be regarded for the purpose of shewing that the notes set out in the indictment were intended by the prisoner to be acted upon as genuine, and that they must disregard them for all other purposes. The reserved case applied for having been refused and an appeal taken, the Court was equally divided:—*Held*, *per* Graham, E.J., Townshend, J., concurring, that a case should be stated for the opinion of the Court. *Per* Russell, J., Longley, J., concurring, that the points mentioned were within the provisions of s. 746 (f) of the Code, and there having been no substantial wrong or miscarriage which would be ground for a new trial, the appeal should not be allowed. *Regina* v. *Corby*, 30 N. S. R. 330, and *Rex* v. *Hill*, 36 N. S. R. 253, discussed. *Rex* v. *McLean*, 39 N. S. R. 147, 1 E. L. R. 334.

Forgery — *Conviction by magistrate — Stated case—Evidence — Authority to sign cheque — Denial of.*]—Magistrate convicted Walker of forgery. Evidence shewed Walker was son-in-law of Sproule and had on several previous occasions signed Sproule's name to cheques and that Sproule had honoured them. Sproule denied Walker's authority to sign his name. Magistrate reserved for opinion of the Court of Appeal the question of "Was it competent for me upon the evidence to hold that Walker had no authority to sign Sproule's name?" Court of Appeal answered in the affirmative. *R.* v. *Walker* (1910), 16 O. W. R. 525, 1 O. W. N. 908.

Forgery — *Corroboration.*] — Where a prisoner is charged with forgery, by writing three false signatures, as indorsements, on the back of a promissory note, and each of the parties whose signature is thus made to appear, swears that it is not his and is a forgery, there is the corroborative evidence required by s. 684 of the Criminal Code, to make good a conviction. *Houle* v. *Rex*, 15 Que. K. B. 170.

Forgery — *Having forged documents in possession—Criminal Code, s. 430—Evidence shewing guilty knowledge—Admission made to police officer—Admissibility — Onus—Verdict of Judge—"Forged note"—"Counterfeit token of value."*]—The prisoner was convicted in a County Court, under the Criminal

Code, s. 430, on a charge of having unlawfully and without lawful authority, or excuse, had in his custody and possession two forged bank notes for the payment of $10 each, well knowing them to be forged. One of the witnesses called on behalf of the prosecution, H., testified that the prisoner one day shewed him a bill or note something like those in evidence (proved to have come out of the prisoner's possession) and that he then told the prisoner it was no good. Another witness, P., stated that, the day before the arrest, he had gone shooting with the prisoner, who said he had something to shew him when they got out of the woods, and that that evening he went to the prisoner's house and the prisoner there gave him two bills. Other evidence established that these bills, which were paid over by P. to G. and M., were both forgeries:—*Held*, that there was ample evidence in the dealings between the prisoner and P., and in the conversation between prisoner and H., to prove the prisoner's knowledge that the documents he was handling were not genuine, and to justify the Judge in finding the prisoner possessed of the guilty knowledge required by s. 430 of the Code. —At the trial evidence was given of a conversation with the prisoner in the presence of the chief of police, in which the prisoner said that he got the bills in question from S., and that he gave them to P.:—*Held*, that the onus was upon the prosecution to establish that the statement in question was entirely free and voluntary, and that it was not sufficient for this purpose that the officer should swear to it, but he should have negatived possible inducements by hope or fear which would have made the statement inadmissible. But that the reception of this evidence did not necessarily influence the Judge's decision in reference to the other evidence, the Judge having stated the evidence on which he based his judgment, and that evidence being sufficient.—A verdict by a Judge, in this particular, is different from the verdict of a jury.—At the trial evidence was given in relation to one of the bills in question, shewing it to be a counterfeit or forgery, purporting to be a $10 bill of the Bank of Montreal:—*Held*, that the document was a "forged note" and was such a document as is contemplated by s. 430 of the Code.—*Semble*, it might also be a "counterfeit token of value" under s. 430. *Rex* v. *Tutty*, 38 N. S. R. 136.

Forgery of note — *Code ss. 852, 853, 466—Incomplete document—Indictment aided by verdict.*]—Defendant was tried and convicted under an indictment charging him with the forgery of a promissory note. The evidence shewed that defendant signed a fictitious name to a blank form of note and delivered it to a merchant in payment for goods. The blank form bore only the date, and the words $14.00, in the upper left hand corner, and the name of the payee, the amount payable, the period of time for which the note must run, the due date, place of payment, etc.—*Held*, *per* Drysdale, J., Longley, J., concurring, that the indictment contained sufficient detail to give the accused reasonable information as to the act to be proved against him and was good under the Code, ss. 852, 853.—Also, that the question whether, in view of the fact that the instrument signed was not a promissory note, the conviction was rightly made, was not open to the prisoner, the trial Judge having in his discretion refused the application made to him after the trial to reserve the point, and the only jurisdiction of the Court to grant leave to appeal and order a case being under s. 1015, which is confined to refusals occurring during the trial.—Also, that the point, even if open, was not well taken, the offence being complete under the Code, s. 466, even though the document in relation to which the offence was charged was incomplete.—Also, that an indictment charging a crime defectively is aided by verdict.—*Per* Russell, J., that defendant, under the indictment, could not be legally convicted, but that the defect in the charge, being amendable, was cured by verdict.—*Per* Meagher, J., that inasmuch as the document in relation to which the offence was charged was not a promissory note, there was error and the verdict could not cure it. *R.* v. *Ead* (1908), 43 N. S. R. 53.

Fortune telling—*Criminal Code, s. 396.*]—Deception is an essential element of the offence of "undertaking to tell fortunes" under s. 396 of the Criminal Code; and to render a person liable to conviction for that offence there must be evidence upon which it may be reasonably found that the person charged was, in so undertaking, asserting or representing, with the intention that such assertion or representation should be believed, that he had the power to tell fortunes, with the intent in so asserting or representing of deluding and defrauding others. In this case the evidence set out in the report was held to be sufficient. *Rex* v. *Marcott*, 21 C. L. T. 431, 2 O. L. R. 105.

Fraudulent packing—*Conviction for—Fruit Marks Act — "Faced or shewn surface."*]—The mere having in possession for sale packages of fruit fraudulently packed within the meaning of s. 7 of the Fruit Marks Act, 1901, 1 Edw. VII. c. 27 (D.), is an offence thereunder, though no one is imposed on thereby nor any fraud intended. *Semble*, that the "faced or shewn surface," within the meaning of the section, is not limited to the branded end of the package. *Rex* v. *James*, 1 O. W. R. 520, 22 C. L. T. 369, 4 O. L. R. 537.

Fraudulent removal and concealment of goods — *Indictment — Date of offence—Evidence of similar acts — Judge's charge.*]—The accused were convicted by the jury at the trial on a count for concealing certain household goods for the purpose of defrauding the insurance company by which they had been insured, by representing that they had been destroyed by fire, and collecting the insurance money upon them; also on a count which alleged a removal of the goods on or about the 11th September, 1900, for a like fraudulent purpose. Both counts were framed under s. 354 of the Criminal Code, 1892. Evidence was given at the trial shewing the removal of some of the goods in question on the 13th August, 1900, and of others on the 11th September, and in his charge to the jury the trial Judge did not distinguish between the goods removed on 13th August, and those removed on 11th September, but left the case to them in such a way that they could convict on both counts or on either of

them as to both sets of goods. In stating a case, the Judge certified that, in his opinion the evidence of the removal of goods on the 13th August materially influenced the verdict of the jury:—*Held*, that the conviction of the accused on the count for concealment was right and should be affirmed, but that, although the evidence of the removal in August was probably admissible for the purpose of shewing a criminal intent in the September removal, yet the conviction for the removal should be set aside, on the ground of misdirection by the Judge in telling the jury that they could convict for the removal in August, as the trial might not have been a fair one. *Rex* v. *Hurst*, 22 C. L. T. 68, 13 Man. L. R. 584.

Fraudulent sale — *Fraudulent conversion—Indictment.*] — The defendant was indicted for theft. The indictment set out that, being intrusted by E. R. H. with a power of attorney, he did fraudulently sell certain bank shares belonging to said E. R. H., and did fraudulently convert the proceeds of the sale to a purpose other than that for which he was intrusted with the power of attorney. After the conviction the defendant moved in arrest of judgment because it was not stated in the indictment that the power of attorney was for the sale, etc., of any property, real or personal, as provided by Art. 309, Criminal Code. The Judge reserved the question for the decision of the Court of Appeal:—*Held*, 1. That the indictment was sufficient, it not being necessary to describe the whole power of attorney; and, further, the alleged omission was only a part omission, and any defect resulting therefrom was cured by verdict.—2. The fraudulent sale and the fraudulent conversion did not constitute two offences, but one specific offence, viz., that of theft. *Regina* v. *Fulton*, 10 Que. Q. B. 1.

Fraudulent sale of land—*Subject to unregistered equity of redemption—Intent to defraud — "Privilege" — Criminal Code, s. 421.*]—J. W. as security for a loan, gave defendant a deed absolute in form, which was registered. There was no entry on the registry books shewing that J. W. had an equity of redemption. Defendant, knowing of this equity, granted said land to his brother, as alleged by the Crown, with intent to defraud J. W. within the meaning of s. 421 of the Code.—Court of Appeal *held* upon a stated case, that the wrong committed by defendant was well within that class of mischief which section 421 of the Code was designed to prevent, but the language of that section failed to include an "equity of redemption" and defendant should be discharged.—Meredith, J.A., suggested that the section would have been more comprehensive if the words "estate, right, title or interest at law or in equity," had been added. *R.* v. *McDevitt* (1910), 17 O. W. R. 864, 2 O. W. N. 396, O. L. R. Can. Cr. Cas.

Furious driving.]—Application by defendant for leave to appeal from the conviction of a police magistrate upon the above charge, the magistrate having refused to state a case, dismissed, there being evidence to support the charge. Knowing the motor was in bad working order was an aggravation of the offence. *R.* v. *Seager* (1909), 14 O. W. R. 418.

Gambling on Lord's Day — *Playing cards for money in private places—Conviction—Motion to quash—C. S. U. C., c. 104, s. 3.*]—Defendant was convicted, under C. S. U. C., c. 104, s. 3, for playing cards, for money, in a private place, on the Lord's Day, and fined $20 and costs. On motion to quash conviction.—Teetzel, J., *held*, that although the Act interfered with a man's freedom in his own house on Sunday, and sought to make people moral by Act of Parliament, yet effect must be given to it. Motion dismissed with costs. *Rex* v. *Quick* (1910), 17 O. W. R. 259, 17 Can. Cr. Cas. 61.

Game Protection Act (B.C.), s. 14—*"Hunt"—License—Pursuit without result—Construction of statute—Territorial jurisdiction of magistrate—Summary Convictions Act—Amendment.*]—Section 14 of the British Columbia Game Protection Act, as amended by 9 Edw. VII. c. 20, s. 8, makes it unlawful to "at any time hunt, take, or kill any animal," without a license, etc. The defendant was convicted by a magistrate for that he did at a specified place and time "hunt animals without a license," etc. The defendant had no license. There was no evidence that he "hunted" in the sense that he pursued any animal. The only evidence was that the defendant went out with a gun to look for deer but did not find any:—*Held*, that the word "hunt" in the statute means, to pursue some particular animal, and, the conviction not so stating and there being no evidence to shew such an offence, no offence was alleged or proved; and the conviction should be quashed. — *Semble*, that certain other objections to the conviction were curable under the provisions of the amendment to the Summary Convictions Act, 62 Vict. c. 69, s. 4 (B.C.):—*Held*, also, that there was no evidence to shew that the convicting magistrate had jurisdiction, *i.e.*, that the offence, if any, was committed in the electoral district of Fernie, beyond which his commission did not extend; and on that ground also the conviction should be quashed.—By s. 103 of the Summary Convictions Act, as amended by the statute of 1899, upon an application to quash a conviction, if there is evidence to support it, it is to be affirmed or not quashed, and may be amended if necessary:—*Held*, that there was no evidence to support the conviction, and it could not be amended. *R.* v. *Oberlander* (1910), 13 W. L. R. 643.

Gaming—*Keeping common gaming house — Evidence of offence — Occupant of premises.*]—The evidence disclosed that two or three police officers saw several men in a stable sitting around a table, and one of the constables saw dice being thrown and heard somebody say "eleven wins;" and a constable said that, when the police entered the place, the men tried to get out and scattered the money that was on the table, and that the prisoner was in charge of the money on the table. The prisoner gave evidence on his own behalf, and also called witnesses to shew that the game they were playing was "poker." The prisoner said he saw no dice; that he did not own the place, nor did he act as banker at the game. Two of the witnesses for the defence said that a game of "craps" (played with dice) was going on at the same time, but in another room; and another witness for the defence said he had been in the

place at other times and had seen the prisoner acting as banker at gambling games there:—*Held*, that this evidence went to shew that the place was used as a gaming house; and had there been any evidence that the prisoner was the owner, lessee, or occupier of the premises, there was ample evidence to shew that it was a place used for playing at games of chance, and so a common gaming house. But the prisoner denied being the keeper of the place, and, unless from the fact sworn to, that the prisoner was in charge of the money for the game, the evidence as to the person who kept the place was as strong against any of the others found there as against him; ss. 196 and 198 of the Code. *Rex* v. *Duffy*, 21 C. L. T. 477.

Goods under seizure—*Innkeeper's lien—Abandonment—Tender—Evidence.*]—An hotelkeeper who locks up the room of a guest containing the latter's luggage and effects, for non-payment of charges for board and lodging, and who notifies the guest thereof, and requires him to leave the hotel on the same day or pay the bill, thereby places the guest's luggage, etc., under "lawful seizure and detention," in respect of the landlord's common law lien; and the taking away of such luggage by the guest without the landlord's authority is "theft" under s. 306 of the Criminal Code. (But see now 63 V. c. 46, s. 3, sched.). The landlord does not, by afterwards granting permission to the guest to remove some specified articles, and by allowing him free access to the room for that purpose, abandon such seizure and detention as regards the other effects, and the owner who removes any luggage, as to which the permission does not extend, is guilty of "stealing" the same under s. 306 of the Criminal Code. The fact that the amount in respect of which a lien is claimed is in excess of the amount legally due does not dispense with the necessity of a tender of the amount legally due, nor invalidate the lien. Circumstantial evidence of theft. *Regina* v. *Hollingsworth*, 4 Terr. L. R. 168.

Having stolen property in possession—*Knowledge of accused—Property stolen in foreign country and brought into Canada.*]—The full Court of Saskatchewan on Crown case reserved *held*, that the conviction must be affirmed, there being sufficient evidence to warrant the jury in concluding that the property had been stolen by the prisoner. *Rex* v. *Duff*, 11 W. L. R. 292.

Housebreaking—*Breaking and entering Misdirection — New trial.*]—The defendant was convicted under s. 410 of the Criminal Code for breaking and entering the dwelling house of D., with intent to commit an assault upon W. The only evidence of the breaking was that, immediately after the accused left the house, a window in the dining room and one in the back porch were found wide open, sufficiently to allow a person to pass through, that when the family retired on the previous night the window in the dining room was entirely closed, and the window in the porch open only a few inches and resting upon a can, and that plants growing below the porch window, which had not been disturbed the previous evening, were broken, as if they had been trodden upon. Apart from this evidence it was left uncertain by which window the accused entered. The trial Judge directed the jury that the lifting of the porch window from where it rested, as well as the lifting of the dining room window, was, under the Code, a "breaking" of the dwelling house:—*Held*, that the direction as to the lifting of the porch window was erroneous, and that the conviction must be set aside:—*Held*, that the prisoner should not be discharged, but that there should be a new trial. *Rex* v. *Burns*, 36 N. S. R. 257.

Householder permitting defilement—*Code s. 217—Evidence.*]—The defendant, a druggist, brought to his store two young women, both over 14 and under 18 years of age, where they were kept or invited to remain until he had carnal connection with one and his clerk with the other. One of them went to the same place a second time and there again had carnal connection with defendant, who paid her therefor on each occasion:—*Held*, that defendant had committed the offence intended by s. 217 of the Criminal Code. *Rex* v. *Karn* (1909), 14 O. W. R. 1215, 1 O. W. N. 247, 20 O. L. R. 91.

Illegal fishing — *Fisheries Act — Evidence—Complaint—Indefiniteness—Conviction—Distress—Imprisonment.*] — Evidence that a person was seen on the river in a canoe between ten and eleven o'clock at night with the appliances commonly used in illegal salmon fishing, is, in the absence of any explanation of the situation and where the charge is not denied on oath, sufficient to justify a conviction for illegal fishing under the Fisheries Act. A complaint charging the accused with having been engaged in illegal fishing in contravention of the Fisheries Act is too indefinite to support a conviction for illegal fishing under the Act. Imprisonment may be adjudged under the Act for default in payment of a penalty imposed without awarding a distress. *Rex* v. *Fraser. Ex p. Dixon, Ex p. Lennon*, 36 N. B. R. 109.

Illegal fishing—*Order in council of September 9th, 1909—Steam trawling — Three mile limit — Offence — Conviction — Imprisonment — Habeas corpus — Practice — Right to review proceedings leading to commitment—Jurisdiction of magistrate — The Fisheries Act.*] — Defendant was convicted under the above Act for using a steam trawler, operating a beam trawl with which to catch fish within the three mile limit. On return of *habeas corpus* proceedings, *held* (1) that service of summons sufficient; (2) that charge of using or operating a prohibited vessel is one offence; (3) that the charge was sufficiently stated; (4) that on a *habeas corpus* return only the legality, not the sufficiency, of the evidence can be considered; (5) that as the statutory conditions had not been complied with, the magistrate had no jurisdiction, and (6) that there had been an adjournment to a day not specified. Prisoner was discharged. *R.* v. *Smith*, 8 E. L. R. 33.

Illegal sale of mineral ore—*Evidence of—Payment for silver in ore—Price fixed upon quantity of silver — Criminal Code (1906), s. 424 (b)—Reserved case.*]—Defendant, a saloon keeper in the Cobalt district, took silver ore over his counter, took it to Toronto where he sold it, and after a

couple of weeks he was paid for the value of the silver in the ore, amounting to about $10,000. He was convicted of purchasing and selling silver ore, he not being the owner or agent of the owner of a mine and not being authorised in writing by the proper officer so to do.—Trial Judge reserved a case for the opinion of the Court of Appeal as to whether there was any evidence upon which a jury could properly find that the prisoner sold any ore containing silver or any unsmelted or untreated or unmanufactured, or partly manufactured silver within the meaning of s. 424 (*b*) of the Criminal Code (1906), as amended in 1909.—Court of Appeal answered in the affirmative and confirmed the conviction. *R.* v. *Barber* (1910), 16 O. W. R. 552, 1 O. W. N. 960.

Illegal voting — *Municipal elections — Indictable offence — Information — Police magistrate — Mandamus.*]—Voting in more than one ward at a municipal election by general vote, contrary to the provisions of 1 Edw. VII. c. 26, s. 9 (O.), is an indictable offence, and mandamus lies to a police magistrate having territorial jurisdiction, to compel him to consider and deal with an application for an information for such an offence. *In re Rex* v. *Meehan*, 22 C. L. T. 179, 3 O. L. R. 567, 1 O. W. R. 136, 248.

Incest—*Attempt to commit—Evidence of child not under oath—Corroboration.*] — Defendant was convicted of the offence of attempting to commit incest with his daughter, aged 7 years, upon the evidence of said daughter and another girl aged 4 years. The trial Judge reserved the following questions for the opinion of the Court of Appeal.—1. Was the evidence of said girls admissible?—2. Was such evidence sufficiently corroborated?—3. Was a statement made by daughter to one Richard Berthiaume, shortly after the attempt, admissible?—4. Did the indictment disclose an indictable offence?—*Held*, Meredith, J.A., dissenting, that all questions should be answered in the affirmative. Conviction affirmed. *R.* v. *Pailleur* (1909), 15 O. W. R. 73, 20 O. L. R. 207, 15 Can. Cr. Cas. 339.

Incest—Evidence — Destroyed letters — Inferences — Misdirection—Substantial miscarriage—New trial. *Rex* v. *Godson*, 1 O. W. R. 250.

Incest—*Evidence—Proof of relationship.*]—On a trial for incest, the only evidence against the accused was that of the child, a girl of 11 years, and of a woman who had known accused and daughter for some seven or eight months. The girl stated that the accused was her father and that for 7 or 8 months the accused and herself had lived together apparently as father and daughter. This evidence was not rebutted:—*Held*, that this was not sufficient proof of relationship to justify a conviction. *Rex* v. *Smith*, 8 W. L. R. 184, 13 B. C. R. 384.

Incest—*Proof of relationship.*]—On an indictment for incest, proof of the relationship of the accused to his alleged victim must be established according to the rules of the civil law. *Regina* v. *Garneau*, 8 Que. Q. B. 447.

Inciting strike—*Master and servant—Mining company — Industrial Disputes Investigation Act, 1907—Construction of statute — Excessive penalty — Amendment — Criminal Code, s. 1124—Powers of Court under—Costs.*]—The Industrial Disputes Investigation Act, 1907, 6 & 7 Edw. VII. c. 20 (D.), provides for a reference, in certain cases, of disputes between employers and employees to boards of conciliation and investigation; by s. 56 prohibits strikes or lock-outs "prior to or during" such a reference; and by s. 60 declares that "any person who incites . . . any employee to go or continue on strike contrary to the provisions" of the Act shall be guilty of an offence, and liable to a fine. The defendant was convicted under the above s. 60 of unlawfully inciting the employees of a mining company to go on strike, and adjudged to pay a fine of $500, and in default thereof to be imprisoned for six months. At the time when the alleged offence was committed, neither the mine-owners nor their employees had made application for the appointment of a board under the Act:—*Held*, that the prohibition by the statute of strikes or lock-outs "prior to or during a reference" of the dispute to a board does not apply only to cases in which one of the parties to the dispute has made application for the appointment of such a board, but makes all strikes and lockouts illegal until there has been such a reference, and the board has made its report thereon. A strike is therefore "contrary to the provisions of the Act," before as well as after it has been invoked by either the employers or employees, and, as there was evidence to support the conviction, it must be affirmed.—As, however, the penalty of six months' imprisonment, in default of payment of the fine, was in excess of that which the magistrate had power to impose, it was reduced to three months, being the maximum term under Part XV. of the Criminal Code, which, by s. 61 of the Act, governs the procedure for enforcing penalties imposed thereunder; and the conviction was amended accordingly, without costs. *Rex* v. *McGuire*, 16 O. L. R. 522, 11 O. W. R. 388.

Indecent act—Criminal Code, s. 177 (*b*)—Conviction—"Wilfully," omission of—*Habeas corpus*—Amended conviction and commitment substituted — Refusal to discharge prisoner—Appeal to full Court, Manitoba. *Rex* v. *Barré* (Man.), 2 W. L. R. 376.

Indecent act — *Information—"Unlawfully"—"Wilfully."*]—It is not sufficient, in an information laid under s. 177 of the Criminal Code, to allege the "unlawful" commission of an indecent act; it is essential that the accused be charged with having committed it "wilfully." A commitment based on an information which merely alleges that the act was committed "unlawfully" will be quashed and the prisoner discharged. *Ex p. O'Shaughnessy*, 13 Que. K. B. 178.

Indecent assault—*Evidence—Charge of Judge to jury—Verdict of attempt—Conviction—Stated case.*]—Court of Appeal *held*, that a jury may not find a verdict of attempt to commit an indecent assault, where the evidence, if believed, would prove the offence. *R.* v. *Menary* (1911), 18 O. W. R. 373, 2 O. W. N. 807.

Indictment—*Criminal Code, s. 431.*]—In the crime of uttering a forged instrument, the knowledge by the utterer that the instrument uttered was forged and had been made with intent to defraud is an essential element, and, as every count of an indictment must contain a statement of all the essential ingredients which together constitute the offence charged in it, the omission of such essential averment renders the count null and void, and the defect cannot be corrected by the Court.—2. Upon the trial of an indictment for forging an instrument, it is not necessary to prove an intent to defraud any particular person; it is sufficient to allege and prove that the accused did the act charged with an intent to defraud, and when the fraud has been carried out it need not appear on the face of the indictment in what manner and by what means the fraud was consummated. *Regina* v. *Weir*, 9 Que. Q. B. 253.

Indictment of corporation — *Punishment.*]—The defendants, a corporation, were indicted for that they unlawfully neglected, without lawful excuse, to take reasonable precautions and to use reasonable care in maintaining a bridge forming part of their railway which was used for hauling coal and carrying passengers, and that on the 17th August, 1898, a locomotive engine and several cars, then being run along said railway and across said bridge, owing to the rotten state of the timbers of the bridge, were precipitated into the valley underneath, thereby causing the death of certain persons. The defendants were found guilty and a fine of $5,000 was inflicted.—*Held, per* McColl, C.J., and Martin, J., on appeal, affirming the conviction, that such an indictment will lie against a corporation under s. 252 of the Code.—*Per* Drake and Irving, JJ., that such an indictment will not lie against a corporation.—Sections 191, 192, 213, 252, 639, and 713 of the Code considered.—A corporation cannot be indicted for manslaughter. *Regina* v. *Union Colliery Co.*, 20 C. L. T. 289, 7 B. C. R. 247.

Indictment of corporation — *Punishment.*] — The defendant company was indicted, under ss. 213 and 220 of the Criminal Code, 1892, for negligence in maintaining machinery in a condition dangerous to life, resulting in the death of one of its employees. —There was also a count for manslaughter. —*Held*, that, notwithstanding s.-s. (*t*) of s. 3 of the Code, by virtue of which ss. 213 and 220 generally apply to corporations as well as individuals, an indictment would not lie against a corporation for manslaughter, and even if a corporation were indicted and convicted of such an offence, there was no provision of law under which any punishment could be imposed.—The punishment for manslaughter being imprisonment for life under s. 236 of the Code, s. 958 did not apply, and a fine could not be imposed in lieu of imprisonment. The general provision of s. 639 that, in case of the conviction of a corporation, the Court "may award such judgment and take such other and subsequent proceedings to enforce the same as are applicable to convictions against corporations," could not be interpreted so as to affect or modify the positive enactment of s. 236. *Regina* v. *Great West Laundry Co.*, 20 C. L. T. 217, 13 Man. L. R. 66.

Keeping bawdy house — *Criminal Code.*]—A female cannot be convicted of unlawfully keeping a bawdy house, under s. 198 or s. 783 of the Criminal Code, unless it is shewn that the house or room in question is occupied or resorted to by more than one female for purposes of prostitution. *Singleton* v. *Ellison*, [1895] 1 Q. B. 607, followed. *Rex* v. *Young*, 22 C. L. T. 211, 14 Man. L. R. 58, 12 Can. Cr. Cas. 109.

Keeping bawdy house—*Criminal Code, s. 195—What constitutes offence — Place of resort for prostitutes.*] — Crown case reserved. Magistrate found that a certain house was kept by defendant for the purposes of prostitution, but there was not sufficient evidence to shew that any other women resorted thereto for such purposes. The question reserved was whether, in these circumstances, the magistrate was right in convicting defendants under s. 195 of the Criminal Code, or whether he should have applied the ruling in *Rex* v. *Young*, 6 Can. Crim. Cas. 42, and acquitted defendant: — *Held*, Code has not changed the law as to what constitutes the offence of keeping a common bawdy house, and that a woman living by herself in a house cannot be convicted of the offence unless other women than herself resort to it for the purpose of prostitution. *Rex* v. *Mannix*, 6 O. W. R. 265, 10 O. L. R. 303, 10 Can. Cr. Cas. 150.

Keeping bawdy house — *Nature of offence—Evidence—Criminal Code, s. 195.*]—1. A woman living by herself in a house, cannot be convicted of keeping a bawdy house therein, unless it is shewn that one or more other women resort to it for purposes of prostitution. *Rex* v. *Young*, 14 Man. L. R. 58, and *Singleton* v. *Ellison*, [1895] 1 Q. B. 607, followed.—2. In order to support a conviction for keeping a bawdy house, it is not sufficient to shew the bad reputation of the house and its inmates and that men resorted to it in the night, but actual proof must be given of some act or acts of prostitution, though definite proof of one may be sufficient. *Regina* v. *St. Clair*, 3 Can. Crim. Cas. at p. 557, followed.—3. Section 195 of the Criminal Code, 1892, does not change the law, as it was before the Code, as to the essential ingredients of the offence of keeping a bawdy house, and is intended merely to define the nature of the premises within which a bawdy house may be kept, and not to state what acts constitute such keeping. *Rex* v. *Osbery*, 15 Man. L. R. 147, 1 W. L. R. 121, 9 Can. Cr. Cas. 180.

Keeping bawdy house — Offence—Conviction—Vagrancy — Criminal Code, s. 207. *Rex* v. *Leconte*, 6 O. W. R. 970, 11 O. L. R. 408, 11 Can. Cr. Cas. 41.

Keeping bawdy house — *Offence — Duplicity—Continuity.*]—The defendant was convicted by the stipendiary magistrate for the city of Halifax of the offence of "keeping a disorderly house, that is to say, a common bawdy house, on the 21st April, 1901, and on divers other days and times during the month of April, 1901," and was fined the sum of $54, and in default of payment of the fine, was adjudged to be imprisoned with hard labour for the term of four months: —*Held*, dismissing application for a *habeas*

corpus, that the offence as charged did not constitute more than one offence; and that the word "keeping" implied a continuous offence. *Rex* v. *Keeping*, 34 N. S. R. 442.

(See also S. C., 21 C. L. T. 508, 34 N. S. R. 443*n*.)

Keeping common betting house — *Betting on racecourse—Definition of "place" —Criminal Code, ss. 227, 228.*]—In order to constitute a "place" within the meaning of s. 227 of the Criminal Code, there must be a measure of fixity, localisation, and exclusive right of user.—The defendants were two of a number of bookmakers, who, on payment of the usual entrance fee, were admitted, along with the general public, to a fenced enclosure owned and controlled by the Ontario Jockey Club, an incorporated racing association. These bookmakers laid bets from day to day, through their assistants, with members of the general public attending the races. They did not use any desk, stool, umbrella, tent, or booth, or erection of any kind, to mark any place where bets were made, and no part of the general enclosure was especially allocated to them, nor did they occupy a fixed position, but during each race stood as much as possible about the same spot within a radius of from 5 to 10 feet. The betting operations were carried on in the same method as in the case of *Rex* v. *Saunders*, 12 O. L. R. 615, 38 S. C. R. 382, except that in that case the bookmakers used a wooden box or booth, moved about on castors from one part of the grounds to another during the progress of the race meeting:—*Held*, that the defendants did not occupy a "house, office, room, or other place," within the meaning of s. 227 of the Criminal Code, and were, therefore, not guilty of the offence of keeping a "common betting house" under s. 228 of the Code.—*Powell* v. *Kempton Park Racecourse Co.*, [1899] A. C. 143, followed. *Rex* v. *Saunders*, 38 S. C. R. 382, distinguished. *Rex* v. *Moylett and Bailey*, 10 O. W. R. 803, 15 O. L. R. 348, 13 Can. Cr. Cas. 279.

Keeping common betting house — *Book-makers in charge of betting booth on racecourse of incorporated association — "House, office, room, or other place"—Movable structure—Criminal Code, 1892, ss. 197, 198, 204.*]—A perambulatory booth used on the racecourse of an incorporated racing association for the purpose of making bets is an "office" or "place" used for betting between persons resorting thereto, as defined in s. 197 of the Criminal Code, 1892.—Sub-section 2 of s. 204, which exempts from the provisions of the main section (dealing with the recording or registering of bets, etc.), bets made on the racecourse of an incorporated association, does not apply to the offence of keeping a common betting house; Davies, J., dissenting.—Judgment of the Court of Appeal, 12 O. L. R. 615, 8 O. W. R. 534, affirmed; Davies, J., dissenting. *Saunders* v. *Rex*, 27 C. L. T. 228, 38 S. C. R. 382.

Keeping common betting house — *Incorporated company—Lease of premises—President.*]—The president of an incorporated company, owners of a racecourse, who lease for valuable consideration the privilege of taking and receiving bets in part of the premises, is not, merely by virtue of his office, and without anything more than acquiescence on his part, liable to conviction as a party to the offence of keeping a common betting house under ss. 197 and 198 of the Criminal Code. *Rex* v. *Hanrahan*, 3 C. L. R. 659, distinguished. Conviction quashed. Maclaren, J.A., dissenting. *Rex* v. *Hendrie*, 11 O. L. R. 202, 6 O. W. R. 1015.

Keeping common betting place—*Evidence of — Conviction — Evading the statute—Betting on streets.*]—Defendant, a barber, stepped outside his shop and made bets on the street, with the obvious purpose of evading the statute:—*Held*, that he was rightly convicted of keeping a common betting place within the meaning of Criminal Code, s. 227. *Rex* v. *Ellis* (1910), 15 O. W. R. 195, 20 O. L. R. 218, distinguished by editor. *R.* v. *Johnston* (1910), 15 O. W. R. 843, 16 Can. Cr. Cas. 379.

Keeping common gaming house — *Evidence—Confession — Criminal Code, ss. 226, 985.*]—Upon the trial of the accused on a charge of unlawfully keeping a common gaming house:—*Held*, that evidence of a confession made by one of the persons found by the police in the house, implicating the accused, was not receivable as evidence against the accused.—2. That, upon the evidence adduced, the case did not come within s. 985 of the Criminal Code, nor within s. 226 (*a*) or (*b*); there was no evidence that the place was kept for gain, nor that persons resorted to the house for the purpose of playing. *R.* v. *See Woo* (1910), 13 W. L. R. 625.

Keeping common gaming house — *Evidence—Money lent—Action for return — Illegal purpose—Gaming—"Poker"—Criminal Code, s. 226—Banker—9 Anne c. 14—5 & 6 Wm. IV. c. 41—12 Geo. II. c. 28.*]—Plaintiff defendant and two others played poker for several evenings in the barber shop of an hotel:—*Held*, that this did not make the shop a common gaming house under s. 226 above. The plaintiff was the banker and lent the defendant money by giving him chips. The defendant was out $115 at the end of the game, which he promised to pay, but now refused. This was an action for money lent:—*Held*, that "poker" is not an illegal game under c. 28 above, and therefore the contract to lend money to defendant for that game is not illegal. Judgment for plaintiff for amount claimed. *Rose* v. *Collision* (1910), 12 W. L. R. 648, 16 Can. Cr. Cas. 359.

Keeping common gaming house — *Evidence.*]—On the premises of the accused a number of persons unconnected with the premises had been observed playing games involving the use of money, dice, and dominoes, and the accused had stated to the chief of police that he was having a game of *fantan* at his place, and that he was willing to pay for the privilege, as he was doing well out of it:—*Held*, sufficient evidence to sustain a conviction for keeping a common gaming house. *Rex* v. *Mah Kee*, 6 Terr. L. R. 121, 1 W. L. R. 37, 9 Can. Cr. Cas. 47.

Keeping common gaming house — *"Gain"—Payment for refreshments—Profit*

—*Misdirection — Acquittal of defendant — Crown case reserved — New trial.*] — The defendant was indicted for keeping a common gaming house, contrary to ss. 196 (*a*) and 198 of the Criminal Code. The evidence shewed that the defendant was the manager of a cigar shop, in the rear of which was a room to which persons, chiefly customers, commonly resorted for the purpose of playing "poker." Out of the stakes on most of the hands a sum of five cents was withdrawn to cover the expenses of refreshments consumed by the players. No charge was made for the use of the room. The "rake-off" did not more than cover a fair price for the refreshments. The proprietor or manager derived an indirect advantage from the sale of cigars to the players, from 50 to 100 being sold to them in the course of a night's play:—*Held*, that "gain" may be derived indirectly as well as directly, that by what the defendant allowed to be done in the room mentioned, the profits of his usual business were increased more or less owing to the sale of the goods in which he dealt, and so he might be found to have kept the room for gain, though the gain was confined to the profits on the cigars which he sold to the players. The question of what is a keeping for gain ought not to be embarrassed by the consideration of whether the amount the defendant receives is an actual substantial profit to him over the price of the cigars which he sells and the refreshments which he furnishes to the players. The direction of the Judge at the trial of the jury, upon which the defendant was acquitted, was found to be wrong, upon a case reserved by the Crown, but the Court declined to order a new trial. *Rex* v. *James*, 2 O. W. R. 342, 23 C. L. T. 220, 6 O. L. R. 35.

Keeping common gaming house — "Gain" — Payment for refreshments — "Rake-off"—Profit — Gambling—Keeper of house—Players at game—Onlookers. *Rex* v. *Sale* (Y.T.), 7 W. L. R. 336.

Keeping common gaming house — *Jurisdiction of police magistrate—Summary trial without consent — "Disorderly house."*] —The term "disorderly house" in s. 774 of the Criminal Code, includes any house to which persons resort for criminal or immoral purposes, and therefore includes a common gaming house; and a police magistrate has jurisdiction summarily and without consent to try persons accused of keeping a common gaming house. *Rex* v. *Four Chinamen*, 7 W. L. R. 146, 13 B. C. R. 216; *Rex* v. *Ah San*, 12 Can. Cr. Cas. 538.

Keeping common gaming house — *Summary trial—Police magistrate—Right of accused to elect to be tried by jury—Criminal Code, ss. 773, 774.*]—A police magistrate has not absolute and summary jurisdiction under ss. 773 and 774 of the Criminal Code to try, without their consent, persons accused of keeping a common gaming house; such persons have the right to elect to be tried by a jury; the words "disorderly house" in s. 773 do not include "common gaming house," but are limited by the words which immediately follow them, "house of ill-fame or bawdy house."—*The Queen* v. *France*, 1 Can. Crim. Cas. 32, approved and followed.—The accused having been illegally tried and convicted before a magistrate, their conviction was quashed, and it was directed that they should be accorded the right of election to be tried by or without a jury, and that they should be tried accordingly. *Rex* v. *Lee Guey*, 10 O. W. R. 1060, 15 O. L. R. 235, 13 Can. Cr. Cas. 80.

Keeping disorderly house — *Criminal Code — Cumulative or alternative punishments.*]—The Court was moved to quash an indictment for keeping and maintaining a disorderly house, to wit, a common bawdy house, on the ground that s. 198 of the Code, under which the defendant was indicted, was repealed by s. 207 (*j*) or s. 783 (*f*) of the Code, as neither of these could be reconciled with s. 198, as cumulative or alternative punishment for the one offence:—*Held*, dismissing the motion and affirming the conviction, that s. 198 was not repealed as contended; s. 207 being a comprehensive section dealing with all classes of vagrants (including, under (j), keepers and inmates of bawdy houses), and s. 783 (*f*) being pure procedure, and enabling a charge based upon the offence above indicated to be disposed of by a summary trial when a party charged with the offence was brought before a magistrate. *Rex* v. *Sarah Smith*, 38 N. S. R. 148, 9 Can. Cr. Cas. 338.

Keeping disorderly or common betting house—*Race track of incorporated association—Betting at.*]—The defendant was tried before a police magistrate upon a charge of keeping a disorderly or common betting house, found guilty, and convicted. A case was stated by the magistrate after leave granted, in which he reported that it was shewn that a house was kept and used for betting between persons resorting thereto and the keeper; that the accused appeared, and he found him to be the keeper; that the house was owned by a joint stock company, of which the accused was president, and was situated on the race track of an incorporated association; that there were about thirty persons betting with the accused and his assistants, some on races then in progress in the State of New York, with which there was telegraphic communication, and others on races in progress on the local race track conducted by the company under an agreement with the association:—*Held*, that the offence was the keeping of a house for the purposes intended in s. 197 of the Code, and that the facts proved brought the accused within its danger, and he was rightly convicted:—*Held*, also, that s.-s. 2 of s. 204 of the Code stands by itself, and that the exception contained in it is expressly limited to the first part of that section, and it should not be read into s. 197. *Rex* v. *Hanrahan*, 22 C. L. T. 228, 3 O. L. R. 659, 1 O. W. R. 346.

Keeping house of ill-fame—Conviction —Evidence. *Rex* v. *Martin*, 1 O. W. R. 429.

Larceny — *Indian — Indian reserve — Theft of hay — Stealing from possessor — Crown case reserved—Criminal Code—Indian Act.*]—It is immaterial upon a prosecution for theft whether the possessor of goods taken larcenously has or has not the real right to them.—Therefore, where hay was taken by a person acting as caretaker of an

Indian on lands part of an Indian Reserve:—*Held*, that it was immaterial on a charge of theft whether the Indian had a right to possession without a location title under ss. 21, 22 of the Indian Act, R. S. C. 1906 c. 81, or not, or whether the Superintendent of Indian affairs might have prevented the removal of the hay.—The Criminal Code applies to Indians as to others. *Rex* v. *Beboning*, 12 O. W. R. 484, 17 O. L. R. 23.

Libel — *Anonymous letters — Question whether written by accused—Evidence—Comparison of handwriting with letters admittedly written by accused—Evidence of experts — Evidence of illwill towards person libelled—Motive—Judge's charge—Reference to similarity in style—Misdirection—Evidence improperly admitted—Discharge of accused.*]—On a stated case, *held*, that where defendant had been found guilty of publishing a libel, evidence of ill-will towards father of person libelled should not have been admitted, nor should the trial Judge have compared the style of letters written by accused but not to person libelled with the libellous letters, there having been no evidence expert or otherwise on that question. Prisoner discharged. *Rex* v. *Law* (1909), 12 W. L. R. 475.

Libel — *Evidence — Innuendo — Extrinsic circumstances — Particulars — Reserved case—Other publications—Newspaper—Previous libels.*]—Where an information for defamatory libel, consisting of words inoffensive in themselves, but importing, by ironical expression, a dishonourable imputation, contains, besides a repetition of the words complained of, an allegation of the sense in which they must be understood, the Crown may adduce evidence of extrinsic circumstances which go to shew the meaning to be attached to the words. It is not necessary that these circumstances shall be enumerated in the information, and the accused is sufficiently protected against surprise by the right which he has to demand particulars of the charge. In default of his applying for particulars, his objection to the evidence will not be entertained, and there is no ground for reserving for the Court of Appeal a question as to its legality. —Where the accused, in a prosecution for libel contained in a newspaper, has recourse to the defence, under s. 297 of the Criminal Code, that the publication of the libel was without his knowledge, the Crown may prove the previous publication of other libels of the same sort, by the same editor, in order to fix the responsibility of the accused, resulting, according to s. 297, from his persistence in maintaining this editor in charge of the newspaper. *Rex* v. *Molleur*, 14 Que. K. B. 556.

Libel — Immoral conduct of Minister of Crown — Justification — Public interest — Demurrer. *Rex* v. *Crocket*, 3 E. L. R. 330.

Libel—*Indictment for—Motion to quash.*]—A true bill being found against defendant for libel, defendant moved to have same quashed on three several grounds. 1st, that one of the grand jurors who found the bill was of affinity to defendant in the seventh degree. 2nd, that the names of two persons on the jury were not the same as those contained in the panel annexed to the *venire facias*. 3rd, that one of the grand jurors had previously to the finding of the indictment expressed an opinion as to the defendant's guilt, hostile to the defendant, and from ill-will: — *Held*, (Peters, J.), that the first ground alleged was not sufficient to quash an indictment, and that from the evidence before him, the second and third grounds were also insufficient. *Rex* v. *Lawson* (1888), 2 P. E. I. R. 398.

Lottery—*Criminal Code, s. 236—Foreign bonds—Prizes — Evidence to justify conviction.*]—The accused had made sales of certain securities called "Bon Panama," which had originally been issued in Paris, France, in 1889, by the Panama Canal Company, under the authority of the laws of France. These bonds promised the repayment of 400 francs in the year 1988, and carried with them the chances of getting prizes, varying in amount from 500,000 francs to 1,000 francs, given to the holders of the lucky numbers by drawings to take place at frequent intervals during the life of the bonds. The accused, in canvassing purchasers of the bonds, held out as an inducement the chance of winning one of these prizes, and the belief that there was such a chance influenced the purchasers in paying the price which they gave for the bonds:—*Held*, that the accused was rightly convicted of selling lottery tickets contrary to s. 236 of the Criminal Code. *Rex* v. *Picard*, 7 W. L. R. 241, 17 Man. L. R. 343.

Lottery—*Disposing of property by chance —Device—Verdict.*]—Upon a case reserved for the opinion of the Court as to whether the interposition of a condition that the winner of a prize in a lottery should shoot a turkey at fifty yards in five shots, or, if a lady, that she could choose a substitute to shoot for her, would prevent a conviction under s. 205 of the Criminal Code, 1892, it was stated that the evidence shewed that any person could easily shoot a turkey under the circumstances:—*Held*, that it was a question for the jury whether the making of that condition was intended as requiring a real contest of skill, or merely as a device for covering up a scheme for disposing of the property by lot; that the verdict of guilty involved a finding that it was merely a device; that the evidence set out in the case justified that finding; and that the conviction should be affirmed. *Rex* v. *Johnson*, 22 C. L. T. 125, 14 Man. L. R. 27.

Maiming cattle — *Criminal Code, s. 510 —Castration of stallion—Mens rea—Alberta Ordinance respecting stallions and bulls.*]—The castration of a stallion running at large contrary to the provisions of the Entire Animals Ordinance is a "maiming" of the stallion within the meaning of s. 510 (B. b.) of the Criminal Code. The fact that the owner of the stallion had expressed an intention to castrate it was held to be no justification of the unauthorised act of the defendant. The interference by the stallion with the defendant's mares, also running at large, was also held to be no justification, the defendant being in such case at best a mere licensee of the land over which the mares grazed: *McLean* v. *Rudd*, A. L. R. 505, followed. The proper test in such a case

is the question, Did the defendant do what he did honestly believing the act to be necessary for the protection of his property? Proof of actual malice is not necessary under this section, but although the word "maliciously" is not used, legal malice such as would establish that *mens rea*, without which there can be no criminal intent, must be proven. The fact that the defendant committed the act without any attempt to avail himself of the provisions of the Ordinance relating to impounding stallions, and the evidence adduced not shewing that he honestly believed the act necessary to protect his property:—*Held*, that legal malice was sufficiently proven.—*Rex* v. *Kroesing*, 2 Alta. R. 275, 10 W. L. R. 646, 16 Can. Cr. Cas. 312.

Malicious injury to property—*Summary conviction—Compensation—Amendment—Costs—Penalty—Appeal.*]—One of the sections of the Act respecting Malicious Injuries to Property enacted that an offender should on summary conviction be liable to a penalty not exceeding $100 over and above the amount of injury done, or to three months' imprisonment.—A conviction thereunder adjudged the defendant "to forfeit and pay the sum of $5 as a penalty, together with $50 for the amount of injury done as compensation in that behalf;"—*Held*, that it was not the intention of the section in question that there should be two separate penalties, but that one penalty should be fixed by first ascertaining the amount of damages, and then adding to that amount such sum not exceeding $100 as the justice should deem proper; and that it was therefore beyond the jurisdiction of the justice to award a sum "as compensation."—*Held*, also, that the words "as compensation in that behalf" could not be struck out as surplusage under the power of amendment given by s. 80 of the Summary Convictions Act, and the $50 be treated as part of the penalty, inasmuch as the effect of such an amendment would be to punish the offender, not according to the conviction of the magistrate, but according to the conviction as amended by the Court, which was not the intention of that provision. See Criminal Code, s. 883.—The conviction also adjudged the payment of a sum for costs which comprised several items, which exceeded the amounts allowed therefor by the tariff fixed by the Summary Convictions Act as amended by 52 V. c. 45, s. 2, or were not mentioned in the tariff.—*Held*, that the conviction was therefore bad, and that it could not be amended by striking out the charges improperly made.—The conviction also adjudged, in default of payment, imprisonment for three months.—*Held*, that s. 68 of the Summary Convictions Act applied, and that, inasmuch as the penalty imposed together with the costs did not exceed $25, two months was the maximum term of imprisonment which could be imposed.—It being contended that the Court had no power on appeal to quash a conviction for defects or errors appearing on the face of the conviction.—*Held*, that the Court had such power. *McLennan* v. *McKinnon*, 1 O. R. 219, on this point, not followed. *Regina* v. *Tebo*, 1 Terr. L. R. 196.

Malicious neglect to provide necessaries—*Child's death—Want of medical aid—Aiding and abetting.*]—The prisoner, an elder of the sect "Catholic Christians in Zion" or "Zionites," was indicted for aiding and abetting and counselling in his actions one who neglected to provide two of his young children under six years of age with medical attendance and remedies when sick with diphtheria. Both children died. The prisoner knew that the children had diphtheria, and knew that it was a dangerous and contagious disease; that the ordinary remedies would have prolonged their lives, and in all probability would have resulted in their complete recovery:—*Held*, that medical attendance and remedies are necessaries within the meaning of ss. 209 and 210 of the Criminal Code, and anyone legally liable to provide such is criminally responsible for neglect to do so. So also at common law. Conscientious belief that it is against the teachings of the Bible and therefore wrong to have recourse to medical attendance and remedies is no excuse. *Rex* v. *Brooks*, 22 C. L. T. 105, 9 B. C. R. 13.

Maliciously killing cattle—*Rebutting implied malice—Mens rea—Verdict—Refusal of Judge to receive.*]—On a charge of unlawfully and maliciously killing cattle (under R. S. C. c. 43), it appeared that the animal was killed by the prisoners, when it was in a helpless and dying condition, and that the prisoners thought it was an act of mercy to kill it:—*Held*, that the killing was not malicious; that the implication of malice was rebuttable, and had been in fact rebutted, a *mens rea* on the part of the prisoners being disproved. Power of trial Judge to refuse a particular verdict considered. *Regina* v. *Mennel*, 1 Terr. L. R. 487.

Manitoba Grain Act—*Offences against—Station agent—Allotting cars to shippers.*]—Where a farmer who is not an elevator owner, lessee, or operator, had grain stored in a special bin in a farmer's elevator at a railway station where grain is shipped, and has also grain stored in another elevator at the same point, in common with other grain, for which he holds storage tickets, it is not a violation of the Manitoba Grain Act and amendments for the station agent to refuse to recognise the farmer as an applicant and to recognise his order in the order book for a car or cars to ship out his grain. 2. Where a farmer has made order for cars in the order book at the station, and all applicants for cars who had made order prior to his had each obtained one car, but not sufficient cars to fill the orders, while the farmer had not yet been allotted a car by reason of the shortage, and the agent out of the next cars which arrived refused to award him a car, but awarded them to those who had already received each one car, there was a violation of the Act. 3. Where each of the prior applicants had been supplied with one car at the time when the farmer gave his order, but on the day previous there had been a surplus of cars after each prior applicant had been given one, and such surplus was distributed among them, but their orders still remained unfilled, it was not a violation of the Act for each agent to allot to each of the prior applicants a car from a lot which arrived to be loaded on the day of the farmer's application, and to refuse him one. 4. Where a farmer who had grain to ship made order for one car in the order book, requiring it

to be placed at the loading platform to be loaded, and the agent allotted a car each to the elevator companies having elevators at the point, but whose orders were subsequent to the farmer's and refused to allot him one, there was a violation of the Act. *In re Castle and Beniot*, 23 C. L. T. 143.

Manslaughter—*Acquittal — Subsequent charge of lesser offence—Autrefois acquit — Criminal Code, s. 951.*]—The defendant was charged with the manslaughter of S. and acquitted. It was contended that he could not be subsequently tried on a charge of unlawfully inflicting grievous bodily harm upon S.:—*Held*, upon construction of s. 951 of the Criminal Code, that the defendant could not, on the original charge, have been convicted of the lesser offence, and therefore the acquittal was not a bar to a prosecution for the lesser offence. *Rex* v. *Shea* (N.S.), 14 Can. Crim. Cas. 320.

Manslaughter—*Endangering human life —Indictment of corporation.*]—Under s. 213 of the Criminal Code a corporation may be indicted for omitting, without lawful excuse, to perform the duty of avoiding danger to human life from anything in its charge or under its control. The fact that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual, is not a ground for quashing the indictment. As s. 213 provides no punishment for the offence, a corporation indicted under it is liable to the common law punishment of a fine. Judgment in 7 B. C. R. 247, 20 C. L. T. 289, affirmed. *Regina* v. *Union Colliery Co.*, 21 C. L. T. 153, *S. C. sub nom Union Colliery Co.* v. *Regina*, 31 S. C. R. 81.

Manslaughter — *Master and servant — Negligence.*]—The deceased, a lad of about 15, was engaged by the prisoner as a farmhand, on the terms of receiving for his work his board, lodging, and clothing. He died on the 14th February, after having been in the prisoner's employment about nine months. Death was caused by the gangrenous condition of many parts of his body resulting from frost bites. He was in the habit of wetting his bed, and on this account was made to sleep in the stable, and had slept there for two or three months up to the 10th February. From the 1st to the 10th the weather was excessively cold. The lad's fingers had been badly frozen at least three weeks before his death, and it was found that the prisoner must be taken to have known it for that length of time; nevertheless, he paid no attention to it till the 10th February. During the night of 9th-10th February, the deceased's feet were frozen solid to the ankles; this was discovered by the prisoner, who then took him to the house. It was found that the lad became so frozen, by reason of the earlier frost-bites rendering him unable to attend to himself properly, and his being left without assistance in the stable in excessively cold weather. The prisoner, on bringing the lad to the house, attended to him personally, asked a neighbour for a remedy for frost-bites, drove to a physician, got from him a prescription for frost-bites, but did not disclose to him the serious condition the lad was in. On and after the 10th February, the lad was helpless, and died on the 14th February. The prisoner had means to procure medical attendance:—*Held*, that, in view of the age of the deceased, the circumstances of the country, the fact of there being no provision for maintaining poor people, it was the duty of the prisoner, as master, towards the deceased as his servant, to have taken care of him, and that by his omission to do so he was guilty of gross negligence, to which the lad's death was attributable, and that, therefore, the prisoner was guilty of manslaughter. *Regina* v. *Brown*, 1 Terr. L. R. 475.

Manslaughter — *Parent's omission to provide necessary medical treatment for child —Legal duty—Lawful excuse—Religious belief—"Necessaries"—Admission of evidence —Judge's charge.*]—The word "necessaries" in s. 209 of the Criminal Code, which enacts that "everyone who has charge of any other person unable by reason of detention, age, sickness, insanity, or any other cause, to withdraw himself from such charge, is under a legal duty to supply that person with the necessaries of life," includes proper medical aid, assistance, care, and treatment. And, therefore, where the jury found that the prisoner, a Christian Scientist, had without lawful excuse omitted to provide medical treatment for his infant child, under sixteen years of age, when it was reasonable and proper that such treatment should be provided, and that the child died from such neglect:—*Held*, that the defendant had been guilty of an indictable offence under s. 210 of the Code, which enacts that everyone who as parent, guardian, or head of a family, is under a legal duty to provide necessaries for any child under sixteen, is criminally responsible for omitting without lawful excuse to do so, etc. Remarks upon the Judge's charge as to "authorised" medical aid and upon the admission of evidence of cures believed to have been wrought by Christian Scientists, even as shewing good faith. *Rex* v. *Lewis*, 23 C. L. T. 257, 6 O. L. R. 132, 2 O. L. R. 290, 566.

Manslaughter—*Peace officer shooting at fugitive offender—Endeavour to arrest without warrant—Shop-breaking—Criminal Code, ss. 30, 41, 461—Reasonable and probable cause—Question for jury—Charge to jury.*]—1. The question whether a peace officer, under s. 30 of the Criminal Code, on reasonable and probable grounds, believed that an offence for which the offender might be arrested without a warrant had been committed, and whether the officer, on reasonable and probable grounds, believed that a fugitive had committed that offence, is one for the jury and not for the Judge to decide. — 2. If a person, with intent to steal something out of a shop or store, opens a door leading into it by lifting the latch or turning the knob, and then enters the store, although during business hours, for the purpose of carrying out his intention, he may be convicted of shop-breaking under s. 461 of the Code.—3. When a peace officer, pursuing a fugitive whom he had a right to arrest without a warrant, found that the fugitive was, in his opinion, likely to escape for the time being owing to superior speed, it is a question for the jury, on the trial of the officer for man-

slaughter in killing the fugitive by a shot from his revolver intended only to wound and so stop his flight, whether, in all the circumstances, the officer was justified under s. 41 of the Code in such shooting in order to prevent the escape of such fugitive, or whether such escape could not have been prevented by reasonable means in a less violent manner.—Form of charge to jury in such a case. *Rex* v. *Smith*, 7 W. L. R. 92, 17 Man. L. R. 282.

Manslaughter — *Result of common assault—Absence of intent.*]—The accused, a boy of 14, rushed at and without legal provocation struck a playmate, who then caught him by the shoulder and fell backwards, the fall dislocating the spinal column just at the base of the skull and causing death:—*Held*, manslaughter; and no defence that the result was not anticipated and would not ordinarily follow from such a blow. *Rex* v. *Chisholm* (N.S.), 14 Can. Crim. Cas. 15.

Mischief to mines—*Damage to dam in course of construction — Criminal Code, s. 539—"Colour of right."*]—The defendant was charged with having, wilfully, maliciously and without colour of right, entered on certain creek placer mining claims, and cut a hole in a dam, thereby causing water to be conveyed to one of the claims, to the injury thereof. The charge was laid under ss. 510, 520 and 539 of the Criminal Code, "Mischief to Mines." The evidence shewed that the accused entered upon the property and tore out part of the dam, throwing out a box which was meant for a sluice-gate and same stakes supporting the dam. The defendant set up a *bona fide* colour of right:—*Held*, following *Rex* v. *Johnson*, 7 O. L. R. 525, that colour of right means an honest belief in a state of facts which, if it existed, would be a legal justification or excuse; and, upon the evidence, the defendant was not proceeding upon an honest belief that he had a legal right to do what he did, but rather upon a hazy belief in a mixed legal and moral right, which would not excuse.—The defendant was found guilty upon the third count in the charge, "damage to the dam in course of construction," under s. 539 of the Code, and sentenced to pay a fine of $10, the costs of the prosecution, and $15 as compensation. *R.* v. *Watier* (Yuk. 1910), 15 W. L. R. 427.

Municipal corporation—*Market fees—Right to possession.*]—The defendant, a market clerk in the employment of the city of Montreal, had collected divers sums from persons exchanging market stalls, by representing that these sums were due and payable to the city, and none were paid over to stalls for others. No such sums were payable to the city, and none were paid over to the city by the defendant. On conviction of the defendant for theft from the city of Montreal:—*Held*, Bossé and Hall, JJ., diss., that the conviction could not be sustained. To constitute the offence of stealing, whether under s. 305, or 319 (*a*), or 319 (*c*), of the Criminal Code, there must be a right existing at the time of the taking, either to the ownership or to the possession of the property taken, which right the city of Montreal did not possess in the present case. *Regina* v. *Terrier*, 21 C. L. T. 48, 10 Que. Q. B. 45.

Murder — Absence of direct evidence — *Corpus delicti*—Presumption of death—Crown counsel—Right of reply—Comment on failure of prisoner to testify—Crown case reserved New trial. *Rex* v. *Charles King* (N.W.T.), 1 W. L. R. 348, 576, 9 Can. Cr. Cas. 426.

Murder—*Attempt to murder — Preliminary investigation—Committal on charge other than that preferred—Indictment — Amendment — Proof of criminal intent — Judge's charge—Inference of guilt.*]—The magistrate who holds the preliminary investigation on a charge preferred against an accused person, may commit him on any other charge or charges disclosed by the evidence.—2. On the trial of a person accused of attempt to murder by shooting, evidence that he had burglar's tools in his possession at the time is admissible, as tending to prove criminal intent.—3. An indictment that "A. B. attempted to kill and murder C. D." sufficiently discloses an indictable offence, and the Court has the power to allow it to be amended so as to read that "A B. with intent to commit murder, shot at C. D."—4. It is lawful for the Judge, in charging the jury in a trial for an attempt to murder, to instruct them that they may draw an inference as to the prisoner's intent to kill from the circumstances of his being a stranger loitering in a street or park, between 4 and 5 o'clock in the morning, with a loaded revolver and burglar's tools in his possession. *Rex* v. *Mooney*, 15 Que. K. B. 57.

Murder — *Circumstantial evidence — Inferences—Jury—Misdirection — New trial.*]—On a trial for murder, where the evidence is circumstantial, and some of the material facts proved are of such a character that it is possible to draw from them inferences bearing either for or against the defence set up, it is the province of the jury to draw the inferences, and it is misdirection for which a new trial will be granted for the trial Judge to tell the jury that the only inferences that should be drawn are those tending to establish the guilt of the prisoner. *Rex* v. *Colline*, 3 L. R. 361, 38 N. B. R. 218.

Murder — *Constructive offence—Unlawful purpose—Common design—Evidence—Judge's charge—Finding of jury—Verdict—Mistrial.*]—The prisoner and two other men were in lawful custody in a cab, when loaded pistols were thrown in by an unknown person, and all three endeavoured to escape by using the pistols. In the struggle which ensued one of the constables in charge of the three men was shot and killed by one of the prisoners. The trial Judge told the jury that there was no evidence of common design up to the moment the pistols were thrown in, yet if at that moment, before the shot was fired that killed the constable, the three men resolved to escape from lawful custody, each was responsible for the acts of the other. The jury after some consideration asked the Judge to repeat his charge as to the resolution to escape, and he did so in different words. The jury did not agree as to whether the prisoner actually fired the shot which killed the constable, but found the prisoner guilty on what their foreman called the second "count," and their verdict was recorded with their consent as one of "guilty," with a clause added as to their inability to agree

as to whether the prisoner fired the shot:—*Held*, having regard to the evidence and s. 61 (2) of the Criminal Code, that the offence being murder in the actual perpetrator was murder in the prisoner, even if he were not the actual perpetrator. 2. That there was nothing in the charge nor in the subsequent instructions to the jury, both of which must be read together, of which the prisoner could properly complain. 3. That the finding of the jury was a proper one, and there was no mistrial. The foreman in speaking of "counts" was referring to the two branches of the case; but the verdict was that recorded and acknowledged. *Rex* v. *Rice*, 22 C. L. T. 225, 4 O. L. R. 223, 1 O. W. R. 399.

Murder — Conviction — Application for leave to appeal and to compel trial Judge to state a case—Limits of jurisdiction of Court of Appeal — Provisions of Criminal Code—Evidence for jury—Absence of misdirection and improper admission or rejection of evidence — Two prisoners tried together—Witness named on back of indictment not called by Crown, nor present in Court—Failure of Crown to procure attendance of all persons present at commission of act—Prejudice—Application to executive for new trial. *Rex* v. *Capelli*, 10 O. W. R. 443, 637.

Murder — *Conviction for — Application for reserved case.*]—Application under 8 and 9 Edw. VII. c. 9, by prisoner convicted of murder, to the trial Judge to reserve a case for the Court of Appeal. No objections had been made to the Judge's charge. It was suggested to prisoner's counsel that he would be heard *amicus curiae* on an application for a reserved case. Counsel then stated that it was not intended to submit any grounds; but an application would be made for executive clemency. The prisoner was sentenced to be hanged on 13th May, but was reprieved until 17th June. On 15th June an application was made under above statute to reserve a case for the Court of Appeal mainly on the ground that prisoner did not intend to kill his victim and that there had been a misdirection as to definition of murder and manslaughter:—*Held*, by the trial Judge, upon an application to him, to state a case for the consideration of the Court of Appeal, that the jury were properly charged that the prisoner's act could only be for an unlawful object, and *Rex* v. *Greenacre* (1837), 8 C. & P. 35, followed. It was not misdirection to charge the jury that, had one blow only been given, the jury might have found a verdict of manslaughter on the ground of provocation, but not where the blows were repeated after there had been time for the prisoner's passion to cool. Application refused. *R.* v. *Blythe* (1909), 14 O. W. R. 363, 19 O. L. R. 386. Application was made to trial Judge to grant stated case for argument in Court of Appeal on the question "should Judge at trial specifically instruct the jury to consider the state of intoxication of prisoner and if they thought his state of intoxication was such as to prevent him appreciating the nature and result of his acts they should not convict of murder, but of manslaughter?":—*Held*, that when a Judge sums up to a jury, he must not be taken to be inditing a treatise on the law. Application refused. *R.* v. *Meade* (1909), 1 K. B. 895, followed. *R.* v. *Blythe* (1909), 14 O. W. R. 634, 1 O. W. N. 17, 19 O. L. R. 386. On a motion for order directing trial Judge to submit a question as to the state of intoxication of prisoner for the opinion of the Court of Appeal, the question raised was fully argued and counsel agreed that the matter should be left to the Court as if argued on a stated case:—*Held*, that the conviction should be set aside and a new trial ordered. *R.* v. *Blythe* (1909), 14 O. W. R. 688, 1 O. W. N. 33, 19 O. L. R. 386, 15 Can. Crim. Cas. 224.

Murder — Evidence — Dying declaration —Admissibility — Abandonment of hope of recovery—Declaration not in deceased's own words—Sworn deposition not taken in presence of accused. *Rex* v. *Magyar* (N.W.T.), 4 W. L. R. 396.

Murder — *Evidence — Dying declaration —Indian woman—Hearsay evidence.*] — Before the death of an Indian woman, for whose murder the prisoner was being tried, a statement was obtained from her in the following way. A justice of the peace swore an Indian to interpret the statement the woman was about to make; a constable then asked questions through the interpreter, and a doctor wrote down what the interpreter said the woman's answers were. The doctor and the justice of the peace then signed the statement. To some of the questions the woman indicated her answers by nodding her head. At the trial the statement was tendered as a dying declaration, and the doctor, the justice of the peace, and the constable identified the statement; the interpreter deposed that he interpreted truly, but he gave no evidence as to what the woman really did say:—*Held*, disapproving *Regina* v. *Mitchell*, 17 Cox C. C. 503, that the statement was admissible as a dying declaration; also that it had been properly proved. An Indian woman's statement that she thinks she is going to die is a sufficient indication of such a settled hopeless expectation of immediate death as to render the statement admissible as a dying declaration. A dying declaration may be obtained by means of questions and answers, and if it is reduced to writing it is sufficient if the answers only appear in the writing. *Rex* v. *Louie*, 23 C. L. T. 274, 10 B. C. R. 1.

Murder — *Evidence — Judge's charge* — Misdirection — Nondirection — Insanity — Onus—Testimony of experts—Circumstances tending to reduce crime to manslaughter — Recalling jury — Remarks of Judge — Tendency to hurry jury — Recommendation to mercy — Executive clemency. *R.* v. *Henderson* (1910), 1 O. W. N. 1021.

Murder — Evidence — Misdirection — New trial. *Rex* v. *De Marco*, 7 O. W. R. 387.

Murder — *Evidence of guilt—Continued silence of prisoner—Story in witness box — Inference—Judge's charge—New trial —Evidence in rebuttal—Cumulative testimony.*]— The prisoner, who was tried and convicted of murder, although he had ample time and opportunity to tell all he knew concerning the crime both to the authorities and others, maintained a complete silence re-

specting it, with the exception of some bald assertions of his innocence, until he went upon the witness stand at the trial to give evidence on his own behalf, when he admitted being present at the doing of the deed, but charged it upon one G., a young companion, who was with him, and who, before and at the trial, had alleged the prisoner's guilt. The Judge, in charging the jury, told them that they were entitled to take this continued silence of the prisoner into consideration, and after deciding whether or not such silence proceeded from a consciousness of guilt and a desire to spring a defence upon the Crown, which it might not be able to meet, they might therefrom draw an inference as to his guilt or innocence. He further instructed them that this continued silence of the prisoner was an element that might assist them in determining the amount of credence that ought to be given by the story told by the prisoner in the witness box:—*Held*, that the charge was correct in both respects; and even if erroneous, as in the opinion of the Court no substantial wrong or miscarriage had been occasioned thereby, such error was cured by proviso (*f*) of s. 746 of the Code. The witness G., in the original case of the Crown, swore that the murder had been committed about three o'clock in the afternoon, and that he and the prisoner were back in the city about five o'clock. The prisoner swore that the crime was not committed until about five o'clock, and that the clocks were striking six when he and G. were coming back to the city. The Crown, by permission, then called a witness to contradict the prisoner as to the time of G.'s return to the city; and the Judge allowed the prisoner's counsel to put in a witness in reply:—*Held*, that the evidence so put in by the Crown was contradictory; and further, as it was in the discretion of the Judge in what order he would receive evidence, and as the prisoner had had the opportunity of replying, of which he had taken advantage, that a new trial on the ground that such evidence was cumulative should be refused. *Rex* v. *Higgins*, 36 N. B. R. 18.

Murder—*Illegitimate infant murdered by mother—Instigated thereto by father—Conviction—Stated case granted — Evidence — Questions as to admissibility of—Conviction affirmed.*]—One, Mary Dolan, murdered her illegitimate infant, being instigated thereto by defendant, the father. Both were found guilty and convicted of murder before Britton, J., who granted a stated case for opinion of Court of Appeal. The questions submitted were: Was evidence tending to shew the intimacy of prisoner with Mary Dolan, the facts relied on, extending over a period long prior to the birth of the infant, properly received, while evidence tending to shew the intimacy of Mary Dolan with other men, both before and immediately after the murder, was rejected, and should the Judge have told the jury that none of the facts offered as corroborative of Mary Dolan's statement were corroborative thereof?—Court of Appeal answered in the affirmative and confirmed the conviction. *R.* v. *McNulty* (1910), 17 O. W. R. 611, 2 O. W. N. 309.

Murder — *Indictment for — Evidence of convicted felon.*]—On an indictment for murder against the defendants, the evidence of one T., convicted of murder and under sentence of death, was tendered by the Crown. Witness held competent. *R.* v. *Hatch, Murray and Hatch*, 7 E. L. R. 502.

Murder — *Insanity — Uncontrollable impulse—Knowledge of nature of act—Criminal Code, s. 19.*]—The prisoner was charged with murdering his wife and two step-daughters. The defence was insanity. Dr. J., called for the defence, gave it as his opinion that the prisoner knew the nature and quality of the act, and that it was wrong; but that, "mentally unbalanced as he was, he might be seized with an uncontrollable impulse, and not to be able to restrain himself:" —*Held*, that the defence was not established. *Rex* v. *Creighton*, 14 Can. Crim. Cas. 349.

Murder — Judge's charge — Evidence — Misdirection—New trial. *Rex* v. *Paul*, 10 O. W. R. 946.

Murder — *Judge's charge — Murder or manslaughter—Benefit of doubt.*]—Where the Judge in a trial for murder concludes his charge thus.—"The verdict of the jury is generally resumed in a few words, in the solemn words of guilty or not guilty," he is not supposed to direct the jury to bring in but one of the two verdicts of guilty or not guilty of murder, if in other parts of his charge he has sufficiently pointed out the distinction between murder and manslaughter, and instructed them as to their duty to find whether the prisoner acted with or without intent to kill. Where the Judge considers that no doubt exists, he is not obliged to instruct the jury that the prisoner is entitled to any doubt they may entertain, such a course being more likely to impede than to assist them in the discharge of their duty. *Rex* v. *Fouquet*, 14 Que. K. B. 87.

Murder—*Judge's charge—No direction as to verdict of manslaughter — Necessity for giving where no evidence to reduce offence—Crown case reserved.*]—On the trial of the accused for the murder of his step-son, the witnesses for the Crown swore that the accused had pointed a revolver at his wife, and that thereupon the deceased, her son, intervened, asking the accused not to shoot, and that the accused thereupon deliberately turned and fired at the boy, wounding him from which wound he subsequently died. The accused swore that there had been no altercation previous to the shooting, that everything had been perfectly amicable, and that he had given the revolver to the deceased to shoot at some dogs, and that when he was handing it back it was accidentally discharged. He denied any provocation whatever, and swore that it was all an accident. The policeman who arrested the accused gave evidence as to a statement made by the accused that he had shot the boy, but that "I was so aggravated, I won't say crazy, at the time." This the accused absolutely denied. — The trial Judge charged in effect that there was under the evidence only one of two verdicts the jury could give, either guilty or not guilty of murder, and refused to charge that they might find the accused guilty of manslaughter. On the objection being

taken by the accused to the charge and the refusal of the Judge to charge as to manslaughter, a Crown case was reserved for the opinion of the Court *en banc*:—*Held*, that, in view of the denial by the accused of any provocation and of his statement that the shooting was purely accidental, the jury could not have found a verdict of manslaughter upon the evidence, and therefore the learned trial Judge was right in refusing to direct them as to the reduction of the charge to one of manslaughter. *Rex* v. *Barrett*, 1 Sask. L. R. 373; *S. C., sub nom. Rex* v. *Barre*, 8 W. L. R. 877.

Murder — Judge's charge — Withdrawal from consideration of jury of question whether evidence shews merely manslaughter—Crown case reserved — Criminal Code. *Rex* v. *Barre* (Sask.), 8 W. L. R. 877.

Murder — *Manslaughter — Definitions—Judge's charge—Failure to instruct jury—Failure to object to charge—New trial — Evidence—Rebuttal.*]—It is the duty of the Judge in a criminal trial with a jury to define to the jury the crime charged and to explain the difference between it and its cognate offences, if any,. Failure to so instruct the jury is good cause for granting a new trial, and the fact that counsel for the accused took no exception to the Judge's charge is immaterial. 2. After the cases for the Crown and defence were closed, the Crown called a witness in rebuttal, whose evidence changed by a few minutes the exact time of the crime as stated by the Crown's previous witnesses and which tended to weaken the alibi set up by the accused:—*Held*, that to allow the evidence was entirely in the discretion of the Judge, and there was no legal prejudice to the accused, as he was allowed an opportunity to cross-examine and meet the evidence. *Rex* v. *Wong On and Wong Gow*, 24 C. L. T. 384, 10 B. C. R. 555.

Murder—*Proof of corpus delicti—Identity—Right to reply by Crown counsel — Judge's charge — Comment upon prisoner's failure to give evidence—New trial.*]—On a charge of murder, the death of a human being having been once established, the identity of the deceased, and the fact that his death was caused by the prisoner, may be established by circumstantial evidence, which should, however, be cogent and convincing:—*Held*, Wetmore, J., *dissentiente*, that in this case the evidence of the identity of the deceased and of the prisoner's having caused his death was sufficient to warrant the prisoner's conviction.—The prosecution was conducted by the Crown prosecutor, having general instructions from the Department of Justice in all criminal cases, and particular instructions in this case:—*Held*, Wetmore, J., *dissentiente*, that, although no evidence was given on behalf of the deceased, the Crown prosecutor had the right to reply. *Rex* v. *Martin*, 5 O. W. R. 317, followed.—The Crown prosecutor in the course of his address to the jury referred to the fact that the prisoner might have given evidence on his own behalf, and expressed the opinion that "his counsel took the very best and wisest course in not having him go on the stand," adding, "I think it was wise for himself:"—*Held*, that the prisoner was entitled to a new trial, these remarks constituting an improper comment, by which substantial wrong and injustice was caused. *Rex* v. *King*, 6 Terr. L. R. 139, 1 W. L. R. 348.

Murder—*Procedure—Reading commission at opening of assizes—Act of provincial legislature dispensing with issue of commissions—Opening address of Crown counsel—Reference to incriminating evidence—Failure of Crown to sustain—Effect on jury—Substantial wrong or miscarriage—Incompetent interpreter—Trial allowed to proceed notwithstanding objection—Reception of evidence at stage when not admissible — Ante mortem statement of deceased—Address of Crown counsel in reply—Right to go beyond what is strictly in reply—Objection not taken at trial —Matter of practice—Right to take before Court of Appeal—Form of Crown case reserved.*]—Upon the trial and conviction of the prisoners for the murder of an Indian woman, certain questions of law were reserved by the trial Judge, under s. 1014 of the Criminal Code, for the opinion of the Court of Appeal:—1. By a British Columbia Act the issue of commissions of assize is dispensed with. It was conceded that this was *intra vires;* but it was contended that the reading of a commission at the opening of the Court was a necessary formality at common law, and was a practice in existence in British Columbia at the time of the Union, and could not be abrogated except by a Dominion statute, being a matter of practice and procedure in criminal cases:—*Held*, that the practice and procedure must adjust themselves to the conditions which are brought about by the lawful exercise of its authority by the provincial legislature; and therefore, when no commission of assize is necessary, the practice of reading a commission at the opening of an assize must fall by the wayside. — 2. The Attorney-General, in opening the case for the Crown, outlined evidence of the most damaging character against the accused, and pointed to blood-stained clothing of one of them, which had been brought into Court, but failed to prove his statements, the Crown witness whom he intended to call not being competent by reason of her being the wife of the prisoner referred to. The question reserved (or intended to be reserved), in regard to this was, whether it was non-direction or other error in law on the part of the trial Judge to omit to direct the jury that these matters were not in evidence and ought to be wholly disregarded in deciding the guilt or innocence of the accused:—*Held*, that the production in Court of the clothing, coupled with the declaration that the stains on them were stains of human blood, was calculated to have the most profound effect upon the jury; and a substantial wrong was done in not withdrawing them and clearly and explicitly warning the jury against being influenced by them; it was not a case of the wrongful admission of evidence, but it could not be treated as much less calculated to do substantial wrong to the accused than would be done by the actual admission of these statements in evidence; and on this ground the conviction should be quashed, and a new trial ordered. —Irving, J.A., dissenting.—*Quære, per* Macdonald, C.J.A., whether the omission to direct the jury was a question of law within the

meaning of s. 1014 of the Code.—*Per* Irving, J.A., that the proper inference was that the jury understood that the statement of the Attorney-General had been made under a misapprehension, and that the fact mentioned to them had been wholly withdrawn from their consideration; and, as no complaint was made by the prisoners' counsel at the trial, there could not be said to have been a substantial wrong or miscarriage.—3. At the trial, much of the testimony being given by Indians, an interpreter was sworn, who interpreted the statements of the witnesses to the Court. The interpreter was objected to by counsel for the prisoners on account of his bad character, and the trial Judge was not satisfied with the manner in which he performed his duties; but there was nothing to shew that the interpreter had dishonestly performed his duties, or had been guilty of misinterpretation of the evidence: — *Held*, Martin, J.A., dissenting, that no substantial wrong or miscarriage was occasioned by continuing the trial with this interpreter.—*Per* Martin, J.A., that the interpreter's incompetence rendered the trial an unfair one; and when that incompetence became apparent, the Judge should have stopped the trial; the fitness and capacity of the interpreter were for him alone to pass upon, and not for the jury.—4. A witness, A., when about to leave the box, was noticed by the trial Judge to be muttering; he asked the interpreter what she was saying; and this brought out a statement from the witness respecting something said by the deceased to the witness, tending to incriminate the prisoners, and which at that stage of the trial was not admissible.—*Held*, that, as the *ante-mortem* statement of the deceased made to A., which included the matter so improperly brought out, was afterwards admitted, no wrong or miscarriage had resulted therefrom.—5. *Held*, that the *ante-mortem* statement was properly admitted in evidence.—6. It was objected that the Attorney-General in his address to the jury in reply did not confine himself to matters proper to a reply, but discussed the case just as if he had addressed the jury first:—*Held*, that no substantial wrong was done to the accused.—*Semble*, *per* Macdonald, C.J.A., that, while it is now well established that in a proper case the Court will not refuse to grant a new trial in a case of felony because counsel for the defence did not take the objection at the trial, deliberate withholding of objection to something which might be remedied at the trial ought to be discountenanced; and, where the objection is one having reference to practice and procedure, failure to take it ought, unless in very exceptional circumstances, to be an answer to the objection when afterwards urged. —7. *Held*, that, looking at certain expressions used by the trial Judge in his charge to the jury, in the light of the whole charge, they were not misdirections. — *Per* Macdonald, C.J.A., that the case was not properly stated, consisting as it did of statement of facts divided into paragraphs, and no questions based on these facts; the Court was left to infer the question of law under each paragraph. *R.* v. *Walker & Chinley* (1910), 13 W. L. R. 47.

Murder — *Provocation — Self-defence—Intention—Intoxication of prisoner—Finding weapons in possession of prisoner—Circumstances to justify jury finding charge of manslaughter—Failure of jury to agree—Recalled by trial Judge—Remarks of trial Judge as to agreeing within short time—Strong recommendation to mercy—Trial Judge not governed by recommendation—Reserved case.*]—Prisoner was tried and convicted of murder. The trial Judge reserved a case for opinion of Court of Appeal as to his charge to the jury and the admissibility of certain evidence. Court of Appeal *held*, that the application was a last resort—a forlorn hope—and contained nothing to support it; that there was nothing objectionable in the Judge's charge to the jury nor in the evidence admitted at the trial. *R.* v. *Ventricini* (1910), 16 O. W. R. 547, 1 O. W. N. 961.

Murder—*Statement of accused made to police officer when in custody — Ability of foreigner to understand the effect of answers to questions put to him by police officer—Admissibility — Second trial — Jury — Additional panel summoned before first panel exhausted—Practice.*]—Where a prisoner under arrest for assault and robbery was warned that he need not answer, but if he did answer what he said might be used against him in evidence, is sufficient warning although he was not told that he would be charged with murder, and a confession so obtained is admissible on a charge of murder. *R.* v. *Rossi* (1910), 8 E. L. R. 595.

Murder—*Verdict of "guilty"—Application to trial Judge after death sentence for a reserved case.*]—An application on behalf of a prisoner under sentence of death for a reserved case was refused, the grounds of the application being whether or not the trial Judge was right in statements made in his charge and comments on the evidence. *Rex* v. *Swyrda*, 13 O. W. R. 468, 15 Can. Cr. Cas. 138.

Murder—*Weight of evidence—Motion for new trial—Circumstantial evidence — Identity.*]—The deceased was murdered, according to the only eye-witness (a girl of about 8 years), by a dark man with a fat face, dressed in brown trousers, in the seat of which were two rents. He also had on a black shirt with white stripes, and a dark coat. The prisoner had been seen in the vicinity of the murder, within 1,000 feet of the place, some 20 or 30 minutes previously. His dress corresponded with the shirt, coat, and trousers mentioned, in addition to which he wore a stiff, black hat. A knife, sworn to as having been in the prisoner's possession three days before, was found on the afternoon of the murder, still wet with blood, a few feet from the murdered woman's body. When arrested three days later, the prisoner was without the dark shirt:—*Held*, refusing an application for a new trial, that the jury was justified on the evidence in coupling the prisoner with the crime.—In a criminal, as in a civil case, on an application for a new trial on the ground that the verdict is against the weight of evidence, the Court will be governed by a consideration of whether the evidence was such that the jury, viewing the whole of the evidence reasonably, could not properly find a verdict of guilty. — While, under the criminal law, the accused person is not called upon to explain suspicious cir-

cumstances, there may yet come a time when, circumstantial evidence having enveloped him in a strong network of inculpatory facts, he is bound to make some explanation or stand condemned. *Rex* v. *Jenkins*, 14 B. C. R. 61, 9 W. L. R. 405, 14 Can. Crim. Cas. 221.

Neglect to provide necessaries for wife—*Code, s. 242 (2)—Acquittal on previous charge — Evidence prior to previous acquittal — Admissibility of — Prisoner discharged.*]—Criminal Code, s. 242 (2), provides that "Every one who is under a legal duty to provide necessaries for his wife, is criminally responsible for omitting, without lawful excuse so to do, if the death of his wife is caused, or if her life is endangered, or her health is or is likely to be permanently injured, by such omission."—Court of Appeal *held*, that not every case of neglect or omission to provide necessaries for a wife renders the husband criminally responsible:—That the jury must be satisfied that the omission was without lawful excuse:—That the question of lawful excuse is to be determined upon all the facts and circumstances, the onus being upon the Crown:—That defendant's evidence as to his liability and means are matters for the consideration of the jury:—That, where defendant had been previously charged with an offence under above section, and acquitted, evidence as to what took place previous to his acquittal should not be received at a subsequent trial for another charge. *R.* v. *Yuman* (1910), 17 O. W. R. 859, 2 O. W. R. 392, O. L. R. , Can. Cr. Cas.

Nuisance—*Indictment against railway for maintaining — Findings of jury—Guilty on one count—Disagreement on remaining counts —New trial ordered — Application to postpone—Granted on terms and undertakings—Case stated for opinion of Court of Appeal —Sentence deferred.*]—Defendants were indicted for common nuisance. The jury gave a verdict of guilty on the count as to overcrowding, but failed to agree on the five other counts. Riddell, J., accepted the verdict, discharged the jury, and ordered a new trial on the five other counts, to take place the following Monday, pursuant to powers given him under ss. 858, 960, of the Code. Defendants moved to postpone the trial, based upon an affidavit that it would be impossible to get necessary witnesses and upon the ground of inconvenience.—Riddell, J., *held*, that there was nothing to shew that defendants' witnesses would be more available at any time other than the one appointed, but on defendants giving an undertaking to make a careful experiment in good faith with a view to increasing the accommodation by modifying the routes, etc., and an undertaking to open other lines so as to relieve the congestion and to adopt such devices as might prove successful, the further trial would be postponed until the next sittings at Toronto for the trial of criminal cases.—Defendants moved for a stated case to be argued before the Court of Appeal.—Riddell, J., granted the application, setting out the facts and the law in question involved in the case. Sentence deferred until Court of Appeal gives opinion. *R.* v. *Toronto Rw. Co.* (1911), 18 O. W. R. 104, 2 O. W. N. 681, 753.

Nuisance — *Indictment of electric railway company—Endangering lives of public —Negligent operation of cars—Want of proper appliances—Fenders—Cars running reversely.*] — Case reserved by Chairman of the General Sessions of the Peace for the county of York, upon an indictment and conviction of defendants for a nuisance, consisting in the negligent operation of the cars, without proper appliances, etc., so as to endanger the lives and safety of His Majesty's subjects, etc. It was alleged that defendants were authorised to operate a street railway on certain streets in the city of Toronto, and in doing so were under a legal duty to take reasonable care and precaution to avoid endangering the lives and safety of the public, but without reasonable excuse neglected to take such precautions and did thereby endanger the lives and safety of the public and thereby committed a common nuisance. It was shewn that at one end of a double tracked street that there was used what is called a "Y," and the cars were backed on a single track for about a quarter of a mile. There was no fender, headlight, nor gong used while backing this distance, which made it very confusing to persons crossing the street to tell which way the cars were going. Elizabeth Ward, in attempting to cross the street in the dark, was knocked down and killed by a car backing up this track:—*Held*, defendants were properly convicted, it being a common nuisance either at common law or under s. 191 and the first part of s. 192 of the Code. *Rex* v. *Toronto Rw. Co.*, 4 O. W. R. 277, 5 O. W. R. 621, 10 O. L. R. 26.

Nuisance—Indictment of electric railway company—Endangering safety of public — Removal from Sessions into High Court—Difficult questions of law—Delay of trial. *Rex* v. *Toronto Rw. Co.*, 8 O. W. R. 441.

Nuisance — Indictment of railway company—Carrying dangerous explosives—Fatal injuries to persons — Board of Railway Commissioners—Plea of guilty — Punishment — Mitigating circumstances—Imposition of fine. *Rex* v. *Michigan Central R. R. Co.*, 10 O. W. R. 660.

Nuisance — *Railway—Crossing—Neglect to safeguard—Order of Railway Committee for protection of street crossing against two railways—Charge of failure to comply therewith—Joint indictment — Validity.*] — The Railway Committee of the Privy Council of Canada, upon the application of a city, in order to provide protection at a place where a street was crossed by the tracks of two railways, ordered and directed that the two railway companies should, within a specified time, properly plank between their said tracks, and also provide gates and watchmen thereat, and should thereafter maintain and protect the said crossing:—*Held*, that a joint indictment against the two companies for the failure to place gates and a watchman at the crossing, would not lie; and therefore there was no jurisdiction in the Court of General Sessions of the Peace to try such an indictment, and a conviction made at the Sessions against the two companies was quashed.—The effect of ss. 165, 221, and 247 of the Criminal Code, and ss. 33, 427, and 431 of the Railway Act, considered. *Rex* v. *Grand Trunk Rw. Co. & Can. Pac. Rw. Co.*, 17 O. L. R. 601, 12 O. W. R. 975, 8 Can. Rw. Cas. 453.

Obscene matters — *Moving picture theatres—Prize fighting—Cr. Code 207; 8 & 9 Edw. VII. c. 9 (c).*]—That to constitute "obscene" in moving pictures, according to s. 207 (a) Crim. Code, there must be an exhibition of unchaste or lustful ideas which tend to corrupt those who are present and whose minds are open to such immoral influences.—In present case, pictures of Jeffries-Johnson fight, while disgraceful, contain nothing which can corrupt morals. *R.* v. *L'Heureux* (1910), 17 R. L. n. s. 32.

Obstructing distress—*Onus on Crown to prove legality of distress—Criminal Code, s. 144 (2).*]—Section 144 (2) of the Criminal Code, enacts that everyone is guilty of an offence . . . who resists or wilfully obstructs any person . . . in making any lawful distress:—*Held*, that it devolves on the prosecution under this seection to prove the existence of all the ingredients which go to make up the offence, one of which is the legality of the distress, as for example, in this case, that there was rent in arrear. It was necessary therefore for the Crown to shew that rent was due and in arrear. *Rex* v. *Harron*, 24 C. L. T. 10, 6 O. L. R. 668, 2 O. W. R. 903.

Obstructing divine service — *Indictment—Proof of lawful authority—Ownership of church building.*]—1. An indictment, under s. 171 of the Criminal Code, for unlawfully obstructing or preventing a clergyman or minister, by threats or force, in or from celebrating divine service or otherwise officiating in any church, chapel, &c., is sufficient without allegation that the clergyman or minister obstructed was, at the time of the offence, in lawful charge of the church, chapel, &c. 2. To support a prosecution under that section, however, it must be proved at the trial that the clergyman or minister obstructed was, at the time of the alleged offence, either the lawful incuhbent of the church or was holding service with the permission of the lawful authorities of the church. 3. A church building erected by a congregation of one religious body remains the property of those who adhere to that body, although a majority of the congregation afterwards decides to join another or religious body, and assumes to appoint a clergyman or priest to hold services in the church, and those who are opposed to such appointment may lawfully prevent or obstruct the person so appointed from officiating in the church. *Rex* v. *Wasyl Kapij*, 15 Man. L. R. 110, 1 W. L. R. 130.

Obstructing highway — Nuisance — Form of indictment. *Rex* v. *Reynolds*, 2 E. L. R. 42.

Obstructing officer—*Seizure of chattel —Conditional sale.*]—The retaking of possession of a chattel by the vendors thereof under the provisions of a conditional sale agreement, is not a seizure within the meaning of the Criminal Code, s. 144, s.-s. 2 (*b*), so as to subject the purchaser of the chattel, who in good faith disputes the right to retake it, to the penalty prescribed in that sub-section. *Rex* v. *Shand*, 24 C. L. T. 125, 7 O. L. R. 190, 3 O. W. R. 293.

Obstruction of highway — Conviction for—Weight of evidence—New trial—Direction to jury—Proof of original survey—Onus. *Rex* v. *Moyer*, 1 O. W. R. 780.

Obstruction of officer of law—*Bailiff —Executing writ of replevin—County Court —Absence of jurisdiction.*]—Section 204 of the County Courts Act, R. S. M. c. 33, does not authorise the issue of a writ of replevin out of the County Court of any County Court division except that in which the goods to be replevied are situate. For the construction of the provision in that section as to the Court out of which the writ is to issue, it is proper to look at the prior enactments of which that section is a revision; and in that light the words "otherwise ordered" should be held to apply only to an order changing the place of trial and not to give power to order the issue of the writ out of the Court for any County Court division other than that in which the goods to be replevied are situate. An order of a County Court Judge for the issue of a writ of replevin out of such other County Court, and the writ issued thereunder, are wholly *ultra vires* and void, and afford no protection to the officer attempting to execute the writ: and the owner of the goods described in the writ cannot be convicted under s. 144 of the Criminal Code, 1892, for unlawfully obstructing or resisting the officer in the execution of his duty, because he by force prevented the bailiff from taking the goods under the writ. *Morse* v. *James*, Willes 122, followed. *Parsons* v. *Lloyd*, 2 W. Bl. 845, and *Collett* v. *Foster*, 2 H. & N. 360, distinguished. *Rex* v. *Finlay*, 21 C. L. T. 419, 13 Man. L. R. 383.

Obstruction of street—*Offence against municipal by-law — Free use of streets — Vehicles—Foot passengers—Street not completely obstructed—Interpretation of by-law.*] —On a case stated by a police magistrate, it was held that the street was practically all occupied by defendants and others so as to cause an obstruction within the meaning of the by-law. The question of whether the free use of the streets meant all portions of them is academic. *Re Bettsworth*, 11 W. L. R. 649.

Offence against city by-law—*Arrest by peace officer without warrant—Action for assault and false imprisonment.*]—The defendant was a police constable in a city: without a warrant he arrested the plaintiff for a breach of a by-law of the city, and the plaintiff brought this action for assault and false imprisonment:—*Held*, that the direction to the jury that the defendant had a right without a warrant to arrest the plaintiff if he found him committing a breach of a city by-law, was erroneous; and a verdict for the defendant founded thereon was set aside.—The power of a constable to make arrests without warrant depends either on the common law or on statute. At common law he may arrest a person whom he finds committing a felony, misdemeanour, or breach of the peace, or whom on reasonable grounds he suspects of having committed a felony; and by the Criminal Code, s. 648, he may arrest any person whom he finds committing a criminal offence. But neither at common law nor by statute is there any authority for

arresting a person without warrant found committing a breach of a city by-law. Section 35 of the Criminal Code protects a constable only in cases in which he is authorised to make an arrest.—*Held*, also, that, there being nothing in the by-law which authorised the defendant to arrest the plaintiff, the defendant was not acting under its provisions, and was not protected by s. 404 of the City Act.—*Held*, also, *per* Lamont, J., that the direction given to the jury that the plaintiff, while the conviction against him remained unreversed, was estopped from setting up that he was not guilty of that offence, was right.—*Per* Lamont, J., also, that the provincial legislature had power to authorise arrest without a warrant for breach of a provincial statute, and, as that power had not been exercised, the right to arrest did not exist. *Plested* v. *McLeod* (1910), 15 W. L. R. 533. Sask. L. R.

Omission to provide necessaries for wife—*Provision by others—Injury to health—Necessity for proof of—Criminal Code.*]—Under s. 210, s-s. (2), of the Criminal Code, which deals with the non-support of a wife by a husband when a legal duty exists on the husband's part to provide necessaries for his wife, the criminal responsibility for the omission to do so only arises when it is proved either that her death has been caused or her life endangered, or her health is permanently injured or likely to be, by such omission. Where, therefore, the husband was convicted on the charge of having "unlawfully omitted, without lawful excuse, to supply his wife and child with the necessaries of life, whereby the health of each of them became, and was and is likely to become permanently injured," and the evidence shewed that the wife and child were living with the wife's mother, who supplied all her needs:—*Held*, that the charge was not sustained, and the conviction was quashed. *Rex* v. *Wilkes*, 12 O. L. R. 264, 7 O. W. R. 854.

Omission to provide necessaries of life — *Criminal Code, ss. 209, 210, 211 — Master and servant—Head of family—Medical aid—Permanent injury to health.*]—The accused had been placed in charge of a child of 12 under agreement with Dr. Barnardo's Homes. The boy's toes were frozen, and after more than three weeks without medical attendance it became necessary to amputate them:—*Held*, that the relation of the accused to the boy was not that of parent, guardian, or head of a family, under s. 209 of the Criminal Code, 1892.—*Held*, further, that, in the absence of medical evidence as to its effect, the loss of the toes could not be taken to be, or to be likely to cause permanent injury to health. *Regina* v. *Coventry*, 3 Terr. L. R. 95.

Ownership — *Evidence—Depositions of witness at preliminary inquiry.*]—*Held*, Rouleau, J., dissenting, upon a Crown case reserved after a conviction for theft, that the production of the steer's hide with the prosecutor's brand and earmarks only upon it, and the evidence of the prosecutor that he had owned and had never parted with the steer from which the hide had come, were sufficient to justify the trial Judge in finding that the steer in question was the property of the prosecutor. (Sec. 63 & 64 V. c. 46, s. 707 A. and 1 Edw. VII. c. 42, s. 707 A.):—*Held, per curiam*, that evidence that a witness at the preliminary inquiry was a corporal in the N. W. M. Police, that he had been sworn in as a member of Strathcona's Horse, that he had left the post at which he had been stationed to join the latter force, and that, in the opinion of the deponent, if he had left the latter force he would have returned to such post, which fact would thereupon have become known to the deponent, was sufficient evidence of the absence of such witness from Canada to justify the admission as evidence at the trial of the deposition of such witness taken at the preliminary inquiry; and that the question was one to be decided by the trial Judge. *Regina* v. *Forsythe*, 4 Terr. L. R. 398.

Perjury — *Absence of formal record.*]—The defendant had been convicted by a police magistrate and sentenced to pay a fine for perjury alleged to have been committed at a former trial before the same magistrate, when the defendant had been acquitted on a charge of theft. On a reserve case the Court of Appeal held that the information was sufficient, that the present conviction was bad because there was no legal evidence of the former trial and the magistrate had no right to import into the present trial anything which had occurred at the previous trial. There is no authority in the Criminal Code to impose a fine on a conviction of perjury. *Rex* v. *Legros*, 17 O. L. R. 425, 12 O. W. R. 983, 14 Can. Crim. Cas. 161.

Perjury—*Affidavit in pending civil cause—Several charges—Duty to consider affidavit as to whole—Charge not in information—Consent—Literally true statement — Crown case reserved—Form of.*]—The defendant was convicted in a County Judge's Criminal Court on several charges of perjury, alleged to have been committed in connection with an affidavit sworn to in a cause pending in the Supreme Court. One of the charges was not contained in the information in the magistrate's Court, but was preferred by the Crown prosecutor, before the Judge of the County Court, without the latter having in any way expressed his consent to the preferring of the charge as required by the Code, s. 773. Another charge was that defendant falsely swore that a sum of money was not received by him, whereas it was received by the firm of which the defendant was a member. There was no allegation that the defendant, knowing that the money had been received, corruptly swore, etc., and the statement as sworn to appeared to have been literally true:—*Held*, that both convictions were bad, and must be set aside. — *Held*, also, that the different allegations being contained in the one affidavit, the Judge was wrong in considering each charge separately, without reference to the other allegations in the affidavit, and that he was bound to weigh the statements as a whole in arriving at a conclusion as to the guilt or innocence of the prisoner.—*Held*, also, that it was not competent for the Judge to submit a question as to whether there was legal evidence to sustain the conviction, and send up the evidence for review, but that he must state the effect of the evidence to support a certain charge and reserve the question as to its sufficiency

in point of law:—*Semble*, that the charge of perjury should not have been brought during the pendency of the civil action in the Supreme Court. *Rex* v. *Cohn*, 36 N. S. R. 240.

Perjury—*Attempt to incite—Bail — Recognisance—Jurisdiction of justice of the peace—Criminal Code.*]—A defendant charged with offering money to a person to swear that A., B., or C. gave him a certain sum of money to vote for a candidate at an election, was admitted to bail and the recognisances taken by one justice of the peace:—*Held*, that the offence was not an attempt to commit the crime of subornation of perjury, but something less, being an incitement to give false evidence or particular evidence regardless of its truth or falsehood, and was a misdemeanour at common law, and that the recognisance was properly taken by one justice, who had power to admit the accused to bail at common law, and that s. 601 of the Code did not apply. The common law jurisdiction as to crime is still operative notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the later law. *Rex* v. *Cole*, 22 C. L. T. 132, 3 O. L. R. 389, 1 O. W. R. 117.

Perjury — *Criminal Code, ss. 170, 171 (2)—"Judicial proceeding" — Cross-examination on affidavit—Absence of registrar.*]—Where an order had been made in a proceeding under the Guardian's Appointment Act for cross-examination on an affidavit:—*Held*, that the judicial proceeding ended when the registrar left the room in which the cross-examination was being held after swearing the witness, leaving the official stenographer to take the cross-examination in shorthand. *Rex* v. *Rulofson*, 14 B. C. R. 79, 8 W. L. R. 197, 14 Can. Crim. Cas. 253.

Perjury — *Defendant acquitted — Stated case at instance of Crown as to authority of acting Crown timber agent to receive oaths —Crown Timber Act, ss. 11, 15 — Public Lands Act, s. 44—Interpretation Act, s. 7 (20).*]—Court of Appeal *held*, that, an acting Crown timber agent, not being a commissioner, notary or justice of the peace, has no authority to administer an oath to a clerk of a lumber company, who signs a return as required by R. S. O. 1897, c. 32. *R.* v. *Johnston* (1910), 17 O. W. R. 78, 2 O. W. N. 106.

Perjury — *Evidence of clerk and stenographer—Proof of proceedings in which offence committed—Record book — Imperfect proof—New trial—Substantial wrong or miscarriage.*]—Crown case reserved by the chairman of the General Sessions of the Peace for the County of Brant. The prisoner was convicted for perjury. The only evidence was that of the Clerk of Assize, who swore the prisoner was called as a witness at a certain trial; and that as Clerk of Assize he had sworn the prisoner on said trial, and he produced his record book which he kept as Clerk of Assize, in which he had entered as a witness sworn on said trial the name of the prisoner, whom he identified as a witness who had been sworn by him; and that of the Court stenographer as to the evidence the prisoner had given at the said trial:—*Held*, the law had simplified the proof in such cases under s. 691 of the Criminal Code, viz., "A certificate containing the substance and effect only of the indictment and trial for any offence, purporting to be signed by the Clerk of the Court or other officer having the custody of the records of the Court where the indictment was tried, would be sufficient proof of the crime for which the prisoner was tried. This was absent and the conviction was not according to law, since the crime was not legally proved. The saving clause (s. 746 of the Code that the conviction ought not to be set aside as no wrong or miscarriage had been done in the mistake), which was invoked by the Crown, did not apply and the conviction was reversed and a new trial granted. *Rex* v. *Drummond*, 6 O. W. R. 211, 10 O. L. R. 546.

Perjury — False declaration — Marriage laws—Lawful hindrance—Marriage with infant — Consent of father. *Rex* v. *Moraes* (B.C.), 5 W. L. R. 285.

Perjury — *Indictment — Intent to deceive—Criminal Code, s. 852 — Lord's Day Act—C. S. U. C. c. 104, s. 3—Perjury in Police Court—Jurisdiction of magistrate — Absence of information—"Judicial proceeding"—Criminal Code, s. 171—Evidence—Record of trial.*]—The indictment contained in substance a statement that the accused committed the indictable offence of perjury in a judicial proceeding:—*Held*, that it complied with the requirements of s. 852 of the Criminal Code, and was not bad because it did not allege that the accused committed perjury with intent to deceive.—2. The statute C. S. U. C. c. 104, s. 3, is in force in Ontario.—*Attorney-General for Ontario* v. *Hamilton Street Ry. Co.*, [1903] A. C. 524, followed. —3. The accused was arrested by a police constable, and brought before a police magistrate, when a charge of gambling with dice on the Lord's day was laid against him. So far as appeared, no information was laid, but the constable had a warrant, which he read to the accused. The latter made no objection to the manner in which he had been brought before the magistrate or in which the charge had been laid; his trial was proceeded with, and in testifying on his own behalf he committed the perjuries for which he was indicted:—*Held*, that the magistrate had jurisdiction, and the accused gave his evidence in a judicial proceeding, within the meaning of s. 171 of the Code.—4. There being no information or other formal record, the charge and the proceedings thereon, so far as material, were proved in the only way in which they were capable of being proved, *i.e.*, by the oral evidence of the magistrate and his clerk, each speaking with the aid of his notes taken at the trial, which was the best evidence possible in the circumstances, and therefore sufficient. *Rex* v. *Drummond*, 10 O. L. R. 546, distinguished. *Rex* v. *Yaldon*, 12 O. W. R. 384, 17 O. L. R. 179.

Perjury — *Information — Sufficiency of —Perjury committed on prior trial—Production of record—Expression and demeanour of witnesses and accused on both trials—Magistrate's decision based on.*]—An information, after setting out the time and place, charged that the prisoner "did unlawfully commit

perjury at the Court of . . police magistrate, on his trial for theft, by swearing to the effect that he had been authorised, either verbally or by letter, by . . . the Crown timber agent, to take possession of certain poles on the farm of D., and that none of the poles taken by him were the poles cut by D." The charge for theft, as well as that for perjury, came before the same police magistrate, and both were tried by him summarily. On the latter trial—when the prisoner was convicted of perjury—no record of the prior trial was produced or proved. The decision of the police magistrate on the charge for perjury, as stated by him, was not based altogether on the evidence, but to a greater or less degree on the expression and demeanour of the witnesses, and especially of the accused on both trials. On a case reserved, submitting questions as to the above for the opinion of the Court:—*Held*, 1. That the information was sufficient, the offence of perjury being sufficiently charged under s. 174 of the Criminal Code, form 64 being complied with, and all averments declared by s. 682 to be unnecessary, omitted. — 2. That whether the property alleged to be taken was under or above $10, under ss. 772, 778, and ss. 777, 782-3, a formal record of the trial for theft was essential, and should have been produced and proved, and the omission to do so invalidated the conviction.—3. That the police magistrate should have been guided by the evidence before him on the trial for perjury, and on that alone.—Meredith, J.A., declined to answer the second question and dissented as to the answer to the third question.—The conviction was quashed and the prisoner discharged. *Rex* v. *Legros*, 17 O. L. R. 425, 12 O. W. R. 983.

Perjury — "Judicial proceeding"—Criminal Code, ss. 170, 171 (2). *Rex* v. *Rulofson*, 9 W. L. R. 197.

Perjury—*Judicial proceeding—De facto tribunal—Jurisdiction.*]—An information under R. S. Q. Art. 5551, for trespass upon lands in the county of Huntingdon, in the district of Beauharnois, was laid, heard, and decided before the recorder of Valleyfield, an *ex officio* justice of the peace within the whole district, but who did not reside in the county where the offence was charged to have been committed, and was, therefore, without jurisdiction to hear the case, as R. S. Q., Art. 5561, provides that such offences shall be cognizable only by a justice or justices resident within the county where the offence has been committed:—*Held*, affirming the judgment in 11 Que. K. B. 477, that the hearing of said charge by the recorder, acting as a justice of the peace having power to hear it, was a judicial proceeding within the meaning of s. 145 of the Criminal Code, and that the appellant was rightly convicted for perjury committed by him upon such hearing, notwithstanding that the recorder had no jurisdiction over the subject matter of the complaint. *Drew* v. *Rex*, 23 C. L. T. 148, 33 S. C. R. 228.

Perjury—*Offence committed on examination for discovery in civil action—Judicial proceeding—Postponement of trial until determination of action.*]—The accused, having been charged with perjury committed on his examination for discovery before the registrar in a civil suit, elected to take speedy trial. On his election, his counsel took the objection that perjury could not be assigned on examination for discovery:—*Held*, that, as every statement made upon oath by the person examined during his examination for discovery, forms part of his evidence at the trial, it is evidence given in a judicial proceeding within the meaning of s. 145 of the Criminal Code.—Discretion of Court exercised by refusal to hear charge of perjury while civil proceedings are pending. *Rex* v. *Thickens*, 12 B. C. R. 223, 4 W. L. R. 454.

Perjury — *Reserved case — Evidence — Police Court record.*] — A reserved case stated: "I withdrew the case from the jury and discharged the prisoner on the ground that the Crown had failed to produce sufficient evidence by not producing any record of the hearing or the result thereof in the Police Court, where the perjury was alleged to have been committed." The question stated for the consideration of the Court of Appeal was: "Was I right in withdrawing the case from the jury on the above grounds?" —*Held*, that the question should be answered in the affirmative, Meredith, J.A., dissenting. *R.* v. *Drummond* (1905), 10 O. L. R. 546; *R.* v. *Le Gros* (1908), 17 O. L. R. 425, and *R.* v. *Dillon* (1877), 14 Cox C. C. 4, followed. *R.* v. *Farrell* (1910), 15 O. W. R. 15, 20 O. L. R. 182, 15 Can. Crim. Cas. 283.

Perjury — *Statutory declaration — Statutory form not followed—Jurat—Criminal Code, ss. 174, 175, 1002—Want of corroboration.*]—The second count charges the accused with committing perjury with the intent to procure the conviction of B. for an offence punishable with imprisonment for life, under s. 174 above. This charge failed for want of corroboration. The accused had made what was intended to be the ordinary statutory declaration. From this the words "knowing that it is" had been omitted. Then the officer before whom the declaration was made asked declarant "do you declare it is true," the accused saying, "I do."—*Held*, that accused not guilty of perjury as a solemn declaration is not made unless declarant reads over to the officer the statutory form or unless the officer reads that form to the declarant. *Rex* v. *Phillips*, 9 W. L. R. 634, 14 Can. Crim. Cas. 239.

Perjury before magistrate—*Evidence—Proof of what occurred before magistrate—Depositions—Oral evidence—Admissibility—Preliminary hearing—Omission of magistrate to sign depositions—Affidavit—Criminal Code, s. 683—Irregularity—Motion to quash indictment—Sufficiency of depositions to support commitment.*]—Upon the trial of the defendant for perjury alleged to have been committed upon a preliminary inquiry before a magistrate into a criminal charge laid by the defendant, parol evidence was admitted to shew what the prisoner had said on oath before the magistrate, although the prisoner's deposition as taken down by the magistrate was already in evidence:—*Held*, that, where a deposition is regularly taken down in writing, and is available, the writing is the best evidence of what purports to be, viz., the whole evidence of the witness on that

occasion. The written deposition must, therefore, be produced, or its non-production properly accounted for. If it be produced and put in evidence, then parol evidence is admissible to prove statements of the witness made on that occasion not appearing in the written deposition.—*Regina* v. *Christopher* (1850), 1 Den. C. C. 536, and *Regina* v. *Coll* (1899) L. R. 24 Ir. 535, followed.—The depositions taken by the magistrate upon the preliminary inquiry into the charge of perjury preferred against the defendant were taken down in shorthand and certified by the stenographer, but the magistrate omitted to sign them, and there was no affidavit by the stenographer, as required by s. 683 of the Criminal Code:—*Held*, not a mere irregularity, and not a ground for quashing the indictment:—*Held*, also, that the depositions supported the commitment for trial, if it were necessary to shew that in a case where the accused was being tried only on the charge on which he was committed. *R.* v. *Prosiloski* (1910), 13 W. L. R. 298, 15 B. C. R. 29, 11 Can. Cr. Cas. 139.

Personation and perjury — *Acquittal on indictment for personation at election—Subsequent indictment for perjury in taking oath of identification—Validity of plea of "autrefois acquit"—Right to acquittal at common law—Res judicata—Nemo bis vexari.*]—The prisoner was indicted at the assizes for having applied for and voted on a ballot in another person's name at a Dominion election, on which charge he was acquitted. He was subsequently indicted and convicted for perjury in having, on the same occasion, taken the oath of identity:—*Held*, that the offences were distinct; the personation being complete under s. 114 of the Dominion Election Act, 1900, when he applied for the ballot; while the perjury, which was an offence under the Criminal Code, was not committed until, on being challenged, he took the false oath; and therefore, a plea of *autrefois acquit* could not be set up as an answer to the subsequent indictment:—*Held*, however, Osler, J.A., and Teetzel, J., dissenting, that he had a good defence at common law—which was reserved to him under s. 7 of the Code—for the identity of the person committing the offence was essential in both indictments, and the acquittal on the first indictment being a finding on that question, it was *res judicata*, and could not be again raised on the perjury charge. *Rex* v. *Quinn*, 11 O. L. R. 242, 6 O. W. R. 1011.

Personation of voter—"Referendum"—Ontario Liquor Act, 1902 — Sentence — Police magistrate—Judicial discretion—Right of appeal—Mandamus—Status of applicant—Informant. *Re Denison, Rex* v. *Case*, 6 O. L. R. 104, 2 O. W. R. 152, 512.

Pocket-picking — *Evidence.*] — The prisoner was summarily tried and convicted of having stolen a pocket book containing money from the person of one Mrs. D.—The evidence shewed that Mrs. D. entered the grounds of an exhibition with a large number of people, and having in her pocket a purse containing the money mentioned; that she stopped in a crowd to watch something that attracted her attention; that there was a commotion in the crowd, during which the prisoner pushed her or was pushed against her; that just as this occurred a police constable saw the prisoner putting his hand in a fold of her dress which he took to be the situation of her pocket; that the purse was shortly afterwards missed, and the prisoner, being arrested after an interval, had upon him money in notes and silver, some of which were of the denominations of the money in Mrs. D.'s purse, but none of which could be identified as having been hers.—*Held*, that upon such evidence a jury should have been directed to acquit the prisoner. The evidence did not raise more than a mere suspicion against the prisoner and was not sufficient in law to warrant a conviction.—Conviction quashed. *Regina* v. *Winslow*, 20 C. L. T. 24, 12 Man. L. R. 649.

Polygamy—*Indian marriage.*] — An Indian who according to the marriage customs of his tribe takes two women at the same time as his wives and cohabits with them, is guilty of an offence under s. 278 of the Criminal Code. *Regina* v. *"Bear's Shin Bone,"* 4 Terr. L. R. 173.

Possession of counterfeit coin — *Guilty knowledge.*]—It is essential to prove that the coins offered in evidence of guilty knowledge on an accusation of having counterfeit coins in one's possession, are themselves counterfeit. *Regina* v. *Benham*, 8 Que. Q. B. 448.

"Post letter"—*Letter handed to postman.*]—Within the meaning of 52 V. c. 20, s. 2 (D.), a letter handed to a postman, in the post office itself, is a letter *"confée à la poste"* (post letter), and where the postman steals such letter he may be convicted under s. 326 (c) of the Criminal Code. *Rex* v. *Trépanier*, 10 Que. K. B. 222.

Prize-fighting — *What constitutes.*] — The defendants advertised a boxing exhibition, which was held in a public hall, and was accompanied by all the particulars and circumstances of a prize-fight. Complainant submitted that the accused came within the provisions of the statute; and on behalf of the defendants it was contended that the encounter was merely a scientific boxing parade, and moreover, a sham fight not forbidden by law:—*Held*, that, as the proof adduced established that the encounter in question was accompanied by all the circumstances and elements which constitute a prize-fight, the defendants committed an infraction of the law, Criminal Code, ss. 92-95, for which they must be found guilty. *Steele* v. *Maher*, 19 Que. S. C. 392.

Procuring personation — Liquor Act, 1902—Ontario Elections Act — Conviction. *Rex* v. *Coulter*, 6 O. L. R. 114, 2 O. W. R. 523.

Public slander.]—Slandering a person in a public restaurant is not an offence under s. 207 of the Criminal Code. *Mercier* v. *Plamondon*, 20 Que. S. C. 288.

Pursuing business for gain on Sunday—*Place of amusement—Quebec Sunday Observance Act — Conviction — Right of appeal.*]—The defendant was convicted by a

Judge of the Sessions of the Peace for a violation of the Quebec statute respecting the observance of Sunday, 7 Edw. VII. c. 42, and appealed to the Court of King's Bench from his conviction:—*Held*, that the appeal lay under Part XV. of the Criminal Code, s. 706, combined with s. 16 of the Dominion Lord's Day Act, having the effect of conferring the right of appeal.—2. That the defendant, the owner of a moving picture show, by keeping his premises open on Sunday and charging an admission fee, pursued his business or calling for gain on Sunday in contravention of s. 2 of the Quebec statute. *Rex* v. *Ouimet* (Que.), 14 Can. Crim. Cas. 136.

Rape—*Aiding and assisting—Evidence—Right of prosecutrix, but not of companion, to refuse to answer as to specific act of unchastity—Finding of no substantial wrong or miscarriage.*]—On the trial of an indictment for aiding and abetting the commission of rape, the evidence shewed that, prior to the commission of the offence, the prosecutrix and one B. had been together all the evening, and early in the morning were for some time together in a room in an hotel with the door closed and the gas turned out. On leaving the hotel they were met by the prisoner and another man, who attacked B. and caused him to leave, whereupon the offence was committed. The prosecutrix and B. were called as witnesses for the Crown, and on cross-examination were questioned as to what took place in the room, which they refused to answer:—*Held*, that while the prosecutor could properly be asked the question as going to her credit, she was not bound to answer; but that it was different as to B., for not only did it go to his credit, but its effect might be to shew a favourable tendency to the prosecutrix as his mistress, and an unfavourable one to the prisoner who had assisted in taking her away from him; but it appearing that no substantial wrong or miscarriage was occasioned thereby, applying clause (*f*) of s. 746 of the Criminal Code, a conviction was affirmed. *Rex* v. *Finnessey*, 11 O. L. R. 338, 7 O. W. R. 383.

Rape — Attempt to commit—Failure of Crown to shew that prosecutrix not wife of prisoner—Objection—Leave to appeal. *Rex* v. *Mullen*, 5 O. W. R. 451.

Rape — *Criminal Code — Indictment — Negativing exception — Amendment — Objection.*]—The defendant was indicted and convicted for rape committed upon the person of W., "a girl under the age of 14 years, to wit, of the age of 8 years." Application was made to the trial Judge on behalf of the prisoner to reserve a case for the opinion of the Court, on the ground that it was not alleged in the indictment that the person upon whom the offence was committed was not the wife of the prisoner. This having been refused:—*Held*, that the expression in the Code, s. 266, "not being his wife," is an exception, and, if it required to be stated in the indictment and negatived, the defect could have been remedied by the Judge by an amendment under s. 723 (2), and that the defendant's counsel was obliged to take the objection before pleading to the indictment under s. 629, and not having done so it was not open to him to take it subsequently. *Rex* v. *Wright*, 39 N. S. R. 103.

Rape — *Evidence — Complaint — Elicitation.*]—Where the complainant makes a statement to a third person, not in the presence of the accused, it may be given in evidence upon his trial for rape, provided it is shewn to have been made at the first opportunity which reasonably offered itself after the commission of the offence, and has not been elicited by questions of a leading and inducing or intimidating kind. *Rex* v. *Spuzzum*, 12 B. C. R. 201, 12 Can. Cr. Cas. 287.

Rape — *Evidence — Complaint — Particulars of—Interval — Civil action—Relations with accused after offence.*]—1. On a trial for rape, the fact that the injured person made a complaint and the particulars or details of the complaint are admissible as evidence in chief for the prosecutor to confirm the testimony of the injured person and disprove consent on her part; and among the particulars the name of the person whom she accused of the offence may be stated.—2. While the injured person should make her complaint as soon as possible after the commission of the offence, yet no specific time for such complaint being fixed by law, evidence may be admitted of a complaint made by her to her mother seven days after the offence; but the jury may and should weigh the interval which elapsed before complaint was made, when considering the probability of its truth. —3. Evidence that civil suits for damages based on the alleged commission of rape, have been instituted by the tutor of the injured person (a minor) on her behalf, and also by her mother, may be excluded as irrelevant on the trial for rape, unless it be first proved that the injured person and her mother had stated, or let it be inferred, that the accused was innocent of the offence charged, and that they had appeared to be desirous of extorting money from him. In such case, the fact that civil actions had been instituted would be corroborative evidence. Judgment in 9 Que. Q. B. 147, confirmed.—4. Evidence that the accused and the injured person were on friendly terms after the commission of the alleged offence, and that she angrily resented the interference of her mother when the latter wished to put an end to such intimacy, should have been admitted, such evidence being important to enable the jury to judge whether or not there was consent on the part of the person injured. Judgment in 9 Que. Q. B. 147, reversed. *Rex* v. *Riendeau*, 10 Que. K. B. 584.

Rape—*Evidence of penetration — Complaint made in answer to questions—Admissibility.*]—The accused was tried and convicted of rape, upon the evidence of the complainant and of her husband and another man, to whom she had narrated the circumstances. The evidence of the complainant was to the effect that the accused had put her upon a bed, holding her so that she could not move, had raised her clothes and "entered her," and that she had resisted to the uttermost of her strength. She then went to a neighbour's and had something to eat, and in the course of the meal mentioned that the accused had been to her house. The neighbour then asked "if Dunning had been too

free with her," and she thereupon narrated the circumstances of the alleged rape. The neighbour then went, after some time, for the husband, and when he came he asked "if Dunning had hurt her," and she then made her complaint. It was objected that there was no sufficient evidence of penetration, and that the complaints were inadmissible as being in answer to questions:—*Held*, that the evidence of penetration was sufficient to warrant the case being left to the jury.—2. That the complaints, being made in answer to questions of a leading and suggestive nature, were inadmissible as evidence. *Rex* v. *Dunning*, 1 Sask. L. R. 291, 7 W. L. R. 857, 14 Can. Cr. Cas. 461.

Rape — *Indictment — Admissibility of evidence — Conversation between the complainant and her mother — Reservation of question of admissibility — Appeal from Judge's refusal to reserve—S.-s. 3, s. 1014, Criminal Code.*]—On trial of prisoner for rape, conversations between complainant and her mother, shortly after committal of offence, admitted as evidence. It is too late, on argument of stated case, to urge that such evidence only goes to shew consistency in complainant's conduct and corroboration of her credibility. *Rex* v. *Cassidy*, 7 E. L. R. 216.

Rape — *Indictment for — Jury returned verdict of common assault—Competency of finding—Unchastity of complainant—Denial by complainant—Right of trial Judge to admit evidence of—New trial.*]—Court of Appeal *held*, (1) that a jury may find a verdict of common assault on an indictment for rape; (2) that evidence of unchastity of complainant should not have been admitted by the trial Judge. *R.* v. *Muma* (1910), 17 O. W. R. 265, 2 O. W. N. 176.

Rape — *Joint indictment—Separate trials Canada Evidence Act, 1893, s. 4—Applicability to person not on trial — "Person charged"—Right of Judge to comment on his not giving evidence.*]—The prisoner and one F. were jointly indicted, and a true bill found against them. It was ordered that the prisoner should be tried separately and apart from F., as to whom the indictment was traversed to another sittings. At the trial of the prisoner the presiding Judge commented on the fact that F. was not called as a witness:—*Held*, that F. was not a person charged under s. 4 of the Canada Evidence Act, 1893, 56 V. c. 31 (D.), for that section only referred to the person actually on trial; F. was a competent witness, but his competency did not depend on this Act, and therefore the Judge had the right to comment as he did. *Regina* v. *Payne*, L. R. 1 C. C. R. 340, and *Regina* v. *Gosselin*, 33 S. C. R. 340, and *Regina* v. *Gosselin*, 33 S. C. R. 255, commented on. *Rex* v. *Blais*, 11 O. L. R. 345, 7 O. W. R. 380, 10 Can. Cr Cas. 354.

Rape — *Verdict of "guilty" — Judge's charge—Exclusion of consideration of minor offence — Misdirection—New trial.*]—If the Judge allows the indictment to go generally to the jury, it is not competent for him to withdraw from their consideration a verdict for any lesser offence which may be included in the indictment. And upon an indictment for rape, where the charge was calculated to lead the jury to believe that if they failed to find the accused guilty of rape they would fall short of their plain duty, and a verdict of "guilty of rape" was returned, a new trial was directed. *Rex* v. *Scherf*, 8 W. L. R. 219, 13 B. C. R. 407.

Receiving stolen goods — *Acquittal of accused on charge of theft—Autrefois acquit —Indictment—Mention of name of thief—Surplusage.*]—A charge of theft does not impliedly include that of receiving stolen goods. An accused who is acquitted of theft remains subject to the accusation of receiving, and cannot, by reason of his acquittal, set up the defence of *autrefois acquit*.—2. Upon a charge against H. G. of receiving a sum of money stolen by J. S., the public prosecutor is not bound first to establish the offence of the thief thus designated. The mention of his name in the indictment for receiving is surplusage, and is no obstacle to the conviction of the receiver by the application of s. 849 of the Criminal Code. *Rex* v. *Groulx*, 19 Que. K. B. 118.

Receiving stolen goods — *Conviction by justices—Omission of scienter — Habeas corpus—Certiorari—Criminal Code, s. 791—Jurisdiction of Supreme Court of Saskatchewan.*]—Defendant was charged before two justices of the peace with having received stolen property. "Knowing same to have been stolen" was omitted from information. He pleaded guilty and was sentenced to imprisonment and fined.—*Held*, that the conviction was bad; that *certiorari* should go, and that the Court has jurisdiction. *Rex* v. *Leschinski*, 9 W. L. R. 602.

Receiving stolen goods — *Conviction for—Charge of theft.*]—Under s. 713 of the Criminal Code, a conviction for receiving stolen goods cannot be sustained where the charge was housebreaking accompanied with theft. *Regina* v. *Lamoureux*, 21 C. L. T. 49, 10 Que. Q. B. 15.

Receiving stolen property — *Indictment for — Prior conviction for stealing — Right to inspect information and depositions.*]—By s. 11 of R. S. O. 1897 c. 324, "a person affected by any record in any Court in this province, whether it concerns the King or other person, shall be entitled, upon payment of the proper fee, to search and examine the same, and to have an exemplification and a certified copy thereof made and delivered to him by the proper officer." The applicant was committed for trial at the Sessions upon three charges of receiving cattle stolen from C. and two other persons, knowing them to have been stolen. At the previous Sessions three persons were convicted of having stolen cattle from C., one of whom and two others were also convicted at the same Sessions of having stolen cattle from S. No charge was pending against the applicant of having received cattle stolen from S.:—*Held*, that in such cases the question is whether the applicant would be affected by the records which he sought to examine, and that, while he might be so affected as regards the cattle stolen from C., and so entitled to the inspection asked for, he was not as regards those stolen from S. *Re Chantler*

& Clerk of Peace of Middlesex, 24 C. L. T. 355, 8 O. L. R. 111, 3 O. W. R. 761.

Reserved case — *Manslaughter.*] — The prisoner was tried for manslaughter and convicted; before verdict a reserved case was asked for. The trial Judge charged that the evidence of the first witness was wholly uncontradicted, and that the prisoner's witnesses had failed to contradict as his counsel had expected:—*Held*, not to be commenting on defendant's failure to testify. *R.* v. *Guerin* (1909), 14 O. W. R. 5, 18 O. L. R. 425.

Resisting bailiff — Distress for rent — Necessity for proof of rent in arrear—Lawful distress—Rescue before impounding. *Rex* v. *Harron*, 2 O. W. R. 903.

Resisting distress — *School taxes — Evidence—Notices—Canada Evidence Act—"Proceeding."*]—On the trial of an accused on a charge of having unlawfully resisted and wilfully obstructed an official trustee of a school district in making a lawful distress and seizure, the production of the tax and assessment rolls of such school district, with entries thereon of the dates of the mailing of the notice of assessment, and of the tax notice to the accused, and of the posting of such tax roll, initialled with what purports to be the initials of the official trustee of such school district, is evidence of the mailing of such notices and of the posting of such tax roll. Such prosecution is a "proceeding" within the meaning of s. 2 of the Canada Evidence Act, 1893. *Rex* v. *Rapay*, 5 Terr. L. R. 367.

Resisting peace officer—Arrest for disorderly conduct in "public place"—Licensed theatre and refreshment bar—Punishment. *Rex* v. *Kearney and Denning* (Y.T.), 6 W. L. R. 140.

Retaining stolen property — *Recent possession — Presumption — Onus.*] — Property stolen on the night of the 3rd December was found on the afternoon of the 4th in the possession of the accused, who failed to give a satisfactory account of how they came by it:—*Held*, that recent possession of stolen property, in the circumstances, raised a presumption which, when not rebutted, warranted a conviction of the accused for unlawfully retaining in their possession stolen property. *R.* v. *Lum Man Bow & Hong* (1910), 13 W. L. R. 345.

Sale of diseased animal—*Animals Contagious Diseases Act — Conviction — Scienter—Evidence.*]—Section 7 of the Animals Contagious Diseases Act, 1903, provides "that every person who sells . . . any animal affected by or labouring under an infectious or contagious disease . . . shall for such offence incur a penalty not exceeding $200:"—*Held*, that knowledge on the part of the defendant that the animal sold was diseased was not necessary to make him liable to conviction. *Betts* v. *Armstead*, 20 Q. B. D. 771, and *Pain* v. *Boughtwood*, 24 Q. B. D. 353, referred to. Objections to evidence discussed. *Rex* v. *Perras*, 6 Terr L. R. 58.

Seduction—Female under age of 21 years —Criminal Code, s. 212—Promise of marriage made as inducement to girl's consent —Crown case reserved. *Rex* v. *Romans*, 4 E. L. R. 426.

Seduction—*"Under promise of marriage" — Direction to jury — Mistrial — New trial.*] — The words "under promise of marriage" in 50 & 51 V. c. 48, s. 2, substituting a new section for R. S. C. c. 157, s. 4 (Criminal Code, s. 182), signify "by means of a promise of marriage." Where therefore the trial Judge directed the jury that the intention of the section was to impose a punishment for the seducing of young women under 21 by men over 21 to whom they were engaged, and the jury rendered a special verdict as follows: "The verdict is that the prisoner promised to marry F. S. in June, 1892, with the intention of carrying out his promise, but in November of the same year he seduced her, at the same time renewing his promise of marriage, and in our opinion no other man had connection with her:—*Held*, that there had been a misdirection and therefore a mistrial; and a new trial was ordered. *Regina* v. *Walker*, 1 Terr. L. R. 482.

Seduction of female under promise of marriage—*Meaning of "previous chaste character"—Sufficiency of promise of marriage.*]—The words "previously chaste character" as used in s. 182 of the Criminal Code, 1892, do not mean previous reputation for chastity but mean those acts and that disposition of mind by which the morals of an unmarried woman may be judged; and therefore, when an unmarried woman under the age of twenty-one years, who, previous to the date of the seduction under promise of marriage in respect of which the charge is laid, has had illicit sexual intercourse with the accused, she cannot be said to be of "previously chaste character" unless between the date of such illicit intercourse and the seduction complained of there is evidence of reform and self-rehabilitation in chastity. *Rex* v. *Lougheed*, 6 Terr. L. R. 77.

Seduction of girl under 16—Evidence — Corroboration — Acquittal — Appeal by Crown—New trial—Criminal Code, s. 746. *Rex* v. *Burr*, 8 O. W. R. 703.

Seduction of girl under 16—*Evidence — Corroboration — Functions of Judge and jury.*]—In a prosecution under the Criminal Code, s. 181, for the seduction of a girl under 16, in addition to the evidence of the girl, evidence was given by other witnesses to the following effect:—That the accused and the girl were found in a house alone; that he was then leaving sheep (which were in his charge) unattended and refused to go with the witness to go where the sheep were; that before he was charged with any offence he stated to the witness "that he had been advised if he could get the girl away and marry her, he would escape punishment:"—*Held*, that the girl was corroborated in some material particulars by evidence implicating the accused, within the intention of the Criminal Code, s. 684.—*Semble*, that the fact that the accused, in giving evidence on his own behalf, stated that he had first had connection with the girl at a date after she had reached 16, while one of the witnesses for the prosecu-

tion stated that the accused, two months before that date, had admitted with reference to the girl that he had "got there," might, though this admission was made after the girl had reached 16, be taken into consideration with the other facts as tending to implicate the accused. Whether there is any corroborative testimony is a question for the Judge, but if there is any such testimony, the sufficiency of it, and the weight to be given it, is for the jury, unless of course the corroboration is so slight that it ought not to be left to the jury at all. *Regina* v. *Wyse*, 2 Terr. L. R. 103.

Seduction of girl under 16—*Offence committed on named date—Election of prisoner to be tried summarily—Amendment to a prior date—Right of—Further election of prisoner.*]—A prisoner was indicted before a County Court Judge charged under s. 181 of the Criminal Code, with having on the 9th January, 1905, seduced a girl of or above the age of 14 and under that of 16, of, as alleged, previously chaste character, upon which he elected, under s. 767 of the Code, to be tried summarily, but, on the evidence disclosing a connection with her six days previously at another place, the charge was amended by setting up the offence as having been committed on such prior date; and, without giving the prisoner the right of electing whether or not he would be tried summarily on such amended charge, he was tried thereon and convicted:—*Held*, that the conviction could not be supported, for the offence could only be supported once, namely, on the first occasion on which the connection took place, so that the date was material to the charge, and while an amendment could be made substituting the prior date, which was in effect preferring a new charge based on a different transaction, the prisoner should have been given the opportunity of electing under s. 767 how he would be tried thereon. *Rex* v. *Lacelle*, 11 O. L. R. 74, 6 O. W. R. 911.

Selling beverage in bottle with name of another on it — *Unregistered name—Criminal Code, s. 449 (b).*]—Defendant, a ginger ale and soda water manufacturer, filled four bottles having another like manufacturer's name permanently affixed thereon, and placed them upon the market for the purpose of sale. Defendant was convicted therefor under Criminal Code, s. 449 (b), which enacts that "Every one is guilty of an indictable offence who, (b) being a manufacturer, dealer, or trader, or a bottler, without the written consent of such person, trades or traffics in any bottle or siphon which has upon it the duly registered trade mark or name of another person, or fills such bottle or siphon with any beverage for the purpose of sale or trade. Defendant pleaded name not duly registered. Plea admitted:—*Held*, it was not necessary that such name should be registered as a trade mark, the object of the legislation evidently being to prevent, as far as possible, the easy commission of a fraud of that kind. In the French version of the Code the words are "*la marque de commerce dument enregistrée ou le nom d'une autre personne*," which more plainly indicate that the words "duly registered" are confined to the trade mark and do not apply to the name: s.-s. 2 of s. 449 supports this construction. *Rex* v. *Irvine*, 5 O. W. R. 352, 9 O. L. R. 389.

Selling crude opium for other than medicinal purposes—*7-8 Edw. VII. c. 50, s. 1—Code, s. 717.*]—Where a drug clerk, contrary to instructions, sold crude opium for other than medicinal purposes:—*Held*, the master could not be convicted of the offence under 7-8 Edw. VII. c. 50, s. 1. Defendants having admitted keeping the crude opium for sale to Chinese:—*Held*, that that was sufficient evidence to support a conviction for keeping crude opium for sale for other than medicinal purposes. Section 717 of the Criminal Code only applies to convictions under Part XV. (Summary Convictions). *R.* v. *A. & N.* (1909), 15 O. W. R. 339, 16 Can. Cr. Cas. 381.

Selling intoxicating liquor to railway employees—*Offence created by both provincial and Dominion Acts—Information under Ontario Act—Non-applicability to employees of Dominion railway company—Knowledge by barkeeper of the employees being such.*] — Where statutes have been passed by the Dominion Parliament and provincial legislature prohibiting an act, and an information is laid charging as an offence the commission of the prohibited act "contrary to the statute in such case made and provided," such information must be held, in the absence of a specific reference to the particular statute, to have been laid under that statute in which words are used to describe the elements of the offence.—An information charged that the defendant at, etc., did sell, give, or barter spirituous or intoxicating liquors to a conductor and engineer on the Grand Trunk Railway, while actually employed in the course of their duty in connection with the operation of a train; and that such liquor was supplied by the defendant's barkeeper contrary to the form of the statute, following the wording of the Ontario Railway Act, 6 Edw. VII. c. 30:—*Held*, that the offence must be deemed to be one under the Ontario Act, and not under s. 414 of the Dominion Railway Act; and as, by s. 3 of the Ontario Act, such Act is restricted to railways within the jurisdiction of the Ontario legislature, and the Grand Trunk Railway is under the jurisdiction of the Dominion Parliament, a magistrate's conviction of the defendant for the alleged offence could not be supported.—*Semble*, that the fact of the men not being in uniform, and not known to the barkeeper to be railway employees, would not exculpate the defendant. *Rex* v. *Treanor*, 18 O. L. R. 194, 12 O. W. R. 1175.

Selling liquor to Indian—Conviction—Appeal—Notice of—Rehearing on new evidence—Unsatisfactory testimony — Quashing conviction. *Rex* v. *Russell* (N.W.T.), 4 W. L. R. 16.

Selling liquor to Indian—Conviction—Indian Act—Criminal Code — Warrant of commitment—Description of offence—Award of costs—Person to whom payable—Sentence —Term—Hard labour — Jurisdiction of Indian agent—Costs of distress and conveying to gaol—Amendment. *Rex* v. *Gow* (B.C.), 3 W. L. R. 308.

Selling lottery ticket—*Criminal Code, ss. 236 (b), 852 — Statement of offence in charge— Description of in popular language.*] —Defendant was tried on a charge of unlawfully selling lottery tickets:—*Held*, that this is a popular and short way of stating the facts constituting the offence under s. 236 (*b*) above. Defendant convicted. *Rex* v. *Ying Foy*, 11 W. L. R. 246.

Selling newspapers containing racing information—*Two days after races were run—Conviction by police magistrate—Offence under Criminal Code, s. 235 (f), as amended by 9 & 10 Edw. VII. (D.), c. 10, s. 3—Stated case—Evidence.*]—Court of Appeal *held*, that there was no evidence to support conviction. Conviction quashed and defendant discharged. *R.* v. *Luttrell* (1911), 18 O. W. R. 659, 2 O. W. N. 729.

Selling obscene books and pictures—*Conviction by magistrate — Admissions—Criminal Code—Habeas corpus—Absence of scienter.*] — Application by defendant upon return of *habeas corpus* for his discharge from custody under a commitment issued pursuant to a conviction of a police magistrate of Toronto for selling obscene books:—*Held*, (1) that magistrate justified in finding that sale took place in Canada, and there being no evidence offered by defendant to the contrary; (2) that the prosecution need not prove that a confession was free and voluntary before evidence thereof admitted; (3) that a confession is sufficient to warrant a conviction; (4) there is nothing to shew that the charge was not reduced to writing; (5) that by looking at the books before the trial the magistrate did not necessarily prejudge the case; (6) that as scienter not alleged in the information, it saying "did contrary to law sell," the conviction is bad unless it be amended, which was done; (7) that the warrant is bad, scienter not having been alleged. Case adjourned to allow a new warrant to warden of Central Prison, prisoner to be detained meantime. *Rex* v. *Graf*, 13 O. W. R. 943. Application by defendant upon return of a *habeas corpus* for his discharge from custody under a commitment pursuant to a conviction by a police magistrate for selling obscene books and pictures:—*Held*, that the question where the sale took place was solely for the magistrate. *Rex* v. *Graf*, 13 O. W. R. 1133. A proper warrant having been lodged with warden of Central Prison, further argument heard for prisoner's discharge. — *Held*, that a police magistrate has power to amend a conviction. Since conviction valid, the Judge may allow a formal commitment to be lodged, prisoner being meanwhile detained. Application dismissed. *Rex* v. *Graf*, 13 O. W. R. 1133, 19 O. L. R. 238, 15 Can. Crim. Cas. 193.

Shooting with intent—*Justification — Questions for jury—Misdirection.*]—The defendant, who was employed as watchman and special constable, was in the act of arresting P. for committing a disturbance, when he received a blow from behind which cut his head. Turning, he saw M. immediately behind him, and, supposing him to be the person by whom the blow was struck, tried to arrest him. M. ran away, followed by the defendant, who had in his hand a small stick. Near the station of which the defendant was in charge, this stick was wrested from him by E. P., who had followed with a number of others, and, in the disturbance which followed, during which, according to the defendant, one of the persons present raised a stick in a menacing manner and threatened to smash his brains out, the defendant drew a revolver, and fired two shots, one of which struck E. P.:—*Held*, setting aside the conviction of the defendant for shooting with intent to do grievous bodily harm, that it was misdirection on the part of the trial Judge to charge the jury that there was no concerted attack upon the defendant, and no assault at the time the shots were fired, that the assault was over, and that those present were not within striking distance, these being questions for the jury. The assault upon the defendant having been admittedly committed without provocation, the questions for the jury were: (1) whether the defendant had any intention of causing grievous bodily harm, and if not, (2) whether he used any more force than was necessary:—*Held*, further, that, under the Code, s. 45, defendant being justified if the force used by him was not meant to cause death or grievous bodily harm, or was no more than was necessary for the purposes of self-defence, and there being evidence which, if believed, would have enabled the jury to find for the defendant, the trial Judge erred in charging the jury that there must be evidence that the defendant could not otherwise preserve himself from death or grievous bodily harm. *Rex* v. *Ritter*, 36 N. S. R. 417.

Smuggling.]—When a person is charged with the offence of participating in smuggling operations, by being on board a boat engaged therein, the onus is on the Crown to prove accused had been "knowingly concerned" in the prohibited acts. "If he has been knowingly concerned," contained in the Customs Act, R. S. C. (1906), c. 48, s. 216, is a condition precedent to the completion of the offence, not merely an exemption, exception or proviso, not necessary to be alleged under s. 717 Cr. Code, as amended 1909. Prisoner having pleaded guilty to a charge not alleging that he had been "knowingly concerned," a warrant of commitment was made out in like terms.—*Held*, prisoner was entitled to his discharge upon a *habeas corpus* as the warrant was insufficient. *R.* v. *McDonald*, 8 E. L. R. 489, 16 Can. Cr. Cas. 505.

Statutory offence—*Grand Trunk Railway—Act of incorporation—Breach of provisions—Tariff of fares—Third class carriages—Conviction of officer—Offence of company—Criminal Code.*]—The defendant, who was second vice-president and general manager of the Grand Trunk Railway Company, was convicted by a police magistrate under s. 138 of the Criminal Code of an offence against s. 3 of 16 V. c. 37 (C.), on the following findings: that the company had not during the year 1906 fixed or issued a tariff of fares or charges, payable by each third class passenger by any train on said railway for each mile travelled; that the company had not during that time permitted a third class passenger to travel by any train on said railway at the fare or charge of one penny currency for

each mile travelled; and that the said company had not, during that time, provided that at least one train having in it third class carriages should run each day to . . . from . . . being part of the said railway:—*Held*, that the conviction of the defendant for the omissions of the company was bad.—*Held*, also, that in any event the operation of s. 138 of the Criminal Code was in this case excluded by the existence of a penalty for the offence under s. 294 of the Railway Act, 1903. *Rex* v. *Hays*, 9 O. W. R. 488, 14 O. L. R. 201.

Stealing trees — *Value — Offence punishable on summary conviction—Jurisdiction of Court of King's Bench—Quashing indictment.*]—The stealing of trees of the value of $25 being declared an indictable offence by s. 336 of the Criminal Code, and the stealing the whole or any part of any tree, etc., of the value of $0.25 at least being declared an offence punishable on summary conviction only, by s. 337, it follows by necessary implication, from the combination of the two sections, that the stealing of trees of the value of $14, is an offence punishable on summary conviction only, and is not an indictable offence cognizable by the Court of King's Bench.—2. In the absence of a special enactment, the Court of King's Bench has no concurrent jurisdiction to try offences punishable on summary conviction.—3. An indictment setting forth an offence which is not indictable will be quashed on motion to that effect. *Rex* v. *Beauvais*, 14 Que. K. B. 498.

Stocks—*Broker.*]—A broker, who merely acts as such for two parties, one a buyer and the other a seller, without having any pecuniary interest in the transaction beyond his fixed commission, and without any guilty knowledge on his part of the intention of the contracting parties to gamble in stocks or merchandise, is not liable to prosecution under s. 201 (*a*) and (*b*) of the Criminal Code of Canada, nor as accessory under s. 61. *Regina* v. *Dowd*, 17 Que. S. C. 67.

Summary trial — *Excessive penalty — Amendment—Discharge—Further detention.*]—The defendant was prosecuted for stealing $5 in money, the property of one J. M., contrary to the form of the statute, etc., and the charge was heard and determined in a summary way by a police magistrate:—*Held*, that the prosecution fell under s. 783 (*a*) of the Criminal Code, the value of the property being less than $10, and it not being charged that the offence was "stealing from the person;" and therefore s. 787 applied, and the magistrate had no power to impose a penalty of imprisonment for longer than six months. —The provisions of the Code respecting amendments to summary convictions do not apply to summary trials; and the provisions of s. 800 do not apply where the same infirmity is found in the conviction as in the commitment. — The conviction and commitment were bad for imposing an unauthorised penalty; the defendant was entitled to be discharged upon *habeas corpus;* and an order should not be made under s. 752 for his further detention. *Regina* v. *Randolph*, 20 C. L. T. 439, 32 O. R. 212.

Sunday observance — *Remedy under a statute and remedy under a municipal by-law respecting the same offence — Plea of autrefois convict.*]—A person condemned to pay a fine by the Recorder's Court, by virtue of a municipal by-law, for having on Sunday kept a theatre open to which an entrance fee was charged, may also be summoned for the same offence, by virtue of the law, whether federal or provincial, respecting the observance of Sunday, and a plea to the second charge of *autrefois convict* will not be entertained. *Lepage* v. *Robitaille* (1910), 16 R. de J. 251.

Sunday observance—*Sale of cigar by druggist—R. S. C. (1906), c. 153, ss. 5, 12 (b)—Conviction by magistrate quashed.*]—It is not an offence under R. S. C. (1906), c. 153, s. 5, to sell tobacco on Sunday. Tobacco is a drug, within the meaning of R. S. c. (1906), c. 153, s. 12 (*b*), it being frequently prescribed by physicians in the form of a smoke. *R.* v. *Lee* (1910), 17 O. W. R. 550.

Overruled by Middleton, J.

Theft—Accessory—Principal not indicted —Receiving stolen goods — Crown case reserved—Leave to appeal—Practice. *Rex* v. *Groulx*, 5 E. L. R. 450.

Theft—*Assault—Retaking money paid—Direction to jury.*] — Where the prisoner acted in the *bona fide* belief that he had been swindled, and, in the belief that he was entitled to retake the money, committed an assault for that purpose alone, and did retake the money, or a portion of it, in that sole and *bona fide* belief, the jury, on consideration of the facts, would be justified in acquitting him on a charge of robbery, although it was open to them, on the same facts, to convict for assault. *Rex* v. *Ford & Armstrong*, 13 B. C. R. 109.

Theft—*Breach of trust—Intent—Conversion.*]—A minor intrusted by his tutor with chattel property of which he is part owner, who fraudulently converts it to his own use, with intent to deprive his tutor of it, is guilty of theft. *Guillet* v. *Rex*, 14 Que. K. B. 385.

Theft—Conductor of train taking money from passengers and allowing free transportation—Jurisdiction of justices—Conviction—Suspended sentence—Costs. *Rex* v. *McLennan* (N.W.T.), 2 W. L. R. 227.

Theft—*Conversion — Misdirection.*]—The mere fact of a person converting to his own use goods found by him does not of itself as a matter of law make him guilty of theft. Where, on the trial of a charge of theft, the jury after retiring asked the question: "Does raising a temporary loan on anything found constitute theft?" the Judge answered "Yes:"—*Held*, that the answer was equivalent to a direction that as a matter of law the accused was guilty, and was a misdirection. *Regina* v. *Slavin*, 35 N. B. R. 388.

Theft—Discharge of accused at preliminary inquiry—Subsequent committal by same magistrates—Indictment — Validity—Dispo-

sitions at first inquiry not before grand jury. *Rex* v. *Hannay* (B.C.), 2 W. L. R. 543.

Theft—*Evidence—Onus.*] — On a charge of theft of goods from a store, evidence of the finding in the prisoner's house of the goods and of keys fitting the store doors, and of the fact that the goods were in the store exposed for sale at the time of the alleged theft and had not been sold, is sufficient to put the onus upon the prisoner of accounting for his possession. In such circumstances, it is not necessary for the Crown to prove that the goods had not passed from the possession of the owners by some means other than sale. *Rex* v. *Theriault*, 11 B. C. R. 117.

Theft — Evidence of former offence — Acquittal—Judge's charge. *Rex* v. *Menard*, 2 O. W. R. 900.

Theft—*False pretences—Count added at trial—Speedy trial—Powers of County Court Judge — Election of accused — Evidence to support conviction.*]—The accused was tried by a County Court Judge upon an indictment containing two counts, the first for theft, and the second for obtaining money under false pretences. The accused was committed for trial only on the charge contained in the first count, the charge contained in the second count having been before the committing magistrate but having been withdrawn by the complainant:—*Held*, that the Judge had the right, under the Criminal Code, as amended in 1909, to add the second count.—*Held*, also, that the accused had elected to be tried by the Judge on both charges.—*Held*, also, that there was evidence to support a conviction on the second count—the Judge was justified in drawing the inference that the accused was a party to a transaction which was admittedly fraudulent. *R.* v. *Stickler* (1910), 13 W. L. R. 316.

Theft—Fraudulent conversion of moneys—Criminal Code, s. 355—Distributive charges—Trial and conviction on one charge—Subsequent arraignment — Pleas of *autrefois acquit* and *autrefois convict*—Reserved case. *Rex* v. *Cross* (N.S.), 6 E. L. R. 414, 14 Can. Crim. Cas. 171.

Theft—*Grain subject to chattel mortgage—Conversion by mortgagor—Special property of mortgagee in grain—Mortgage void for uncertainty—Absence of mens rea.*]—A chattel mortgage given by defendant covered "entire yield of 25 acres sown to wheat, estimated yield 18 bushels to the acre." Defendant having sold all the wheat was arrested by the mortgagees and charged with theft. Doubted if a mortgagee's rights are "special property" under the Code:—*Held*, that mortgage void for uncertainty and incorrect consideration, and *mens rea* absent. As mortgage void, no property passed to mortgagees, therefore no theft. *Rex* v. *Ripplinger* (Sask.), 9 W. L. R. 605, 14 Can. Crim. Cas. 111.

Theft—*Habeas corpus—Summary trial—Question as to election—Right of prisoner to re-elect—Jurisdiction of magistrates—Criminal Code, s. 777.*]—Prisoner was found guilty of theft, and convicted. On *habeas corpus* proceedings for his discharge, he alleged (1) that he did not really elect summary trial, and that if he did he should not have been refused a re-election, such as he afterwards sought, through his counsel, and (2) that he was denied an opportunity for making full answers and defence in being refused a postponement of trial to procure witnesses. Before Clute, J., it was alleged that the original warrant of commitment was defective, but another was substituted for it. Without considering the objections to the first warrant, Clute, J., remanded the prisoner to custody under the substituted warrant.—Court of Appeal *held*, that that was within his power, following *R.* v. *Richards, et al.*, 5 A. & E. N. E. 926:—*Held*, also, that the evidence shewed that the prisoner did elect summary trial, and that once before he had elected and been tried in a like manner upon another charge, and that it was proved at the trial that the prisoner had no witnesses and so did not need any postponement of trial for that purpose:—*Held*, further, that the prisoner was not entitled to a re-election, and the fact that the words "with hard labour" were stricken out of the conviction had no substantial effect upon his sentence:—*Held*, lastly, under s. 777 of the Criminal Code, with consent of the accused, the magistrate had jurisdiction and the appeal should be dismissed. *R.* v. *McDonald* (1910), 15 O. W. R. 797, 21 O. L. R. 38.

Theft—*Juvenile offender — Imprisonment—Warrant of commitment—Defect—Amendment—Discharge.*]—The defendant was detained under a warrant of commitment from a magistrate, reciting a conviction of the prisoner before that magistrate, for the offence of fraudulently and without colour of right taking and converting to his own use one stove of the value of $5, the property of one W., with intent to deprive said W. absolutely of the said stove. A return to an order in the nature of a *habeas corpus* made under R. S. N. S. c. 181, shewed that the prisoner was detained under a warrant of commitment made the 9th January, 1903, a copy of which was annexed, and that he came into the custody of the keeper of the home, under said warrant, on said last mentioned day, and was detained on said warrant until the 22nd January, 1903, when, being still in custody, the magistrate caused to be delivered to the keeper of the home a certain other warrant of commitment, under which the prisoner had been detained ever since:—*Held*, ordering the discharge of the prisoner, that the return to the order was bad, because neither it nor the second commitment shewed that the magistrate intended to amend the first warrant, or substitute the second one for it. *In re Elmy* v. *Sawyer*, 1 A. & E. 843, followed. *Rex* v. *Venot*, 23 C. L. T. 71.

Theft—*Magistrate's conviction — Juvenile offender — Place of imprisonment—Duration of sentence — Discharge—Order for further detention—Circumstances.*] — The defendant, a youth of over 17 years of age, was charged before a magistrate with stealing a small sum of money out of the contribution box of a church. The magistrate's return shewed that the defendant pleaded guilty, and was committed for two years to the Provincial Reformatory. He was taken to the Reforma-

tory and sent on to the Central Prison and kept there in custody under the warrant of commitment to the Reformatory. On a motion for his discharge on the return of a *habeas corpus*:—*Held*, that there had been a miscarriage of legal directions in sending a lad of over 17 years of age to the Reformatory and in sending him on a sentence of two years to the Central Prison.—*Held*, also, that s. 785 of the Criminal Code is intended to comprehend summary trial "in certain other cases" than those enumerated in s. 783, and that when the offence is charged, and in reality falls under s. 783 (a), it is to be treated as a comparatively petty offence with the extreme limit of incarceration fixed at six months under s. 787:—*Held*, also, that, under the circumstances, this was not a case for further detention, or the direction of further proceedings under s. 752; and an order for the defendant's discharge was granted. *Rex* v. *Hayward*, 23 C. L. T. 48, 5 O. L. R. 65, 1 O. W. R. 799.

Theft — *Post letter and money—Evidence—Confession — False statements — Person in authority—Decoy letter—"Post letter"—Addresses to jury—Order of—Reply—King's counsel representing Attorney-General.*] — Prisoner convicted for stealing a post letter and of theft of money. At the trial the post office inspector was about to testify with respect to a statement or confession made to him by the prisoner, when counsel for prisoner objected, and was allowed to examine the inspector as to the circumstances in which the statement was made. Upon testimony thus elicited counsel for the prisoner contended that it was shewn that the statement or confession was not admissible, because it was made as he contended to a person in authority, and was procured by means of threats or inducements, or by false statements made by inspector to the prisoner. The statement was admitted in evidence. Counsel for prisoner also objected that the letter was not a post letter within the meaning of the Act 1 Edw VII. c. 19, s. 1, it having been written by the inspector as a decoy. Prisoner called no witnesses and his counsel contended on that ground he had the right of reply. Trial Judge ruled against him and Crown replied:—*Held*, 1. That there was no evidence that the confession was obtained by means of threats or inducements held out, and evidence was properly admitted.—2. The letter in question was a post letter within the meaning of the Act.—3. Crown always had the right of reply if its representative saw fit to use it. See as to this last point, *Rex* v. *Martin*, 5 O. W. R. 317, 9 O. L. R. 218; *Rex* v. *Ryan*, 5 O. W. R. 125, 9 O. L. R. 137.

Theft—*Restitution of stolen goods when prisoner acquitted — Evidence.*]—McIntyre was indicted for stealing $95 in bank notes, and acquitted. He applied to have $37 in notes, found on his person when arrested, returned to him, which was resisted on behalf of the prosecutor. The P. E. Island Statute 6 William IV. c. 22, s. 38, enacts that when a prisoner is not convicted the Court may if it sees fit order restitution of the property where it "clearly appears" to have been stolen from the owner. When arrested the prisoner had the money sewed up in his trousers and among the notes was a $5 one of the Bank of N. B., a $5 of the Bank of Halifax, and a $5 of the Bank of Montreal, and when asked why he had put the money there he said "to hide it from the police." The prosecutor swore he had carefully counted the money before the robbery and that it included a $5 Bank of N. B. note, and a $5 Bank of Halifax note:—*Held*, Peters, J., that the evidence was not sufficient to identify the notes as the prosecutor's and that the application must be granted. *R.* v. *McIntyre* (1877), 2 P. E. I. R. 154.

Theft—*Special property in railway car—Manitoba Grain Act.*]—M. made application in the order book kept at Moosomin station, under s. 58 of the Manitoba Grain Act as amended, which provides that "cars so ordered shall be awarded to applicants according to order in time in which said orders appear on the order book." Section 42 of the Act, as amended by s. 5 of 2 Edw. VII. c. 19, provides (clause 5): "The railway company shall furnish cars to farmers, without undue delay, for the purpose of being loaded at said loading platform." The station agent intended a special car for M., and told one S. to notify M. He was not notified; and the accused took possession of and loaded the car. He was convicted of theft:—*Held*, that M. could not insist on any particular car being delivered to him; and he had therefore no special property or interest in the car in question within the intent of clause A. of s.-s. 1 of s. 305 of the Criminal Code. Conviction quashed. *Rex* v. *McElroy*, 6 Terr. L. R. 10.

Theft—*Summary trial — Jurisdiction of stipendiary magistrate—Plea of guilty—Reducing charge to writing—Warning to prisoner—Form of conviction — Waiver.*]—The defendant was charged before the stipendiary magistrate for the city of Halifax with the theft of a number of amalgam plates and copper plates with gold amalgam thereon of the value of $200 or thereabouts, and, the charge having been stated to him in open Court, and he having pleaded guilty, he was thereupon convicted of the offence charged and sentenced to three years' imprisonment in the penitentiary. An order in the nature of a *habeas corpus* for the defendant's discharge was applied for, on the ground that the magistrate could not proceed with the trial without the preliminary examination required under s. 789 of the Code, and that the requirements of s. 786 were not complied with: — *Held*, Weatherbe, C.J., dissenting, that the stipendiary magistrate had power to proceed with the trial under s. 785 of the Code, as amended by Acts of 1900, c. 46, without entering upon the preliminary examination under s. 789.—2. That the procedure adopted by the magistrate was sufficiently in accordance with the requirements of the statute to be considered as defective in form only, and, there being a good conviction and one alleging that the defendant had been convicted, the provisions of s. 800 applied.—3. That the charge having been read to the defendant in the terms of the information, which was in writing, and the defendant having pleaded guilty, it was not competent for him thereafter to say that he was

not aware of the nature and particulars of the charge. *Rex* v. *McElroy*, 39 N. S. R. 108, 1 E. L. R. 202.

Theft by an agent—*Broker—Purchase of stock—Obtaining money to maintain margin.*]—A broker who receives money from a customer to purchase stocks on margin from a firm of correspondents, holds them in his own name and allows them to be sold on his account, but subsequently rearranges with his correspondents to resume business and carry the same stocks, receiving in the meantime remittances from his customer to maintain the margin, without informing him of what has taken place, and who afterwards severs anew his connection with his correspondents, and receives at the same time from his customers instructions to sell the stocks, which would have resulted in a comparatively small loss, instead of doing so, replaces them by purchase of a like quantity of the same kind from another firm, whose subsequent failure causes their total loss, is not guilty of theft by an agent under the Criminal Code. *Rex* v. *Bastien*, 15 Que. K. B. 16.

Theft of cattle — *Criminal Code, s. 989—Branding — Evidence — New trial.*]—Case stated at instance of the Crown after the trial and acquittal of accused on a charge of theft:—*Held*, that there was possession under above section, as steer in question was in accused's herd, a small compact one, in charge of his son. New trial directed. *R.* v. *Dubois* (1909), 12 W. L. R. 560.

Theft of cattle — *Criminal Code, s. 889 — Branding — Evidence of possession—Case stated by Judge—Form of.*]—The defendant was tried by a Judge, without a jury, upon a charge of stealing a steer, and convicted. The trial Judge reserved for the opinion of the Court the question: "Was there sufficient evidence of possession of the steer by the defendant to throw upon him the burthen of proving that it came lawfully into his possession?" The facts found by the trial Judge and submitted to the Court were: that the steer was the property of the H. ranch company, and was branded with that company's registered brand; that it was afterwards (that is, an undetermined time after being so branded) found with a herd of cattle grazing on the prairie in the vicinity of the defendant's ranch, about 120 miles from the company's ranch; and it was then branded with the defendant's brand and marked with his ear-marks; that it was not shewn that the defendant had ever seen the steer; and that the defendant's brand upon the steer was in such a condition as to indicate that it had been put on within two months:—*Held*, that this was not sufficient evidence of possession; and therefore the provisions of s. 889 of the Criminal Code had no application; and, the trial Judge's finding being in effect that the Crown's case failed unless that section were applicable, the conviction could not be sustained.—*Per* Beck, J., that the proper course, in reserving a case for the consideration of the Court, where the question reserved is a point of law, is for the trial Judge himself to find the facts upon which the question of law depends, and, where the question reserved is whether there is any evidence or sufficient evidence to support his finding of a particular fact, to extract from the notes of the evidence the whole of the evidence bearing upon that finding, and in neither case to leave it to the Court of Appeal to ascertain the facts from a perusal of the notes of evidence; Harvey, J., expressly dissenting from this opinion; and the other members of the Court not expressing any opinion. *R.* v. *Dubois* (1910), 15 W. L. R. 238.

Theft of fowls — *Value under $20 — Prisoner pleaded guilty before County Court Judge's Criminal Court—Sentenced to three years—Reserved case—Criminal Code, ss. 82, 208, 291, 370, 430, 435, 438, 440, 582, 781, 824, 825.*]—Prisoner pleaded guilty to theft of fowls. There was no evidence that the value of the fowls was over $20, and the presumption was that the value was much less. The Judge of Lambton County Court Judge's Criminal Court sentenced prisoner to three years' imprisonment. On a reserved case Court of Appeal *held*, that the Judge had no jurisdiction to impose such a sentence, the maximum penalty for such an offence being a fine or one month's imprisonment under s. 370 of the Criminal Code. Prisoner discharged from custody. *R.* v. *Williams* (1910), 16 O. W. R. 364, 21 O. L. R. 467, 1 O. W. N. 954.

Theft of gold dust—Conviction of defendant—Circumstantial evidence — *Corpus delicti* — Admission of evidence — Judge's charge — Misdirection — Empanelling of jury — Evidence — Examination of defendant in civil action—Application for reserved case. *Rex* v. *Brindamour* (Y.T.), 4 W. L. R. 339.

Treason — *North-West Territories — Forum for trial—Jury—Dominion statutes—Intra vires—Information—Waiver of objection — Evidence — Stenographer — Appeal —Finding of jury—Insanity.*]—In the North-West Territories a stipendiary magistrate and a justice of the peace, with the intervention of a jury of six, have power to try a prisoner charged with treason. The Dominion Act, 43 V. c. 25, is not *ultra vires*.—2. The information in such case (if any information be necessary) may be taken before the stipendiary magistrate alone. An objection to the information would not be waived by pleading to the charge after objection taken. —3. At the trial in such case the evidence may be taken by a shorthand reporter.—4. A finding of "guilty" will not be set aside upon appeal if there be any evidence to support the verdict.—5. To the extent of the power conferred upon it, the Dominion Parliament exercises not delegated, but plenary powers of legislation.—Insanity as a defence in criminal cases, discussed. *Regina* v. *Riel* (No. 2), 1 Terr. L. R. 23.

Trespass—*Damage to property — "Fair and reasonable supposition of right" — Water—Access to shore.*]—The honest belief of a person charged with an offence under R. S. O. c. 120, s. 1 (unlawfully trespassing), or the Criminal Code, s. 511 (wilfully committing damage to property), that he had the right to do the act complained of, is not sufficient to protect him; there must be fair and reasonable ground in fact for that belief.

—The usual reservation in a patent of land bounded by navigable water of "free access to the shore for all vessels, boats, and persons" gives a right of access only from the water to the shore, and in this case a person who had broken down fences and had driven across private property to the shore, was held not to be able to successfully assert, when charged under R. S. O. c. 120, s. 1, and the Criminal Code, s. 511, that he "acted under a fair and reasonable supposition of right" in so doing. *Regina* v. *Davey*, 20 C. L. T. 345, 27 A. R. 508.

Unlawful assembly — *Street meeting—Conviction — Proof of obstruction — Vagrancy.*]—The mere fact of holding a meeting in a street does not necessarily imply the impeding or incommoding of peaceable passengers, and proof of actual impeding or incommoding is essential to justify a conviction.—2. Art. 207 of the Criminal Code does not apply to persons of general good character, but is intended to apply to loose, idle, and disorderly persons ("*aux vagabonds, aux desœuvrés, ou aux débauchés.*") *Rex* v. *Kneeland*, 11 Que. K. B. 85.

Unlawfully making contracts for sale of stocks—*Keeping common gaming house —Stock transactions on margin — Agent for broker—Evidence—Onus — Criminal Code—Aiding and abetting.*]—Defendant was convicted upon charges of unlawfully making contracts purporting to be for the sale of stocks, goods, wares, or merchandise, in respect of which no delivery thereof was made or received, without the *bona fide* intention to make such delivery, with intent to make gain or profit by the rise or fall in price of the stocks, goods, etc., contrary to s. 201 of the Criminal Code, and of being a keeper of a common gaming house contrary to said section. The following were submitted for the opinion of the Court of Appeal—1. Does the evidence given on behalf of the Crown prove an offence against sec. 201 of the Criminal Code, under which the indictment was laid? 2. Does the evidence shew that the contracts charged in the first and second counts of the indictment were made or authorised by defendant; and if the evidence shews that defendant had no interest in either of the transactions with which he is charged in said counts except the payment of his commission, which was a fixed amount, and was payable to him whether the price of wheat or of the stock, the subject of such transaction, rose or fell or remained stationary, can the conviction upon such counts or either of them be sustained?—3. Does the evidence shew that the contracts charged in the first and second counts of the indictment were made within the Dominion of Canada and can the conviction upon said counts be sustained? 4. Was the evidence of J. G. Beaty and Clarence W. Cody, received by the County Court Judge, upon the trial of the accused, admissible as evidence, and having been received should such conviction be sustained? 5. Could defendant properly be convicted of an indictable offence under s.-s. 3 of s. 201 of the Criminal Code? 6. Is defendant liable to a penalty or punishment in respect of an offence under s.-s. 3 of s. 201 of the Criminal Code, by virtue of s. 951 or otherwise, under the Code or under the common law? The evidence shewed that from the beginning of January, 1904, until the information was laid, some time after 1st March in the same year, defendant was occupying a room or office in the town of Niagara Falls, Ontario, in which he was carrying on a business under the name and style of Harkness & Co. The nature of the business was learned from a circular issued by defendant, a copy of which was put in as evidence. It was headed "Office of Harkness & Co., Brokers, Stocks, Grain, and Provisions." Defendant was not a member of the stock exchange at New York nor Chicago, and he did not deal directly with either of these cities. He claimed to be a branch or agency of a firm of operators known as Richmond & Co., whose head office was in Pittsburg, Pennsylvania, with a branch in Buffalo, N.Y. Defendant swore that he did not know whether any member of the firm of Richmond & Co. was a member of either of these exchanges. When giving orders the persons who dealt with defendant deposited with him sums of money, never exceeding a margin of 2 per cent. in the case of stocks, or 1 per cent. in the case of grain or provisions, out of which the defendant received a commission from the Buffalo office. Each order was telegraphed to the Buffalo office, and the next day defendant handed to the customer a paper, signed "Harkness & Co., brokers," containing, amongst other things, a notification to the customer as follows: "Mr. ———, You have bought from Richmond & Co., Pittsburg, at the price named in this memorandum, for delivery on demand, subject to the contract and notice and provisions above and herein." In the margin appear the words: "I consent and agree to the contract expressed hereon." But the customer was not required or expected to sign, and apparently never did sign it. Save this document, there was no delivery, and it was proved that in answer to a question put to him by the Chief of Police, to whom he was explaining the nature of the business, defendant stated that he did not deliver goods or stock—the people did not do business that way. If the stocks, grain, or provisions held by the customer went up in price, he directed defendant to sell out and received back his deposit with the profit. If the price declined below the margin, the customer either put up a further deposit or let his first deposit go and bore the loss. Defendant remitted the amounts he received each day to Richmond & Co., Buffalo, who remitted to him the sums payable to customers on the result of transactions closed out during the day:—*Held*, with regard to defendant's position, that he is only an agent receiving a commission and is therefore not liable. Upon his own admissions his office is a branch of Richmond & Co.; he was engaged in soliciting, attracting, or inducing persons to deal with Richmond & Co., through him in illegal transactions, and, as the County Court Judge has found, he had a guilty knowledge of the nature of the dealings. There was no purchase shewn on the exchange for or on account of the customer. There was nothing but a contract or agreement with Richmond & Co., to which the defendant was a party, with knowledge of its real nature. The customer and Richmond & Co., through and by the aid of defendant, have committed the offence prohibited by s. 201 (1) (b), and

defendant has done acts for the purpose of aiding them to commit the offence and has abetted them in the commission of the offence. At common law one who aided and abetted them in the commission of an offence thereby rendered himself liable as a principal. Then s. 61 of the Criminal Code expressly declares that every one is a party to and guilty of an offence who does or omits an act for the purpose of aiding any person to commit the offence or abets any person in commission of the offence. That is to say, by aiding or abetting in the commission of an offence, he becomes a party to and guilty of the same offence. Thus he becomes a party principal, and there appears to be no reason why he should not be indicted or charged as a principal under the Code. See *Regina* v. *Campbell*, 2 Can. Crim. Cas. 357. Upon the evidence it must be held that the contracts charged in the first and second counts of the indictment were made in Canada—according to the holding of the majority of the Judges of the Supreme Court in *Pearson* v. *Carpenter*, 35 S. C. R. 380. The conviction of defendant under s.-s. (3) of s. 201 was properly made. By that sub-section it is declared that every office or place of business wherein is carried on the business of making or signing or procuring to be made or signed, or negotiating or bargaining for the making or signing of such contracts of sale or purchase as are prohibited by this section, is a common gaming house, and every one who as principal or agent occupies, uses, manages, or maintains the same, is the keeper of a common gaming house. All the questions should be answered in favour of the Crown, and the conviction should be affirmed. *Rex* v. *Harkness*, 6 O. W. R. 219, 10 O. L. R. 555.

Unlawfully solemnising marriage—*R. S. O. 1897, c. 162, s. 2 (1)—Minister of independent congregation — Qualification — Appointment — Ordination — Conviction — Reserved case—Question of fact—Appeal—Jurisdiction.*]—Certain persons met and professed to form themselves into an independent church or congregation known as "The First Chinese Christian Church, Toronto," and appointed the defendant, one of their number, the minister of the church. At a subsequent meeting he was ordained by two Congregationalist ministers, not as a Congregationalist minister, but as a minister of a new independent church:—*Held*, that he was not a minister ordained or appointed according to the rites and ceremonies of the church or denomination to which he belonged, within the meaning of R. S. O. 1897, c. 162, s. 2, s.-s. 1; and, the above facts appearing upon his indictment and trial for solemnising or pretending to solemnise a marriage without lawful authority, contrary to s. 311 of the Criminal Code, there was evidence upon which he could be convicted; and his conviction was affirmed.—*Per* Moss, C.J.O., that where the Judge at the trial states a case for the opinion of the Court of Appeal, the case comes before that Court as an appeal, within the meaning of s. 1017 of the Code, and the Court has the right to refer to the evidence, even when it is not made a part of the case.—*Per* Meredith, J.A., that the Court of Appeal had no jurisdiction to entertain the case, the questions reserved for the opinion of the Court being questions of fact. *Rex* v. *Brown*, 12 O. W. R. 448, 17 O. L. R. 197, 14 Can. Crim. Cas. 87.

Usury—*Conviction under Money Lenders' Act, R. S. C. (1906), c. 122—Scheme to evade Act—Note endorsed—Cashed by another party — Charges for endorsement — Evidence — "Money lender"—"Aider and abettor."*]—Defendant was Toronto manager of Borrowers Agency, which advertised to negotiate loans on borrower's note, which they would endorse. One Holmes applied to defendant for a loan of $30, and defendant sent a man to examine Holmes' furniture. The next day defendant endorsed a note for Holmes and his wife, taking a chattel mortgage for $30 to secure company's endorsement, and a second chattel mortgage for $13.10 to cover charges for endorsement. Defendant then asked Holmes if he knew where he could get the note cashed, and on being informed that he did not, defendant directed Holmes to Brenizer's office, where a young woman cashed the note, charging 12% interest, or 90 cents, paying $29.10 to Holmes. Crown proved another similar transaction cashed at same office.—Denton, Co.C.J., *held*, that defendant was a money lender within the meaning of the Money Lenders' Act, and convicted.—Court of Appeal *held*, that defendant was not a money lender, but was an aider and abettor, and conviction should stand.—Denton, Co.C.J., thereupon imposed a fine of $500, or three months' imprisonment. The fine was paid. *Rex* v. *Kehr* (1910), 17 O. W. R. 213, 2 O. W. N. 133, Can. Crim. Cas.

Usury—*Lending money at usurious rates—Conviction—Money Lenders' Act—Scheme to evade Act—Discount at bank—Brokerage — Evidence.*]—The defendant, a money lender, was convicted by a magistrate of lending money at a rate of interest greater than that authorised by the Money Lenders' Act, R. S. C. 1906, c. 122. The evidence shewed that the defendant advanced $185 to R. on two promissory notes, at one and two months, for $100 each, the rate of interest thus being apparently 60 per cent. per annum. The defendant, however, explained the charge of $15 by shewing that he discounted the notes with a chartered bank, for which the bank received $1.50, and that the balance of $13.50 was charged as "brokerage"—he being, as he said, not a principal, but a broker or agent. The magistrate found that the accused was a principal, and that the transaction with the bank was merely a shift to avoid the penalties of the Act:—*Held*, that there was evidence upon which the magistrate could properly so find; and the conviction was affirmed. *Rex* v. *Dubé*, 18 O. L. R. 367, 14 O. W. R. 45.

Usury—*Money Lenders' Act—Loan—Rate of interest—"Money lender"—Practice of lending money at usurious rates—Evidence—Contract—Oral testimony to explain.*]—The prosecutor, on applying for a loan of $35, was required by the accused to sign a contract in the form of an assignment of his monthly salary for several months, to commence at a later date, which was not to be acted on or notified to his employer in case he should make the stipulated payments of

$2.80 per week for 20 weeks, the first of which was to be made in four days. There was no covenant to make these payments, so that the accused was without remedy in case the prosecutor should die or fail to earn any salary.—At the trial, the entries of the transaction in the books kept by the accused and oral testimony as to its nature were admitted to shew that it was in reality a loan, and not, as the accused contended, a mere purchase of the prosecutor's future salary earnings:—*Held*, that the oral testimony and entries in the book were admissible to shew the real nature of the transaction, and they sufficiently shewed that it was a loan of money, within the meaning of the Money Lenders' Act, R. S. C. 1906, c. 122, s. 11, and at a rate of interest greater than that authorised by that Act.—*Held*, however, that, under s. 2 of the Act, the prosecutor should have given evidence to shew that the accused had made a practice of lending money at a higher rate than ten per cent. per annum, and that, as no such evidence had been given, the conviction must be quashed. *Rex* v. *Clegg*, 8 W. L. R. 572, 18 Man. L. R. 9, 14 Can. Cr. Cas. 217.

Usury — *Money Lenders' Act, R. S. C. (1906), c. 122—Evasion of statute—Evidence—Conviction—Leave to appeal to Court of Appeal refused.*]—Defendants were convicted upon a charge of lending money at a greater rate of interest than that authorised by the Money Lenders' Act, R. S. C. (1906), c. 122. Counsel for defendants applied to trial Judge to reserve a case, and were refused. On motion for leave to appeal to the Court of Appeal, *held*, that there was evidence, to which no objection could be taken, to justify the trial Judge's conclusion. Leave to appeal refused. *R.* v. *Smith & Luther* (1910), 16 O. W. R. 542, 1 O. W. N. 956.

Usury—*Money Lenders' Act — Usury — Illegal interest—Agent of money lender — Liability for offence—Mandate.*]—An agent acting as manager for a non-resident of Canada, may be convicted under the Money Lenders' Act, R. S. C. 1906, c. 122, and s. 69 of the Criminal Code, although paid by salary and having no share in the excessive interest charged. *R.* v. *Glynn* (1909), 19 Man. L. R. 63, 15 Can. Crim. Cas. 243; *R.* v. *Lalonde* (1909), 18 Que. K. B. 267, 15 Can. Cr. Cas. 72, 6 E. L. R. 184.

Usury — *Usurious transactions — Commission of five per cent, besides interest—Customary allowance for transacting business.*]—Where a merchant supplied goods, money, promissory notes and other commercial instruments to country customers and where accounts, returns and settlements were made from time to time at their convenience with produce from the upper country, transferred by vessels and barges, the Privy Council *held*, that a commission of five per cent. on all advances besides interest, under the circumstances, was not an usurious transaction, but a customary allowance for the trouble and inconvenience of transacting the business. *Pollock* v. *Bradbury* (1853), C. R. 2 A. C. 46.

Vagrancy—*By-law — Loitering on street—Validity—Arrest without warrant—R. S. N. cc. 71 and 161—Information—Charge—Stipendiary magistrate — Jurisdiction.*] — Defendant was arrested by a police constable for loitering on the street and convicted:—*Held*, on a case stated, (1) that no information necessary; (2) that the charge was under the law not under a by-law; (3) it makes no difference that constable was also paid by a private party; (4) loitering "about" equals loitering "in." *R.* v. *Sweeney*, 8 E. L. R. 16.

Vagrancy — *Conviction — Evidence — Criminal Code, s. 207 (l)—Habeas corpus—Discharge.*]—The evidence upon which a magistrate's conviction of the defendant under s. 207 (l) of the Criminal Code for vagrancy was based, was, that, though never convicted, he was an associate of pickpockets, and was "known to the police authorities of Montreal as a professional pickpocket." There was no further material evidence against the defendant, though a number of circumstances were shewn which would create suspicion of his honesty. There was no evidence offered by the Crown that he had no means of earning a livelihood; evidence of his being recently employed as an hostler was given on his behalf. He had $40 on his person when arrested:—*Held*, that, if there was some evidence that the defendant "for the most part supported himself by crime," there was no evidence to warrant a finding that he had "no peaceable profession or calling to maintain himself by;" and he was discharged upon the return of a *habeas corpus*. *Rex* v. *Collette*, 10 O. L. R. 718, 6 O. W. R. 746.

Vagrancy — *Conviction — Sentence — Recorder of Montreal—Jurisdiction.*] — The Recorder of the city of Montreal, by virtue of s. 493 of 62 V. c. 58, has a right to sentence an idle and disorderly person, who is an habitual drunkard and incorrigible, to imprisonment for six months at least, and a year beyond, but he is not at liberty to add to this punishment the condemnation of hard labour. *Gévris* v. *Weir*, 8 Que. P. R. 51.

Vagrancy—*Means of support—Gambling—Evidence.*]—The accused, when arrested, had on his person $27.20. Evidence was given that he lived by "following the race track," and that his general associates were gamblers and others of the criminal classes:—*Held*, that, although he might be convicted under s. 238 (b) of the Criminal Code, yet he could not, on the evidence, be convicted of being a loose, idle, disorderly person, with no visible means of support, and that evidence that the money found on his person was obtained by gambling was immaterial to the charge in this case. *Rex* v. *Sheehan*, 14 B. C. R. 13, 8 W. L. R. 605, 14 Can. Crim. Cas. 119.

Vagrancy — Prostitute — Conviction not stating that accused was asked to give an account of herself—Criminal Code, s. 238 (i)—Conviction following words of statute—Information—Plea of guilty — Waiver of objections — Form of information — Reference to repealed statute—Surplusage. *Rex* v. *Harris* (Y.T.), 8 W. L. R. 633, 13 Can. Cr. Cas. 393.

Vagrancy—*Prostitute not giving satisfactory account of herself—Plea of guilty—Con-*

viction—Request not disclosed — Summary trial — Habeas corpus.] — Defendant was charged with being a common prostitute not giving a satisfactory account of herself, and being a vagrant. Pleading guilty she was convicted. *Habeas corpus*, held to be the proper remedy on a summons conviction even if conviction bad:—*Held*, further, that the information did not shew that there had been a demand on her to give a satisfactory account of herself. Pleading guilty was no waiver. Accused discharged. *R.* v. *Levecque* (1871), 30 U. C. R. 509, and *R.* v. *Harris* (1908), 13 Can. Cr. Cas. 393, followed. *R.* v. *Pepper*, 12 W. L. R. 58, 15 Can. Crim. Cas. 314, 19 Man. R. 209.

Vagrancy — *Statutory offence — Necessity for person charged to properly account for herself—Police officer—Disclosure of authority.*]—A police detective, in plain clothes, questioned the accused as to what she was doing in a certain house. He did not inform her that he was an officer:—*Held*, that the officer should have first disclosed his authority, and then expressly asked the accused to give an account of herself. *Rex* v. *Regan*, 14 B. C. R. 12, 8 W. L. R. 525, 14 Can. Crim. Cas. 106.

Vagrancy — *Summary conviction — Imposition of illegal costs—Amendment—Costs of conveying to gaol—Omission to provide for—Loose, idle, and disorderly person—How charged—Different acts constituting offence.*] —The defendant was convicted before two justices of the peace "for that he did use abusive language and was drunk and disorderly on the street, contrary to s. 238 of the Criminal Code," and was ordered to pay a fine of $50 and $16.70 costs, including $5.15 for his own witness fees. The defendant secured a writ of *certiorari* to quash the conviction on the following grounds, among others: (1) that it condemned the defendant to pay illegal costs; (2) that it did not fix the costs of commitment and conveyance to gaol; and (3), that the conviction was for two offences. On the return of the writ the justices returned an amended conviction as follows: "Did unlawfully cause a disturbance in Main street and the store of one Lorimer, the said store being a public place, and did unlawfully loiter on said street and did obstruct passengers by using insulting language, thereby being a vagrant:"—*Held*, that the justices had no jurisdiction to order the defendant to pay to the prosecutor the costs of the defendant's witnesses, and the conviction was therefore bad, but under s. 754 of the Code the Court has power to amend the conviction and to provide that the defendant is only liable to pay such costs as he is legally liable to pay under Part XV. of the Code.—2. That it is not necessary to set out the costs of commitment and conveyance to gaol in the conviction.—3. That a person cannot be convicted for being a "loose, idle, or disorderly person or a vagrant" without specifying which of the acts of vagrancy under clauses (*a*) to (*l*) have been committed, and each of such clauses creates an offence; and, the defendant having been convicted of two of such offences, the conviction was bad.—4. That the fact that one of such offences was not properly described, while the other was, did not prevent the conviction from being bad. *Rex* v. *Code*, 1 Sask. L. R. 295, 7 W. L. R. 814.

Violation of Ontario Dentistry Act —*Ontario Summary Convictions Act — Reserved case for Court of Appeal—No jurisdiction to order.*] — Defendant obtained an order directing the deputy police magistrate of Toronto to state a case, for opinion of the Court of Appeal, on the conviction of defendant for violation of the Dentistry Act, R. S. O. c. 178:—*Held*, that the conviction was a summary one, under a provincial enactment, and subject to provisions of Ont. Summary Convictions Act, therefore not being a case of a trial for an indictable offence, the Court of Appeal had no jurisdiction. The reserved case which the magistrate was required to state should be remitted to him because of such want of jurisdiction. Appeal quashed. *R.* v. *Henry* (1910), 15 O. W. R. 621, 20 O. L. R. 494.

Warrant of commitment — *Form of.*] The warrant of commitment stated that the defendant "did steal a certain waggon," etc. —without alleging the absence of colour of right, and without laying in any person the property in the waggon.—*Held*, that the warrant contained a sufficiently definite statement of the alleged crime of theft. *Regina* v. *Leet*, 20 C. L. T. 46.

Watching and besetting — Criminal Code, s. 523 (*f*)—Obtaining or communicating information. *Rex* v. *Burns*, 2 O. W. R. 1115.

Wilful damage to property — *Summary trial—Conviction — Information—Warrant of commitment—Statement of offence—Reference to statute—Criminal Code, ss. 521, 778—"Without legal justification or excuse and without colour of right"—Plea of guilty —Magistrate formulating charge in writing —Punishment—Imprisonment.*]—An information laid under s. 521 of the Criminal Code charged that the accused, on, etc., did unlawfully and wilfully commit damage by breaking four insulators on telegraph poles, the property of the Canadian Pacific Rw. Co., contrary to the provisions of the said section, without stating, as required by the section, that the insulators formed part of and were used and employed in and about the electric telegraph line of the railway, or that the damage was done without legal justification or excuse and without colour of right. The magistrate, however, did not try the accused on the information, but, on his electing to be tried summarily, and on the magistrate deciding to try the case, he was required by s. 778 (3) in cases of indictable offences, to formulate the charge in writing, containing all the requirements of s. 521, which he read over to the accused, who pleaded guilty thereto, and on such charge, so formulated and pleaded to, the accused was tried and convicted:—*Held*, that, the charge being for an indictable offence, it was not essential that the whole subject matter, including matters requiring to be negatived, should be set out in the information, its object being merely to inform the magistrate of the nature of the charge, the accused not being tried and convicted thereon, but on the charge as formu-

lated and read over to him.—*Held*, also, that it was immaterial that the warrant of commitment followed the information, for that the keeper of the prisoner or any Court before which the matter might come up on *habeas corpus* would be sufficiently informed of the nature of the offence; but, if not, there being a valid and regular conviction, opportunity would be afforded of allowing a warrant in strict compliance with the conviction to be lodged with the keeper.—*Held*, also, that the punishment imposed, nine months' imprisonment, was not, in the circumstances, excessive. *Rex* v. *Gill*, 18 O. L. R. 234, 12 O. W. R. 742, 14 Can. Crim. Cas. 294.

Wilful destruction of fence—"*Colour of right*"—*Conviction—Jurisdiction of magistrate—Rejection of evidence — Unregistered plans.*]—The defendant was convicted under s. 507 of the Criminal Code for unlawfully and wilfully destroying or damaging a certain fence upon the land of the complainant. By s. 481 (2), there is no criminal offence under s. 507 unless the act of damage is done without legal justification or excuse, and "without colour of right:" — *Held*, that "colour of right" means an honest belief in a state of facts which, if it existed, would be a legal justification or excuse. Upon the evidence in this case, there was on the part of the defendant such an honest belief, reasonably entertained, in the existence of a right of way over a lane on the complainant's land, as satisfied the terms of the statute, and rendered the conviction bad for want of jurisdiction:—*Held*, also, that the convicting magistrate erred in disregarding plans of the *locus* because they were not registered. Where lots are sold in sections pursuant to a plan of the whole made by or for the owner of the whole, according to which he sells the parts, the plan is good to establish such a lane among the different sub-owners, whether registered or not. *Rex* v. *Johnson*, 24 C. L. T. 267, 7 O. L. R. 525, 3 O. W. R. 221, 222.

"Wilfully and knowingly" — *Transmitting racing information—By local manager of telegraph company—Conviction by magistrate—Offence under Criminal Code, s. 235 (h), as amended by 9 & 10 Edw. VII. (D.), c. 10, s. 3—Stated case—Facts incorrectly stated—Correction—Criminal Code, s. 1017 (3).*]—Court of Appeal *held*, that there was no evidence to support the conviction. Conviction quashed and defendant discharged. —*Rex* v. *Hayes* (1902), 2 O. W. R. 123, 5 O. L. R. 198, followed. *R.* v. *Hogarth* (1911), 18 O. W. R. 656, 2 O. W. N. 727.

Wounding with intent to disable — *Indictment—Proof of lesser offence — Verdict — Actual malice — Criminal Code, ss. 241, 242.*]—Upon an indictment for wounding by shooting with intent to disable, under the Criminal Code, s. 241, the jury is properly instructed that if such intent is negatived the accused may still be convicted of the simple offence of wounding under s. 242, if the jury find that the accused pointed a loaded gun at another and fired it, and either knew or ought to have known that it was loaded. A verdict returned upon such indictment of "guilty without malicious intent" is a verdict of guilty of such lesser offence. To constitute the offence of wounding under s. 242, it is not necessary to prove actual malice; it is sufficient that the act was unlawful. As s. 109 of the Code declares that a person who without lawful excuse points at another person any firearm is guilty of an offence, the wounding resulting from the discharge of a firearm so pointed is an unlawful wounding within s. 242. *Rex* v. *Slaughenwhite*, 37 N. S. Reps. 382. Reversed by the Supreme Court of Canada, which held that a verdict of "guilty without malicious intent" is an acquittal. *Slaughenwhite* v. *Rex*, 35 S. C. R. 607.

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7. PRACTICE AND PROCEDURE.

Appeal—*Leave—Acquittal by magistrate —Application by prosecutor—Perjury—Corroboration.*]—A motion by the prosecutor, under s. 744 of the Criminal Code (as amended by 63 & 64 V. c. 46), for leave to appeal from the decision of a police magistrate acquitting the defendant of perjury, and refusing to reserve for the opinion of the Court of Appeal the question whether there was corroborative evidence of the prosecutor in any material particular, and whether the magistrate exercised a legal discretion under s. 791 of the Code in declining to adjudicate summarily upon the case, and had jurisdiction to try the defendant, who was a client of the County Crown Attorney, in the absence of counsel for the Crown, was refused, under circumstances and for reasons appearing in the report. *Rex* v. *Burns*, 21 C. L. T. 202, 1 O. L. R. 336.

Appeal — *Leave — Forum.*]—Since the passing of 63 & 64 V. c. 46, s. 3, amending s. 744 of the Criminal Code, the accused may apply directly to the Court of Appeal to obtain leave to appeal. *Rex* v. *Trépanier*, 10 Que. K. B. 222.

Appeal — *Leave — Practice — Oath for Chinamen—Form of—Perjury—Confession—Threat or inducement—Voluntary confession —Judge's ruling—Review.*]—The prisoner, a Chinaman, had been convicted of perjury:—*Held*, that leave to appeal to the Court of Criminal Appeal should not be lightly granted, and the representative of the Crown should be served with a notice of motion setting out the grounds of appeal.—*Quære*, whether the ruling of a Judge as to the admissibility of a confession is open to review by the Court of Criminal Appeal:—*Held*, on the facts, that before making his confession the prisoner was duly cautioned, and that the confession was admissible in evidence, although, on an occasion previous to his making it, an inducement may have been held out to him. When a witness without objection takes an oath in the form ordinarily administered to persons of his race or belief, he is then under a legal obligation to speak the truth and cannot be heard to say that he was not sworn. Perjury may be assigned in respect of statements given in evidence by a Chinaman, who was not a Christian, where the oath was administered to him by the burning of paper and an admonition to him "that he was to tell the truth, the whole truth, and nothing but the truth, or his soul would burn up as the paper had been burned." *Rex* v. *Lai Ping*, 25 C. L. T. 22, 11 B. C. R. 102.

Appeal—*Leave—Reserved case—Grounds for granting—Remarks of Judge—Prejudice—Jurors — Evidence.*]—*Held*, affirming the judgment in 12 Que. K. B. 368, that a verdict cannot be impeached in consequence of an observation made by the Judge presiding at the trial, unless such observation was calculated to influence the jury against the defendant; and, consequently, the fact that the Judge remarked to the defendant's counsel while the jury was being sworn, "if you continue to challenge every man who reads the newspapers, we shall have the most ignorant jurors selected for the trial of this cause," is not a proper ground for granting leave to appeal, such remark having no tendency to influence the jury against the defendant, and being without importance. 2. An observation by the Judge presiding at the trial of a criminal case, in his charge to the jury, to the effect that "about 40 or 50 witnesses had been examined for the purpose of establishing the defendant's good character, and that it was very strange that it should take 40 or 50 witnesses to establish it," is not an irregularity which can constitute a ground for granting leave to appeal, the presiding Judge having the right to express his opinion of the evidence, which, however, may or may not be accepted by the jury. The essential point is that the whole evidence be submitted to the jury, who decide finally as to the innocence or guilt of the accused. 3. An appeal from the verdict to the Court of King's Bench sitting in appeal lies only upon questions of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the Judge. It follows that in cases such as the following, the right of appeal does not exist, viz., where it is alleged that one of the jurors was prejudiced against the prisoner; where it is alleged that the verdict was the result of an improper arrangement entered into between the jurors, these being questions of fact; or where it appears that no application was made to the trial Judge to reserve the question for the opinion of the Court of Appeal. *Rex* v. *Carlin*, 12 Que. K. B. 483.

Appeal—*New trial — Jury — Conflict of testimony—Perverse verdict—Opinion of trial Judge.*]—On a charge of theft a new trial was refused although the verdict was contrary to the view of the trial Judge, the evidence being conflicting, but the Court being of opinion that the verdict of guilty was one which reasonable men could properly find. In deciding the question of reasonableness of the verdict the opinion of the trial Judge is entitled to and ought to receive great weight; but it is not conclusive. *Regina* v. *Brewster* (No. 2), 2 Terr. L. R. 377.

Appeal from conviction or order of magistrate — *Condition precedent—Transmission to Court—Time — Criminal Code, s. 757.*]—Section 757 of the Criminal Code is merely directory, and the transmission of the conviction or order of the magistrate to the Court in accordance with the provisions of that section before the time when the appeal may first be heard, is not a condition precedent to the appeal, and it is sufficient if the conviction or order be lodged in Court before the appeal is actually heard. *Rex* v. *Williamson*, 7 W. L. R. 490; *Harwood* v. *Williamson*, 1 Sask. L. R. 58.

Appeal from conviction or order of magistrate — Condition precedent—Transmission to Court—Time—Criminal Code, s. 757—Directory provision. *Rex* v. *Williamson*, 7 W. L. R. 490; *Harwood* v. *Williamson*, 1 Sask. L. R. 58, 14 Can. Crim. Cas. 76.

Appeal to Court of Queen's Bench, Manitoba—*From judgment of stipendiary magistrate, N. W. T.—Habeas corpus—Presence of prisoner—Production of record.*]—The Court of Queen's Bench for Manitoba has no power to send a *habeas corpus* beyond the limits of Manitoba, and the North-West Territories Acts have not extended its powers in this respect.—The Court will hear an appeal in the absence of the prisoner.—The original papers should be produced, but if the prisoner cannot procure them the Court will act on sworn or certified copies. *Regina* v. *Riel* (No. 1), 1 Terr. L. R. 20.

Appellate tribunal may, while correcting any defect of form, affirm the decision upon the merits. *Bernier* v. *Que. & Levis Ferry Co.* (1910), 39 Que. S. C. 193.

Arrest of accused in foreign country—*Forcible return to Canada without extradition proceedings—Right to question on habeas corpus—Remands—Verbal remands—Justice sitting for police magistrate—Jurisdiction.*]—The prisoner, who had committed a number of thefts in Canada, and had escaped to the United States, was arrested there on a telegram from Canada, and, as he alleged, was forcibly brought back against his will and without the intervention of extradition proceedings, the Crown, however, alleging that he came back voluntarily. On the 11th November he was brought before a justice of the peace of the city where the offences were committed, for preliminary investigation into the charges. There were then two informations before the justice taken before the police magistrate on the 6th November, on which warrants of arrest had been issued, one being that on which the telegram had been sent directing the prisoner's arrest. Two further informations were taken on the same day before the justice for other alleged thefts. A remand was made to the 13th November, the justice issuing his warrant of remand, under his hand and seal, the warrant reciting the bringing of the prisoner before him as a justice of the peace, acting for, in the absence of, and at the request of, one of the police magistrates for the city, there being two such police magistrates, and on the depositions remands were noted without it being stated by whom. On the 13th November a writ of *habeas corpus* was issued, to which, by a return, dated the 14th, the gaoler returned, as the only cause of the prisoner's detention, the warrant of remand of the 11th November; but on the 16th November he made a further return of four additional warrants of remand, dated the 13th November, under the hand and seal of the said police magistrate, remanding the prisoner until the 17th November:—*Held*, that the circumstances under which the prisoner was brought back to Canada could not be inquired into, that being a matter to be

raised by the government of the country whose laws were alleged to have been violated, or at the suit of the party injured against the person who had committed the alleged trespass against him.—*Held*, also, whether or not the justice had jurisdiction to take the informations or to make the remand, by reason of it not appearing that he was acting in the absence of both police magistrates, and for other reasons, the detention of the prisoner was justifiable, for he was properly before the police magistrate on the 13th on the informations taken before him on the 6th November, and was then duly remanded; and, though the second return was made subsequently to the issue of the writ, it was valid, and could be looked at in support of the prisoner's detention. *In re Walton*, 11 O. L. R. 94; *S. C., sub nom. Rex* v. *Walton*, 6 O. W. R. 905.

Arrest on Sunday—*Canada Temperance Act—Magistrate taking bail on Sunday and fixing day—Jurisdiction — Escape—Prohibition.*]—M. was arrested on Sunday on a warrant issued for an offence against the Canada Temperance Act. When brought before the magistrate he applied to be admitted to bail, and was permitted to make a deposit in lieu of bail. The case was set down for hearing on a week day, and M. was discharged from custody. M. appeared at the time appointed and secured a further adjournment, upon his agreeing to leave the amount of his deposit as bail for his appearance. On the day last mentioned he appeared and objected to the legality of his arrest on Sunday and to the action of the magistrate in taking bail and fixing a day:—*Held*, that s. 564, s.-s. 3, of the Criminal Code, was made applicable to the case by the Canada Temperance Act, s. 107, and that the warrant could be executed on Sunday.—(2) *Per* Graham, E.J., Meagher, J., and Russell, J., assuming that the releasing on bail and fixing a day for the hearing were illegal, that, the arrest being legal, there was a negligent escape, and nothing to prevent the defendant from being retaken, and that the magistrate had jurisdiction to proceed with the case.—(3) For such a defect as that contended for in the procedure prohibition was not the proper remedy.—*Per* Townshend, J., that the taking of bail and fixing a day was not illegal, but an act done in connection with the arrest.—Weatherbe, C.J., dissented. *Rex* v. *McGillivray*, 2 E. L. R. 414, 41 N. S. R. 321.

Arrest under warrant—*Escape—Right to re-arrest under same warrant.*]—The prisoner had been arrested at Amherst by one of the police of that town, under a warrant. After his arrest he escaped, and left the town for some weeks. When he returned he was re-arrested under the same warrant:—*Held*, that, at the most, the escape in this case was negligence on the part of the officer, and that he did not contemplate a voluntary abandonment of his prisoner, but negligently trusted to the latter's promise to surrender himself under the warrant; therefore, he might be re-arrested. *Rex* v. *O'Hearn*, 21 C. L. T. 355.

Arrest under warrant—*Production of prisoner before magistrate—Commitment in absence of prisoner—Criminal Code—Habeas corpus.*]—A commitment to gaol by a magistrate of a woman, arrested under a warrant, made without having her brought before him, upon a verbal unsworn statement that she had shewn signs of insanity, and in order that a medical examination might be had, is illegal.—2. The first duty of a magistrate dealing with a person arrested upon his warrant is to have such person brought before him as soon as practicable, and then make such order as the case requires. The express enactment of the Criminal Code (s. 567), must be followed in this respect, although the form of remand in connection with it has no mention of the presence of the prisoner. The failure to conform to the above rule will entitle the prisoner, on petition for *habeas corpus*, to have the commitment quashed and to be discharged from custody. *Ex p. Sarrault*, 15 Que. K. B. 3.

Arrest without warrant of person charged with crime committed in another province.]—The police of one province can arrest without warrant a person charged with having committed a crime in another province only where the crime is one for which the accused could have been arrested without warrant in the province where the crime was committed, or where the accused is escaping fresh pursuit: Criminal Code, ss. 30, 33, 649.—The coming to British Columbia in September of an officer from Quebec is not a fresh pursuit in respect of a crime said to have been committed on the 1st August.—The charge was that the accused, in Quebec, received a ring from S., with directions to hand it to a third person, and that, instead, he converted it to his own use:—*Held*, that the offence charged fell within the definition of ordinary theft in s. 347 of the Code, and not within s. 355; and for ordinary theft an offender cannot be arrested without warrant.—The accused, having been arrested without warrant in British Columbia, was discharged upon *habeas corpus*. *R.* v. *Shyffer* (1910), 15 W. L. R. 323, B. C. R.

Authenticity of depositions taken during the preliminary enquiry upon an indictment charging attempted murder—*Absence of such authenticity—Indictment rendered null and void—Motion to quash—Art. 683, Criminal Code, R. S. C. 1906.*]—When depositions at a preliminary hearing are taken by stenography, according to the provisions of art. 683, par. 2, Criminal Code, R. S. C. 1906, and although it is not necessary that such depositions should be read over to and signed by the witnesses, it is, however, essential that such depositions be signed by the magistrate who presided at the enquiry and be accompanied by an affidavit of the stenographer that it is a true report of the evidence.—The absence of these essential formalities has the effect of rendering null and void all proceedings had at such preliminary hearing, and an indictment, found by the grand jury and based upon such preliminary proceedings, will be quashed upon motion made by the accused. *R.* v. *Robert*, (1910), 16 R. de J. 447.

Bail—Estreat—Certificate of non-appearance—Informality—Criminal Code—Forms—Motion to vacate estreat — Delay — Action taken on certificate. *Rex* v. *May*, 5 O. W. R. 67.

Bail — Estreat—Motion to vacate—Delay —Adjournment of hearing without notice to sureties—Conflicting affidavits. *Rex* v. *Bole*, 5 O. W. R. 68.

Bail—Estreat—Notice to surety to perform condition—Adjournment at accused's request for more than eight days. *Rex* v. *Burns*, 2 E. L. R. 167.

Bail—Estreat—Nova Scotia Crown Rule 28—Imperial Statute 5 Geo. II. c. 19—Costs —Canada Temperance Act—Criminal Code, s. 1906. *Rex* v. *Townshend*, 4 E. L. R. 387.

Bail—*Estreat—Sittings of Court — Non-appearance—Notice.*]—In a recognizance of bail the expression "the next sittings of a Court of competent criminal jurisdiction," means the next sittings fixed by the Lieutenant-Governor in council in pursuance of the N. W. T. Act, s. 55. The fact that a special sitting was held in the interval pursuant to the N. W. T. Amendment Act, 1891, s. 12, s.-s. 2, for the trial of a designated prisoner confined in gaol and awaiting trial, did not affect the obligation of the accused to appear at the next sittings fixed by the Lieutenant-Governor. No notice to the bail of intention to estreat or to produce the accused is necessary. *Regina* v. *Schram*, 2 U. C. R. 91, and *Re Talbot's Bail*, 23 O. R. 65, followed. *In re McArthur's Bail* (No. 1), 2 Terr. L. R. 413.

Bail—*Murder — Conviction—New trial.*] —When a prisoner, charged with wilful murder, has been tried, found guilty, and sentenced to death, but, upon appeal, has obtained a reversal of the conviction on technical grounds, and stands committed for a second trial, the Court of King's Bench, Quebec, will not admit him to bail, especially when the Crown appears to proceed with due diligence. *McCraw* v. *Rex*, 16 Que. K. B. 505.

Bail—*Right to — Discretion of Judge.* — All Superior Courts of criminal jurisdiction, or one of their Judges, and also, in the province of Quebec, a Judge of the Superior Court, have authority to admit to bail persons accused of any crime whatsoever (including treason and capital offences), but as respects indictable offences which, before the enacting of the Criminal Code, were felonies, it is within their discretion to grant or refuse the application for bail. With respect to indictable offences which were formerly misdemeanours, the accused is entitled to be admitted to bail as a matter of right. 2. The propriety of admitting to bail for indictable offences which were formerly classed as felonies should be determined with reference to the accused person's opportunities for escape, and to the probability of his appearing for trial. To determine this point it is proper to consider the nature of the offence charged and its punishment, the strength of the evidence against the accused, his character, means, and standing. Where a serious doubt exists as to his guilt the application for bail should be granted. If, on the evidence, it stands indifferent whether he is guilty or innocent, the rule generally is to admit him to bail, but if his guilt is beyond dispute, the general rule is not to grant the application for bail unless the opportunities to escape do not appear to be possible, and it is consequently almost certain that he will appear for trial. The fact that the application for bail is not opposed either by the Attorney-General or the private prosecutor may also be taken into account by the Court or Judge. *Rex* v. *Fortier*, 13 Que. K. B. 251, 23 C. L. T. 115.

Bail before committal for trial — Amount of bail—Serious offence. *Rex* v. *Hall* (Y.T.), 6 W. L. R. 842.

Certiorari—*Rule nisi to quash conviction —No cause shewn.*]—A rule *nisi* to quash a conviction will be made absolute as a matter of course on proof of due service and on production of the writ of *certiorari* with a proper return thereto, if no one appears to shew cause; *per* Tuck, C.J., Hanington, and Landry, JJ.; McLeod and Gregory, JJ., dissenting. *Rex* v. *Sweeney and Bourque, Ex p. Cormier*, 2 E. L. R. 161, 38 N. B. R. 6.

Certiorari — *Security for costs.*]—No general rule requiring a petitioner on a writ of *certiorari* to give security for the costs and other charges of the case, is in existence in the province of Quebec. *Tierney* v. *Choquet*, 9 Que. P. R. 229.

Charge against incorporated company — Procedure — Criminal Code, s. 873 —Order of Court authorising charge—North-West Territories Act—Grand jury not existing in provinces of Saskatchewan and Alberta —Corporation not subject to preliminary examination by magistrate—Formal charge in lieu of indictment. *Rex* v. *Standard Soap Co.* (N.W.P.), 6 W. L. R. 64.

Charge inconsistent with facts in evidence — New trial. *Rex* v. *Collins*, 3 E. L. R. 361.

Comment of Crown counsel on failure to call wife of accused—*Conviction quashed—New trial.*] — On the trial of the defendant on a charge of shooting with intent to kill, counsel for the Crown commented upon the fact that the defendant's wife, who had been a witness on the preliminary examination before the magistrate, was not called. On a Crown case reserved:—*Held*, that the comment in question was not justified by the fact that it was made in reply to an explanation offered by counsel for the defendant to account for the omission to call the wife, and that the conviction must be set aside:—*Held*, that the defendant should not be discharged, but that there should be a new trial. *Rex* v. *Hill*, 36 N. S. Reps. 240.

Commitment for trial—*Jurisdiction of Crown prosecutor—Election—Place of imprisonment—Criminal Code, ss. 825, 826.*]—Defendant was charged under s. 303 of the Criminal Code. The preliminary hearing was held and accused was committed to the Prince Albert gaol. En route to Price Albert the accused was held over at Battleford and brought before the prosecution officer there, when she elected for a speedy trial, and was taken to Prince Albert gaol. There was then no Judge resident in the Battleford district. When brought before the Judge at Prince Albert she claimed the right of election, and at her trial at Battleford renewed this application:—*Held*, that election before

the Crown prosecutor at Battleford was bad, and conviction was quashed. *Rex* v. *Tetreault*, 11 W. L. R. 305.

Conviction—Imprisonment — Release of convict on bail pending appeal — Adjudication that appeal not competent—Convict remaining at large—Re-arrest on charge of being unlawfully at large—Arraignment — Plea of not guilty—Trial — Right to elect—Jury—Proof of conviction—informalities — Return of amended conviction pending trial—Admissibility—Computation of term of imprisonment—Escape from custody—Lawful excuse—Conviction on second charge—Concurrent sentence. *Rex* v. *Taylor* (N.W.T.), 4 W. L. R. 532.

Conviction—Motion by prisoner for his release because insufficient penalty imposed. *Rex* v. *Tupper*, 2 E. L. R. 110.

Conviction for killing dogs — Complaint laid by wife of owner—Defendant ordered to pay costs to owner instead of to prosecutrix—Amended conviction returned on *certiorari*. *Rex* v. *Grey*, 2 E. L. R. 68.

Costs.]—In a penal condemnation of two or more defendants, a general order as to costs may go against them without specifying the share for which each will be liable. *Bernier* v. *Que. & Levis Ferry Co.* (1910), 39 Que. S. C. 193.

Costs — *Private prosecutor — Attorney-General—Nolle prosequi — Effect.*]—Where a *nolle prosequi* has been entered by the Attorney-General, upon an indictment in the name of the King at the instance of a private prosecutor, and the accused is thereupon discharged, judgment is, within the meaning of Art. 833 of the Criminal Code, given for the defendant, and he is entitled to recover costs from the private prosecutor. *Rex* v. *Blackley*, 13 Que. K. B. 472.

County Court Judge's Criminal Court—*Court of Record — Right to issue writ of habeas corpus to—Certiorari in aid—Refusal to discharge prisoner—Omission to file papers in High Court — Non-return to County Judge's Court—Validity of conviction.*] — A prisoner charged with perjury elected to be tried without a jury at the County Court Judge's Criminal Court, and was tried there and convicted, the Judge refusing to state a case for the Court of Appeal; but postponing judgment to enable the prisoner to appeal. The Court of Appeal, however, refused leave to do so. The discharge of the prisoner was then moved for in the High Court under *habeas corpus*, and *certiorari* issued in aid thereof, which was refused on the ground that the *habeas corpus*, etc., had been improvidently issued, that writ not lying to the County Court Judge's Court, a Court of record, and the prisoner was remanded for sentence, which was pronounced without any objection. Some time afterwards the sentence was objected to for alleged want of jurisdiction in the County Court Judge to pronounce it, because the papers which had been returned to but not filed in the High Court under the *certiorari* had not been brought back, but were in the hands of one of the High Court officers, and so did not repass to the County Court Judge's Court, a special order of transfer being necessary.—A motion for leave to appeal from the conviction, and for an order requiring the County Court Judge to state a case was, under the circumstances, refused. *Rex* v. *Harrison*, 10 O. W. R. 578, 15 O. L. R. 231.

Criminal information — *Libel — Affidavit in reply—Practice.*]—Where the libel charges the person libelled with having, by a previous writing, provoked it, the latter by his affidavit, on which he moves for a criminal information, is bound to answer it, otherwise the affidavit is insufficient and the rule will be discharged. *R.* v. *Whelan* (1862), 1 P. E. I. R. 220.

Crown documents—*Stamps — Warrant for arrest—Want of stamps—Waiver.*]—The Crown is not obliged to affix stamps upon its papers and proceedings in Court.—An accused person who has pleaded to the indictment, has furnished security for his appearance at a future time, and has demanded a speedy trial, cannot complain of the legality of his original arrest because of the want of stamps upon the warrant. *Rex* v. *Rodrigue*, 9 Que. P. R. 122.

Dismissal of complaint — *Motion to quash.*]—An order dismissing a complaint under the Summary Convictions Act may be quashed on *certiorari*. *Rex* v. *Ritchie, Ex p. Sandall*, 37 N. B. R. 206.

Election by prioner as to trial — *Power of prosecuting officer to receive—Depositions—Perusal of — Magistrate's Signature.*] — Where there is no Judge of the County Court residing in a county, the prosecuting officer or counsel appointed under the provisions of R. S. 1900 c. 165, s. 1, is empowered to take the election of a prisoner, under the Code, s. 766, to be tried before the Judge of the County Court. The power given to such officers to conduct all criminal business on behalf of the Crown includes all process necessary to bring the prisoner to trial, and the making of his election is one necessary act in these proceedings. Where all the depositions, or copies thereof, taken against the prisoner, and returned into the Court before the trial, were handed to the prisoner's counsel for perusal:—*Held*, that it was no cause of complaint that the papers so handed were mixed up with other papers, there being no serious difficulty in understanding those applicable to the particular offence with which the prisoner was charged:—*Held*, also, that depositions to which the magistrate had affixed his signature were not to be rejected because such signature was possibly not placed in the most correct place. *Quære*, whether an indictment found by the grand jury should be quashed because depositions are improperly taken. *Rex* v. *Traynor*, 4 Can. Crim. Cas. 410, questioned. *Rex* v. *Jodrey*, 25 C. L. T. 109.

English and French text of penal laws, where there is a difference, the version more favourable to accused should be preferred. *Bernier* v. *Que. & Levis Ferry Co.* (1910), 39 Que. S. C. 193.

Estreat of bail—*Arrest of surety—Application for discarge—Forum—Jurisdiction.*] —Motion under s. 1110 of the Criminal Code

for the discharge of a surety detained on an execution and capias issued on an estreat roll:—*Held*, that the application should be made to the Judge presiding at the criminal sittings, not to the Court *en banc*. *Re Pippy*, 14 Can. Crim. Cas. 305.

Extradition—*Identity of prisoner—Surrender to Russia — Treaty — Political character of crime.*]—At a village in Russia, one F. shot and killed a watchman, in circumstances which, according to the law of Canada, would make the act murder. F. fled; a man of the same name was arrested in Manitoba, and his extradition to Russia to answer a charge of murder was sought:—*Held*, that the prisoner's identity with F. was sufficiently established by the evidence. —2. That the crime of the accused was not committed in the furtherance of a political object, within the meaning of the Treaty with Russia of the 24th November, 1886. The accused was a member of a political society whose object was to alter the form of government and to do away with private ownership of property—a society by which revolutionary outrages had been perpetrated. In the district where the crime was committed, martial law had been proclaimed, and was in force. F. was in charge of the watchman on his way to the village administrative office, having been asked to give an account of himself, because he was a stranger in the village, when he shot the officer. The crime would, in Russia, be called a political crime and be tried by a special tribunal. But that did not make it a crime of a political character within the meaning of the Treaty.—Extradition ordered. *Re Federenko* (No. 1) 1910), 15 W. L. R. 370, 20 Man. L. R. 221.

Grand jury — *Constitution of — Indictment.*]—A sheriff, when about to summon, pursuant to s. 48 of the Jurors' Act, one of the jurors drafted to serve on a grand jury, ascertained that the juror was demented and did not summon him:—*Held*, that the grand jury was not legally constituted, and that an indictment found by the jurors who had been summoned must be quashed. A motion to quash such an indictment is not an objection to the constitution of the grand jury within the meaning of s. 656 of the Criminal Code. *Rex* v. *Hayes*, 23 C. L. T. 342, 9 B. C. R. 574.

Grand jury—*Constitution of—Qualification of juror—Prejudice—Motion to quash indictment—Reserved case.*]—An objection to the qualification of an individual member of a grand jury is not an objection to the "constitution" of the grand jury within the meaning of s. 656 of the Criminal Code, and so cannot be raised by motion to quash the indictment. The question as to whether or not a grand juror is prejudiced, is for the Judge of Assize to decide, and his decision cannot be reviewed on a stated case. *Rex* v. *Hayes*, 11 B. C. R. 4. See S. C., 23 C. L. T. 342, 9 B. C. R. 574.

Grand jury — *Endorsing names of witnesses on indictment—Abortion—Form of indictment.*]—The provisions of s. 645 of the Criminal Code, requiring the names of all witnesses examined by the grand jury to be indorsed on the bill of indictment, are directory only, and an omission so to indorse does not invalidate the indictment. An indictment under s. 273 of the Code charging accused "with unlawfully using on her own person . . . with intent thereby to procure a miscarriage" (without stating whose miscarriage) is sufficient. *Rex* v. *Holmes*, 22 C. L. T. 457, 9 B. C. R. 294.

Grand jury—*Formation and number — True bill—Rejection.*]—Where eleven grand jurors answered their names when the roll was first called, but only ten were impanelled and sworn (one having failed to answer on the second calling), the grand jury was properly formed; and the accused, having suffered no prejudice thereby, cannot, on that ground, move for the rejection of the true bill found against him. *Rex* v. *Fouquet*, 14 Que. K. B. 87.

Grand jury—*Swearing—Examination of witnesses—Petit jury—Challenge — "Verificateurs."*]—It is not necessary that the accused should be present in Court during the swearing of the grand juries. 2. The grand jury may examine the Crown witnesses in whatever order they choose, and the examination of a single one of such witnesses is not an irregularity nor an illegality, where it is admitted that the witness was able to establish a complete admission on the part of the accused. 3. Since the coming into force of the Criminal Code, it is not necessary that the first juror sworn should be added to the board of *verificateurs* who are to pass upon the challenge of the second juror: s. 668, Criminal Code. *Rex* v. *Mathurin*, 12 Que. K. B. 494.

Grand jury—*Swearing in — Foreman—Omission to initial names of witnesses—Effect on indictment—Submission of record—Depositions—Crown case reserved.*]—1. It is essential that, at the time the foreman of the grand jury is sworn, the other jurors be present and hear the oath taken by their foreman. And, therefore, where it appeared that none of the other jurors were in the box at the time their foreman was sworn, that there was no certainty that the oath taken by him was heard by them, that the other jurors were only sworn, afterwards, to observe the same oath which their foreman had taken, and that objection was duly made by motion to quash, before the arraignment of the defendant, the indictment found by the grand jury was held to be null and void. 2. The omission by the foreman to initial the names of the witnesses examined before the grand jury, as required by law, is a fatal defect, and has the effect of annulling the indictment. 3. The submission of a record to the grand jury, in order that they may examine certain exhibits, and verify certain statements made by witnesses examined before them, is not a fatal irregularity, where it is proved that the decision of the grand jury was arrived at without reference to the depositions contained in such record. 4. The objections to the indictment above mentioned are proper grounds for a reserved case. *Bélanger* v. *Rex*, 12 Que. K. B. 69.

Habeas corpus—*Quashing writ—Powers of Judge—Part of sentence not executed.*]—The Judge to whom a writ of *habeas corpus* has been referred, and who supersedes it upon

the ground that the petitioner is detained by virtue of a lawful sentence pronounced by a competent tribunal, has no power to order that tribunal to cause a part of the sentence to be executed (in this case the penalty of the lash) which had been suspended by reason of the issue of the writ. *Goldsberry* v. *Bernatchez*, 28 Que. S. C. 52.

Illness of juryman — *Juryman leaving jury-box—Bailiff not sworn—Rebutting evidence—Admissibility.*] — During a trial for murder one of the jurymen was taken ill, and it being necessary for him to leave the Court for some time, he was accompanied by an unsworn bailiff and by doctors who examined him and asked him questions in reference to his condition. There was no suggestion that during the time the juryman was absent from the Court he was tampered with in any way. After his recovery the trial proceeded. —*Held*, that the fact that the juryman was allowed to leave the Court without being in charge of a sworn bailiff did not constitute a mistrial.—Where evidence which is relevant to the issue is tendered by the prosecution to rebut the case set up by the defence, it is for the Judge at the trial to determine in his discretion whether such evidence should be allowed to be given or not. Even if the Judge exercises his discretion in a way different from that in which the Court of Criminal Appeal would have exercised it, that affords no ground for quashing the conviction of the prisoner. If, however, it is shewn in any case that the prosecution has done something unfair which has resulted in injustice to the prisoner the Court of Criminal Appeal may interfere. *R.* v. *Crippen* (1910), 31 C. L. T. 53, 27 T. L. R. 69.

Indictable offence—*Place of trial—Right of accused.*]—At common law and under the Criminal Code, a person accused of an indictable offence has a right to be tried in the Judicial District in which the offence was committed, unless an order of the Court is first obtained, under s. 884 of the Code, directing that the trial be held elsewhere.—Sections 557, 580, 584 (*c*), 873 A., and 884, of the Code, considered.—*The Queen* v. *Ponton*, 2 Can. Crim. Cas. 192. *The King* v. *O'Gorman*, 12 Can. Crim. Cas. 230; *Rex* v. *Harris*, 3 Burr, 1330, and *The King* v. *Roy*, 14 Can. Crim. Cas. 368, followed. *R.* v. *Lynn* (1910), 15 W. L. R. 336, Sask. L. R.

Indictment—*Foundation of charge—Inquest.*]—In the Territories it is not necessary, in order to put an accused person upon his trial on a criminal charge, that the charge should be based upon an indictment by a grand jury or a coroner's inquest. *Regina* v. *Connor*, 1 Terr. L. R. 4.

Indictment—*Particularity—Statement of offence—Preferring of indictment — Order — Grand jury.*] — Where a person is charged with an offence, the indictment should describe it with such particularity as will enable the accused to know exactly what he has to meet. An indictment which stated the offence in the language of the section of the Criminal Code supposed to have been violated, without setting out the particular facts constituting the offence, was quashed, for want of particularity, and also because it was not preferred in accordance with s. 641 of the Code. The Attorney-General did not in person or even by his authority prefer the indictment, and the informal direction of a Judge to the foreman of the grand jury, recognised by a formal order after the indictment had actually been preferred, was insufficient. *Rex* v. *Beckwith*, 23 C. L. T. 307.

Indictment for wounding with intent and for common assault—*Motion to quash—Jury—Peremptory challenges.*] — The defendant was indicted under ss. 241 and 265 of the Criminal Code on two counts charging (1) that he in the city of Halifax on the 13th November, 1903, with intent to do grievous bodily harm to one W., did unlawfully wound the said W., and (2) that he did in the city of Halifax on the 13th November, 1903, unlawfully assault one W. After arraignment and before pleading to the indictment, the prisoner's counsel moved to quash it, on the ground that the clerk of the Crown had not sent the depositions taken on the prisoner's preliminary examination, before the grand jury of the county of Halifax, as required by s. 760 of the Criminal Code. When the jury were being sworn, the prisoner claimed the right to 16 peremptory challenges, on the ground that these counts would, before the Code, have been for a felony and misdemeanour respectively, and, as s. 626 (1) and (2) of the Criminal Code abrogated the common law rule as to their non-joinder, he was, under the above section, being tried on two indictments:—*Held*, that the indictment was properly found. 2. That the prisoner was entitled under s. 668 of the Criminal Code only to 12 peremptory challenges, being the largest number allowed him on the first count of the indictment, it not being necessary for the Crown to add a count for common assault in order to get a conviction for that offence, if the evidence warranted it. The prisoner was then tried and acquitted on both counts in the indictment. *Rex* v. *Turpin*, 24 C. L. T. 183.

Indictment of street railway company—Nuisance—Endangering lives of public—Removal from Sessions into High Court —Difficult questions of law. *Rex* v. *Toronto Rw. Co.*, 4 O. W. R. 277, 5 O. W. R. 621.

Indictment preferred by Attorney-General.]—*Motion to quash—Cr. C.* 873.]—The Attorney-General has the right to prefer directly before the Grand Jury a bill of indictment against any person suspected of having committed a criminal offence, without having to adopt the preliminary procedure usual in such cases.—The fact that an accused person has been committed for trial after a preliminary enquiry does not deprive the Attorney-General of the right to himself prefer a bill of indictment before the Grand Jury and completely ignore the proceedings already had before the magistrate who conducted the preliminary enquiry. *R.* v. *Houle* (1910), 12 Que. P. R. 4, 16 R. de J. 532.

Although an indictment has been quashed for irregularities in the preliminary enquiry, there is nothing to prevent the Attorney-General from preferring another indictment before the Grand Jury without the necessity of again holding a preliminary enquiry or laying an information before a magistrate. *R.* v. *Robert* (1910), 12 Que. P. R. 9.

Inmate of bawdy house—Form of conviction—Imprisonment for time certain or until released. *Rex* v. *Young*, 2 E. L. R. 65.

Joint conviction—*Prohibition to magistrate.*]—Every act committed by two or more persons in violation of s. 94 of 51 V. c. 22 is a contravention by each of them. A joint conviction of these persons is therefore illegal; and prohibition will be ordered against the convicting magistrate. *Amyot* v. *Chauveau*, 28 Que. S. C. 54.

Judgment is sufficiently explicit when it contains a brief summary of the nature of the offence and the date upon which it was committed, the names of the complainant, of the offending party, of the presiding Judge and of the Court in which he sat. *Bernier* v. *Que. & Levis Ferry Co.* (1910), 39 Que. S. C. 193.

Judgment upon stated case—*Subsequent motion to quash conviction—Res judicata — Necessity for writ of certiorari.*]—*Held*, that where a summary conviction has been questioned on a case stated by the magistrate under s. 900 of the Criminal Code, 1892, and has been upheld, a subsequent application to quash it by way of *certiorari*, will not be entertained.—*Semble*, *per* Richardson and Wetmore, JJ. (Scott and Rouleau, JJ., dissenting), that the papers in connection with a summary conviction, returned by the magistrate to one of the clerks of the Court under s. 888 of the Criminal Code, 1892, are not before the Court for all purposes, and that a writ of *certiorari* must issue in order that a motion to quash the conviction may be entertained. *Regina* v. *Monaghan*, 3 Terr. L. R. 43.

Jury—Conviction for rape—Conduct of jury—Improper communication with sheriff—Affidavits by jurors. *Rex* v. *Barnes*, 4 E. L. R. 234.

Jury—*Exclusion of, during enquiry as to admissibility of dying declaration—Comment on prisoner's failure to testify.*] — Motion for leave to appeal to the Court of Criminal Appeal:—*Held*, that the jury should not be excluded during the preliminary enquiry as to whether certain evidence is admissible as a dying declaration.—2. A prisoner at his trial has the option of making a statement not under oath or of giving evidence under oath. —3. A direction to the jury that an accused has failed to account for a particular occurrence, when the onus has been cast upon him to do so, does not amount to a comment on his failure to testify, within the meaning of s. 4, s.-s. 2, of the Canada Evidence Act, 1883. *Rex* v. *Aho*, 25 C. L. T. 50, 11 B. C. R. 114, 8 Can. Cr. Cas. 453.

Jury — *Polling — Separating — Refreshments.*]—In a prosecution for felony it is discretionary with the trial Judge to permit or refuse to allow the jury to be polled. The prisoner being convicted of felony, the circumstances that two of the jurors had during the trial, but before the Judge's charge, been allowed to separate for a short time from the other jurors in the custody of one of the constables who had been placed in charge of the jury, and during such separation to hold a short conversation, not referring to the cause, with a stranger to the proceedings, and to partake, at their own expense, of intoxicating liquor, insufficient in quantity to cause intoxication, were held not to constitute sufficient ground for discharging the prisoner, or for a new trial. *Regina* v. *McClung*, 1 Terr. L. R. 379.

Jury—*Right of accused to inspect panel —Provincial statute—Absence of Dominion legislation — Criminal procedure.*]—Appeal from order dismissing appellant's application for a mandamus to the sheriff of Middlesex commanding him to shew to appellant or his agent for examination the panel of jurors at the Middlesex Sessions, for the purpose of determining whether it would be necessary to strike a special jury for the trial of appellant upon a charge of receiving stolen cattle. Argued that s. 85 of c. 31 C. S. U. C. is still the law in criminal matters, because being matter of criminal procedure the Legislature had no power to pass 58 V. c. 15, s. 3 (O.), now R. S. O. 1897 c. 61, s. 94, imposing restrictions upon the disclosure of the names of the jurors and inspection of the panel, to relate to criminal matters:—*Held*, Osler, J.A., dissenting, affirming the judgment refusing the mandamus. *Re Chantler & Cameron*, 5 O. W. R. 574, S. C., *sub nom.*, *Re Chantler*, 9 O. L. R. 529.

Justices of the peace—*Jurisdiction—Committal of accused for trial—Absence of information in writing—Waiver — Submission to jurisdiction by appearing on summons—Crim Code, ss. 654, 655.*]—Application for writ on *habeas corpus* refused. Applicant, a police constable, informed a justice of the peace that he had unlawfully set at liberty a prisoner in his custody. The magistrate issued a summons. On the return defendant was represented by another justice of the peace as his counsel, who objected that there was no sworn information, the summons having been issued on the statement of the defendant. *Rex* v. *Thompson*, 11 W. L. R. 517.

Lost indictment — Direction to prefer new indictment — Grand jury — Return of true bill — Refusal of prisoner to plead — Entry of plea by Court—Conviction—Regularity. *Rex* v. *McAuliffe*, 7 O. W. R. 704.

Magistrate's conviction — *Appeal — Stated case—Criminal Code, ss. 238, 752— No offence disclosed in information.*]—Defendant having called complainant a liar, was convicted before two justices of the peace under s. 238 above for disorderly conduct and insulting language and ordered to apologise to plaintiff within three days. The justices, in delivering their stated case on this appeal, did not do so within the required four days. This held to be directory, and Judge in Chambers held he had had jurisdiction. Conviction held to be bad, first, because there was no offence; secondly, penalty ridiculous; and thirdly, no judgment of forfeiture. *Rex* v. *Turnbull*, 11 W. L. R. 55, 2 Sask. L. R. 186.

Magistrate's conviction — *Criminal Code, ss. 682, 711, 721, 796, 797 and 798—*

Reading depositions to witnesses.]—An appeal from a magistrate's conviction dismissed. The magistrate in dealing with the case under Part XVI. of the Criminal Code is not by virtue of s. 711 bound to take depositions in the manner prescribed by s. 682. The magistrate is relieved under s. 798 from the duty of reading over the depositions to the witnesses before the prisoner enters on his defence. *Rex* v. *Klien*, 11 W. L. R. 249.

Magistrate's warrant of commitment —*Habeas corpus — Certiorari in aid.*]—A warrant without alleging a conviction directed the defendant's conveyance to and detention at a gaol. The defendant procured a writ of *habeas corpus* declining a *certiorari* in aid. On return counsel for Attorney-General asked for a *certiorari* in aid:—*Held*, that the Attorney-General is entitled to this of absolute right and that the warrant was bad, and could not be amended. There is no power to impose terms. Prisoner discharged. *Rex* v. *Nelson*, 12 O. W. R. 1063, 18 O. L. R. 484, 15 Can. Cr. Cas. 10.

Method of trial — *Election—Criminal Code, 1892, s. 773 — Speedy trial—Adding new charges—Consent.*]—When an accused person elects to take his trial before a Judge without a jury, on the charge upon which he was committed, or to answer which he was bound over to take his trial under s. 601 of the Criminal Code, 1892, leave should not be granted, under s. 773 of the Code, for the addition to the indictment of new or other charges for offences substantially different, unless the accused elect to be tried on such other charges also by a Judge without a jury. *Rex* v. *Carriere*, 14 Man. L. R. 52, followed. *Rex* v. *Douglas*, 5 W. L. R. 6, 16 Man. L. R. 345.

Motion for change of venue — *Fair trial—Convenience—Prejudice.*] — The principle on which a change of venue in a criminal case will be ordered under s. 651 of the Criminal Code is, that there is fair and reasonable probability of partiality and prejudice in the district, county, or place, within which the indictment would otherwise be tried.—On a motion to change the venue, notwithstanding that a strong case was made out for the change, if the balance of convenience alone was to be considered, still, as it was not shewn that there was or was likely to be any prejudice against the accused, and certainly no more where the indictment was found than in the place to which it was proposed to change the venue, the motion was refused. *Rex* v. *O'Gorman*, 9 O. W. R. 928, 14 O. L. R. 102.

Motion for leave to appeal from conviction at sessions and for a reserved case—Indictment for robbing and wounding —Verdict of guilty of assault — Recording verdict—Interpretation. *Rex* v. *Edmondstone and New*, 10 O. W. R. 581.

Motion for new trial—*Leave.*]—A motion for a new trial in a criminal cause can be made before the Court of Appeal only upon leave therefor granted by the Court before which the trial has taken place. *Rex* v. *Fouquet*, 14 Que. K. B. 87.

Motion for new trial, etc. — *Grand juror, foreman of coroner's jury which returned verdict of murder against prisoner.*] —The prisoner had been found guilty of murder. His counsel moved for a new trial, or to arrest judgment, on the ground that W., one of the grand jury, which found the bill against him, had previously acted as foreman of the coroner's jury, which had returned a verdict of murder against the prisoner. The same objection had been taken before the jury were sworn:—*Held*, Peters, J., that as the objection did not affect the justice of the proceeding the application must be refused. *R.* v. *Downey* (1869), 1 P. E. I. R. 291.

Motion to quash conviction—*Rule nisi —Practice where cause not shewn.*]—An order *nisi* granted by a single Judge under Rule 7 of the General Rules of Michaelmas Term, 1899, if not entered to shew cause, will on proof of service be made absolute, and the Court will not consider and determine the sufficiency of the grounds on which the order was granted. *Rex* v. *Ritchie, Ex p. Sandall*, 37 N. B. R. 206.

Motion to quash indictment—Written opinion of Judge after hearing motion—Effect of delivering to registrar—Judgment—Motion still pending. *Rex* v. *Hannay* (B.C.), 4 W. L. R. 96.

Nuisance—*Prosecution — Municipal corporation — Indictment—Preliminary inquiry —Prohibition — Chancery Division.*]—1. A prosecution of a municipal corporation for a nuisance in not keeping a public street in repair can only be by indictment, under s. 641, s.-s. 2, of the Criminal Code.—2. A preliminary inquiry cannot be taken before a magistrate for the purposes of s.-s. 2.—3. The Judges of the Chancery Division of the High Court of Justice for Ontario have jurisdiction at common law and by virtue of 28 V. c. 18, s. 2 (D.), in prohibition in criminal cases, notwithstanding that no Rules have been made under s. 533 (*b*) of the Code, and notwithstanding the provisions of s. 754. Motion for a rule *nisi* to set aside order of Ferguson, J., prohibiting a police magistrate from proceeding, refused. *Regina* v. *London*, 21 C. L. T. 71, 32 O. R. 326.

Order of magistrate requiring accused to furnish security to keep the peace—Criminal Code, ss. 748, 749—Right of appeal. *Rex* v. *Mitchell* (Y.T.), 8 W. L. R. 357.

Penal action — *Penalty for failure to comply with a formality — Limitations of time to begin an action—Beginning of running of statute—Expiry of time destroys the right of action—Courts should take notice of this—Proof—Failure of the defendant in a penal action to answer questions on deeds and articles—Right of the plaintiff to have the questions taken "pro confesso."*]—The time of one year, fixed by the statute to bring actions to recover penalties (Art. 2615 R. S. C.), begins to run, in the case of a failure to comply with the formalities, as soon as the cause of action arose. Hence, an action to recover a penalty of $400

against a company for failure to make and deposit within sixty days from the time it begins operations, the declaration provided in Art. 4754, R. S. Q., begun more than a year after the expiry of the sixty days, comes too late and ought to be dismissed. The limitation to a year within which penal actions must be brought is not a prescription the defendant must invoke. It extinguishes the right by lapse of time, and Courts must take cognizance of this. The defendant in penal actions is not bound to answer questions concerning deeds and articles, and his failure to do so does not give the plaintiff the right to take them "*pro confesso*." *Stewart* v. *Harrower Co.* (1903), 36 Que. S. C. 418.

Plea of "guilty"—*Magistrate's conviction—Denial of accused.*] — On motion to quash a conviction the defendant swore he had pleaded not guilty, while the magistrate and another swore he had pleaded guilty. In view of this and the magistrate's notes motion was refused. *Rex* v. *Campbell*, 12 O. W. R. 1061.

Practice — *Fraudulent conversion of moneys—Criminal Code, s. 355—Distributive charges—Trial and conviction on a charge—Autrefois acquit and autrefois convict.*]—The charges were objected to because "and" was substituted for "or" wherever it occurs in s. 355 above:—*Held*, that the charge is sufficiently and legally set forth. The magistrate had jurisdiction to amend the original charge of theft by permitting the Crown prosecutor to substitute for it 62 charges of theft. Three of the charges were tried together. No objection to this as they were in no respect identical nor were they identical with a previous charge on which he had been convicted. The different charges are not different indictments. *Rex* v. *Cross*, 6 E. L. R. 414.

Preliminary enquiry — *Irregularities—Hearing of a witness in absence of the accused—Grounds for quashing indictments.*] —The object of a preliminary inquiry is not to establish the guilt or innocence of the accused, but merely to ascertain whether he should be committed for trial or not. Hence, irregularities thereat afford no grounds for quashing an indictment subsequently preferred, such as the hearing of one of the witnesses in the absence of the accused. *R.* v. *Eliasoph* (1909), 19 Que. K. B. 232.

Preliminary enquiry before magistrate—*Discretion—Evidence— Re-opening.*] —In a criminal matter the preliminary enquête before the magistrate in respect of an offence which may be prosecuted by way of information, is not, properly speaking, the enquête of the complainant, but that of the magistrate.—2. At the time of the preliminary hearing, after the enquête of the prosecution has been declared closed, and nothing has been shewn against the accused, and even after the parties have been heard as to the legal effect of the evidence, the magistrate has a discretion to permit the prosecutor to re-open the enquête to make more ample proof. *Bélanger* v. *Mulvena*, 22 Que. S. C. 37.

Private prosecution—*Prosecutor bound over to prefer indictment — Appearance before grand jury — Irregularity — Motion to quash indictment — Security for costs.*]— When a person preferring a charge requires the magistrate who has discharged the accused, to bind him over to lay and prosecute an indictment, and does submit such an indictment to the grand jury, at the following sitting of the Court, he has no right to appear, by himself or through counsel, before the grand Jury, without the permission of the Court. The rule being, though not express, established by the hitherto unchallenged practice of the Court, a violation of it affords a ground for a motion to quash the indictment after a true bill has been found; but, when the question arises for a formal decision for the first time, and no injustice appears to have been caused by the irregularity, the motion will be discharged and the indictment allowed to stand.—2. The right of the accused to security for his costs, under cl. 4 of s. 595 of the Criminal Code, will be enforced, upon motion, after the finding of a true bill under the circumstances stated above. *Rex* v. *Hoo Yoke*, 14 Que. K. B. 540.

Private prosecutor—*Right to take part in proceedings.*]—*Held*, on motion for a *certiorari*, that, though it is the right of everyone to make a complaint with a view to the institution of criminal proceedings, and also, under certain circumstances, to prefer a bill of indictment, yet the prosecutor is no party to the prosecution, and cannot insist that he, or counsel retained by him, shall aid in the conduct of the prosecution. *Rex* v. *Gilmore*, 23 C. L. T. 298, 6 O. L. R. 286, 2 O. W. R. 710.

Proof of previous conviction—*Time for—Recollection of magistrate—Crown case reserved.*]—The proper time for proving a previous conviction against a prisoner under the Criminal Code, s. 971, is not upon the trial of the offence, but after the trial and before sentence.—Where there has been a previous conviction, within the recollection of the magistrate, but the Crown has failed to prove it, and it has not been otherwise shewn, the magistrate may proceed upon his own initiative, and may inform himself at the same time as to the previous conviction, and the age, character, and antecedents of the prisoner.—Semble, that the proper course to be pursued by the magistrate in such a case is not a subject for a reserved case. *Rex* v. *Bonnevie*, 38 N. S. R. 560, 1 E. L. R. 48.

Prosecuting officer—*Election of prisoner—Criminal Code—Inspection of depositions.*] —A barrister appointed by the Attorney-General, under the authority of R. S. N. S. 1900 c. 165, "to prosecute all matters in His Majesty's Supreme Court and County Court Criminal Court in and for the county of L., until further notice," has power to take the election of a prisoner under the Criminal Code, s. 706, the words "all criminal business," including all process necessary to bring the prisoner to trial, and the making of the election, being a necessary act in these proceedings.—The Dominion statute (Code, s. 706, s.-s. 2, amended by Acts of 1900 c.

46), must be read, if possible, in such a way as to make it applicable to the varying circumstances of the different provinces for which it was passed.—Where the depositions handed to the prisoner for his inspection are contained in a bundle with other depositions, but in such a way that there is no difficulty in understanding those applicable to the particular offence charged, there is a sufficient compliance with the Code, s. 653. *Rex* v. *Jodrey*, 38 N. S. R. 142.

Prosecution under Ontario Act—*Application to police magistrate by Attorney-General to state case—Time—Criminal Code—Ontario statutes.*] — Section 900 of the Criminal Code is now available for the review of all summary convictions under Ontario law, by virtue of the amendment to R. S. O. 1897 c. 90, by 1 Edw. VII. c. 13, s. 2 (O.)—An application to a magistrate to state a case in regard to a prosecution under an Ontario statute need not be made within the time limited by R. S. O. 1897 c. 90, s. 9, which applies only to appeals to the general sessions, but should be made within reasonable time, no time being limited by s. 900, and no rules having been made under s. 533 of the Code. *Rex* v. *Ferguson*, 12 O. L. R. 411, 8 O. W. R. 306.

Quebec Sunday Observance Act—Information—Informant must be British subject—Allegation—Proof. *Rex* v. *Panos*, 14 Can. Crim. Cas. 291; *Couture* v. *Panos*, 5 E. L. R. 525.

Recognizance—*Estreat — Notice.*] — A recognizance was entered into by the defendant and his surety before a stipendiary magistrate, conditioned to keep the peace and to appear before the magistrate on a day named. The defendant failed to appear, and the recognizance was estreated without notice to the defendant or to his surety:—*Held*, *per* Graham, E.J., McDonald, C.J., concurring, following *Regina* v. *Creelman*, 25 N. S. R. 404, that notice was necessary, and that the order estreating the recognizance was improperly made.—*Held*, otherwise, *per* Townshend, J., and Meagher, J., following the dissenting opinion in *Regina* v. *Creelman*, *Regina* v. *Brooke*, 11 Times L. R. 163, referred to and distinguished. Crown Rules 84, 86 and 87, and Criminal Code, ss. 916-922, discussed. *Rex* v. *Barrett*, 36 N. S. R. 135.

Recognizance — *Infant defendant.*] — Defendant had been convicted for illegally selling liquor. A motion was made to quash this conviction on the ground that defendant was an infant. No recognizance had been entered into, it being contended that as an infant defendant could not give a recognizance nor had $100 been paid into Court as required by s. 101 (*a*) of the Judicature Act:—*Held*, that as defendant had the option of paying money into Court the motion could not succeed. *Rex* v. *Reid*, 12 O. W. R. 1037.

Recorder of Montreal—*Summary trials—Evidence—Reduction to writing.*]—In all causes brought before the recorder of the city of Montreal, other than civil actions, the provisions of the Criminal Code apply generally, and the evidence must be taken down in writing. *Lacroix* v. *Weir*, 8 Que. P. R. 186, 12 Can. Cr. Cas. 297.

Recorder of Montreal—*Summary trials—Evidence—Reduction to writing—Waiver—Consent—Plea of "guilty"—Conviction—Certiorari.*]—In a trial before the Recorder's Court, the accused may validly waive the taking down of evidence in writing, and a summary conviction pronounced after such trial will not be quashed on *certiorari*, on the ground that such consent would be illegal. *Rex* v. *Weir*, 8 Que. P. R. 400.

But where the prisoner has pleaded guilty upon a summary trial, the depositions need not be in writing. S. C., 8 Que. P. R. 405.

Reference by the Governor-General in Council—*Criminal Code 6 & 7 Edw. VII. c. 8—Procedure—Alberta and Saskatchewan—Indictable offence—Preliminary enquiry—Preferring charge—Consent of Attorney-General—Powers of deputy — Lord's Day Act, s. 17.*]—Section 873*a* of Criminal Code (6 & 7 Edw. VII. c. 8), provides that "In the provinces of Alberta and Saskatchewan it shall not be necessary to prefer any bill of indictment before a grand jury, but it shall be sufficient that the trial of any person charged with a criminal offence shall be commenced by a formal charge in writing setting forth as in an indictment the offence with which he is charged."—"2. Such charge may be preferred by the Attorney-General or an agent of the Attorney-General or by any person with the written consent of the Judge of the Court or of the Attorney-General or by order of the Court:"—*Held*, Idington, J., dissenting, that a preliminary inquiry before a magistrate is not necessary before a charge can be preferred under this section.—*Held*, also, that the deputy of the Attorney-General for either of the said provinces has no authority to prefer a charge thereunder without the written consent of the Judge or of the Attorney-General or an order of the Court. Section 17 of Lord's Day Act provides that "no action or prosecution for a violation of this Act shall be commenced without the leave of the Attorney-General for the province in which the offence is alleged to have been committed. . ."—*Held*, that the deputy of the Attorney-General of a province has no authority to grant such leave. *Re Criminal Code* (1910), 30 C. L. T. 687, 43 S. C. R. 434.

Reserved case after verdict—*Criminal Code, ss. 1014, 1021.*]—Application to state a reserved case after trial and before sentence refused, following *Ead* v. *The King*, 40 S. C. R. 272. The Court refused to hear counsel as *amici curiæ* suggesting doubts as to correctness of charge. *Rex* v. *Pantilla*, 9 W. L. R. 241.

Restitution of stolen property—*Absence of identification at trial.*]—The prisoner was convicted for stealing from the person. At the trial the prosecutor testified that bank notes of the value of $70 were taken from him, and he gave the denomination of the notes, which included one for $20. Another witness testified that when the prisoner was arrested and brought to the police station she was searched and a $20 bank note

and some smaller notes, amounting in all to $28, were found upon her. The money was not produced at the trial nor any evidence given to identify the notes found on the prisoner with the stolen notes. After the trial, upon the *ex parte* application of the prisoner, an order was made by a Judge in the County Court Judge's Criminal Court, directing that the money found on the prisoner should be restored to her. A motion was made to set aside the order, whereon judgment was reserved. The Judge died without delivering judgment. The motion was renewed before his successor, who dismissed the application to set aside the *ex parte* order, and made an order for restitution to the prisoner, on the ground that the money was not produced and identified at the trial as part of the stolen property. *Regina* v. *Haverstock*, 21 C. L. T. 482.

Right to jury—*Stealing cattle.*]—The prisoner was charged with having stolen one steer, and was tried summarily before a Judge without a jury. The Judge found that the value of the animal did not exceed $200: —*Held*, that the charge was one of theft simply, although the punishment for stealing cattle was greater than for stealing other property; and s. 66 of the North-West Territories Act applied to the offence, and not s. 67. *Regina* v. *Pachal*, 20 C. L. T. 192.

Search warrant—*Information on which based — Causes of suspicion — Certiorari— Quashing.*]—The proceedings upon which a search warrant is issued and the warrant itself may be brought before the Court on *certiorari*, and if the warrant is deemed to have been improperly issued, it may be quashed. — The information necessary to justify the issuing of such warrant must disclose facts and circumstances shewing the causes of suspicion, which tended to the belief of the commission of the alleged offence, with regard to which the warrant is deemed essential. The information herein being defective in this respect, the warrant was directed to be quashed, but on condition that no action should be brought against the police magistrate who issued it, or the officer who executed it. *Rex* v. *Kehr*, 11 O. L. R. 517, 7 O. W. R. 446.

Sittings of Court—*Appeal to Court of King's Bench — Dismissal of information— Autrefois convict—Invalid conviction.*]—The words "sittings of the Court," in s. 880 (*a*) of the Criminal Code, mean a term of the Court as fixed by law, and not a sitting had in virtue of an order of adjournment.—2. An appeal lies to the Court of King's Bench from an order of a justice of the peace dismissing an information or complaint on a plea of *autrefois convict*.—3. A conviction by a magistrate or magistrates upon an information or complaint charging an offence for which a previous information against the same defendant has been made before another magistrate, and while the same is pending, is null and void, and will not avail in support of a plea of *autrefois convict* to the previous conviction or complaint. Hence an order dismissing the latter on such a plea will be quashed in appeal. *Cotton* v. *Bombardier*, 15 Que. K. B. 7.

Stamps—*Proceedings by Crown—Warrant of arrest—Execution—Validity.*]—The affixing of stamps on judicial proceedings enjoined by ss. 1167 and following, R. S. Q., is not required on proceedings by the Crown. But, even if it were, the omission to affix a stamp to a warrant of arrest would not affect the validity of the proceedings subsequent to the execution of the same. *Rex* v. *Hamelin*, 16 Que. K. B. 501.

Stated case—*N. S. Speedy Trials Act— Judge taken ill on day fixed for trial of prisoner—Jurisdiction to convict on a subsequent trial.*]—On day fixed for trial of prisoner, under above Act, the Judge was suddenly taken ill and unable to attend. No adjournment was made. Subsequently the Judge fixed another day, tried, and convicted defendant:—*Held*, that conviction was right. *Rex* v. *Stewart*, 6 E. L. R. 564.

Summary conviction — *Jurisdiction of District Court.*]—Defendant had been summarily convicted before two justices of the peace for unlawfully obstructing a sheriff's officer. On appeal to a District Court the Judge of that Court referred the matter to the Full Court. There being no authority to warrant the reference and no jurisdiction in the Court to entertain it, the matter was not dealt with. *Rex* v. *Mischowsky*, 11 W. L. R. 290.

Summary trial — *Election — Indictment at assizes — Grand jury — Prisoners called on to plead—Re-election.*]—The right of an accused person, bound over by the magistrate at the preliminary hearing to appear and take his trial at the assizes, to elect, under s. 825 of the Criminal Code, to be tried by a Judge without a jury, may be exercised even after finding of a true bill by the grand jury on an indictment upon the same charge preferred by the Crown at the next sessions, if such election is made before plea to the indictment. *Rex* v. *Komiensky*, 6 Can. Crim. Cas. 524, distinguished. *Rex* v. *Thompson*, 8 W. L. R. 3, 17 Man. L. R. 608, 14 Can. Crim. Cas. 27.

Summary trial—*Police magistrate—Jurisdiction — Consent of accused — Criminal Code, s. 778 (2)—Information not given by magistrate—Conviction quashed—New trial —Protection of magistrate and others acting under conviction.*]—Sub-section 2 of s. 778 of the Criminal Code, as now amended by 8 & 9 Edw. VII. c. 9, requires the magistrate, where consent of the accused is necessary to enable the magistrate to try the accused summarily, to inform the accused that he is charged with the offence, describing it, and that he has the option to be forthwith tried by the magistrate without the intervention of a jury, or "to remain in custody or under bail, as the Court decides, to be tried in the ordinary way by the Court having criminal jurisdiction." — Where a police magistrate, having before him a prisoner charged with indecent assault upon a female, complied with the section by informing the prisoner of the substance of the charge against him, and also that he had the option of being tried by the magistrate without the intervention of a jury, or by a jury if he (the

accused) saw fit, but did not give him the information in the words of the section in quotation marks above, and the accused elected to be tried by the magistrate and was convicted and sentenced: — *Held*, that the magistrate did not acquire jurisdiction; and the conviction must be quashed.—The prisoner, however, was not to be released, but must be brought again before the magistrate, and the charge must be again inquired into; the magistrate and all acting under the conviction to be protected. *R.* v. *Howell* (1910), 13 W. L. R. 594.

Summary trial of prisoner for theft —*Sentence imposed by police magistrate—Admission by prisoner of previous conviction—Information or indictment not charging previous conviction—Criminal Code, ss. 386, 851, 963, 1016* (2)*—Alteration of sentence by Court of Appeal.*]—1. When a prisoner is convicted, on a summary trial before a police magistrate, of theft, he cannot be sentenced, under s.-s. 2 of s. 386 of the Criminal Code, to more than 7 years' imprisonment, although he has been previously convicted of theft, unless such previous conviction has been charged in the information by analogy to s. 851, and proved in accordance with s. 963, and where in such a case a greater punishment is inflicted, the Court of Appeal, upon an application under s.-s. 2 of s. 1016 of the Code, will set aside the sentence and pass what it considers a proper sentence.—*Quære*, Whether the procedure provided in the Code permits of inserting charges of previous convictions in an information leading up to the preliminary hearing of a charge of an indictable offence.—2. When a previous conviction is not charged in the indictment or information, neither a Judge nor a magistrate has any right to ask a prisoner, after conviction, whether he has been previously convicted or not, either with the view of ascertaining whether the prisoner is liable to any increased punishment in such case, or with the view of determining what the proper sentence, within the ordinary maximum provided by the statute in the particular case, should be.—*Semble*, previous convictions cannot be in any way considered in passing sentence unless they have been charged in the indictment or information. *Rex* v. *Edwards*, 7 W. L. R. 1, 17 Man. L. R. 288.

Summoning grand jury—*Irregularities—Sheriff—Disqualification— Coroner.*]—The prisoner was convicted at the circuit for the county of C., which opened on the second Tuesday in November, 1897. When the Court first met, as there was no criminal business, the grand jury was discharged. After proceeding for a time with the trial of a civil cause the Court adjourned until the 30th November, before which time the prisoner was committed for trial. The sheriff, without any order, summoned a second grand jury for the adjourned Court. Objection having been taken, on an order made by the Court, the sheriff summoned a third grand jury, which was practically the same as the second. This jury found a true bill, and the prisoner pleaded guilty to two of the counts in the indictment. It then appearing that the sheriff was related to the prosecutor, the Court, without formally discharging the third jury, allowed the plea of guilty to be withdrawn and ordered a fourth grand jury to be summoned, the *venire* being addressed to a coroner. The order for summoning the last grand jury (which also directed the summoning of a petit jury) was brief in form and did not shew on its face all the facts which necessitated its issue. Among the grand jurors summoned by the coroner were two who had been on the sheriff's third panel. The coroner's grand jury was all drawn from the parish of Woodstock:—*Held*, that the order to the coroner to summon a jury need not shew on its face all the facts that made its issue a necessity.—2. The facts that the sheriff's jury had not been formally discharged, nor the indictment found by it in terms disposed of, were immaterial—the whole proceedings being void by reason of the defect in the returning officer.—3. The power of the Court to summon grand juries is not exhausted by the summoning of two.—4. The disqualification of the sheriff sufficiently appeared.—5. It is not necessary that the grand jury should be drawn from all parts of the county.—6. The fact that some of the jurymen summoned by the coroner were also on the sheriff's panel was not material.—7. It is no objection to the order to the coroner that it directed him to summon both a grand jury and a petit jury.—8. Section 12 of C. S. N. B. c. 45 applies to criminal as well as to civil matters.—9. *Per* Tuck, C.J.: The doctrine held in England that all the coroners of a county, when acting ministerially, constitute but one officer, is not applicable to this province.—*Per* Hanington, J.: The direction of *venire* to a single coroner, and a return by him alone, is sufficient under s. 12 of C. S. N. B. c. 25, and if not the defect is cured by s. 656 of the Criminal Code. *Regina* v. *McGuire*, 34 N. B. R. 430.

Suspended sentence—*Estreating recognizance—Locus standi.*]—The defendant was in 1887 convicted of libel, and released from custody upon entering into a recognizance with sureties to appear and receive judgment when called upon. The private prosecutor obtained a rule *nisi* calling on the defendant to shew cause why he should not be ordered to appear at the next assizes to receive judgment, on the ground that he had failed to be of good behaviour since entering into the recognizance, by reason of his having published further libels:—*Held*, that it is only upon motion of the Crown in such cases that the recognizance of the defendant and his bail are estreated, or judgment moved against the offender.—*Held*, also, that, apart from this, under the circumstances, the prosecutor must be left to his remedy by action or indictment against the defendant in regard to the libels complained of. *Rex* v. *Young*, 21 C. L. T. 463, 2 O. L. R. 228.

Trial — *Juror — Order to stand by — Time.*]—The direction to a juror to stand by is practically a challenge for cause, and therefore the order to stand by must be given at a time when a challenge could be made; and, inasmuch as the right to challenge must be exercised before the juror has taken the book in order to be sworn, the direction to stand by can only be given before the juror has received the book. *Rex* v. *Barsalou*, 10 Que. Q. B. 180.

Trial—*Jury—Influence upon, by Judge's Remark—Conspiracy — Evidence—Reserved case—Prejudice of juror — New trial—Affidavits—Misconduct.*] — A verdict cannot be impeached in consequence of an observation made by the Judge presiding while the trial was proceeding, unless such observation was calculated to influence the jury against the defendant; and consequently, a remark of the presiding Judge to the defendant's counsel while the jury was being sworn, that "if you continue to challenge every man who reads the newspapers, we shall have the most ignorant jurors selected for the trial of this cause," is not a proper ground for a reserved case, it having no tendency to influence the jury one way or the other.—2. On a trial for conspiracy to defraud a railway company by fraudulently obtaining information of the secret audits about to be made and furnishing the same to conductors of cars to enable them to be prepared for the audits, proof that information of this nature might be given by one conductor to another for purposes other than to defraud the company, was properly excluded, because such questions could not disprove the object of the conspiracy or throw any doubt on the evidence which had been adduced to shew the object which the parties had in view.—3. An observation by the presiding Judge, in his charge to the jury, to the effect that "about forty or fifty witnesses had been examined for the purpose of establishing the defendant's good character, and that it was very strange that it should take forty or fifty witnesses to establish it," is not an irregularity which can constitute a ground for granting a reserved case.—4. A new trial should not be ordered in consequence of remarks made by a juror tending to shew prejudice, unless it be shewn that he was so prejudiced as to be unable to give the defendant an impartial trial.—5. An application for a new trial on the ground of improper conduct of the jury must be supported by affidavits clearly setting forth the alleged irregularity, and, in the absence of full proof under oath, the presumption is that the jury properly performed its duty.—6. The affidavits of jurors are not admissible to impeach their finding, but are admissible to support and confirm the presumption that the proceedings of the jury were correct, and that there was no misconduct. *Rex* v. *Carlin*, 12 Que. K. B. 368.

Trial—*Jury—Right to — Assault—Criminal Code.*]—A person charged with assault occasioning actual bodily harm contrary to s. 262 of the Criminal Code is not entitled, under s. 67 of the North-West Territories Act, to be tried with the intervention of a jury. Section 66 extends to all minor offences included in the several offences specifically enumerated therein. *Rex* v. *Hostetter*, 5 Terr. L. R. 363.

Trial—*Offence other than that for which prisoner committed.*] — *Held*, that, notwithstanding the provisions of s. 773 of the Criminal Code, 1892, a Judge should not, against the wish of a prisoner, give his consent, at the trial before him without a jury which the prisoner has elected to take, to any charge being preferred in the indictment unless it is clear that, while it may be more formally or differently expressed, it is substantially the same charge as the one on which he was committed for trial. *Rex* v. *Carriere*, 22 C. L. T. 187, 14 Man. L. R. 52.

Trial—*Place other than Court house.*]—At the trial of an indictable offence the presiding Judge has the power to order the Court to be adjourned to a place in the county other than the Court house, for the purpose of allowing the jury to hear the evidence of a witness who was unable through illness to leave his home. *Rex* v. *Rogers*, 36 N. B. R. 1.

Trial—*Right of jury — Stealing cattle.*]—Although the punishment which may be awarded on a conviction for stealing cattle is greater than that which may be awarded on a conviction for stealing certain other classes of property, a person charged with having stolen cattle the value of which does not, in the opinion of the trial Judge, exceed $200, has not the right to be tried by jury. *Regina* v. *Pachal*, 20 C. L. T. 192, 4 Terr. L. R. 310.

Trial—*Speedy trial of indictable offences—Election as to mode of trial — Time for—Indictment.*]—After an indictment has been found against the accused by the grand jury, it is too late for him to elect for speedy trial without a jury under Part LIV. of the Criminal Code. Jurisdiction to hold a speedy trial is strictly limited by the terms of s. 765 of the Criminal Code, and such jurisdiction is only conferred where the accused has been committed to gaol for trial, or is otherwise in custody awaiting trial on the charge against him. *Rex* v. *Komiensky*, 12 Que. K. B. 329.

Trial—*Speedy trial of indictable offences—Election as to mode of trial — Time for—Indictment.*]—When, in the ordinary course, an indictment has been found for an offence with which a person who is either in custody or on bail, has been charged, and such indictment has been returned into Court and has been filed of record, the Court is regularly and exclusively seised of the case, and the accused has no right then to ask for a speedy trial and to remove the case and the indictment and the other documents forming the record to the special Court for speedy trials. *Rex* v. *Komiensky*, 12 Que. K. B. 463, 7 Can. Cr. Cas. 27.

Trial—*Speedy trial of indictable offences—Election as to mode of trial — Time for—Waiver—Plea to indictment.*]—Four accused persons, after a preliminary enquiry, were committed for trial for conspiracy to defraud, but no bill of indictment was preferred to the grand jury on such charge. A bill of indictment, however, was preferred by the Crown counsel, with the written consent of the Judge presiding in the Court of King's Bench, charging the four accused and two other persons with conspiracy. Two additional bills were preferred against the six persons, charging them with having committed other indictable offences, and the grand jury declared the three bills well founded and returned them into Court as true bills. The accused, when arraigned, severally pleaded not guilty on the three indictments, but when

the Court was proceeding to fix a day for the trials, they moved that an order be made allowing them to be taken before a Judge of sessions to declare their option for speedy trial on the indictments:—*Held*, that in order to waive a trial by jury and to elect to be tried by a Judge of sessions, an information must have been laid before a justice of the peace, a preliminary enquiry must have been made, depositions giving evidence concerning the offence charged must have been taken, and the accused must have been committed for trial. *Rex* v. *Gibson*, 4 Can. Crim. Cas. 451, followed.—2. Whenever an accused party neglects to take the necessary steps to elect for a trial without a jury in the special Court for speedy trials, before an indictment is found against him and returned into Court, his plea to such indictment will be conclusive against him, and he cannot afterwards elect for a speedy trial without a jury: *Regina* v. *Lawrence*, 1 Can. Crim. Cas. 295. His plea to the indictment conclusively and exclusively fixes the form. *Rex* v. *Wener*, 12 Que. K. B. 320.

Trial—*Speedy trial of indictable offences —Jurisdiction of district magistrate — Criminal Code.*]—A district magistrate has no jurisdiction to try a person for an indictable offence, except in the special cases provided by law, viz., the indictable offence must be one which is triable before the general or quarter sessions of the peace; the accused person must have been committed or bailed for trial, and be in actual custody awaiting trial; the sheriff must have notified the district magistrate in writing that such person is so confined, stating his name and the nature of the charge preferred against him; the district magistrate must thereupon have caused the prisoner to be brought before him, and, after having obtained the depositions on which the prisoner was committed, state and describe to him the offence with which he is charged, and the prisoner must then have consented to be tried before such district magistrate without a jury. The jurisdiction to hold a speedy trial is strictly limited by the terms of ss. 765-767, Criminal Code, and the conditions specified in these sections must be strictly complied with, on pain of absolute nullity, even where the accused has expressly declared that he consents to stand his trial before the district magistrate who convicted him. *Rex* v. *Breckenridge*, 12 Que. K. B. 474.

Trial—*Summary trial — Assault—Penalty—Right to jury—Notification by magistrate's clerk.*]—Section 785 of the Criminal Code, 1892, as re-enacted by 63 & 64 V. c. 46, gives to the police magistrate of a city or town power to impose the same punishment for a common assault as could be imposed upon a person convicted on an indictment, when he has decided to treat it as an indictable offence and is proceeding under the summary trials part of the Code.—2. The magistrate may ask the question provided for by s. 786 of the Code through the mouth of his clerk. *Rex* v. *Ridehaugh*, 23 C. L. T. 236, 14 Man. L. R. 434.

Venue — *Indictment — Commitment to penitentiary—Warrant.*] — The venue mentioned in s. 609 of the Criminal Code, 1892, means the place where the crime is charged to have been committed; and, in cases where local description is not required, there is an implied allegation that the offence was committed at the place mentioned in the venue in the margin of the record. It is of no consequence whether or not the trial Court should be considered an inferior Court.—Under s. 42 of the Penitentiary Act, R. S. C. c. 182, a copy of the sentence of the trial Court, certified by a Judge or by the clerk or acting clerk of that Court, is a sufficient warrant for the commitment and detention of the convict. Decision of Davies, J., in *Ex p. Smitheman*, 24 C. L. T. 329, 35 S. C. R. 189, affirmed. *Smitheman* v. *Rex*, 35 S. C. R. 490.

Verdict — *Indictment for robbery with violence and wounding—Finding of "guilty of assault" — Recording — Interpretation—New trial.*]—On the trial of the defendants at the general sessions of the peace on an indictment charging them with robbery with violence and wounding, on the jury bringing in a finding of "guilty of assault," the chairman questioned the Crown Attorney as to its meaning, when he replied, "assault as charged in the indictment." The chairman then asked the foreman, when he replied, "We mean inflicting the blow with a bottle as described, but not guilty of robbery," and, on being questioned as to which prisoner, replied, "Both;" whereupon the chairman indorsed the verdict on the record as follows, "Guilty of assault as charged, but not guilty of robbery," he so interpreting the finding:—*Held*, that the verdict was not properly interpreted and acted upon by the chairman, and was not rightly recorded; and a new trial was directed. *Rex* v. *Edmonstone and New*, 10 O. W. R. 1065, 15 O. L. R. 325.

Warrant of arrest — *Habeas corpus—Return—Arrest on telegram — Proper warrant duly indorsed—Perjury—Sufficient allegation of—Signature of magistrate—Designation of office.*]—The accused was arrested for an offence alleged to have been committed in another province in respect of which a warrant of arrest had been there issued and notified by telegram to the police department at the place of arrest:—*Held*, that he was not entitled to be discharged on *habeas corpus* on the ground of the irregularity of his arrest, if the original warrant in due form and duly indorsed was returned in answer to the writ.—2. A warrant of arrest for perjury is sufficient under s. 1152 of the Criminal Code if it charges that the accused committed perjury by swearing that he did not do a particular act specified, without alleging therein that the statement was sworn with intent to mislead the Court.—3. A magistrate signing a warrant need not add to his signature the full designation of his office and the name of the district for which he was appointed, if recited in the body of the warrant. *Rex* v. *Lee Chu* (N.S.), 14 Can. Crim. Cas. 322.

Wilfully obstructing a peace officer —*Right of accused to be put on election before summary trial — Party put twice in jeopardy — Power of appellate Court to retry appellant on original charge.*] — An accused party charged before two justices of the peace with wilfully ob-

structing a peace officer in the execution of his duty, cannot be tried summarily by them without his consent, after being put to election as provided in s. 778 Cr. C. A summary conviction of the accused by the justices, without his consent, is irregular and will be quashed on appeal.—The Court to which an appeal is taken by the accused from a summary conviction so made, shall hear and determine *de novo* the charge upon which it was made and make such other conviction or order as it thinks just. Section 754 Cr. C. *Von Koolberger & Lapointe* (1909), 19 Que. K. B. 240.

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8. Summary Conviction.

Amendment — *Certiorari—Indian Act.*]—Under s. 889 of the Criminal Code, the Court, if a conviction under any Act to which the procedure in the Code applies is brought up by *certiorari* (whether in aid of a writ of *habeas corpus* or on motion to quash the conviction, is immaterial), may hear and determine the charge as disclosed by the depositions upon the merits, and may confirm, reverse, vary, or modify the decision.—A conviction under the Indian Act, defective on its face, was amended by describing the offence accurately, and by substituting for imprisonment for six months and a fine of $50 and $5 costs or imprisonment for a further term of six months in default of payment of the costs or in default of sufficient distress, imprisonment for six months and a fine of $50 and $5 costs or imprisonment for a further term of three months in default of payment of the fine and costs. *Regina* v. *Murdock*, 20 C. L. T. 350, 27 A. R. 443.

Appeal — *Magistrate stating case after appeal—Res judicata.*]—The defendant was convicted before a stipendiary magistrate for violation of certain regulations made under the Fisheries Act, R. S. C. c. 96, s. 17, and an appeal was taken to the County Court for district No. 3, where the conviction was affirmed. No appeal was taken from the judgment in the County Court, but the stipendiary magistrate was applied to to state a case for the opinion of the Supreme Court, with the view of questioning the validity of the conviction, which he did:—*Held*, quashing the case stated, that, with the judgment of the County Court standing in the way, the defendant was precluded from asking the stipendiary magistrate to state a case for the purpose of attacking the conviction in the Supreme Court. The judgment in the County Court, in the identical case, was binding as between the parties, and upon the stipendiary magistrate, and the matter was therefore *res judicata*, and one in which the magistrate could not be asked to state a case. *Rex* v. *Townshend*, 35 N. S. R. 401.

Appeal—*Notice—Sufficiency — Recognizance — Affidavit of justification.*] — *Held*, Scott, J., *dissentiente*, that a notice of appeal from a conviction is insufficient if it is not addressed to any person.—*Held, per curiam*, that no affidavit of justification of the sureties need accompany the recognizance. *Cragg* v. *Lamarsh*, 3 Terr. L. R. 91.

Appeal—*Notice of—Parties to be served.*]—A notice of appeal from a summary conviction (provincial) served upon the convicting magistrate is not invalid because it is not also addressed to and served upon the respondent. It is not a pre-requisite to the right of appeal that the person convicted should have been taken into custody. *Quære*, whether service of notice of appeal on the respondent's solicitor would not be sufficient in any event. *Rex* v. *Jordan*, 22 C. L. T. 219, 9 B. C. R. 33.

Appeal—*Notice to complainant.*]—A notice of appeal from a conviction under the Summary Convictions Act, C. S. C. c. 178, was addressed to the convicting magistrate only, and was served upon him only. The notice contained no intimation that it was served on the magistrate for the prosecutor or complainant, nor did it appear that the magistrate was otherwise notified to that effect:—*Held*, the notice of appeal was insufficient. *Keohan* v. *Cook*, 1 Terr. L. R. 125.

Appeal — *Notice to complainant — Forum.*] — *Held*, that a notice of appeal neither addressed to nor served upon the prosecutor, but addressed to and served upon one only of two convicting justices of the peace, is insufficient, though it appear that when the notice was so served the justice upon whom it was served was verbally informed that it was for the prosecutor. *Keohan* v. *Cook*, 1 Terr. L. R. 125, followed. The question, whether a notice of appeal to the Supreme Court of the North-West Territories instead of a Judge thereof was valid, was raised but not decided. *Hostetter* v. *Thomas*, 4 Terr. L. R. 224.

Appeal—*Payment of fine — Security — Money deposit—Return to appellate Court.*]—A person by paying his fine on a summary conviction loses any right of appeal he might otherwise have had under s. 880 of the Criminal Code. Where on an appeal from a summary conviction an appellant makes a money deposit in lieu of recognizance, the deposit, which includes both the fine and the security for costs of appeal, should be returned by the justice into the appellate Court, and in default the appeal cannot be heard. *Rex* v. *Neuberger*, 9 B. C. R. 272.

Appeal—*Recognizance.*]—It is too late to file the recognizance required by s. 77 of the Summary Convictions Act, on an appeal from a summary conviction or order where the defendant has not remained in custody, after the appellant has entered upon his case. *Bestwick* v. *Bell*, 1 Terr. L. R. 193.

Appeal—*Recognizance—Defect in—Costs—Order—Motion to quash — Grounds—Addition of.*] — The Court may allow new grounds to be added on shewing cause against an order *nisi* to quash an order dismissing an appeal from a conviction under the Criminal Code, granted under the Rule of Court of Michaelmas term, 1899, although the Rule requires the grounds to be stated in the order. — A recognizance entered into under s. 880 (*e*) of the Code is bad if the word "personally" is omitted from the condition to appear and try the appeal and abide the

judgment of the Court thereupon. And the appellate Court, on this objection being raised to the recognizance, has jurisdiction to dismiss the appeal with costs. *Rex* v. *Wedderburn, Ex p. Sprague*, 36 N. B. R. 213.

Appeal — *Recognizance — Sureties — Statutory requirements.*]—On an appeal, under s. 879, Criminal Code, by several defendants from a summary conviction, the recognizance must be that of two sureties besides the appellant, and the appeal will be quashed if the recognizance be given with only one surety.—2. An appeal not being of common law right, the conditions precedent imposed by the statute must be strictly complied with. —3. The giving of security is an essential part of the appeal, and unless it be done in the manner required by statute, the giving of a notice of appeal will be unavailing, and the conviction may be prosecuted as if no notice had been given. *Regina* v. *Joseph*, 21 Que. S. C. 211.

Appeal—*Right of—Plea of guilty.*]—A person who has pleaded "guilty" to a charge, and has been summarily convicted, may raise a question of law in an appeal under s. 897 of the Criminal Code, but on such appeal his former plea of "guilty" estops him from calling upon the respondent to prove his guilt. So far as his guilt or innocence is concerned, he is not a "party aggrieved" within the meaning of s. 879 of the Criminal Code. *Rex* v. *Brook*, 5 Terr. L. R. 369.

Appeal to County Court—*Habeas corpus proceedings.*]—Application for a writ of *habeas corpus*. The prisoner was charged with an offence under s. 523 of the Criminal Code, convicted thereof by the police magistrate for the city of Rossland, and sentenced to two months' hard labour. Immediately after conviction he appealed to a County Court, and Leamy, Co.J., affirmed the conviction:—*Held*, dismissing the application, that the decision of the County Court in appeal from a summary conviction is final and conclusive, and a Supreme Court Judge has no jurisdiction to interfere by *habeas corpus*. *Rex* v. *Beamish*, 21 C. L. T. 603, 8 B. C. R. 171.

Appeal to Judge of Supreme Court. N.W.T.—Notice of appeal—Insufficiency—Time of sitting of Court not stated. *Rex* v. *Brimacombe* (N.W.T.), 2 W. L. R. 53.

Breach of municipal by-law—*Statement of offence—Costs—Fees of experts.*]—A conviction which purports to be for breaches of a municipal by-law, but fails to set out which of the large number of sections of the by-law the defendant has violated, and does not in other respects allege the offence or offences whereof the defendant was deemed to be guilty, in specific, distinct, and substantive terms, is insufficient and defective, and will be quashed on *certiorari*.—2. The fees paid to experts appointed by the Recorder to visit and report upon the condition of the defendant's premises could not be made payable by the defendant as part of the costs of the conviction. *Riopelle* v. *Desrosiers*, 3 Que. P. R. 195.

Canada Shipping Act—*Offence*—"*Wilfully*"—*Omission of.*]—It is essential in a conviction under s. 287 of the Canada Shipping Act to state that the act charged was wilfully committed, and the omission to so state is fatal to the conviction. *The King* v. *Tupper*, 11 Can. Crim. Cas. 199, and *Ex p. O'Shaughnessy*, 8 Can. Crim. Cas. 136, followed. *Rex* v. *Bridges*, 13 B. C. R. 67.

Case stated—*Recognizance — Cash deposit in lieu of.*]—Appeal by way of case stated under s. 900 of the Code. The defendant was convicted of an offence under the Act to restrict the Importation and Employment of Aliens. Instead of entering into the recognizance required by s.-s. 4 of s. 900 of the Code, the defendant deposited a marked cheque for $100 with the convicting magistrate:—*Held*, that the recognizance was a condition precedent to the jurisdiction of the Court to hear the appeal, and no substitute was permissible. *Rex* v. *Geiser*, 21 C. L. T. 604, 8 B. C. R. 169.

Certiorari — *Amended conviction returned—Costs.*]—In the return to a writ of *certiorari* to remove two convictions with a view to quashing the same, on the grounds that they did not follow the minute of adjudication, and were made on an information and summons for a single offence, the convicting magistrate returned the original convictions and an amended conviction in which the objections were cured: — *Held*, that the magistrate had power to amend; and the rule *nisi* to quash should be discharged.—A conviction will not be quashed because the costs are ordered to be paid to the party aggrieved, instead of the prosecutor. *Rex* v. *O'Brien, Ex p. Grey*, 37 N. B. R. 604; *Rex* v. *Grey*, 2 E. L. R. 68.

Certiorari — *Defect in conviction — Imprisonment — Amendment — Retrial.*] — Where upon the return to a writ of *certiorari* the Court, upon perusal of the depositions, has no doubt as to the commission of the offence for which the defendant has been tried and convicted, but the conviction is defective in awarding a longer term of imprisonment than the statute permits, the Court has power, under ss. 883 and 889 of the Criminal Code, to amend the conviction so as to make it conform to the law.—It is not necessary, before making such amendment, that the Court should retry the case by having the witnesses orally examined before it. *Rex* v. *McKenzie*, 2 E. L. R. 319, 41 N. S. R. 178.

Certiorari—*Habeas corpus — Keeper of bawdy house—Pleading guilty—Trial on the merits.*]—The offence of being a keeper of a house of ill-fame is an indictable offence, and it may be tried either before a jury in the ordinary way, or before a police magistrate under the summary trials clauses, or before a justice of the peace under the summary convictions clauses, of the Code. Upon an application to quash a conviction where the prisoner was in custody when the matter came up on *certiorari*:—*Held*, that a writ of *habeas corpus* was necessary. The defendant was convicted by a police magistrate after pleading guilty to a charge that she did "unlawfully appear the keeper of a house of

ill-fame," and sentenced to be imprisoned for one year in the Andrew Mercer reformatory: —*Held*, that the conviction might be treated as having been made under the summary convictions clauses of the Code, although the sentence exceeded the power of the magistrate, and that such conviction might be supported and the sentence amended under those clauses:—*Held*, also, that when a prisoner charged before a magistrate with appearing the keeper of a house of ill-fame had pleaded guilty to such charge, there was a trial on the merits, and that such person was to be deemed guilty of the offence of keeping a house of ill-fame. *Regina* v. *Spooner*, 21 C. L. T. 159, 32 O. R. 451.

Certiorari—*Recognizance—Sufficiency of justification — Appeal.*]—An affidavit of justification upon a recognizance given pursuant to Rule of Court passed under s. 892 of the Criminal Code, need not state that the surety is worth the amount of the penalty over and above other sums for which he is surety. A Rule of Court made under s. 892 of the Criminal Code requiring sufficient sureties for a specific amount, is complied with if the sureties justify as being possessed of property of that value, and as being worth the amount over and above all their just debts and liabilities, and over and above all exemptions allowed by law. *Regina* v. *Robinet*, 16 P. R. 49, not followed. Where a conviction is attacked on the ground of want of jurisdiction, the mere filing of a recognizance by the defendant on an appeal therefrom does not deprive him of his right to a writ of *certiorari*. The conviction and all other proceedings relating thereto having been filed by the magistrate under s. 891 of the Criminal Code, in the office of the clerk of the Court for the judicial district in which the motion is made, a motion to quash the conviction can be made without the issue of a writ of *certiorari*. Section 892 of the Criminal Code authorises the requiring of a recognizance only where the conviction is brought before the Court by a writ of *certiorari*, and no recognizance is required where such a writ is not necessary or is dispensed with. *Regina* v. *Ashcroft*, 4 Terr. L. R. 119.

Certiorari—*Right to—Criminal Code, s. 887 — Failure of remedy by appeal.*]—Section 887 of the Criminal Code, which enacts that "no writ of *certiorari* shall be allowed to remove any conviction or order had or made before any justice of the peace, if the defendant has appealed from such conviction or order to any Court to which an appeal from such conviction or order is authorised by law, or shall be allowed to remove any conviction or order made upon such appeal," does not deprive the Court of the right to quash a conviction on *certiorari*, where the convicting justice acted as a partisan in collusion with the prosecutor and without jurisdiction, even though an appeal has been taken which has failed by reason of the refusal of the justice to make the return required by law; Landry, J., dissenting. *In re Kelly*, 27 N. B. R. 553, discussed. *Rex* v. *Delegarde, Ex p. Cowan*, 36 N. B. Reps. 503.

Certiorari—*Selling liquor to Indians — View of place of sale.*]—Motion for *certiorari* to remove a conviction for selling an intoxicant to an Indian. The magistrate, after hearing the evidence, but before giving his decision, went alone and took a view of the place of sale:—*Held*, quashing the conviction, that the proceeding was unwarrantable.—2. That s. 108 of the Indian Act and s. 889 of the Criminal Code do not prevent proceedings by *certiorari* where the ground of complaint is that something was done contrary to the fundamental principles of criminal procedure. *Re Sing Kee*, 21 C. L. T. 220, 8 B. C. R. 20.

Certiorari—*Warrant of commitment — Illegality—Refusal to quash — Habeas corpus.*]—When a person is in custody under a warrant of commitment, founded on a good conviction, the Court will not quash the commitment on *certiorari*, even if it is illegal. The proper procedure is by way of *habeas corpus*. *Rex* v. *Melanson, Ex p. Bertin*, 36 N. B. R. 577.

Complaint—*Description of offence—Uncertainty—Certiorari.*] — A conviction obtained upon a complaint which does not give a clear and precise description of the alleged offence or contravention of a statute or by-law will be quashed upon *certiorari*. *Carriere* v. *Montreal*, 5 Que. P. R. 44.

Costs—*Unauthorised items—Amendment.*]—A justice's order dismissing an information under the Summary Convictions Act, ordered the informant to pay as costs a sum which included items for "rent of hall," "counsel fee," "compensation for wages," and "railway fare."—*Held*, that none of these items could legally be charged as costs, and that, therefore, the order was bad, so far as it awarded any costs. — *Held*, also, that the Court could not amend the order by deducting the illegal items, though it could amend by striking out *in toto* all that part of the order relating to costs. *Regina* v. *Dunning*, 14 O. R. 52, considered. *Regina* v. *Laird*, 1 Terr. L. R. 179.

Costs of distress and conveying to gaol—*Variance between minute and conviction.*]—The costs of distress and of conveying to gaol are obligatory where a summary conviction imposes a fine and awards distress and imprisonment in default of distress, and therefore the omission of any reference to such costs in the minute of adjudication will not invalidate the formal conviction which includes them. *Rex* v. *Beagan* (No. 2), 36 N. S. R. 208.

Depositions not in writing—Waiver. *Rex* v. *Janneau*, 3 E. L. R. 5; *Rex* v. *Goulet*, 3 E. L. R. 9.

Distress—*Imprisonment.*]—A statute provided that in case of non-payment of the penalty and costs immediately after conviction, the justice might, in his discretion, levy the same by distress and sale, or might commit the person who was so convicted and made default, to any common gaol for a term not exceeding six months, with or without hard labour, unless the said penalty and costs should be sooner paid: N. W. T. Act, s. 99.—A conviction under this statute ordered that the penalty and costs be levied by distress, and that, in default of sufficient

distress, the defendant be imprisoned for one month.—*Held*, that the imposition of imprisonment in default of distress was authorised by the Summary Convictions Act, R. S. C. c. 178, s. 67. *Regina* v. *Mathewson*, 1 Terr. L. R. 168.

Distress—*Imprisonment—Costs of conveying to gaol—Certiorari—Return of amended conviction.*]—The defendant was convicted under a statute which authorised, in default of payment of the penalty and costs, (1) distress, or (2) six months' imprisonment.—The magistrate's minute directed six months' imprisonment, unless the fine and costs should be sooner paid. The magistrate filed with the proper officer a formal conviction, which directed distress, and in default of distress six months' imprisonment. This conviction being obviously bad, inasmuch as (besides not according with the minute) three months is the limit for imprisonment for default of distress, upon the issue of a *certiorari* the magistrate filed a new formal conviction, which accorded with the minute, except that there were added the words "(unless) the costs of conveying the defendant to the guard room are sooner paid."—*Held*, following *Regina* v. *Mathewson*, 1 Terr. L. R. 168, that the first formal conviction was bad.—*Held*, also, that the second formal conviction was also bad, inasmuch as the statute under which the conviction was made did not authorise the imposing of the costs of conveying to gaol; the words to that effect in the forms to the Summary Convictions Act being intended to be used only when expressly made applicable. *Regina* v. *Wright*, 14 O. R. 668, followed.—*Semble*, *per* Richardson, J., that the Summary Convictions Act, s. 85 (as remodelled by 51 V. c. 45, s. 9), directing that the convicting magistrate shall transmit the conviction to the proper officer "before the time when an appeal . . . may be heard, there to be kept by the proper officer among the records of the Court," and the magistrate having complied with this provision, by filing the first formal conviction, the second could not be considered. *Regina* v. *Hamilton*, 1 Terr. L. R. 172.

Fine—*Distress—Hard labour — Duplicity — Warrant of commitment — Habeas corpus.*] — A conviction, which attaches hard labour to imprisonment in default of there being sufficient distress to levy the fine imposed, is bad. A conviction which charges an offence on two separate days, charges two distinct separate offences, and, if it be a case where s. 26 of the Summary Convictions Act applies, is bad; a warrant of commitment based on such a conviction is consequently bad. It is a usual, convenient, and established practice that a rule *nisi* to shew cause why a writ of *habeas corpus* should not issue should also require cause to be shewn why, in the event of the rule being made absolute, the prisoner should not be discharged without the actual issue of the writ of *habeas corpus* and without his being personally brought before the Court; but in order that the rule may be made absolute in this form, the magistrate, the keeper of the prisoner, and the prosecutor should all be served with the rule *nisi*, or at least be represented on its return. *Regina* v. *Farrar*, 11 C. L. T. 25, 1 Terr. L. R. 306.

Fine — *Payment to clerk — Illegality — Quashing.*]—A conviction by the Recorder's Court of Montreal requiring payment of a fine to the clerk of the Court, and not to the city, is illegal, and will be quashed upon *certiorari*. *Wilcock* v. *Montreal*, 5 Que. P. R. 126.

Fine and costs or imprisonment — *Defendant submitting to imprisonment — Motion for certiorari—Deposit of fine and costs—Refusal of writ—Surrender of prisoner—Right to return of deposit.*]—W., the plaintiff's assignor, having been condemned to pay a fine and costs for an infraction of the license law, and to imprisonment in default, sought to set aside the conviction by means of *certiorari* proceedings, after having suffered part of the imprisonment imposed. He deposited with the defendant, in his capacity of clerk of the peace at Montreal, the sum of $114.83, the amount of the fine and costs, besides $50 to cover subsequent costs, pursuant to s. 217 of the Quebec Liquor License Act, 63 V. c. 12, and was released from prison. The writ of *certiorari* having been refused, W. surrendered himself again as a prisoner, and offered to serve the time of his imprisonment, but claimed at the same time from the defendant the repayment of the $114.83. The latter refused and gave as reasons that W., in making this deposit voluntarily and thus obtaining his freedom, had chosen the alternative of a fine, and the judgment setting aside the writ of *certiorari* had the result of awarding the deposit in payment of the fine to the *mise-en-cause*, the collector of revenue of Montreal:—*Held*, that this deposit possessed only the character of a security, and could not be converted into a payment of the fine and costs; that the application for *certiorari* could not take away from one convicted of an offence his right to choose to submit to the term of imprisonment to which he is condemned, instead of paying the fine; that the writ of *certiorari*, in suspending the execution of the sentence, has only the result when it is discharged of rendering the person convicted liable to his term of imprisonment; and if he makes that choice, he has a right to repayment of his deposit representing the fine and costs. *Wing* v. *Sicotte*, 26 Que. S. C. 387.

Imprisonment — *Warrant of commitment—Defects—Place of offence — Time for commencement of imprisonment — Court of Record—Copy of sentence.*]—A motion for the discharge of S., a prisoner serving a term of imprisonment at Dorchester Penitentiary, was based upon alleged defects in the warrant of commitment signed by the clerk of the County Court Judge's Criminal Court at Halifax, returned by the warden of the penitentiary as the authority under which S. was held:—*Held*, that, even if the place where the offence was committed was not stated in the body of the record of conviction, it was covered by that named in the margin, viz., "the county of Halifax."—*Semble*, that the "copy of the sentence" required to be delivered to the warden of the penitentiary (R. S. C. c. 182, s. 42), need not contain all the averments essential to the validity of an indictment or conviction:—*Held*, that the document certified by the warden in the present

case as his authority was sufficient. *Rex* v. *Smitheman*, 24 C. L. T. 329.

Injury to property — *Description of fence.*]—N. L. was committed to gaol under a warrant of a stipendiary magistrate, charging him with having at L., in the county of C. B., "unlawfully and wilfully destroyed and damaged property owned by A. M. S. on the 24th day of December, 1903:"—*Held*, that the conviction was bad because it did not specify the injuries and the nature of the property injured. *Regina* v. *Spain*, 18 O. R. 385, followed. *Re Leary*, 24 C. L. T. 70.

Justice of the peace—*Master and servant Act—Refusal to work—Information — Amendment—Form of conviction—Omissions — Distress—Costs.*] — The prosecutor hired the defendant to work on a farm and paid for the defendant's transportation thereto. The defendant worked a few hours, and then left. The prosecutor swore to an information that the defendant did "accept the sum of $1.30 to pay his fare to B. on the condition that the said amount was to be worked out, and refusing to work after reaching this place, with the exception of 4 hours," etc. The magistrate issued a warrant setting out the facts stated in the information and adding "consequently obtaining money under false pretences," and the defendant was arrested. The magistrate amended the information by adding a reference to the Master and Servants Act, 1901, but the information was not re-sworn. The amended information was read over to the prisoner and he was informed that he was to be tried under it as amended. He made no objection; the prosecutor gave evidence, and the defendant was sworn and testified on his own behalf. The magistrate adjudged that the defendant should be fined $5 and $4.88 costs, and if the amounts were not paid forthwith he should be committed to gaol. A note of the conviction was made and a formal conviction drawn up. The conviction form was headed "conviction for a penalty to be levied by distress," but no such term was mentioned in the body of it:—*Held*, that the nature of the offence was sufficiently clear in the original information, and any doubt was removed by the addition of the reference to the Act.—2. That the information having been read over, and the trial proceeding without objection, and the magistrate having the prisoner before him, even if brought there improperly, he might try him on the amended information not re-sworn, although the Act required an information on oath.—3. That the Court, being satisfied that an offence of the nature described in the conviction had been committed, and that the magistrate had jurisdiction, and that the punishment imposed was not excessive, should not hold the conviction invalid because the date and place of offence were not stated, there being power to amend.—4. That the heading formed no part of the conviction, which was correctly drawn under the statute.—5. That the costs of conveying the accused to gaol being omitted, was a matter which could be amended, if necessary, but here there were no such costs, as the prisoner never went to gaol.—6. That there was special power by 1 Edw. VII., c. 2, s. 14, under which the prisoner was convicted, to award imprisonment in default of payment; and that by R. S. O. 1897 c. 90, s. 4, that power covered costs as well as fine. *Rex* v. *Lewis*, 23 C. L. T. 190, 5 O. L. R. 509, 2 O. W. R. 290, 566.

Motion for rule nisi to quash—Untenable grounds—Like motions in other cases—Rule granted on terms. *Rex* v. *McGinnes*, 1 O. W. R. 812.

Motion to quash — *Certiorari — Merits —Appeal.*]—When the arguments urged in support of a writ of *certiorari* attack the merits of the conviction, they then constitute an appeal, and no appeal can be taken by means of a writ of *certiorari*. *Lescarbeau* v. *Martineau*, 8 Que. P. R. 415.

Motion to quash—*Jurisdiction of single Judge—Certiorari — Disorderly house — Inmate—Pleading guilty — Form of conviction — Summary conviction or summary trial — Penalty.*]—A single Judge in the Territories has jurisdiction under 54 & 55 V. c. 22, s. 7, s.-s. 2, to hear and determine applications to quash summary convictions, whether the convictions have been brought into Court by *certiorari* or not. If the convictions have been returned to the clerk of the Supreme Court, by virtue of s. 102 of the N. W. T. Act, the issue of a writ of *certiorari* is unnecessary. The defendant pleaded guilty before a magistrate of being an inmate of a disorderly house, an offence punishable either under Part XV. of the Criminal Code (Vagrancy), where the fine on summary conviction is limited to $50, or under part LX. (Summary Trials of Indictable Offences), where the fine and costs together must not exceed $100. A fine of $90, with $6.25 costs, was imposed, but the conviction was in the form WW prescribed under part LVIII. relating to summary convictions, and not the form QQ prescribed under part LV., and did not contain the words "being charged before me the undersigned," which appear in the latter form. On an application to quash, the conviction was sustained as a good conviction under part LV., as being of like effect to the form therein prescribed; the amount of the fine and the fact that the accused was not charged with or convicted of being a loose, idle, or disorderly person, indicating the procedure adopted by the magistrate. The omission to recite that the accused had been charged with the offence before him, a fact which appeared from the proceedings, is a matter of form only, and not sufficient to void the conviction. *Rex* v. *Ames*, 5 Terr. L. R. 492, 10 Can. Cr. Cas. 52.

Motion to quash — *Practice—Duty of justice to return depositions — Certiorari.*]—Section 888 of the Criminal Code provides for the return of convictions by justices into the Court to which the appeal is given:—*Semble*, apart from this provision, it is the duty of justices to make return also of the depositions upon which the conviction is founded: — *Held*, that papers purporting to be the depositions relating to the conviction having been returned therewith, they should be assumed to be such depositions; that they were properly before the Court, and a writ of *certiorari* was unnecessary. *Rex* v. *Rondeau*, 5 Terr. L. R. 478.

Motion to quash — *Preliminary objections — Security — Cash deposit — Written document — Certiorari—Notice—Objection to —Delay.*]—On the return of a rule *nisi* to quash the conviction of the defendant for an offence against the Liquor License Ordinance, it was objected that no proper security had been given, as required by Supreme Court Rule 13. It appeared by the certificate of the registrar that $100 in cash had been deposited with him in this cause, and that such sum stood to the credit of the cause in a chartered bank. It was the fact, however, that no written document had been deposited with the registrar stating the conditions upon which the deposit was made. Rule 13 requires the deposit to be made "with a condition to prosecute such motion and writ of *certiorari*;"—*Held*, that no written document was necessary, the money being in the hands of the registrar for the purposes provided by law. It was also objected that the notice did not give the name of the party who intended to apply, nor the name of the Court or the Judge in Chambers; — *Held*, that the Court should not entertain this and other like objections, for after a writ of *certiorari* has issued the objections should be raised by a substantive motion to quash the writ:—*Held*, also, that when more than three months have intervened between the return to the writ of *certiorari* and the motion for a rule *nisi*, the preliminary facts must be taken to be admitted, and an application to quash the writ would be too late. *Regina* v. *Davidson*, 21 C. L. T. 98.

Motion to quash—*Recognizance—Inefficiency—Justice of the peace—Married woman—Separate estate.*]—The defendant is a necessary party to the recognizance required upon a motion to quash his conviction; and where his recognizance was invalid because entered into before a justice of the peace for a county other than that in which the conviction was made, the recognizance of his surety, though properly taken, was held bad also.—*Semble*, that a recognizance by the wife of the defendant might be binding in respect to her separate estate, which she connected by affidavit with her recognizance. *Rex* v. *Johnston*, 24 C. L. T. 266, 7 O. L. R. 525, 3 O. W. R. 221, 222.

Motion to quash—Recognizance—Necessity for defendant joining in—Company defendant—Leave to deposit money in lieu of recognizance — Defective condition — Costs. *Re Western Co-operative Construction Co. and Brodsky* (Man.), 2 W. L. R. 541.

Ontario Summary Convictions Act—*Criminal Code, s. 841—Time for laying information.*]—The Ontario Summary Convictions Act, R. S. O. c. 90, s. 2, has the effect of incorporating s. 841 of the Criminal Code, and therefore, in the case of any offence punishable on summary conviction, if no time is especially limited for making any complaint or laying any information under the Act or law relating to the particular case, the complaint must be made or the information laid within six months from the time the matter of complaint or information arose. *Rex* v. *McKinnon*, 22 C. L. T. 161, 3 O. L. R. 508, 1 O. W. R. 199.

Penalty — *Imprisonment — Excessive sentence — Quashing conviction.*] — A conviction by the Recorder for the city of Montreal with a penalty of 9 months' imprisonment at hard labour, purporting to be made pursuant to a statute which prescribes a penalty of six months' imprisonment at least and of a year further, is invalid, and may be quashed on *certiorari* by the Superior Court. *Gévry* v. *Weir*, 30 Que. S. C. 95.

Special Court — Ontario Liquor Act, 1902 — *Certiorari* — Commitment after service of — Discharge — Amendment — Error in name—Adjudication—Sentence. *Rex* v. *Forster*, 2 O. W. R. 312, 5 O. L. R. 624.

Trial—*Evidence in writing—Waiver.*]—The accused at a trial before a Recorder under the summary conviction procedure may waive the taking down in writing of the evidence against him. *Rex* v. *Poirier*, 31 Que. S. C. 67, 12 Can. Cr. Cas. 360.

Two charges — Evidence — Assault — Pointing firearm — Procedure — Hearing both charges at once—Irregularity — Stipendiary magistrate — Jurisdiction — Consent—Warrant of commitment. *Rex* v. *Reid*, 4 E. L. R. 12.

Two informations—*Withdrawal of one —Canada Temperance Act.*]—Under s. 858 of the Criminal Code, after the evidence has been heard, the magistrate is not bound either to convict or discharge the defendant; he may allow the prosecutor to withdraw the charge, and he may do so, even when another information for the same offence has been laid by the same prosecutor against the same defendant, and the determination thereof is still pending. *Ex p. Wyman*, 34 N. B. R. 608.

Vagrancy — *Conviction — Information —Facts necessary to be stated.*]—Application for *habeas corpus*. The accused was charged with being a "loose, idle person, or vagrant," and was convicted by a police magistrate, and sentenced to six months' imprisonment with hard labour. The conviction described the offence in the same terms as the information:—*Held*, that the conviction was bad in that it did not set out the facts constituting the offence. Under s. 207 of the Code various acts constituting vagrancy are specified, and an information charging vagrancy should shew the particular facts on which the prosecution relies to establish the offence. *Rex* v. *McCormack*, 23 C. L. T. 207, 9 B. C. R. 497.

Warrant of commitment — *No conviction alleged—Habeas corpus—Return.*]—On an application for a writ of *habeas corpus*, and for discharge of prisoner detained in custody under a warrant of a justice of the peace in form V., Criminal Code, s. 596 (committal for trial), the warrant did not allege a conviction, but only that the accused had been charged before the justice. The conviction upon which the warrant was issued was admittedly bad, but an amended conviction was returned to the clerk by the justice after the argument: — *Held*, that where a warrant of commitment upon a con-

viction does not allege that the prisoner has been convicted of an offence, the conviction cannot be referred to in order to support the warrant. Order made discharging prisoner. —*Semble*, that had the warrant shewn the prisoner to have been convicted of some specific offence, even though insufficiently stated, the conviction could have been referred to, to support it. An application to discharge a prisoner held under a defective warrant of committal in execution will not be adjourned in order to procure the return of the conviction with a view to supporting the warrant, if the prisoner has been actually brought up on a *habeas corpus, aliter* where he has not been brought up. *Regina* v. *Lalonde*, 2 Terr. L. R. 281.

Wrong name — *Objection.*]—A person whose real name was Bridget Corrigan, but who kept house under the name of Kate Wilson, was arrested under the latter name for an offence under the License Acts, pleaded not guilty, and was tried and convicted under the assumed name, without objection that it was not her real name.—*Held*, that it was too late after conviction to complain of the mistake, and the writ of *habeas corpus* which had been issued was set aside. *Ex p. Corrigan*, 9 Que. Q. B. 43.

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9. Summary Trial.

Assault — *Information for indictable offences — Conviction for common assault— Jurisdiction of magistrate — Indictment — Court — Information.*] — The defendant was tried before a stipendiary magistrate on an information charging him with committing an assault upon J. F., causing bodily harm. The accused having consented to be tried summarily, in accordance with s. 787 of the Code, was tried and convicted of a common assault only:—*Held*, that s. 713 of the Code enabled the magistrate to convict of the common assault under s. 265, notwithstanding that the information was for an indictable offence under s. 262, as the latter section includes common assault.—2. That the contention that s. 713 only applies to indictments, "counts" being the only word used, was disposed of by s. 3 (*b*) of the Code, where it is provided that the expressions "indictment" and "count," respectively, include information and presentment, as well as indictment, and also any plea, replication, or other pleading, and any record.—3. That independently of the statute the conviction was good. *Regina* v. *Oliver*, 30 L. J. M. 12, and *Regina* v. *Taylor*, L. R. 1 C. C. R. 194, followed. *Rex* v. *Coolen*, 36 N. S. R. 510.

Assault and theft — *Summary trial — Police magistrate—Election—Next Court for jury trial—Amendment — Fresh election — New trial.*]—In order to give a police magistrate jurisdiction to try an indictable offence, namely, a charge of assault and robbing prosecutor of 30c., not triable summarily by the magistrate except with the prisoner's consent, the magistrate, in putting the prisoner to his election to be tried before him or by jury, must expressly name the Court at which the charge can probably be soonest heard; and it is immaterial that the election is made by counsel representing the prisoner: McLaren, J.A., dissenting. *Regina* v. *Cockshott*, [1898] 1 Q. B. 582, followed.—After the election of the prisoner to be tried summarily on such charge, and after the magistrate has entered upon the trial thereof, he has no power to amend the indictment so as to cause a further charge to be preferred against the prisoner, unless the prisoner is again put to his election, and consents to be so tried. *Rex* v. *Walsh*, 24 C. L. T. 82, 7 O. L. R. 149, 2 O. W. R. 222, 3 O. W. R. 31.

Election—*Absence of accused.*]—A prisoner charged with theft waived preliminary examination, and was committed for trial. Upon then being arraigned before the junior Judge of the County Court he consented to be tried by "the said Judge without a jury:" —*Held*, that s. 767 of the Criminal Code, as amended by 63 & 64 V. c. 46 (D.), contemplates an election to be tried in a certain way and not necessarily by the Judge before whom the election is made; that the election in question having been given in a limited form was void; and that the senior Judge could not proceed with the trial of the accused.—*Held*, also, that a person accused, by waiving preliminary investigation and thus accepting committal without depositions taken, foregoes his right to a speedy trial and cannot make an election effectual to confer jurisdiction:—*Held*, further, that, unless in the case of misconduct rendering it impracticable to continue the proceedings in his presence, or at his request and with the permission of the Court, the trial of a person accused of felony cannot proceed in his absence. *Rex* v. *McDougall*, 24 C. L. T. 324, 8 O. L. R. 30, 3 O. W. R. 750.

Election — Absence of preliminary inquiry by magistrate—Neglect to inform prisoner of time of next sitting—Conviction— Invalidity — Discharge. *Rex* v. *Williams* (B.C.), 2 W. L. R. 410.

Election—Amendment of charges—Substitution of earlier date for offence — Seduction of girl under sixteen—Necessity for new election. *Rex* v. *Lacelle*, 6 O. W. R. 911, 11 O. L. R. 74.

Election — *Depositions disclosing more serious offence.*]—Where the depositions disclose an offence which could not have been disposed of by speedy trial, the prisoner will not be allowed to elect for speedy trial if the Crown intends to lay the more serious charge, even though he is committed for an offence which may be disposed of by speedy trial. *Rex* v. *Preston*, 11 B. C. R. 159, 1 W. L. R. 17.

Election—*N. W. T. Act—Re-trial—New election—Duty of Judge.*]—The North-West Territories Act, R. S. C. c. 50, s. 67 (section substituted by 54 & 55 V. c. 22) provides that "when the person is charged with any other criminal offence, the same shall be tried, heard, and determined by the Judge with the intervention of a jury of six, but in any such case the accused may, with his own consent, be tried by a Judge in a summary way, and without the intervention of

a jury:"—*Held*, that the consent of the accused does not make it imperative upon the Judge to try the charge without the intervention of a jury. It appears to be assumed by the Court that where the accused had been tried by a Judge with the intervention of a jury who disagreed and were discharged, and the accused was brought up again for trial, the Judge on the second trial might, had he seen fit, have, on the accused's consent, tried him without the intervention of the jury. *Regina* v. *Brewster* (No. 1), 2 Terr. L. R. 353.

Election — *Withdrawal.*] — A prisoner who, on being brought before the County Judge's Criminal Court, elects to be tried summarily by the Judge, cannot be allowed afterwards to withdraw his election; no provision therefor having been made in the Criminal Code, ss. 762-781, such as the amendment to s. 767 with regard to elections to be tried by a jury. *Rex* v. *Keefer*, 21 C. L. T. 585, 2 O. L. R. 572.

Evidence — Consent — Felony — Misdemeanour. *Rex* v. *Fox*, 2 O. W. R. 728.

Habeas corpus—*Writ of error—Evidence—Consent—Public morals.*] — A conviction by a magistrate under the sections of the Criminal Code relating to the summary trial of indictable offences may be brought up for review by writs of *habeas corpus* and *certiorari*, a conviction under those sections not being matter of record in such sense as to make it reviewable only by writ of error.—Upon the hearing of a charge under these sections, evidence in other proceedings against another prisoner is admissible upon the consent of the accused's counsel.—Nature of evidence to prove a charge of being an inmate of a house of ill-fame, considered. *Regina* v. *St. Clair*, 20 C. L. T. 204, 27 A. R. 308.

Inmate of house of ill-fame—*Jurisdiction of stipendiary magistrate — Punishment.*]—The defendant was convicted before a stipendiary magistrate of being an inmate of a house of ill-fame, and sentenced to imprisonment at hard labour for one day, and to forfeit and pay $60, and in default of payment to a further term of imprisonment for six months, unless the sum should be sooner paid. She was arrested and imprisoned under a warrant issued on the conviction, and an application was made for a writ of *habeas corpus* to test the legality of her imprisonment:—*Held*, that the conviction was under Part LV. of the Criminal Code, and the trial was a summary trial of an indictable offence, and not a summary conviction. The jurisdiction is given by s. 783 (*f*) of the Code. The following section makes the jurisdiction of the magistrate absolute in respect of the particular offence, and independent of the consent of the person charged. Section 788 fixes the punishment which the magistrate on summary trial of indictable offences may inflict upon the person convicted in respect of all the crimes mentioned in s. 783, except theft and attempt to commit theft, the punishment for which is provided by s. 787. The punishment inflicted was not in excess of that authorized by the Code, and is not limited to that prescribed by s. 208. The jurisdiction of the magistrate to try the offence charged under Part LV. of the Code and to inflict the punishment which he awarded was quite clear, and no ground had been shewn for the discharge of the prisoner. *Rex* v. *Roberts*, 21 C. L. T. 314.

Jury — *Election — Withdrawal — Refusal of Judge to dispense with jury.*]—The N. W. T. Act, R. S. C. 1886 c. 50, s. 67 (section substituted by 54 & 55 V. c. 22, s. 9), provides that "When the person is charged with any other criminal offence the same shall be tried, heard, and determined by the Judge, with the intervention of a jury of six; but in any such case the accused may, with his own consent, be tried by a Judge in a summary way and without the intervention of a jury:"—*Held*, that in the event of the accused electing to be tried by a Judge alone, the Judge is not bound so to try the case, but may insist upon the intervention of a jury. Above *held*, where the accused was first tried with the intervention of a jury, who disagreed, and upon a second trial coming on withdrew his first election and elected to be tried by the Judge alone. *Regina* v. *Webster*, 2 Terr. L. R. 236.

Keeping bawdy house—*Consent—Conviction—Date of offence — Discharge of prisoner—Protection against actions.*]—The defendant was summarily tried without her consent and convicted for keeping a disorderly house, that is to say, a common bawdy house, and was sentenced to pay a fine, and in default to be imprisoned at hard labour:—*Held*, that, as she was charged and punished under the combined operation of ss. 198 and 958 of the Criminal Code, the magistrate could lawfully try her only after having obtained her consent under s. 785, and for want of such consent the conviction was wholly without jurisdiction and void. Nor could the proceedings be sustained under s. 783 (*f*) of the Code, nor under s. 207 (*j*). 2. The conviction, which was in the form QQ, declared that the defendant had been guilty of the offence "on the 21st day of April, A.D. 1901, and on divers other days and times during the month of April:"—*Held*, that it was bad, as it might be read as indicating the commission of an offence subsequent to the laying of the information (the date of which was the 29th April) and including the date of the conviction (the 30th April.) *Ex p. Kennedy*, 27 N. B. R. 493, followed. 3. *Held*, also, following *In re Moore*, 33 C. L. J. 400, that where relief from imprisonment was given as in this case under R. S. N. S. 1900 c. 181, the Judge can only protect from civil action, at the instance of the applicant, in respect to the imprisonment from which she is discharged, the keeper of the common gaol in which she was detained. *Rex* v. *Keeping*, 21 C. L. T. 508.

Motion to quash — *Recognizance—Necessity for defendant joining in—Company defendant—Leave to deposit money—Defective condition.*]—1. Where a corporation cannot enter into a recognizance, it can only comply with s. 4 of the Manitoba Summary Convictions Act, R. S. M. 1902 c. 163 (requiring the entering into of a recognizance or making a deposit with the justice of the peace or

magistrate as a necessary preliminary to the application for a *certiorari* to quash a conviction), by making such deposit.—2. A recognizance under that section is defective if it is conditioned for the due prosecution of "a writ of *certiorari* issued," etc., instead of a writ to be issued.—3. Following *Ex p. Tomlinson*, 20 L. T. 324, and *Regina* v. *Robinet*, 16 P. R. 49, the defendant company should have leave to make the necessary deposit with the convicting magistrate within 14 days, and then to renew the motion. *Re Western Co-operative Construction Co. and Brodsky*, 15 Man. L. R. 681.

Municipal by-law—*Offence against — Defects on face of conviction—Keeping billiard room open in prohibited hours—Uncertainty.*]—Under a by-law of the village of Carman, providing that all pool rooms in the village should be closed from 8.30 p.m. every Saturday until 7 a.m. of the following Monday, and should remain closed on every other day from 10 p.m. until 6 a.m. on the following day, the defendant was convicted for that "he did refuse to close a pool room occupied by him in the village of Carman after the hour of half-past eight, contrary to the by-law of the village in that behalf:"—*Held*, that the conviction was bad and should be quashed on the following grounds:—1. It did not state that the pool room had been kept open after half-past eight in the afternoon. —2. It did not state that it was on a Saturday or Sunday the offence was committed; for, if it was not Saturday or Sunday, the pool room might have been lawfully kept open until ten o'clock p.m.—3. The conviction did not give the date when the offence had been committed, and, for all that it stated, it might have been before the by-law came into operation, or more than six months before the information was laid. *Re Fisher & Village of Carman*, 15 Man. L. R. 475, 1 W. L. R. 276.

Obstructing peace officer — *Consent.*] —A person charged with obstructing a peace officer in the execution of his duty may, without his own consent, be tried summarily by the magistrate. *Rex* v. *Jack*, 9 B. C. R. 19.

Obstructing peace officer—*Consent of accused.*]—*Held*, that a person charged with obstructing a peace officer in the execution of his duty may be tried summarily by a magistrate without the consent of the accused. See Criminal Code, ss. 144, 783-6. Semble, that a magistrate is not bound to inform an accused of the exact sections of the Code under which the proceedings are being taken. *Regina* v. *Crossen*, 3 Can. Crim. Cas. 152, not followed. *Rex* v. *Nelson*, 21 C. L. T. 456, 8 B. C. R. 110.

Powers of magistrate — *Theft — Attempt to commit—Description of offence — Warrant of commitment—Absence of—Order for further detention.*]—It is competent for a magistrate upon the summary trial before him of a prisoner charged under s. 783 (*a*) of the Criminal Code with having committed theft, to convict him of the offence of attempting to commit it provided for in s.-s. (*b*). The offence of theft from the person is sufficiently described in popular language as picking the pocket of a person. To authorize the detention of a person under a conviction there should be a warrant of commitment; but where there was none, and the conviction itself was lodged with the gaoler as his authority for the detention, there being an offence proved and a proper conviction for the offence, and no merits on the part of the prisoner, the Judge before whom the prisoner was brought upon *habeas corpus* exercised the power conferred by s. 752 of the Code, and directed that the prisoner should be further detained and that the convicting magistrate should issue and lodge with the gaoler a proper warrant. *Rex* v. *Morgan*, 21 C. L. T. 533, 2 O. L. R. 413. (Affirmed by the Court of Appeal, 20th November, 1901, 21 C. L. T. 583.)

Without consent of prisoner—Conviction—Discharge from gaol—Second prosecution. *Rex* v. *Kennedy*, 1 O. W. R. 31.

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10. MISCELLANEOUS.

Comment of Judge—*Reserved case — Application for after sentence.*]—On the trial of a prisoner indicted for stealing, the Judge, in his charge to the jury, called attention to the fact that the prisoner was not called to testify on his own behalf, and warned the jury that they were not to take that fact to his prejudice; but added, if he were an innocent man he could have proved that at the time of the offence he was not in the vicinity where the theft took place:—*Held*, that this was "comment" within the meaning of s. 4 (2) of the Canada Evidence Act, 1893. It is not too late after the sentence has been imposed to ask to have a case reserved for the opinion of the Court. *Rex* v. *McGuire*, 36 N. B. R. 609, 9 Can. Cr. Cas. 554.

Judge of sessions—*Acting for Recorder —Conviction—Jurisdiction.*] — A conviction and sentence rendered by a Judge of the sessions of the peace, acting for the recorder of Montreal, are valid. *Deschamps* v. *Vallée*, 7 Que. P. R. 231.

Jurisdiction of magistrate—*Constitutional law—Constitution of Criminal Courts.*] —By s. 785 of the Criminal Code any person charged before a police magistrate in Ontario with an offence which might be tried at the General Sessions of the Peace, may, with his own consent, be tried by the magistrate and sentenced, if convicted, to the same punishment as if tried at the General Sessions. By an amendment in 1900 the provisions of this section were extended to police and stipendiary magistrates of cities and towns in other parts of Canada:—*Held*, that, though there are no Courts of General Sessions except in Ontario, the amending Act is not therefore inoperative, but gives to a magistrate in any other province the jurisdiction created for Ontario by s. 785. Though the organization of Courts of criminal jurisdiction is within the exclusive powers of the legislature, the Parliament of Canada may impose upon existing Courts or individuals the duty of administering the criminal law, and their action to that end need not be supplemented by provincial legislation. *In re Vancini*, 24 C. L. T. 265, 34 S. C. R. 621.

Leave to appeal—Conviction for theft —Evidence for jury—Weight of evidence — Conduct of case. *Rex* v. *Callaghan*, 2 O. W. R. 1141.

CRIMINAL PROCEDURE.

See CRIMINAL LAW.

CRIMINAL PROSECUTION.

See DURESS.

CROPS.

Destruction by fire — Railway Act, s. 298 — Liability of railway company — Sparks from engine—Marsh hay baled and piled at siding—Meaning of "crops"—Construction of statute — *Noscitur a sociis* — Negligence—Contributory negligence. *Fraser* v. *Père Marquette Rw. Co.*, 12 O. W. R. 531, 838.

Execution against tenant—*Provision as to crops—Rights of Landlord—Bills of Sale Act—Seizure of equitable interest.*] — The claimant let to the execution debtor the farm on which the grain had been grown by an indenture reserving as rent "the share or portion of the whole crop which shall be grown upon the demised premises as hereinafter set forth," and the lease provided that the lessor might retain from the share of the crop that was to be delivered to the lessee a sufficient amount to cover taxes, and to repay advances and other indebtedness; that the lessee immediately after threshing, should deliver the whole crop, excepting hay, in the name of the lessor, at an elevator to be named by the lessor; that all crops of grain grown upon the said premises should be and remain the absolute property of the lessor until all covenants, conditions, provisoes, and agreements therein contained should have been fully kept, performed and satisfied; and that the lessor should deliver to the lessee two-thirds of the proceeds of the crop to be stored in the elevator, less any sum retained for taxes, advances, indebtedness or guaranties previously mentioned. The grain in question had, until its seizure under the plaintiff's execution, remained on the farm in the possession of the lessee. The claimant claimed it as owner under the terms of the lease and not for rent:—*Held*, that the lease did not operate to prevent the lessee from ever having any property in the grain to be grown.—2. That, even if the legal ownership of the grain was to be in the lessor, it was still, as to two-thirds, held for the benefit of the lessee subject to the lessor's charges for taxes and advances, etc., and the lessee had an equitable interest in it, and the lessor's lien or charge would be void under the Bills of Sale and Chattel Mortgage Act, R. S. M. 1902, c. 11, s. 39, as being a charge upon crops to be grown in the future. —3. That the interest of the lessee in the grain, whether legal or only equitable, was subject, under s. 182 of the County Courts Act, R. S. M. 1902, c. 38, to seizure and sale under execution, and that the claimant's interest could not prevail over that of the plaintiff. *Campbell* v. *McKinnon*, 23 C. L. T. 234, 14 Man. L. R. 421.

Sale of growing crop — *Subsequent mortgage to third party—Bills of Sale Ordinance—Change of possession—Conversion.*] — The plaintiffs agreed to purchase certain lands from one K., who held under contract with C., the first mentioned contract containing a clause that the crop then growing and unharvested on the land should be the property of the purchasers. Subsequently the plaintiffs acquired the interest of C. in the land. K. remained in possession, cut and harvested the crop, and mortgaged it to the defendants, who sold it, and applied the proceeds in payment of K.'s indebtedness to them. In an action for conversion K. swore that he did not understand that he was selling the crop to the plaintiffs, but the whole arrangement was one by which the plaintiffs would get paid before his other creditors:—*Held*, that the sale of the crop was void as against the defendants under the provisions of s. 9 of the Bills of Sale Ordinance (c. 43, C. O. 1898), not being followed by an actual and continued change of possession. *Mihm* v. *Balcolvski*, 1 Sask. L. R. 415, 9 W. L. R. 25.

Sale of growing hay—"*Goods*"—*Sale of Goods Act, s. 2 — Implied warranty of title.*]—Growing wild hay, when sold to a person who is to cut and remove it the same season, is "goods" within the meaning of paragraph (*h*) of s. 2 of the Sale of Goods Act, R. S. M. 1902 c. 152, and there is, under s. 14 of the Act, an implied warrant of title by the vendor of hay sold under such circumstances. *Marshall* v. *Green*, 1 C. P. D. 35, followed. *Fredkin* v. *Glines*, 18 Man. L. R. 249, 8 W. L. R. 587, 9 W. L. R. 393.

Tilling and sowing —*Harvesting.*] — In a defence claiming the value of crops the defendant is not entitled at the same time to the cost of tilling and sowing and the cost of harvesting, and a claim for the latter will be set aside upon inscription in law. *Désormeau* v. *Bastien*, 5 Que. P. R. 417.

CROSS-APPEAL.

See APPEAL.

CROSS-DEMAND.

See PLEADING.

CROSS-EXAMINATION.

See AFFIDAVIT—PRACTICE.

CROSSINGS.

See RAILWAYS.

CROWN.

1. Crown Lands, 1337.
2. Expropriation of Land, 1351.
3. Negligence, 1358.
4. Public Works, 1364.
5. Timber Licenses, 1377.
6. Other Cases, 1378.

1. Crown Lands.

British Columbia Land Act—*Holder of pre-emption record — Occupation — Non-compliance with requirements of Act—Hearing by commissioner — Notice — Waiver—Secs. 13, 14, 15.*]—The 30 days' notice required by s. 13 of the British Columbia Land Act is for the benefit of the pre-emption holder, who can waive it, wholly or in part, if he so desires; and, if he does so, the Commissioner has jurisdiction to adjudicate and cancel the pre-emption record before the 30 days have elapsed. And *held*, that the pre-emption holder had waived the notice by requesting the Commissioner to give an earlier hearing and by attending thereon with counsel without objection. — The pre-emptor obtained his record on the 8th January, 1909, and was on the land for the first time thereafter on the 6th March, staying 3 days. He was there again in March, but for no length of time. He next went upon it for 2 nights in May, and again in July—for how long did not appear. After that he was absent from the land continuously to the date of hearing, the 15th February, 1910:—*Held*, that, in view of the spirit of all the sections of the Land Act dealing with pre-emptions, and especially ss. 14 and 16, it was impossible to hold that the Commissioner was wrong in finding that the pre-emption holder had not complied with the provisions of the Act as to occupation. *Re Haselwood* (1910), 15 W. L. R. 52.

Charge on land created by homesteader before recommendation for patent — *"Transfer" — Incumbrance — Charge to secure debts—Sanction of minister —Absolute nullity—Construction of statute —60 & 61 Vict. c. 29, s. 5; R. S. C. (1906), c. 55, s. 142.*]—On 6th August, 1904, the holder of rights of homestead and pre-emption in Dominion lands, in Manitoba, which had not then been patented or recommended for patent, assumed to "incumber, charge and create a lien" upon the lands as security for the payment of a debt by an instrument executed without the sanction of the Minister of the Interior:—*Held*, that the instrument was in effect a "transfer" and was absolutely null and void under the provisions of the Dominion Lands Act. *American-Abell Co.* v. *McMillan & Doig* (1909), 10 W. L. R. 239.

Affirmed 11 W. L. R. 185, 42 S. C. R. 377.

Contract for grant of public domain —*Breach of—Exchequer Court—Petition of right.*]—The Exchequer Court of Canada has jurisdiction in respect of a claim arising out of a contract to grant a portion of the public domain made under the authority of an Act of Parliament.—2. Such a claim may be prosecuted by a petition of right.—3. Where the Court has jurisdiction in respect of the subject-matter of a petition of right, the petition is not open to objection on the ground that a merely declaratory judgment or order is sought thereby. If, on the other hand, there is no jurisdiction, no such declaration should be made. *Clark* v. *The Queen*, 1 Ex. C. R. 182, considered. *Qu'Appelle, Long Lake & Saskatchewan Rw. & Steamboat Co.* v. *R.*, 21 C. L. T. 283, 7 Ex. C. R. 105.

Crown grant — *Extent of—Evidence—Preliminary correspondence — Concluded agreement — Possession — Intention—Fishing rights — Navigable rivers.*] — 1. Where letters patent issue as a grant of land by the Crown, upon the application of the grantee, and after correspondence, disclosing a concluded agreement, the latter should be read into the letters patent. Evidence of the application and correspondence is therefore admissible to prove the extent of the grant, e.g., that a grant of land along a river was made with the right to fish in it.—2. Although possession cannot give a title by prescription to Crown lands, it may be relied upon and proved to establish the extent of a grant or conveyance of land by the Crown, and the intention of the contracting parties respecting an accessory right; in this case, the right to fish.—3. *Per* Hall, J.—Rivers are navigable and floatable, and, as such, form part of the public domain, which are *de facto* used, or susceptible of being used, in their ordinary condition, by the public, as highways for trade and travel by navigation, or for the transportation of timber afloat.—4. Also *per* Hall, J.—A grant by the Crown of land, along a non-navigable and non-floatable river (such as the river Moisie is proved in this case to be), conveys ownership of it to midstream, *usque ad medium filum aquæ*. As a consequence, the grantee acquires, as riparian proprietor, the right to fish in the river opposite the land granted to him. *Lefaivre* v. *Att'y.-Gen. for Que.*, 14 Que. K. B. 115.

Crown grant—*Person in occupation — Permission — Estoppel — Non-disclosure—Collateral proceedings.*]—In an action to recover land, the plaintiffs relied upon a grant from the Crown dated the 14th March, 1891. The defendants limited their defence to a portion of the land claimed, and, as to that portion, depended upon title acquired in 1893, from H., who entered as a servant of the plaintiffs, and, by their permission, erected a house on the land in 1890:—*Held*, that the possession of H. was not sufficient to prevent the Crown from granting to the plaintiffs; that H. having entered by the plaintiffs' permission, both the defendants and H. were estopped from denying the plaintiffs' title; that if the Crown was misled by the omission of the plaintiffs to disclose in their petition that the land was in the occupation of H., that objection could not be raised by a third party, in collateral proceedings, but must be raised in a proceeding to be taken

before the Governor in council to have the grant vacated; and that the case was not within the provisions of R. S. (5th series) c. 9, and that the occupancy, being that of a person in possession by permission of the plaintiffs, did not require to be disclosed. *Lakeview Mining Co.* v. *Moore*, 36 N. S. R. 335.

Crown grant—See *La Rose Mining Co.* v. *Temiskaming & Nor. Ont. Rw. Co.*, C. R. [1909] A. C. 347. Digested under MINES AND MINERALS.

Crown lands in New Brunswick—*Adverse possession for less than 60 years—Grant by the Crown during adverse possession valid—Rights of grantee—21 Jac. I. c. 14—Construction.*]—In an action of ejectment it appeared that the land belonged to the Crown, and was in peaceable possession of its grantee, the defendant, but that the plaintiff and his predecessors in title had enjoyed uninterrupted occupation thereof for a period of 56 years down to a date about 7 years prior to date of action:—*Held*, that judgment was rightly entered for the defendant.—Occupation against the Crown for any period less than the 60 years required by the Nullum Tempus Act is of no avail against the title and legal possession of the Crown, and still less against its grantee in actual possession.—The Act 21 Jac. I. c. 14 only regulates procedure, and its effect is that if an information of intrusion is filed, and the Crown has been out of possession for 20 years, the defendant is allowed to retain possession till the Crown has established its title. Where no information has been filed, there is nothing to prevent the Crown or its grantee from making a peacable entry, and then holding possession by virtue of title.—Decisions by the Courts of New Brunswick and Nova Scotia, to the effect that when the Crown has been out of actual possession for 20 years it could not make a grant until it had first established its title by information of intrusion, overruled. Judgment in 24 C. L. T. 204, 34 S. C. R. 533, affirmed. Judgment in 36 N. B. R. 260, set aside. *Emmerson* v. *Maddison*, [1906] A. C. 569.

Crown mining leases—*Misrepresentation—Jurisdiction — Discretion of Attorney-General — Land Titles Act—Conditions.*]—Where an action was brought by the Attorney-General for the province to avoid mining leases of public lands as having been granted by the Crown through misrepresentation and fraud on the part of the defendants, and the latter set up in their defence matter attacking the plaintiff's status as suing not in the interest of the public, but at the private solicitation of interested individuals:—*Held*, that this portion of the defence was objectionable and should be struck out, because the discretion of the Attorney-General, as representing the Crown in the commencement and conduct of litigation, is not subject to investigation or control by the Court.—A "caution" under the Land Titles Act, R. S. O. 1897 c. 138, amounts to no more than the notice of an adverse claim equivalent to a *lis pendens*, and expires by lapse of time, or otherwise as may be directed by the Court in an action.—It does not form a blot on the title, and no pleading is necessary to have it vacated.—Matter proper for petition of right cannot be set up by way of counterclaim. *Attorney-General for Ontario* v. *Hargrave*, 11 O. L. R. 530, 7 O. W. R. 368, 455, 8 O. W. R. 127.

Dominion lands—*License to cut timber—Royalties — Burnt timber — Payment by mistake — Rectification — Lapse of time—Counterclaim for trespass — Estoppel — Laches.*]—The suppliant held certain licenses from the Crown to cut timber on Dominion lands. Three of such licenses were issued on the 28th January, 1892, and each provided for a royalty of 5 per cent. on the timber cut thereunder. Another license was issued on the 8th August in the same year, and contained a provision that "if the timber be burnt then the royalty shall be 2½ per cent. instead of 5 per cent." The suppliant obtained other licenses containing similar provisions as to "burnt timber." The suppliant cut timber under such licenses, but, owing, as he alleged, to mistake and inadvertence, the returns furnished by him did not shew that a portion of the material cut was "burnt timber." Royalties having been paid upon the basis of there being no burned timber cut, the suppliant claimed in these proceedings a refund of one-half of such royalties as a fair deduction for burnt timber. During the time that the timber was cut and returns made, the suppliant was unable to read or write, and he asserted that he had not seen or been made aware of the provisions as to the royalty on burnt timber. His bookkeeper and business manager testified that he had not seen any timber regulations, and that he had never taken the trouble to read the suppliant's licenses. At the trial it appeared that no person's attention, either on behalf of the Crown or the suppliant, had been directed to the matter with a view of ascertaining or even estimating the quantity of burnt timber. Furthermore, at the time of the trial, there was no opportunity for scaling the quantity of burnt timber:—*Held*, that it was too late to open up the matter after action brought, and that the suppliant had not shewn circumstances that would make it inequitable for the Crown to retain the dues which the suppliant himself had returned as due and payable on the timber cut. —2. The Crown counterclaimed in the action for damages for timber cut by the suppliant in trespass on vacant Dominion lands, in effect claiming the difference between the royalty for which he was liable under his licenses and the dues he would have been liable for had the timber in question been cut under a permit to cut the same on Dominion lands. To this the suppliant answered that the timber alleged to have been cut in trespass, if any, was included in the whole quantity of timber which the suppliant had returned as cut under his licenses, and that a royalty of 5 per cent. having been paid thereon to the Crown officers and accepted by them, the Crown was estopped from setting up a larger claim:—*Held*, that the Crown was not estopped by the laches of its officers from claiming as damages a larger sum than that already paid as royalties. *Genelle* v. *R.*, 10 Ex. C. R. 427.

Free Grants and Homesteads Act—*Contract for sale of free grant after issue of*

patent—Within 20 years from date of location—Wife party to negotiations but not to contract — Validity of contract — R. S. O. (1897), c. 29, s. 20.]—Section 20 of the Free Grants and Homesteads Act, R. S. O. (1887), c. 29, provides that "no mortgage or pledge of the land, or of any right or interest therein by the locatee after the issue of the patent, and within 20 years from the date of the location, and during the life-time of the wife of the locatee, shall be valid or of any effect, unless the same be by deed in which the wife of the locatee is one of the grantors with her husband, nor unless such deed is duly executed by her."—Where locatee and wife negotiated an exchange of their free grant, within 20 years after the issue of the patent, with defendant for other property, but wife failed to sign the contract, Riddell, J., *held*, that the contract was valid and could be enforced notwithstanding above section. *Meek* v. *Parsons*, 31 O. R. 529, followed. *Asselin* v. *Aubin* (1910), 16 O. W. R. 566, 1 O. W. N. 986.

Free Grants and Homesteads Act—*Sale by patentee of mineral rights—Reservation of mines and minerals by Crown—Cancellation of reservation — Wife of patentee did not join in conveyance—Subsequent conveyance of land in which wife joined to bar dower—R. S. O. (1897), c. 29, s. 20.*]—Patentee of a free grant from Crown executed an instrument in favour of plaintiff, called a mining lease and option. The Crown had reserved the mines and minerals in the original grant. Later, patentee sold and conveyed same lands to defendant by deed, the wife joining to bar dower. 8 Edw. VII. c. 17. s. 4 (3), cancelled all reservations by the Crown as to mines and minerals. Plaintiff brought action for possession:—*Held*, that R. S. O. (1897), c. 29, s. 20, which provides that "No alienation . . . of the land, or of any right or interest therein, by the locatee after the issue of the patent, and within twenty years from the date of the location, and during the lifetime of the wife, shall be valid or of any effect, unless the same be by deed in which the wife of the locatee is one of the grantors with her husband, nor unless such deed is duly executed by her," was a complete bar to plaintiff's action, as nothing passed to him under his agreement. Action dismissed without costs. *Austin* v. *Riley* (1910), 16 O. W. R. 668, 1 O. W. N. 1049.

Holders of location ticket — *Prior mining rights—Privilege reserved—"Proprietor of the soil"—Construction of statutes.*]—The expression "proprietor of the soil," in s. 1441 of R. S. Q. 1888, as amended by 55 & 56 V. c. 20, read in connection with s. 1269, R. S. Q. 1888, is not intended to designate the holder of a location ticket, and, consequently, persons holding Crown lands, merely as locatees, have no vested preferential rights to grants from the Crown of the mining rights therein, under ss. 1440 and 1441 of R. S. Q. 1888, as amended by the Act to amend and consolidate the Mining Law, 55 & 56 V. c. 20 (Que.) *Green* v. *Blackburn*, 40 S. C. R. 647.

Homestead entry — *Agreement to give mortgage — Patent.*]—*Held*, that an agreement by a person who has made homestead entry for Dominion lands to give a mortgage on such lands is void if made before the issue of the certificate of recommendation for patent. *Waterous Engine Works Co.* v. *Weaver*, 8 W. L. R. 432, 1 Sask. L. R. 103.

Hydraulic mining lease — *Breach of contract—Construction of leases and mining regulations—Right of lessees to be heard at a judicial investigation before Crown could declare forfeiture and re-enter.*]—The two defendant companies held leases, under the Crown, of hydraulic mining locations in the Yukon, with exclusive rights under certain conditions of taking all metals. The Minister of the Interior, purporting to act under powers provided in their leases, gave notice to the companies that their leases were void as they had failed to expend $5,000 in the efficient working of their rights granted by their leases, and claimed to re-enter possession on the ground that the companies had not provided sufficient hydraulic or other machinery to permit of the working of their rights conferred:—*Held*, that while the Hydraulic Mining Regulations of 3rd December, 1898, provided that the Minister of the Interior was to be the "sole and final judge" of the fact of default by the lessees, yet the power to cancel their leases should not be exercised by the Crown without first holding an investigation of a judicial character and giving all parties interested an opportunity of being heard in respect to the matters alleged against them. Judgment of the Supreme Court of Canada, 40 S. C. R. 281, 294, confirmed, judgment of the Exchequer Court of Canada (Burbidge, J.), discharged. *Rex* v. *Bonanza Creek Hyd. Con.*; *Rex* v. *Klondyke Gov. Con.* C. R., [1908] A. C. 297.

Land Purchase Act, P. E. I.—Action to set aside conveyance of land obtained from Commissioner of Public Lands—Misrepresentation or misstatement—Commissioner an officer of Crown—Remedy by *scire facias* or petition of right. *Dobson* v. *White* (P. E. I.), 6 E. L. R. 144.

Lease—*Water power from canal—Temporary stoppage—Compensation—Total stoppage—Measure of damages—Loss of profits.*]—A mill was operated by water power taken from the surplus water of the Galops canal, under a lease from the Crown. The lease provided that in case of a temporary stoppage of the supply caused by repairs or alterations in the canal, the lessee would not be entitled to compensation unless the same continued for 6 months, and then only to an abatement of rent:—*Held*, Idington, J., *dubitante*, that a stoppage of the supply for two whole seasons, necessarily and *bona fide* caused by alterations in the canal, was a temporary stoppage under this provision.—The lease also provided that in case the flow of surplus water should at any time be required for the use of the canal, or for any public purpose whatever, the Crown could, on giving notice to the lessee, cancel the lease, in which case the lessee would be entitled to be paid the value of all buildings and fixtures thereon belonging to him, with 10 per cent. added thereto. The Crown unwatered the canal in order to execute works

for its enlargement and improvement, contemplating at the time only a temporary stoppage of the supply of water to the lessee, but afterwards changes were made in the proposed work, which caused a total stoppage, and the lessee, by petition of right, claimed damages: — *Held*, Girouard, J., dissenting, that, as the Crown had not given notice of an intention to cancel the lease, the lessee was not entitled to the damages provided for in case of cancellation:—*Held*, also, that the lessee was not entitled to damages for loss of profits during the time his mill was idle owing to the water being out of the canal.—Judgment of the Court below, 25 C. L. T. 83, 9 Ex. C. R. 287, affirmed; Girouard and Idington, JJ., dissenting. *Beach* v. *R.*, 26 C. L. T. 246, 34 S. C. R. 259.

Lease for subaqueous mining — *Breach of contract—Grant of same area for placer mining—Liability of Crown—Damages —Practice.*]—The Crown by indenture dated 23rd March, 1898, leased unto the petitioner for 20 years, the exclusive right and privilege of taking and extracting by subaqueous mining and dredging, all royal and base metals other than coal, to be found within a certain defined area on Dominion Creek, in the Yukon Territory. Subsequent to the granting of this lease, and while the same was in full force, the Crown, through the Gold Commissioner at Dawson, granted to free miners the same area covered by said petitioner's lease as placer mining claims, and placed these free miners in possession of the said area:—*Held*, that the petitioner had suffered sufficient injury by reason of the subsequent grants to support a petition of right against the Crown for damages. Judgment of the Supreme Court of Canada, 38 S. C. R. 542, affirmed, judgment of the Exchequer Court of Canada (Burbidge, J.), 10 Ex. C. R. 390, discharged. *McLean* v. *Rex*, C. R., [1908] A. C. 232.

Lease of—Building erected by lessee—Interference with right of access to canal—Action—Parties. *Slater* v. *Dominion Supply Co.*, 3 O. W. R. 254.

Lien — *Dominion Lands Act Amendment, 1897—Registry laws—Entries—Costs.*]—Under s. 18 of 60 & 61 V. c. 29, amending the Dominion Lands Act, unless the Registrar makes the necessary entries respecting the indebtedness of the patentee there referred to "in the proper register or other record book in his office," no charge or lien will be created on the land comprised in the patent for such indebtedness. A docket or note book in which the Registrar kept a record of applications under the Real Property Act received and examined by him, is not to be considered "the proper register or record book" in which to make the necessary entries, which should have been made in the abstract book kept under the Registry Act, as the patent had been registered under the old system of registration. Under Rule 277 of the Queen's Bench Act, 1895, costs will be given against the Crown when it fails in proceedings taken by way of caveat and petition under the Real Property Act. *Regina* v. *Fawcett*, 20 C. L. T. 287, 13 Man. L. R. 205.

Location ticket—*Conditions—Non-fulfilment—Cancellation — Prescription.*]—Under the terms of a sale from the Crown in 1857, the grantee was obliged to perform all the obligations contained in ordinary location tickets, and without residence and clearance upon the lot the grantee could not become the incommutable owner nor acquire letters patent. 2. Prescription does not run against the Crown, which always has the right to cancel a location ticket. *Kealy* v. *Regan*, 23 Que. S. C. 305.

Military reserve — *Order in council—License to use as public park—Lease of part of park for industrial purposes—Mistake — Evidence—Priorities — Waiver — Breach of trust—Ordnance lands—R. S. C. 1886, s. 55.*] —On the 8th of June, 1887, a portion of land near the City of Vancouver, and known as Stanley Park, was handed over to the municipality for an indefinite period for use as a public park. The land, which had been an Imperial military reserve, had been transferred to the Dominion on the 7th of March, 1884. The city's petition, presented in 1886 to the Dominion, asked for "that portion of land (described as within the city limits) known as the Dominion Government military reserve near the First Narrows . . . bounded on the west by English Bay and on the east by Burrard Inlet." Adjacent to the peninsula known as Stanley Park, and within Vancouver harbor, is a small island, and there was some evidence that at certain stages of the tide during the year, there was bare land between the island and the peninsula. Shortly prior to the 8th of June above mentioned, the city's boundaries, by an amendment to the charter, were stated so as to extend down to low water mark. It was contended for the city that this made the island a portion of the park. But in all charts and maps the land was shewn as an island. The city assumed to use the island as a portion of the park and built out to it a foot-bridge, which afterwards was allowed to fall into disuse and decay. Plaintiffs' predecessor, in 1898, applied for a lease of the island, and although the city was notified of such application, no reply was given until when, in February, 1899, an order was passed authorising the Minister of Militia to grant a lease for 25 years, the city protested and asserted a right to possession of the island under the terms of the order of the 8th of June, 1887. A question then arose between the Province and the Dominion as to the ownership of the island (see (1901), 8 B. C. R. 242; (1904), 11 B. C. R. 258; [1906] A. C. 552), resulting in favour of the Dominion. In consequence, the city opened negotiations with the Dominion for a lease of Stanley Park, and sought to have Deadman's Island specifically included in such lease. Eventually a lease was executed of "all that portion of the City of Vancouver (and the foreshore adjacent thereto, bounded by the western limit of district lot 185, group 1, New Westminster District, as shewn on the official plan thereof filed in the Land Registry office at Vancouver) and the low water mark of the waters of Burrard Inlet, the First Narrows and English Bay, and being all that peninsula lying to the west and north of said district lot 185, known as "Stanley Park.'" The lease was also "subject, until their determination, to any existing leases of portions of said land." Two small portions of Stanley

Park were leased to athletic clubs:—*Held*, that, in all the circumstances, the city's lease granted in 1908 embraced only the portion of the reserve set out in the peninsula.—*Held*, also, that the plaintiffs' lease was a valid one. Judgment of Morrison, J., 13 W. L. R. 75, reversed. *Vancouver Lumber Co.* v. *City of Vancouver*, 15 B. C. R. 432, 15 W. L. R. 460.

Military reserve—*Provincial or federal domain — Recitals in private Acts.*] — The statement in the Vancouver Incorporation Acts, which are private in their nature, that certain land is a "Government Military Reserve," is not conclusive on the Crown in right of the Province:—*Held*, on the facts, that it was not shewn that Deadman's Island was a military reserve called into existence by properly constituted authority, and, therefore, that it belongs to the Province and not to the Dominion. Remarks as to the powers of the Governor of British Columbia in 1858, and as to what constituted a "reserve." *Attorney-General for British Columbia* v. *Ludgate*, 8 B. C. R. 242.

Military reserve—*Title of the Dominion —Transfer by Imperial Government—British North America Act, 1867, ss. 108, 117.*]—The land in suit, called Deadman's Island, was *de facto* a "reserve" by the Government of British Columbia under paragraph 3 of the Proclamation of 1859, and according to the evidence a military reserve:—*Held*, that it remained Imperial property at the time of the British North America Act, 1867, and was transferred to the Dominion by special grant dated the 27th March, 1884. It did not, therefore, fall to the colony in virtue of s. 117 of the Act, nor to the Dominion in virtue of s. 108. Judgment in *Attorney-General* v. *Ludgate*, 11 B. C. R. 258, affirmed. *Attorney-General for British Columbia* v. *Attorney-General for Canada*, [1906] A. C. 552.

Mining leases — Action by Attorney-General to cancel—Improvidence—Misrepresentations—Affidavit as to discovery — Untruth of—Evidence—Land Titles Act—Costs —Compensation for improvements—Notice—Questions of fact—Appeal—Duty of Appellate Court. *Attorney-General for Ontario* v. *Hargrave*, 8 O. W. R. 127, 10 O. W. R. 319.

Mortgage of homestead before recommendation for patent—*Invalidity—Land Titles Act—Construction of statutes—Subsequent legislation.*]—*Held*, that a mortgage of land, acquired by homestead entry under the Dominion Lands Act, before the issue of patent or of the certificate of recommendation, is absolutely void.—A subsequent Act of Parliament ought not to be used to put a construction on previous legislation, unless such Act by clear and express language indicates that it was the intention of the legislature to put a construction on such previous legislation. *Park* v. *Long*, 7 W. L. R. 309, 1 Sask. L. R. 31.

Ownership in right of province of floatable and navigable rivers—C. C. L. C., Arts, 400, 2213, 2242. *Attorney-General for Quebec* v. *McManamy*, 3 E. L. R. 179.

Patent — *Construction — Erroneous description—Description to accord with grants of other parcels—Occupancy under French title.*]—Under a patent from the Crown a parcel of land, forming part of a large block originally held under what is known as the French title, was granted to the defendant's grantor, with the express condition that the patent must be consistent with the patents of other portions of the block. The description of the land in the patent was erroneous, which was apparent from the other patents and the registered and unregistered plans, and had the effect of including land to which the plaintiff had a good title derivable from such French title, and with which possession had gone. In an action of trespass against the defendant for pulling down the plaintiff's fence, and for a declaration as to his boundaries:—*Held*, that the patent must be read as only including the land according to the proper description thereof, and would not include the portion in question; but, even if it were otherwise, it could not be made use of to displace the title of the plaintiff, whose beneficial ownership was derivable through the French title. The occupancy of lands under the French title, and the rights vested in such occupants by virtue of the Imperial Acts 14 Geo. III. c. 83, s. 8, and 31 Geo. III. c. 31, s. 33, considered and commented on. *Drulard* v. *Welsh*, 11 O. L. R. 647, 7 O. W. R. 575. An appeal by the defendant from above decision was allowed by the Court of Appeal, upon the ground that the plaintiff had failed to prove his ownership either by shewing a paper title or title by possession. *Drulard* v. *Welsh*, 9 O. W. R. 491, 14 O. L. R. 54.

Patent — *Revocation—Procedure—Incidental claim—Scire facias.*]—Where a party does not demand in a general and absolute manner the nullity of revocation of letters patent, but demands it only in an incidental manner, and as against himself only, it is not imperative to proceed by way of *scire facias*. *Shawinigan Carbide Co.* v. *Wilson*, 8 Que. P. R. 61.

Patent — *Locatee—Improvements—Ascertainment of amount payable for — Crown Lands Department.*]—On an application being made for the patent to certain lands, a claim was made by the defendant, who had married the widow of the locatee and had improved the land, to be allowed the value of such improvements, whereupon the Commissioner of Crown Lands directed that before the patent issued the amount, if any, payable to the defendant for his improvements and work on the land, after proper deductions, should be ascertained. A consent judgment was obtained referring it to the Master to inquire and report as to what sum, if any, the defendant was entitled to for permanent improvements and work done upon the land; for maintenance of the family of the locatee, and for any advances made to the family, after making all proper deductions:—*Held*, that, as the consent judgment was silent as to the principle to be applied in ascertaining the amount payable to the defendant for the improvements the proper mode, having regard to the object of the Crown Lands Department, was to award such sum as in *foro conscientiæ* the defendant ought to receive. *Highland* v. *Sherry*, 21 C. L. T. 116, 32 O. R. 371.

Patent — *Revocation—Powers of Commissioner of Lands — Scire facias.*] — The power to annul letters patent belongs to the Superior Court only, and not to the Commissioner of Lands, who has no power to correct errors which have crept in, in the preparation of such letters, when there is no adverse contention. 2. The legal way to proceed to have nullified the action of the Commissioner in revoking letters patent in order to make a grant to another, is by *scire facias*. *Regina* v. *Adams*, 18 Que. S. C. 520. (Reversed by the Court of Queen's Bench, but restored by the Supreme Court of Canada), 11 Que. K. B. 56, 21 C. L. T. 328, 31 S. C. R. 220.

Patent demising Crown land—Derogation from previous grant — Description—Bed of river—Cancellation of Crown lease. *Kilgour* v. *Town of Port Arthur*, 10 O. W. R. 841.

Patent for land — Action to repeal—Affidavit — Concealment of improvements — Burden of proof—Costs. *Bailey* v. *DuCailland*, 6 O. W. R. 506.

Patent for mining land — Action for trespass—Counterclaim to set aside patent—Issue by error or improvidence—Repeal of patent — *Scire facias* — Review of legislation — Rule 241 — Jurisdiction of High Court—Fiat of Attorney-General — Certificate of title—Land Titles Act — *Bona fide* purchase for value without notice—Caution—Registration. *Farah* v. *Bailey*, 10 O. W. R. 252.

Patent for mining land—*Trespass—Counterclaim to set aside patent for fraud, error, or improvidence—Jurisdiction of High Court—Parties—Attorney-General — Fiat — Con. Rule 241—Land Titles Act—Bona fide purchaser for value without notice—Injunction—Damages.*]—In all cases of patents for lands issued through fraud or in error or improvidence, the High Court has power, under ss. 41 and 42 of the Judicature Act, notwithstanding the repeal and non-re-enactment in terms of s. 29 of R. S. O. 1877 c. 23, in an action instituted in respect of such lands situate within its jurisdiction, to declare such patents to be void; and this remedy may be accorded in an action by a private individual, to which the Attorney-General may or may not be a party, but to the institution of which his consent is not necessary. The operation of Con. Rule 241 may properly be confined to cases in which it may be necessary to resort for remedy to a writ of *scire facias*.—In an action to restrain the defendants from trespassing or mining upon or removing ore from a small parcel of land in a mining district, the defendants disputed the plaintiffs' title and asserted title in themselves as assignees of the mining claim of one C., comprising the parcel in dispute. The defendants also counterclaimed, alleging inadvertence, omission, or mistake, and claiming a declaration that the letters patent obtained by the plaintiffs did not give them the title to the parcel in dispute, or that, if they did, the letters patent should be repealed, in so far as the parcel in question was concerned, and an injunction and damages:—*Held*, that the matter set up by the defendants in their counterclaim would properly form the subject of an action which might have been instituted by the defendants, without obtaining the Attorney-General's *fiat* or his consent in any other form, in respect of the patent for land granted by the Crown to the plaintiffs; and, in that being so, the counterclaim was maintainable in this action, without the necessity of adding the Attorney-General as a party or of obtaining his *fiat* or consent:—*Held*, however, upon the evidence, that the plaintiff E., who acquired the interests of the original plaintiffs in the land in question *pendente lite*, did so for value and without notice of the action or counterclaim, and therefore having regard to the provisions of the Land Titles Act, under which the plaintiffs' title was registered, the plaintiff E. was in the position of a registered purchaser for valuable consideration without notice, and the relief sought by the counterclaim could not be granted as against him; the right to an injunction followed upon his ownership of the land; but neither he nor his co-plaintiffs were entitled to damages. *Farah* v. *Glen Lake Mining Co.*, 17 O. L. R. 1, 11 O. W. R. 1020.

Pre-emption — Laches—Abandonment—Petition of right—Contract of Crown with pre-emptor. *Cartwright* v. *R.* (B.C.), 1 W. L. R. 82, 103, 3 W. L. R. 47.

Prescription—*Party invoking prescription by his own possession and that of anterior possessors—Grant of land by the Crown as a town site—Part that becomes unfit or less for the purpose—Reversion.*]—A party who claims a title to property by thirty years' prescription can rely only on his own possession or on his own and that of anterior possessors from whom he holds a valid title to the property in the nature of a demise. When a piece of land is set apart or granted by the Crown as a site for a town, any part of it that becomes unfit or useless for the purpose (*e.g.*, by submersion) reverts to the Crown. Judgment of the Court of King's Bench for Quebec (16 Que. K. B. 142), affirmed, judgment of L'Hon. Gagné, J.C.S. (30 Que. S. C. 293), set aside. *Price* v. *Chicoutimi Pulp Co.*, C. R. [1909] A. C. 359, 19 Que. K. B. 227.

Property may be extra commercium as forming part of the public domain of the Crown, artificially and by destination only, and when such destination is changed it falls into the private domain and is *intra commercium*. *Montreal Harbour Commissioners* v. *Record Foundry* (1909), 38 Que. S. C. 161.

Reservation of timber in grant of land—*Mortgage by patentee — Subsequent order in council rescinding reservation—Effect as to rights of mortgagee in timber—Accretion—Estoppel.*]—A grant of land issued pursuant to ss. 14 and 15 of the Dominion Land Regulations (c. 100, Consolidated Orders in Council) contained, *inter alia*, a reservation to the Crown or its agents of all merchantable timber. Subsequently an order in council was passed cancelling such reservation and declaring that all persons who had received homestead entries for lands similarly granted should be entitled to the timber on their homesteads free of dues. The owner, M., sold the timber to the defendants, J. and C., who

in turn transferred their interest to the defendant S. M.'s mortgagees claiming under a mortgage of the 5th August, 1893, brought an action for an injunction and damages for trespass: — *Held*, (Martin, J., dissenting), reversing the judgment of Duff, J., 3 W. L. R. 154, that the cancellation operated either as an extinguishment of the reserve, or a grant of the right in gross to the owner of the land; that the owner thereby became possessed of both the land and the profit which issued out of it, the profit becoming extinct and falling into the inheritance. That the reserve mentioned in the Crown grant was merely a license to enter and cut the timber, and was not a reservation such as that in *Stanley* v. *White*, 14 East 322, 343, *MacCrimmon* v. *Smith*, 12 B. C. R. 377, 3 W. L. R. 154.

Right of way over—*Easement — Prescription—Possession—Predecessors in title.*]—The provisions of C. S. U. C. c. 88, ss. 37, 40, and 44, were in force at the time of Confederation, and have not been repealed by the Parliament of Canada. Such provisions affect the right of the Crown as represented by the Government of Canada. 2. Under such provisions, where one enjoys an easement as against the Crown and over Crown property within the limits of some town or township, or other parcel or tract of land duly surveyed and laid out by proper authority in Ontario, for a period of twenty years, he thereby establishes a right by prescription in such easement; and if the Crown interferes with the enjoyment of it by expropriation proceedings the owner is entitled to compensation. 3. To establish the easement by prescription it is not necessary to shew that the present owner was in undisturbed possession for the full twenty years; but the undisturbed possession of his predecessors in title may be invoked in order to complete the term of prescription. *McGee* v. *R.*, 22 C. L. T. 87, 7 Ex. C. R. 309.

Road reservation — *Expropriation by the town—Subsequent grant to individual — Fraudulent concealment — Cancellation—Jurisdiction of Court—Construction of statutes.*]—The defendant, in making application for a grant of land from the Crown, represented that the land applied for was "near" the town of Sydney, when in fact it was in that town; also that the land was "unoccupied and unimproved," when in truth, to the defendant's knowledge, it was then in the occupation of the Dominion Steel Co., being a part of land which had been expropriated by the town and conveyed to the company for use in connection with their works, and was a portion of what was known as the "Cornish town road," being land reserved by the Crown many years previously for the purpose of a public road or highway, but which had never been used and was wider than was required for the purpose, and out of which some grants had been made. By the provisions of the Towns Incorporation Act, R. S. N. S. c. 71, s. 170, all public streets, roads, highways, &c., were vested absolutely in the town, and the town council was given full control over the same:—*Held*, that the Crown having been induced by false suggestions and fraudulent concealment to make a grant which it would not have made if the Crown officers had been properly informed, the grant must be set aside; that the statute was not to be construed as not applying to the road in question merely because it had not been used or was wider than was required; that the grant was one which the Court had jurisdiction to vacate; and that authority on the part of the town to expropriate the land in question, if the Act (1899 c. 84), did not apply to Crown land, was supplied by the Act ratifying and confirming the expropriation proceedings (1900. c. 66). *Atty.-Gen. for N. S.* v. *McGowan*, 37 N. S. R. 35, 24 C. L. T. 136.

Sale—*Timber lease—Renewal of, subsequent to Crown grant.*]—The plaintiff obtained a Crown grant to certain lands, for the timber on which a lease for 21 years had been previously given. The grant from the Crown was silent as to the timber lease. At a date subsequent to the said grant, the timber lease had to be surrendered for renewal under the provisions of the Land Act: —*Held*, that the rights given the grantee under his Crown grant were subject to the existing timber lease, and that the lessees did not lose their priority by taking a renewal under the Act. *Brohm* v. *B. C. Mills, Timber & Trading Co.*, 13 B. C. R. 123.

Squatter—*Grant—Purchaser for value—Priorities—Notice — Registry Act — Instrument improperly registered.*]—A squatter upon Crown land, which he had partly cleared, and upon which he had built a house, gave a registered mortgage of it in 1874 for value, and in 1881 conveyed the equity of redemption by registered deed to the mortgagee, remaining in occupation of the land as tenant. In 1898 a son of the squatter, having no knowledge of the mortgage or deed, or that his father occupied the land as tenant, obtained a grant of the land from the Crown:—*Held*, that he should not be declared a trustee of the land for the purchaser from the father:—*Semble*, that s. 69 of the Registry Act, 57 V. c. 20 (C. S. 1903, c. 151, s. 66), by which it is provided that "the registration of any instrument under this Act shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to such registration, "does not apply to an instrument not properly on the registry, such as a conveyance of Crown land by a squatter. *Robin, Collas & Co.* v. *Theriault*, 25 C. L. T. 68, 3 N. B. Eq. 14.

Squatter — Settler—Rights of—Railway belt—Vancouver Island Settlers' Rights Act, 1904—Construction—Expropriation — Compensation—Powers of Provincial Legislature —Timber—Mines and minerals. *Esquimalt and Nanaimo Rw. Co.* v. *McGregor* (B.C.), 2 W. L. R. 530.

Subsidy — *Grant—Construction of statute—Mines and minerals — Reservation — Dominion Lands Act.*]—*Held*, that the appellant railway company, being entitled under 53 V. c. 4 (D.), and an order in council made in pursuance thereof, to grants of Dominion lands as a subsidy in aid of the construction of their railway, were entitled to them without any reservation by the Crown of mines and minerals except gold and silver. The Dominion Lands Act, 1886, and the Regula-

tions of 1889 thereunder, which prescribe a reservation to that effect, do not apply. They relate only to the sale of Dominion lands and to the settlements, use, and occupation thereof. The grants in question were not by way of sale. Judgments in 8 Ex. C. 83, 33 S. C. R. 673, reversed. *Calgary & Edmonton Rw. Co.* v. *Rex*, [1904] A. C. 765.

Swamp lands—*Transfer to province—Construction of statute—Order in council.*] —By s. 1 of 48 & 49 V. c. 50 (D.), subsequently re-enacted by R. S. C. c. 47, s. 4, it was provided that all Crown lands which may be shewn to the satisfaction of the Dominion Government to be swamp lands shall be transferred to the province and enure wholly to its benefit and uses:—*Held*, that by its true construction the section did not operate an immediate transfer to the province of any swamp lands or of the profits arising therefrom, but only from the date of the order in council, made after survey and selection as prescribed by the Act directing that the selected lands be vested in the province. Down to that date the profits resulting from the transferred lands belonged to the Dominion. Judgment in 34 S. C. R. 287, 24 C. L. T. 163, and 8 Ex. C. R. 337, affirmed. *Atty.-Gen. for Man.* v. *Atty.-Gen. for Can.*, [1904] A. C. 799.

Timber licenses—*Prior grant of land—Retroactivity.*] — Lots granted or located prior to the date of a license to cut timber under Art. 1309, R. S. Q., are exempt from the rights conferred by such license.—2. Licenses to cut timber on Crown lands are not retroactive as against prior grantees of said lands. *Price* v. *Delisle*, 21 Que. S. C. 411.

Timber licenses—*Sales by local agent—Location ticket — Suspensive condition — Title to lands.*] — During the term of a license to cut timber on ungranted lands of the province of Quebec, the local Crown lands agent made a sale of a part of the lands covered by the license, and issued location tickets or licenses of occupation thereof under the provisions of Arts 1269 *et seq.*, R. S. Q., respecting the sale of Crown lands. Subsequently the timber license was renewed, but at the time the renewal license was issued there had not been any express approval by the commissioner of Crown lands of the sales so made by the local agent, as provided in Art. 1269, R. S. Q.: — *Held*, affirming the judgment appealed from, Taschereau and Davies, JJ., dissenting, that the approval required by Art. 1269, R. S. Q., was not a suspensive condition, the fulfilment of which would have retroactive effect from the date when the sales by the local agent were made, and that, at the time of the issue of the renewal license, the lands in question were still ungranted lands of the Crown for which the timber license had been validly issued. *Leblanc* v. *Robitaille*, 22 C. L. T. 78, 31 S. C. R. 582.

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2. EXPROPRIATION OF LAND.

Actual value — *Compulsory taking — Compensation.*] — In expropriation cases, where the actual value of lands can be closely and accurately determined, a sum equivalent to ten per cent, of such actual value should be added thereto for the compulsory taking; but where that cannot be done, and where the price allowed is liberal and generous, nothing should be added for the compulsory taking. *Symonds* v. *Rex*, 8 Ex. C. R. 319.

Compensation—*Damages for injury to adjoining lands — Amount of judgment of Exchequer Court — Appeal to Supreme Court.*]—Information in the Exchequer Court for a declaration that certain lands taken for the Trent Canal were vested in Her Majesty, and that the sum of $6,860 tendered to the defendant was sufficient compensation for the lands taken and for damages to adjoining lands. The amount tendered was made up of $3,860 for the lands taken and $3,000 for damages. The valuators on whose report the tender was made put the value of the land at $200 per acre. This was accepted by the Judge of the Exchequer Court, but, upon conflicting evidence, he increased the amount for damages to $10,250. The Crown appealed on the ground that the damages were excessive:—*Held*, Gwynne and Girouard, JJ., dissenting, that, as it did not appear from the evidence that there was error in the judgment appealed from, the Supreme Court would not interfere. *R.* v. *Armour*, 31 S. C. R. 499.

Compensation — *Leasehold interest — Measure of damages.*]—The suppliants were lessees of certain land and premises expropriated for the Intercolonial Railway. The premises had been fitted up and were used by them for the purpose of their business as coal merchants. By the terms of the lease under which they were in possession, the term for which they held could at any time be determined by the lessors by giving six months' notice in writing, in which event the suppliants were to be paid $2,500 for the improvements they had made: — *Held*, that the measure of compensation to be paid to the suppliants was the value, at the time of the expropriations, of their leasehold interest in the lands and premises. Apart from the sum payable for improvements there was no direct evidence to shew what the value was. But it appeared that the suppliants had procured other premises in which to carry on their business, and that in doing so they had of necessity been at some loss, and that the cost of carrying on their business had been increased. The amount of the loss and of increased cost of carrying on business during the six months succeeding the expropriation proceedings was, in addition to the sum mentioned, taken to represent the value to them, or to any person in a like position, of their interest in the premises. The suppliants also contended that, if they had not been disturbed in their possession, they could have increased their business, and so have made additional profits, and they claimed compensation for the loss of such profits, but this claim was not allowed. *Gibbon* v. *R.*, 20 C. L. T. 434, 6 Ex. C. R. 430.

Contract — *Restriction — Easement — Enforcement in equity.*]—The defendant was track master on the Pictou branch of the Intercolonial Railway, and committed the acts complained of in this action under in-

structions from the department of railways, and justified under the Crown, which had become the owner of the land in question, by expropriation. The predecessor in title of the Crown had sold part of a lot of land to the predecessor in title of the plaintiff, and at the same time entered into an agreement with the purchaser that an adjoining plot of land should never be thereafter sold, but left for the common benefit of both parties and their successors:—*Held*, following *McLean* v. *McKay*, L. R. 5 P. C. 327, that the agreement constituted a restriction imposed upon the estate of the Crown in favour of the estate of the plaintiff, enforceable in equity by the latter.—The land expropriated by the Crown being the servient tenement, and that of the plaintiff the dominant tenement, nothing passed to the Crown except the land described in the expropriation documents. *McLean* v. *Gray*, 40 N. S. R. 111.

Damage to remaining land — *Access — Undertaking — Right of way — Future damages — Agreement—Increased value.*]— The defendants owned a certain property, a portion of which was taken by the Crown for the purpose of a canal. Access to the remaining portion of the defendants' land was cut off by the canal, but the Crown, under 52 V, c. 38, s. 3, filed an undertaking to build and maintain a suitable road across its property for the use of the defendants. The evidence shewed that the effect of this road would be to do away with all future damage arising from deprivation of access; and the Court assessed the damages for past deprivation only. — 2. It having been agreed between the parties in this case that the question of damages which might arise in the future from any flooding of the defendants' lands should not be dealt with in the present action, the Court took cognizance of such agreement in pronouncing judgment. —3. In respect to the lands taken, the Court declined to assess compensation based upon the consideration that the lands were of more value to the Crown than they were to the defendants at the time of the taking. *Stebbing* v. *Metropolitan Board of Works*, L. R. 6 Q. B. 37, and *Paint* v. *R.*, 2 Ex. C. R. 149, 18 S. C. R. 718, followed. *R.* v. *Harwood*, 20 C. L. T. 424, 6 Ex. C. R. 420.

Damages — *Valuation—Evidence.*[—The Crown expropriated land of L. and had it appraised by valuators, who assessed it at $11,400, which sum was tendered to L. but refused. L. brought suit by petition of right for a larger sum as compensation. The Exchequer Court awarded him $17,000. On appeal by the Crown:—*Held*, Girouard, J., dissenting, that the evidence given on the trial of the petition shewed that the sum assessed by the valuators was a very generous compensation to L. for the loss of his land, and the increase by the judgment appealed from was not justified. The Court, while considering that a less sum than that fixed by the valuators should not be given in this case, expressly stated that the same course would not necessarily be followed in future cases of the kind. *R.* v. *Likely*, 22 C. L. T. 191, 32 S. C. R. 47.

Expropriation of land for public works—*Water lot—Special adaptability for wharf purposes — Interference with navigation—Right to erect wharf.*]—Appeal to Supreme Court of Canada dismissed. The Crown had offered the appellant $10,000 as compensation for a water lot. The trial Judge allowed the same amount because the Crown had tendered it. Even if trial Judge technically wrong in refusing to consider the appellant's chance of obtaining a license to erect a wharf which would obstruct navigation, still the sum allowed for damages was more than ample. *R.* v. *Cunard*, 8 E. L. R. 94.

Foundry—*Depreciation of value of machinery and tools by reason of expropriation —Compensation.*]—Where a building used as a foundry is expropriated for the purposes of a public work, the owner who is unable to find suitable premises elsewhere to carry on his business is entitled to compensation for the depreciation in value of the machinery, tools, and other personal property with which his foundry is fitted up. *R.* v. *Thompson*, 11 Ex. C. R. 161, 27 C. L. T. 669.

Injury to business — *Depreciation of value of machinery—Compensation.*]—Where the whole property is taken and there is no severance, the owner is entitled to compensation for the land and property taken, and for such damages as may properly be included in the value of such land and property. He is not entitled to damages because such taking injuriously affects a business which he carries on at some other place.—2. The defendants, in expropriation proceedings, at the time their premises were taken, had them fitted up as a boiler and machine shop. The machinery was treated as personal property by the defendants and sold for less than it was worth to them when used for such purposes: —*Held*, that they were entitled to compensation for the depreciation in value of the machinery by reason of the taking of the premises where it had been in use. *R.* v. *Stairs*, 11 Ex. C. R. 137, 27 C. L. T. 670.

Leasehold property—*Tenant's improvements—Expense of removal—Compensation.*] —The suppliant was tenant of certain buildings and wharves erected upon lands of which he had acquired possession as assignee of two leases. He there carried on business as a junk dealer. The terms for which the leases were made had expired at the time of the expropriation of the lands by the Crown; but the leases contained a proviso that the buildings and other erections put on the demised premises should be valued by appraisers, and that the lessor or reversioner should have the option of resuming possession upon payment of the amount of such appraisement, or of renewing the leases on the same terms for a further term not less than three years. No such appraisement had been made, and the suppliant continued in possession of the property as tenant from year to year. The evidence shewed that the lessor had no present intention of paying for the improvements and of resuming possession of the property:—*Held*, that, in addition to the value of his improvements, the suppliant should be allowed compensation for the value under all the circumstances of his possession under the leases at the date of the expropriation. *McGoldrick* v. *R.*, 23 C. L. T. 99, 8 Ex. C. R. 169.

Lessor and lessee—*Covenant to build on demised premises.*] — Where a lessee is under covenant to build upon the demised premises, and a part of the premises are expropriated by the Crown for the purposes of a public work, the fact that by the expropriation the lessee is relieved from his covenant and the further fact that his rent is reduced by reason of the taking of a part of the premises, will be taken into consideration by the Court in fixing the amount of compensation to be paid to the lessee. *R.* v. *Young*, 22 C. L. T. 84, 7 Ex. C. R. 282.

Licensed hotel — *Special value of premises to owner arising from liquor license—Compensation.*] — The Crown expropriated for the purposes of a public work certain premises which the owner used as a hotel licensed to sell liquors. The license was an annual one, but, as the license laws then stood, it could be renewed in favour of the then owner, or, in case of his death, of his widow; but no license could be granted to any other person for such premises.—If the owner sold the property it was shewn that the use to which he put it could not be continued:—*Held*, that, while this particular use of the property added nothing to its market or selling value, it enhanced its value to the owner at the time of the expropriation, and that such was an element to be considered in determining the amount of compensation to be paid to him for the premises taken. *R.* v. *Rogers*, 27 C. L. T. 669, 11 Ex. C. R. 132.

National Transcontinental Railway —*Lands taken by Commissioners—Compensation — Arbitration — Jurisdiction of Exchequer Court—Construction of statutes.*]—Section 13 of 3 Edw. VII. c. 71, reads as follows: — "The Commissioners may enter upon and take possession of any lands required for the purposes of the Eastern Division, and they shall lay off such lands by metes and bounds, and deposit of record a description and plan thereof in the office for the registry of deeds or the land titles office for the county or registration district in which such lands respectively are situate; and such deposit shall act as a dedication to the public of such lands, which shall thereupon be vested in the Crown saving always the lawful claim to compensation of any person interested therein."—*Held*, that, under the terms of section 15 of the above Act (read in connection with the provisions of the Railway Act, R. S. 1906, c. 37), when lands have been taken and become vested in the Crown as provided by section 13, and the Commissioners cannot agree with the owner thereof as to compensation for the same, such compensation must be ascertained by a reference to arbitration, and not by proceedings taken in the Exchequer Court for such purpose. *National Transcontinental Railway, Ex p. Bouchard*, 38 N. B. R. 346, not followed. *Rex* v. *Jones* (1910), 13 Ex. C. R. 171.

Possession by officers of the Crown of lands not expropriated—*Taking of Highway—Rifle range—Damages.*]—The defendants complained that possession of certain lands not covered by the plan and description filed by the Crown in an expropriation proceeding had been taken by the officers of the Crown, and claimed compensation:—*Held*, that the right to recover compensation must be limited to lands mentioned in the plan and description filed, and to the injurious affection of other lands held therewith.—2. The defendants' predecessor in title, in laying off into lots the land of which a portion was taken from the defendants by the Crown, left a roadway between the land so divided and the top of the land adjacent to the sea. This roadway had been used by the public, and work had been done upon it by the municipal authorities. The land between that so taken and the sea was not included in the plan and description filed; but the Crown closed up the roadway, and from the land taken from the defendants opened another in lieu thereof:—*Held*, that the defendants were not entitled to compensation in respect of the taking of the roadway.—3. Where property adjoins a rifle range, the site of which has been expropriated from the lands of the owner of such adjacent property, he is entitled to compensation for damages arising from the use of such rifle range. *R.* v. *Harris*, 22 C. L. T. 83, 7 Ex. C. R. 277.

Prospective value—*Assessed value.*]—Where lands at the time of the expropriation had a prospective value for residential purposes beyond that which then attached to them as lands used for farming or dairy purposes, such prospective value was taken into consideration in assessing compensation. —2. In assessing compensation in this case the Court looked at the assessed value of the lands, not as a determining consideration, but as affording some assistance in arriving at a fair valuation of the property taken. *R.* v. *Turnbull Real Estate Co.*, 23 C. L. T. 99, 8 Ex. C. R. 163. Affirmed in *Turnbull Real Estate Co.* v. *R.*, *Corkery* v. *R.*, *De Bury* v. *R.*, 33 S. C. R. 677.

Public work—*Damages—Reference.*] — Upon an appeal from the report of special referees, on the ground that the amount of damages reported by them was excessive, and it appearing to the Court that the matter was one in which it was expedient that there should be a reference back to the referees under the 19th Rule of Court of the 12th December, 1899, an order was made therefor, in which the following directions were given to the referees:—1. To find what in September, 1902, was the value of the wharf, land, and premises taken by the Crown as mentioned in the information. In finding that value the referees were directed to exclude from their consideration the value of the same to the Crown, in the way of saving expense in the construction of the public work, or otherwise, and to determine its value at that time to the owner or any other person, for any purpose to which in the ordinary course of events it could be put. In finding that value the referees were also directed to take into account the condition, situation, and prospects of the property taken; but that such value should be one that the property had at the time it was taken, and not one that the referees might think that it might have at some future time by reason of its condition, situation, or prospects.—2. With regard to the remainder of the property, of which that taken formed part, the referees

were directed to find the amount of damages, if any, that had been occasioned to the portion not expropriated by the taking of the part mentioned, and the construction of the public work. The referees were further directed that if the construction of the public work benefited and increased the value of the portion of the property not expropriated, that was to be taken into account and set off against the damages occasioned by the severance. *R.* v. *Shives*, 9 Ex. C. R. 200.

Public work — Government railway—Compensation — Value — Evidence — Costs. *R.* v. *Pero*, 5 E. L. R. 427; *R.* v. *Gannon*, *ib.* 430; *R.* v. *Francis*, *ib.* 433; *R.* v. *Day*, *ib.* 434; *R.* v. *Hamilton*, *ib.* 439.

Public work — Government railway—Compensation — Value — Barn — Fixture. *R.* v. *McDonald*, 5 E. L. R. 431.

Public work — Government railway—Compensation — Value — Crossing — Evidence. *R.* v. *McPhee*, 5 E. L. R. 440.

Public work — Government railway—Compensation—Sales as a criterion of value —Costs. *R.* v. *McKay*, 5 E. L. R. 424.

Public work — *Statutes—Warrant for possession — Damages.*]—The commissioners acting under the National Transcontinental Railway Act, 3 Edw. VII. c. 71, are entitled to apply for and obtain under the Expropriation Act, R. S. C. 1906, c. 143, s. 21, a warrant for the possession of land expropriated for the purposes of the railway, irrespective of whether the damages have been paid or not. *Re National Transcontinental Railway, Ex p. Bouchard*, 38 N. B. R. 346, 4 E. L. R. 253.

Value—*Payment—Market value—Potential value—Evidence.*]—D. purchased at different times and in 16 different parcels 623 acres of land, paying for the whole nearly $7,000, or about $11 per acre. The Crown, on expropriating the land, offered him $20 per acre, which he refused, claiming $22,000, which on a reference to ascertain the value was increased to $45,000. The Referee allowed $38,000, which the Exchequer Court reduced to the sum first claimed:—*Held*, reversing the judgment of the Exchequer Court, 10 Ex. C. R. 208, 26 C. L. T. 528, Girouard, J., dissenting, that there was no user of the land nor any special circumstance to make it worth more than the market value, which was established by the price for which it was sold shortly before expropriation.—D. claimed the larger price as potential value of the land for orchard purposes, to which he had intended to devote it:—*Held*, that, as he had not proved the land to be fit for such purpose, and the evidence tended to disprove it, he could not receive compensation on that ground.—By 2 Edw. VII. c. 9, s. 1, only 5 expert witnesses can be called by either side on the trial of a case.—*Quære*, if more are called without objection by the opposite party, is the testimony of the extra witnesses valid? *Dodge* v. *R.*, 27 C. L. T. 151, 38 S. C. R. 149.

Will — *Construction—Gift over in the event of death—Life estate — Interest on compensation money.*] — A testatrix devised and bequeathed to her niece M. W. a dwelling-house and its contents, "but in case she should die without leaving lawful issue, then to my nieces hereinafter mentioned, and their children, being females." Following this there was a residuary gift or bequest to "the daughters of my sisters M. and H. and to the daughters or daughter of my late brother J., and to their children, if any, being daughters:"—*Held*, that there was nothing in the will to indicate any intention on the part of the testatrix that the gift over should not take effect unless in her lifetime her niece M. W. died without leaving lawful issue, but, on the contrary, it was to be inferred from the terms of the will that it was the intention of the testatrix that in the case of the death at any time of M. W. without leaving lawful issue, the other nieces, to whom she left the residue of her estate, should take the property. *Cowan* v. *Allen*, 26 S. C. R. 292, *Fraser* v. *Fraser*, *ib.* 316, and *Olivant* v. *Wright*, 1 Ch. D. 348, referred to.—2. The property in question had been expropriated by the Crown for the purposes of a public work:—*Held*, that the suppliant M. T., the devisee under the will *sub nomine* M. W., was in any event entitled to a life interest in the compensation money, and that she might be paid the interest thereon during the pendency of proceedings to determine the respective rights of all parties interested therein. *Trail* v. *R.*, 21 C. L. T. 281, 7 Ex. C. R. 98.

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3. Negligence.

Government railway—*Freight rates—Regular and special rate—Agent's mistake—Estoppel.*]—A freight agent on the Intercolonial Railway, without authority therefor and by error and mistake, quoted to a shipper a special rate for hay between a certain point on another railway and one on the Intercolonial, the rate being lower than the regular tariff rate between the two places. The shipper accepted the special rate, and shipped a considerable quantity of hay. Being compelled to pay freight thereon at the regular rate, he filed a petition of right to recover the difference between the amount paid and that due under the special rate:—*Held*, that, as the claim was based upon the negligence or laches of an officer or servant of the Crown, for which there was no statutory remedy, the petition must be dismissed. *Gunn & Co.* v. *R.*, 26 C. L. T. 780, 10 Ex. C. R. 343.

Government railway — *Injury to the person—Negligence of Crown's servant—Liability.*]—The suppliant, while waiting on the platform of the Intercolonial station at Stellarton, N. S., to board a train, was knocked down by a baggage truck and injured. The truck was being moved by the baggage master. The evidence shewed that the accident could have been prevented by the exercise of ordinary care on the part of the baggage master:—*Held*, that, as the injuries of which the suppliant complained were received on a public work, and resulted from the negligence of a servant of the Crown while acting within the scope of his duties and employment, the Crown was liable therefor. *Sedgewick* v. *R.*, 27 C. L. T. 670, 11 Ex. C. R. 84.

Government railway — *Injury to the person—Negligence—Liability of Crown — 50 & 51 V. c. 16, s. 16 (c)—Interpretation —Art. 1056, C. C. L. C.—Right of action—Waiver by accepting indemnity.*]—The provisions of s. 16 (c) of 50 & 51 V. c. 16, now R. S. C. 1906 c. 140, s. 20 (c), not only give exclusive original jurisdiction to the Exchequer Court of Canada to hear and determine claims against the Crown arising out of any death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, but impose a liability upon the Crown to answer in such cases for the wrongful acts of its officers or servants.—2. The suppliant's husband, in his lifetime a locomotive engineer employed on the Intercolonial Railway, was killed by an accident on the railway while on duty. The accident happened by reason of a fireman, who was employed on another train belonging to the same railway, failing properly to set and lock a switch in the performance of his duty:—*Held*, that the case fell within the provisions of s. 16 (c) above mentioned, and that the Crown was liable in damages.—3. *Held*, following *Miller* v. *Grand Trunk Rw. Co.*, [1906] A. C. 187, the result of which is to overrule *The Queen* v. *Grenier*, 30 S. C. R. 42, that the right of action conferred by Art. 1056 of the Civil Code of Quebec on the widow and relatives of a deceased employee whose death has been caused by negligence for which the employer is responsible, is an independent and personal right of action, and is not, as in the English Act known as Lord Campbell's Act, conferred on the representatives of the deceased only; and that a provision in a by-law of a society to which the deceased belonged, and to the funds of which the defendant company subscribed, that in consideration of such subscription no member of the society or his representatives should have any claim against the company for compensation on account of injury or death from accident, did not constitute a good defence to the widow's action. *Armstrong* v. *R.*, 27 C. L. T. 671.

Government railway — Liability for nonfeasance—Destruction of timber—Negligence. *Gillies Brothers Co. Limited* v. *Temiskaming and Northern Ontario Railway Commission* (No. 2), 10 O. W. R. 975.

Government railway — *Negligence of fellow servant—Common employment—Lord Campbell's Act—Widow and children—Action —Bar—Damages.*]—Article 1056, C. C., embodies the action previously given by a statute of the province of Canada re-enacting Lord Campbell's Act. *Robinson* v. *Can. Pac. Rw. Co.*, [1892] A. C. 481, distinguished.—A workman may so contract with his employer as to exonerate the latter from liability for negligence, and such renunciation would be an answer to an action under Lord Campbell's Act. *Griffiths* v. *Earl Dudley*, 9 Q. B. D. 357, followed.—In s. 50 of the Government Railways Act, R. S. C. c. 38, the words "notice, condition, or declaration" do not include a contract or agreement by which an employee has renounced his right to claim damages from the Crown for injury from negligence of his fellow servants. *Vogel* v. *Grand Trunk Rw. Co.*, 11 S. C. R. 612, disapproved.—An employee of the Intercolonial Railway became a member of the Intercolonial Railway Relief and Assurance Association, to the funds of which the Government contributed annually $6,000. In consequence of such contribution, a rule of the association provided that the members renounced all claims against the Crown arising from injury or death in the course of their employment. The employee having been killed in the discharge of his duty by negligence of a fellow servant:—*Held*, reversing the judgment of the Exchequer Court, 6 Ex. C. R. 276, 19 C. L. T. 202, that the rule of the association was an answer to an action by his widow under Art. 1056, C. C., to recover compensation for his death.—The doctrine of common employment does not prevail in the Province of Quebec. *Grenier* v. *R.*, 19 C. L. T. 378, 30 S. C. R. 42.

Overruled by *Miller* v. *Grand Trunk Rw. Co.*, [1906] A. C. 187.

Government railway — Negligence — Fire set by sparks from smoke-stack—Evidence—Burden of proof. *Chamberlain* v. *R.*, 5 E. L. R. 441.

Government railway — Negligence — Injury to passenger alighting — Damages. *Colpitts* v. *R.*, 5 E. L. R. 446.

Government railway — *Operation of—Defective switch—Public work—Tort—Liability of Crown—Negligence of fellow-servant —Right of action—Exchequer Court Act, s. 16 (c)—Jurisdiction of Court—Lord Campbell's Act—Art. 1056, C. C.—Satisfaction or indemnity.*] — In consequence of a broken switch, at a siding on the Intercolonial Railway (a public work of Canada), failing to work properly, although the moving of the crank by the pointsman had the effect of changing the signal so as to indicate that the line was properly set for an approaching train, an accident occurred by which the locomotive engine was wrecked and the engine-driver killed. In an action to recover damages from the Crown, under Art. 1056 of the Civil Code of Lower Canada: — *Held*, affirming the judgment appealed from, *Armstrong* v. *R.*, 11 Ex. C. R. 119, that there was such negligence on the part of the officers and servants of the Crown as rendered it liable in an action in tort: that the Exchequer Court Act, 50 & 51 Vict. c. 16, s. 16 (c), imposed liability upon the Crown, in such a case, and gave jurisdiction to the Exchequer Court of Canada to entertain the claim for damages; and that the defence that deceased, having obtained satisfaction or indemnity within the meaning of Art. 1056 of the Civil Code, by reason of the annual contribution made by the Railway Department towards the Intercolonial Railway Employees' Relief and Insurance Association, of which deceased was a member, was not an answer to the action. *Miller* v. *Grand Trunk Rw. Co.*, [1906] A. C. 187, followed. *R.* v. *Armstrong*, 40 S. C. R. 229, 5 E. L. R. 182.

Leave to appeal to P. C. refused.

Government railway — *Public work—Effect of Government acquiring running rights and powers over another railway.*]—The suppliant's husband was mortally injured while

employed as a locomotive fireman on an Intercolonial Railway train, running between Levis and Chaudière, at a point on the Grand Trunk Railway, enclosed between two sections of the Intercolonial Railway, over which the Government of Canada had acquired running rights and powers in perpetuity and free of charge under 43 V. c. 8. Over this section of railway the Government operated its trains and locomotives as on a part of the Intercolonial Railway system.—*Held*, that the agreement between the Government of Canada and the Grand Trunk Rw. Co. made under the provisions of the Dom. statute 43 V. c. 8, giving the Government running rights and powers over a portion of the Grand Trunk Rw. from Levis to Chaudière, between two sections of the Intercolonial Railway, constitutes that portion of the Grand Trunk Rw. a part of the Intercolonial Railway, under the provisions of the Government Railways Act, as amended by 54 & 55 V. c. 50 (D.), and, consequently, a public work within the meaning of the Exchequer Court Act, 50 & 51 V. c. 16, s. 16 (*c*), R. S. C. 1906, c. 140, s. 20 (*c*). Judgment in 11 Ex. C. R. 252 affirmed. *R.* v. *Lefrançois*, 40 S. C. R. 431, 5 E. L. R. 268.

Government railway — *Passenger — Injury while alighting from train—Negligence of conductor and brakesman — Liability of Crown.*]—The suppliant was injured while alighting from an Intercolonial Railway train on which she was being carried as a passenger. Owing to the negligence of a brakesman in failing to open the vestibule door of the car next to the station platform, and leaving the opposite door open, the suppliant was compelled to use the latter. While in the act of alighting and before she had reached the ground, the conductor started the train, with the result that the suppliant was thrown down and sustained bodily injury:—*Held*, that both the conductor and brakesman of the train were guilty of negligence, upon the facts shewn, and that the Crown was liable in damages. *Ryan* v. *R.*, 11 Ex. C. R. 267.

Government railway — *Servant — Injury to and consequent death—Negligence—Tort—Liability of Crown — Demise of the Crown—Personal action—Release — Operation of railway—Common employment—Exchequer Court Act, 50 & 51 c. 16, s. 16 (c)—Appeals to Privy Council.*]—Under s. 16 (*c*) of the Exchequer Court Act, 50 & 51 V. c. 16, an action in tort will lie against the Crown, represented by the Government of Canada.—Under the Civil Code of Lower Canada, in case of death by negligence of servants of the Crown, an action for damages may be maintained by the widow of the deceased on behalf of herself and her children. The action of the widow is not barred by her acceptance of the amount of a policy of insurance on the life of deceased from the Intercolonial Railway Employees' Relief and Insurance Association, under the constitution, rules, and regulations of which the Crown is declared to be released from liability to make compensation for injuries to or death or any member of the association. *Miller* v. *Grand Trunk Rw. Co.*, [1906] A. C. 187, followed.—The doctrine of common employment does not prevail in the province of Quebec.—The right of action for compensation for injury or death by negligence of Government employees does not abate on demise of the Crown. *Viscount Canterbury* v. *The Queen*, 12 L. J. Ch. 281, referred to.—The Judicial Committee of the Privy Council having refused leave to appeal from the judgment of the Supreme Court of Canada in *Armstrong* v. *R.*, 40 S. C. R. 229, in accord with a long series of decisions in the Dominion, that case was held binding, and was followed.—Judgment in *Desrosiers* v. *R.*, 11 Ex. C. R. 128, affirmed. *R.* v. *Desrosiers*, 41 S. C. R. 71, 6 E. L. R. 119.

Government steam dredge — *Negligence of employee—Boiler explosion — Fatal injury—Liability of Crown—Public work.*]—B., an employee on board of a dredge belonging to the Dominion Government, was charged with the duty of keeping the boilers supplied with water, the condition of the boilers being indicated to him by means of water-gauges. These gauges demanded unremitting attention, owing to the peculiar character of the boilers. B. was instructed by the engineer and fully understood that these gauges demanded his unremitting attention, and that it was dangerous for him to leave except momentarily a position which gave him a view of some of the gauges. B. left such a position for about ten minutes, going to another part of the dredge, and during his absence one of the boilers exploded, and he was fatally injured. Upon a petition of right by his widow for damages:—*Held*, that the accident was attributable to B.'s own neglect, and that the petition must be dismissed.—*Quære*, whether the dredge was a "public work" within the meaning of s. 20 (*c*) of the Exchequer Court Act. *Massicotte* v. *R.*, 11 Ex. C. R. 286, 27 C. L. T. 339.

Highway—*Agreement with municipality —Accident from ice — Liability — Public work.*]—Under an agreement between the corporation of a city and the Dominion Government, the latter undertook, amongst other things, to maintain an approach to the Sappers' Bridge, such approach having been built by the city corporation, and forming part of a public highway. On the 23rd February, 1898, the sidewalk on the approach was in a slippery condition, and the suppliant in passing over it fell and sustained a fracture of one of her arms. She filed a petition of right seeking damages against the Crown, under 50 & 51 V. c. 16, s. 16 (*c*). —*Held*, that, whilst it was the duty of certain servants of the Crown to go and see that the bridge was in a safe condition for pedestrians every morning, the suppliant, upon whom the onus was, had not shewn that they had failed in their duty on the morning of the accident.—2. In this climate it is not possible in winter to have the sidewalks of the highways always in a safe condition to walk upon; and negligence in that respect when it is actionable consists in allowing them to remain an unreasonable time in an unsafe condition. *Davies* v. *R.*, 20 C. L. T. 163, 6 Ex. C. R. 344.

Navigation of inland waters — *Collision—Government ships and vessels—"Public work"—Exchequer Court Act, s. 16 — Construction of statute—Right of action.*]—His Majesty's steamship "Champain," while navigating the river St. Lawrence at some

distance from a place where dredging was being carried on by the Government of Canada, and engaged in towing an empty mud-scow, owned by the Government, from the dumping ground back to the place where the dredging was being done, came in collision with the suppliant's steam-barge, which was also navigating the river, and the barge sustained injuries:—*Held*, affirming the judgment of the Exchequer Court of Canada, that there could be no recovery against the Crown for damages suffered in consequence of negligence of officers or servants, as the injury had not been sustained on a public work, within the meaning of s. 16 of the Exchequer Court Act. —*Chambers* v. *Whitehaven Harbour Commissioners*, [1899] 2 Q. B. 132; *Hall* v. *Snowdon, Hubbard & Co., ib.* 136; *Lowth* v. *Ibbotson*, [1899] 1 Q. B. 1003; *Farrell* v. *Bowman*, 12 App. Cas. 643, and *Attorney-General for the Straits Settlement* v. *Wemyss*, 13 App. Cas. 195, referred to. *Paul* v. *R.*, 27 C. L. T. 152, 38 S. C. R. 126.

Public work — *Bridge—Maintenance—Minister of Public Works.*]—There is nothing in the Public Works Act, R. S. C. c. 36, in relation to the maintenance and repair by the Minister of Public Works of bridges belonging to the Dominion Government, which makes him "an officer or servant of the Crown" for whose negligence the Crown would be liable under s. 16 (*c*) of the Exchequer Court Act, 50 & 51 V. c. 16. *McHugh* v. *R.*, 20 C. L. T. 275, 6 Ex. C. R. 374.

Public work — *Collision of vessel with entrance pier to canal — Negligence in construction—Liability of Crown.*]—One of the entrance piers to a Government canal was so constructed that a substructure of masonry rested on crib-work. The base of the pier was set back three feet from the edge of the crib-work, which left a step or projection under water between the masonry and the side of the crib-work. It was necessary for vessels to enter the canal with great care, at this point, owing to the eddies and currents that existed there. The proper course, however, for vessels to steer was marked by buoys. A vessel on entering the canal touched another pier than the one in question, and then taking a sheer and getting out of control, swung over and came in collision with this pier:—*Held*, that, upon the facts proved, the accident was caused by the vessel being caught in a current or eddy and so carried against the pier.—2. That, as there was no negligence by any officer or servant of the Crown as to the location and the method of construction of this pier, the Crown was not liable for damages arising out of the collision. *British & Foreign Marine Ins. Co.* v. *R.*, 9 Ex. C. R. 478, 25 C. L. T. 146.

Public work—*Injury to adjoining property by fire—Liability of Crown under s. 16 (c) of Exchequer Court Act—Injury not actually happening on the public work.*]—It is sufficient to bring a case within the provisions of s. 16 (*c*) of the Exchequer Court Act to shew that the injury complained of arose from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment on a public work. It is not necessary to shew that the injury was actually done or suffered upon the public work itself. *Letourneux* v. *R.*, 7 Ex. C. R. 1, 33 S. C. R. 335, followed. *Price* v. *R.*, 26 C. L. T. 462, 10 Ex. C. R. 105.

Public work — *Negligence—Freight elevator in post office—Use of, by employees — City by-law—Liability of Crown.*]—The suppliant, an employee of the post office in the city of Montreal, was injured by falling from a lift to the floor of the basement. The lift was used for the transfer of mail bags and matter with those in charge of them from one floor to another in the post office building. It was proved that the lift was constructed in the usual and customary manner of freight elevators; but the suppliant contended that, as the lift was allowed to be used by certain employees in going from one floor to another, it should have been provided with guards or something to prevent any one from falling from it, as the suppliant did while passing from the first floor to the basement:—*Held*, that such user by the employees did not constitute the lift a passenger elevator and impose a duty upon those in charge of it to see that it was better protected than it was.—2. In any event the suppliant was not using the lift as a passenger at the time of the accident, but to transfer mail matter of which he was then in charge.—3. The by-law of the city of Montreal respecting freight and passenger elevators passed on the 4th February, 1901, did not affect the liability of the Crown in this case. The lift in question was built in 1897, before the enactment of such by-law, and was situated in the post office at Montreal, which building constitutes part of the public property of the Dominion, and so was within the exclusive legislative authority of the Parliament of Canada. *Finigan* v. *R.*, 25 C. L. T. 145, 9 Ex. C. R. 472.

Public work — *Negligence — Unskilled labourer required to remove electric wire — Bodily injury—Timekeeper — Fellow-servant —Liability.*]—R., a labourer employed by the Department of Public Works in the reconstruction of a public building, was ordered by a timekeeper to remove an electric wire which had been used for the purposes of such reconstruction. R. had no skill in respect of this particular work. The timekeeper was permitted by the officer of the department in charge of the work to direct the workmen to attend to matters of this nature, and they were done under his direction from time to time. Removing the wire under the conditions then existing was attended with danger, and this fact was known or ought to have been known to the timekeeper, but he gave no notice of this to R. at the time he directed him to remove the wire. While engaged in removing it, R. received a severe electric shock; and was thrown from a girder upon which he was standing, falling to a lower storey of the building, and in that way receiving serious bodily injury:—*Held*, following *Ryder* v. *R.*, 9 Ex. C. R. 330, 36 S. C. R. 462, that the negligence of the timekeeper was the negligence of a fellow-servant of R., and that the Crown was not liable therefor. *Robillard* v. *R.*, 11 Ex. C. R. 271.

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4. PUBLIC WORKS.

Canal bridge — *Agreement between Crown and company as to construction—Lia-*

bility for maintenance and operation—Order in council.]—The appellants applied for liberty to build a bridge over the Otonabee, a navigable river, undertaking to construct a draw in it, should the Government deem it necessary. An order in council was passed providing that "the company shall construct either a swing in the bridge now in question, the cost to be borne by themselves, or else a new swing bridge over the contemplated canal (Trent Valley Canal), in which case the expense incurred, over and above the cost of the swing itself and the necessary pivot pier therefor, shall be borne by the Government." A new swing bridge was constructed over the canal by agreement with the company:—*Held*, that the words "the cost of the swing itself and the necessary pier" included, under the circumstances and in the connection in which they were used, the operation and maintenance also of the swing by the company. Judgment of the Exchequer Court, 26 C. L. T. 777, 10 Ex. C. R. 317, affirmed. *Can. Pac. Ry. Co.* v. *R.*, 27 C. L. T. 223, 38 S. C. R. 211.

Canals—*Natural channels of rivers—Distinction between public property and public works—Order in council — Constitutional law.*]—The natural channels of the St. Lawrence river, which lie between the canals, are not public works unless made so by statute, or unless something has been done to give them the character of public works.—2. By the 1st clause of the 3rd schedule of the British North America Act, 1867, "Canals with land and water power connected therewith" (of which the Cornwall canal is one) are enumerated as part of the "Provincial Public Works and Property" that in virtue of s. 108 of the Act became "the property of Canada:"—*Held*, that this does not give the Dominion any proprietary rights in the river St. Lawrence from which the water is taken for the Cornwall canal, beyond the right to take the water, nor make the river itself a public work of Canada.—3. By an order of the Governor-General in council of the 22nd March, 1870, the St. Lawrence river to the head of Lake Superior, the Ottawa river, the St. Croix river, the Restigouche river, the St. John river, and Lake Champlain, are declared to be under the control of the Dominion Government: — *Held*, that this order in council did not have the effect of altering in any way the proprietary rights, if any, that the Government of Canada then had in the rivers and lake mentioned, or of making them or any parts of them public works of Canada. *Macdonald* v. *R.*, 26 C. L. T. 781, 10 Ex. C. R. 394.

Commissioners National Transcontinental Railway — *Contract — Services connected with construction of eastern division—Disputed claim—Petition of right—Liability of commissioners.*]—A petition of right will not lie in the case of a disputed claim founded upon a contract entered into with the Commissioners of the National Transcontinental Railway for services connected with the construction of the Eastern Division of such railway. Under the provisions of 3 Edw. VII. c. 71, the Commissioners are a body corporate, having capacity to sue and be sued on their contracts. Action, therefore, upon such a claim should be brought against the Commissioners and not against the Crown. *Johnston* v. *Rex* (1910), 13 Ex. C. R. 155.

Compulsory taking — *Compensation — Value.*]—It is the value of the land at the time of the expropriation that the Court has to consider in assessing compensation. If the property has depreciated in value between the time it was acquired by the person seeking compensation and the time of the expropriation by the Crown, the former has to bear the loss. 2. Where the property is occupied by the owner as his home, and he has no need or wish to sell, the compensation ought to be assessed upon a liberal basis. *R.* v. *Sedger*, 22 C. L. T. 84, 7 Ex. C. R. 274.

Contract—*Abandonment and substitution of work—Implied contract.*]—The suppliants contracted with the Crown to do certain work on the Cornwall canal, the contract providing that they should provide all labour, plant, etc., for executing and completing all the works set out or referred to it in the specifications, namely, "all the dredging of the Cornwall canal on section No. 8 (not otherwise provided for)" on a date named; "that the several parts of this contract shall be taken together to explain each other and to make the whole consistent; and if it be found that anything has been omitted or misstated which is necessary for the proper performance and completion of any part of the work contemplated the contractors will, at their own expense, execute the same, as though it had been properly described:" and that the engineer could, at any time before or during construction, order extra work to be done, or changes to be made, either to increase or diminish the work to be done, the contractors to comply with his written requirements therefor. By cl. 34 it was declared that no contract on the part of the Crown should be implied from anything contained in the signed contract or from the position of the parties at any time. After a portion of the work had been done, the Crown abandoned the scheme of constructing dams contemplated by the contract, and adopted another plan, the work on which was given to other contractors. After it was completed the suppliants filed a petition of right for the profits they could have made had it been given to them:—*Held*, affirming the judgment of the Exchequer Court, 7 Ex. C. R. 221, 22 C. L. T. 82, that the contract contained no express covenant by the Crown to give all the work done to the suppliants and cl. 34 prohibited any implied covenant therefor. Therefore the petition of right was properly dismissed. *Gilbert Blasting & Dredging Co.* v. *R.*, 23 C. L. T. 59, 33 S. C. R. 21.

Contract—*Change in plans and specifications—Waiver by order in council—Powers of executive—Construction of statute—Directory and imperative clauses—"Stipulations"—Exchequer Court Act, s. 33—Extra works—Engineer's certificate—Instructions in writing—Schedule of prices — Compensation at increased rates—Damages—Right of action — Quantum meruit.*] — The suppliants, appellants, were contractors with the Crown for the widening and deepening of a canal, and by their petition of right contended that there were such changes from the plans and specifications and in the manner in which the

works were obliged to be executed as made the provisions of their contract inapplicable, and that they were, consequently, entitled to recover upon a *quantum meruit*. In order to afford relief, an order in council was passed waiving certain conditions, provisoes, and stipulations contained in the contract. By the judgment appealed from, the Judge of the Exchequer Court *held*, 10 Ex. C. R. 248, 26 C. L. T. 463, that there had been no such changes as would entitle the contractors to recover on the *quantum meruit*, as in *Bush* v. *Trustees of the Town and Harbour of Whitehaven*, 52 J. P. 392, 2 Hudson on Building Contracts, 2nd ed., p. 121; that the words "shall decide in accordance with the stipulations in such contract" in s. 33 of the Exchequer Court Act might be treated as directory only, and effect given to the waiver in respect to the absence of written directions or certificates by the engineer in regard to works done; but that the remaining clauses of the section were imperative, and there could be no valid waiver whereby a larger sum than the amount stipulated in the contract could be recovered, *e.g.*, on prices for the classes of work, so as to give the contractors a legal claim for higher rates of compensation without a new agreement under proper authority and for good consideration. On appeal to the Supreme Court of Canada:—*Held*, *per* Girouard, Davies, and Maclennan, JJ., that the decision of the Judge of the Exchequer Court was correct.—*Per* Idington and Duff, JJ., that the word "stipulations" in the first part of the section referred to, should be construed as having relation entirely to the second part of the section, and as applying to the rates of compensation fixed by the contract; that, on either construction, the result would be the same in so far as the circumstances of the case were concerned; that it did not warrant an implication that the executive could, without proper authority, exceed its powers in relation to a fully executed contract, or confer the power to dispense with the requirements of the statute; and that, consequently, there could not be a recovery upon *quantum meruit*. *Pigott & Ingles* v. *R.*, 38 S. C. R. 501.

Contract — *Delay — Forfeiture—Notice by engineer—Withdrawal of work—Damages —Interest.*]—Where a contract provides for a forfeiture for not proceeding with work at the rate required, and fixes a time for its completion, any notice given after such date to determine the contract and enforce the forfeiture must give the contractor a reasonable time in which to complete the work, and the contractor must, before the forfeiture can be enforced, have made default with reference to such reasonable time, according to the decision of the engineer, of which the contractor is to have notice. *Walker* v. *London and North-Western Rw. Co.*, 1 C. P. D. 518, discussed. 2. The damages for a breach have to be measured as nearly as may be by the profits which the contractor would have made by completing the contract in a reasonable time; and loss of profits in respect of extras could not be taken into consideration. 3. Where the Crown dispossessed the contractor of his plant, and used it in the completion of the work, the contractor was entitled to recover the value as a going concern. 4. Where the contractor was not allowed interest upon the value of such plant, it was *held* that he was not to be charged with interest upon the balance of the purchase price of a portion of the plant which, with his consent, the Crown had subsequently paid. *Stewart* v. *R.*, 21 C. L. T. 280, 7 Ex. C. R. 55. Affirmed *R.* v. *Stewart*, 32 S. C. R. 483.

Contract—*Inspector of prisons—Employment of prisoners—Provincial legislature — Contract authorised by resolution—Effect of —Modification, by order in council—Executive government—Claim on—Effect of decision of Court—Rights under contract—Interest—Insurance—Accounts — Fraud.*] — The Government of the province of Ontario, through its inspector of prisons, entered into a contract, authorising and approved of by a resolution of the legislature, for the manufacture of twine in the central prison, utilising prison labour, which contract was assigned to a company with the consent of the Lieutenant-Governor in council. After the assignment, and during the currency of the contract, the workshops and machinery were destroyed by fire, and the work stopped. A new agreement with the company was then entered into, authorised by orders in council, but not approved of by the legislature, for furnishing new machinery, etc. On the trial of a petition of right, in which the company claimed balances as due after a termination of the contract:—*Held*, that, while a judgment of the Court would be wholly inoperative, so far as any payment to the contractor of the amount found due was concerned, unless the legislature should appropriate the money, the original agreement was within the authority of the executive Government of the province, and did not require the ratification of the legislature to give it contractual validity, and that the latter agreement was a new agreement, which also was within the authority of the executive Government, as well as any changes or modifications in either: —*Held*, also, on the evidence, that, after accounts had been taken on a certain basis occasioned by a change in the contract, it was too late to re-open them.—2. That the parties were not entitled to interest as of right, and as, in the transactions between the parties here, interest was not charged by the Government, as it now sought to charge it, that claim could not be allowed.—3. That, although insurance was not provided for in the agreement, and the machinery was purchased by the company, it was subsequently to become the property of the Government, and so was substantially a purchase by the Government, and, as insurance had been allowed to the company in the accounts, it was too late to object to such allowance now. —4. That accounts rendered, checked, and entered in the prison books, there being no fraud or concealment, should not be disturbed. —5. That the contract did not call for the payment of additional men supplied beyond the original number contracted for, and there was no implied contract for their payment as on a *quantum meruit*.—While not necessary to determine the case, the Court was of opinion that the resolution of the legislature ratifying the contract did not give the contract the force of a statute of the province, and there was no intention it should, and, even if it did, that the executive Government had power to modify it. *Independent Cordage Co.* v. *R.*, 8 O. W. R. 723, 13 O. L. R. 619.

Contract — *Railway ties—Inspection—Inspector exceeding authority in respect of acceptance—Subsequent rejection of ties improperly accepted — Right to recover price.*] —The suppliant, in reply to an advertisement calling for tenders for ties for the use of the Intercolonial Railway, offered to supply ties to the Crown for such purpose. The Crown expressed its willingness to purchase his ties provided they answered the requirements of the specifications mentioned in the advertisement for tenders. D., an inspector appointed by the Government, in excess of his authority and contrary to his instructions, undertook on behalf of the Crown to accept ties not up to the said specifications. On this becoming known to the Crown, D.'s inspection was stopped, and other persons were appointed to re-inspect the ties, who rejected a portion of those which D. had undertaken to accept. The suppliant claimed the price of the ties so rejected:—*Held*, confirming the report of the Registrar, as referee, that the Crown was not liable for the price of the ties which D., as inspector, wrongfully and in excess of his authority, had undertaken to accept. *Michaud* v. *R.* (1910), 13 Ex. C. R. 147.

Contract for improvement of Government canal—*Change in works—Breach of contract—Spoiled grounds—Cost of — Allowance for.*]—The suppliants were contractors for certain works of improvement on the Rapide Plat division of the Williamsburg canal. For their own use and benefit, and without notice to or request of the Crown in such behalf, they obtained certain grounds upon which to waste the material excavated by them:—*Held*, that the Crown was not bound to indemnify them for money expended in obtaining the said spoiled grounds. 2. In order to carry on the works in the way contemplated by the contract and specification, the contractors changed certain dump-scows into deck-scows. Thereafter a change was made by the Crown in the manner of carrying out the work, which required the contractors to convert the deck-scows into dump-scows: — *Held*, that the contractors were not entitled to recover from the Crown the expense they were put to in respect to the scows, because, the change in the works being provided for in the contract, there was no breach; but that such expense might be taken into account in considering the increased cost of doing the work, under the circumstances in which it was done, as compared with the cost of doing it in the way contemplated by the contract. *Weddell* v. *R.*, 22 C. L. T. 85, 7 Ex. C. R. 323.

Contract for sale of railway ties—*Delivery—Inspection — Payment — Purchase by Crown from vendee in default—Title.*]—In January, 1894, the suppliant agreed with M., acting for the B. & N. S. C. Co., to supply the company with railway ties. The number of the ties was not fixed, but the suppliant was to get out as many as he could, to place them along the line of the Intercolonial Railway, and was to be paid for them as soon as they were inspected by the company. The ties were not to be removed from where the suppliant placed them until they were paid for. During the season of 1894 the suppliant got out a number of ties, which were piled alongside the Intercolonial Railway, inspected, those accepted being marked with a dot of paint and the letters "B. & S.," and thereafter paid for by the company. In 1905 the suppliant made a second agreement with M. to get out another lot of ties for the company upon the same terms and conditions. Under this agreement the suppliant got out ties and placed them along the Intercolonial Railway where the former ties were piled, but the lots were not mixed. The second lot was inspected and marked with the dot of paint, but the letters "B. & S." were not put on them. The suppliant demanded payment for them from the company, but was not paid. In November, 1896, the company sold both lots of ties to the Crown for the use of the Intercolonial Railway, and was paid for them, and in May or June, 1897, the Intercolonial Railway authorities removed all the ties:—*Held*, that the B. & N. S. C. Co. had not at the time when they professed to sell the second lot of ties to the Crown any right to sell them, and the Crown did not thereby acquire a good title to the ties. That being so, the suppliant was entitled to have the possession of the ties restored to him, or to recover their value from the Crown. *McLellan* v. *R.*, 25 C. L. T. 81, 9 Ex. C. R. 227.

Fish-dam — Negligence—Construction—Flooding of farm lands—Natural causes — Compensation — Evidence. *Barrett* v. *R.*, 5 E. L. R. 436.

Fishing lease from Crown — Timber license — Trespass — Conflicting interests — Deed—Construction — Computation of time. *Columbus Fish and Game Club* v. *Edwards Co. Limited*, 4 E. L. R. 212.

Government railway — *Carriage of goods — Breach of contract — Damages — Negligence.*] — The suppliant sought to recover a sum of $886.38 alleged to have been lost by him on a shipment of sheep undertaken to be carried by the Crown from Charlottetown, P.E.I., to Boston, U.S.A. The loss was occasioned by the sheep not arriving in Boston before the sailing of a steamship thence for England, on which space had been engaged for them; and the cause of such failure was lack of room to forward them on a steamboat by which connections are made between the Summerside terminus of the Prince Edward Island Railway and Pointe du Chene, N.B., a point on the Intercolonial Railway. The suppliant alleged that before the shipment was made the freight agent of the Prince Edward Island Railway at Charlottetown represented to him that if the sheep were shipped at Charlottetown on a certain date, which was done, they would arrive in Boston in time:—*Held*, that, even if the suppliant had proved, which he failed to do, that this representation had been made, it would have been inconsistent with the terms of the way-bill, and contrary to the regulations of the Prince Edward Island Railway, and therefore in excess of the freight agent's authority. 2. That the evidence did not disclose negligence on the part of any officer or servant of the Crown within the meaning of s. 16 (*c*) of the Exchequer Court Act. *Wheatley* v. *R.*, 25 C. L. T. 80, 9 Ex. C. R. 222.

Government railway — *Contract for services — Conditional increase of salary — Impossibility of performance of condition — Promises by Crown's officers—Liability.*] — H., while general traffic manager of the Intercolonial Railway, offered to secure the appointment of R. to a position in H.'s department of the railway at a salary of $2,000 per annum. R. refused that amount, but signified his willingness to accept $2,400. H., after obtaining the permission of the Minister of Railways to offer R. $2,100 per annum, wrote to him: "I would be prepared to alter the terms of my letter to read $2,100, with the assurance that should you, as I feel confident you can, develop the traffic on your division to my satisfaction, your salary should be increased to $2,400 on the 1st January, 1899." R. accepted the appointment upon these terms, and entered upon the duties of his office on the 1st January, 1898. In the following autumn H. resigned his position on the railway. Shortly after, namely, in September, 1898, the department offered to appoint R. general traveller freight agent of the railway, with headquarters at Toronto, and R. accepted the new office on the assurance contained in the letter from W., the then general freight agent of the railway, that "there is to be no change in the salary of the present position and the one in the west." R. entered upon his new duties on the 10th October, 1898, and discharged the same until April 1903, when his services were dispensed with. He had never been paid a salary during his employment by the Department of Railways of more than $2,100 per annum, and after his retirement he filed a petition of right claiming a balance of salary due him at the rate of $2,400 from the 1st January, 1899, basing such claim upon H.'s letter and W.'s letter, above mentioned: —*Held*, that, even if the assurance of increase of salary contained in such letter was more than an engagement or liability in honour, the contingency upon the happening of which the salary was to be increased had never in fact arisen. Before the time arrived when it could happen, two things had occurred to prevent it, neither of which was in the contemplation of the parties when the appointment was made. H. had resigned his office, and was no longer in a position to say whether R. had, or had not, developed the traffic to his satisfaction, and secondly, R. had ceased to hold the office in respect of which the increase of salary had been promised, and had accepted another office in connection with the traffic department of the railway. 2. The fair meaning of W.'s promise that there would be no change in the salary on R.'s acceptance of his new office on the traffic department was that R. would be paid the same amount of salary in the new position as that which he was then receiving, namely, $2,100. 3. That W. not having been shewn to have had any authority to bind the Crown by a promise to give any such increase of salary, no such authority was to be implied from the fact that he was at the time the general freight agent of the railway, and as such R.'s immediate superior officer. *Robinson* v. *R.*, 25 C. L. T. 143, 9 Ex. C. R. 448.

Government railway—*Injury to person at crossing—Negligence—Defective engine—Rate of Speed—"Train of cars"—Dangerous crossing—Gates or watchman—Discretion of Crown.*]—The husband of the suppliant was killed by being struck by the tender of an engine while he was on a level crossing over the Intercolonial Railway tracks, in the city of Halifax. The evidence shewed that the crossing was a dangerous one, and that no special provision had been made for the protection of the public. Immediately before the deceased attempted to cross the tracks, a train of cars had been backed, or shunted, over this crossing in a direction opposite to that from which the engine and tender by which he was killed was coming. The engine used in shunting this train was leaking steam. The atmosphere was at the time heavy, and the steam and smoke from the engine did not lift quickly, but remained for some time near the ground. The result was that the shunting engine left a cloud of steam and smoke that was carried over towards the track on which the engine and tender were running, and obscured them from the view of any one who approached the crossing from the direction in which the deceased approached it. The train that was being shunted and the engine and tender by which the accident was caused passed each other a little to the south of the crossing. The train and shunting engine being clear of the crossing, the deceased attempted to cross, and when he had reached the track on which the engine and tender were being backed, the latter emerged from the cloud of steam and smoke and were upon him before he had time to get out of the way. At the time of the accident the engine and tender were being backed at the rate of six miles an hour:—*Held*, that the accident was attributable to the negligence of officers and servants of the Crown employed on the railway, both in using a defective engine, as above described, and in maintaining too high a rate of speed under the circumstances. 2. An engine and tender do not constitute a "train of cars" within the meaning of s. 29 of the Government Railways Act, R. S. C. c. 38. *Hollinger* v. *Canadian Pacific Rw. Co.*, 21 O. R. 705, not followed. 3. Where the Minister of Railways, or the Crown's officer under him whose duty it is to decide as to the matter, comes, in his discretion, to the conclusion not to employ a watchman or to set up gates at any level crossing over the Intercolonial Railway, it is not for the Court to say that the Minister or the officer was guilty of negligence because the facts shew that the crossing in question was a very dangerous one. *Harris* v. *R.*, 24 C. L. T. 388, 9 Ex. C. R. 206.

Government Railways Act, R. S. C. 1906 c. 36, ss. 22, 23 — *Fences—Trespasser—Injury—Liability.*] — Where not required by the adjoining proprietors to fence its line of railway, there is no duty, in favour of a trespasser, cast upon the Crown by the provisions of ss. 22 and 23 of the Government Railways Act to fence as aforesaid.—2. The suppliant, while working on a property adjoining the Intercolonial Railway within the city of Levis, P.Q., was injured while innocently trespassing on the right of way, there being no fence erected or other means taken by the Crown to mark the boundary between the adjoining property and the railway. It

was not alleged that the adjoining owner had requested the Crown to fence:—*Held*, that the suppliant had made no case of negligence against the Crown under s.-s. (c) of s. 20 of R. S. C. c. 140. *Viger* v. *R.*, 11 Ex. C. R. 328, 5 E. L. R. 53.

Head-gates and waters of canal—*Control of public and private rights—Crown officer—Estoppel by Acts of—Departmental report.*]—The suppliant's predecessor in title, the seignior of Beauharnois, early in the last century had constructed a canal or feeder, with head-gates and appurtenances, through his own land for the purpose of conveying water from the river St. Lawrence to the river St. Louis, and so increase certain waterpowers belonging to the seigniory. Later in the century, when the Beauharnois canal was constructed by the Government of the province of Canada, certain works near the head of that canal had the effect of raising the water along the shores of Hungry bay, in lake St. Francis, and flooding a considerable portion of the seigniory of Beauharnois. To overcome this, the government built a dyke through Hungry bay, which crossed the feeder and had a flume with three sluice-gates at its entrance into St. Louis river. The gates that the seignior had used up to that time were removed, and the three sluice-gates mentioned were constructed as part of the public work. It was not disputed that this dyke was part of the property of the province, and passed to the Dominion of Canada in 1867; but down to the year 1882 the seignior and his grantees remained in possession of the feeder and head-gates. In that year, however, a sum of $10,000 was voted by Parliament for the improvement of the river St. Louis, and a sum of $5,000 in each of the two years following. In connection with the work so provided for, the Crown took possession of the feeder, deepened and improved it, built a bridge over it, and took out and re-built the head-gates. It was not quite clear whether these works were undertaken by the Dominion Government at the request of the farmers who owned adjacent lands or of the mill owners, or at the request of both. It was clear, however, that none of the mill owners, of whom the suppliant was one, objected in any way to what was done. But after the work was completed, the Crown's officers continued in possession of both the feeder and the head-gates, and the suppliant complained to the Minister of Public Works that he was prevented, along with other mill owners, from exercising the control of the feeder and head-gates to which they were as such owners entitled. The result of this complaint was that the control and possession of the feeder and head-gates were handed over to the suppliant, who retained possession until 1892, when the Government resumed possession against the will and consent of the suppliant, who gave up the keys of the gates without waiving any of his rights. Prior to the time when the Government in 1892 took possession of the feeder, the suppliant had acquired the rights therein of all the mill owners interested excepting one, the rights of the latter being acquired afterwards in the same year: —*Held*, that, as the suppliant's auteurs were not in possession of the feeder and head-gates at the time of the deed of conveyance, they could not give him possession thereof as against the Crown; and, as the right of control and regulation of the head-gates had been in the Crown from the time the dyke was built, such right was not lost by the Crown ceasing to exercise it for the period above mentioned. The suppliant, while enjoying the right to have these works so regulated and controlled as to give him all the water he was entitled to, consistent with other public or private interest therein, had not the paramount or exclusive control and regulation of them, which, by the necessities of the case, were vested in the Crown. The Crown is not estopped by any statement of facts or by any conclusions or opinions stated in any departmental report by any of its officers or servants. *Robert* v. *R.*, 9 Ex. C. R. 21.

Injurious affection—*Erosion—Increase of—Exchequer Court—Jurisdiction.*]—Where the erosion of land by the natural action of the waters of a river was accelerated and increased by certain works erected in the river, and some dredging done therein by the Crown, a petition of right will lie for damages.—2. The jurisdiction of the official arbitrators under s. 1 of 33 V. c. 23, and s. 4 of 31 V. c. 12, was, in substance, transferred to the Exchequer Court of Canada by ss. 16, 58 and 59 of 50 & 51 V. c. 16. *Graham* v. *R.*, 8 Ex. C. R. 331.

Injurious affection of property—*Deprivation of access—Street—Damages.*]—By the construction of a public work a public highway was closed up at a point two hundred and fifty feet distant from the suppliant's property, which fronted on the highway. In the first expropriation for the public work of land in the neighbourhood no part of the suppliant's property was taken. Afterwards, and during the construction of the public work, a portion of his property was taken for the public work, and on the trial of a petition of right for compensation, the question arose as to whether or not the depreciation of the property by reason of the closing up of the street or highway should be taken into account as one of the elements of damages:—*Held*, that it should be so taken into account, first, because it appeared that the depreciation from this cause in fact occurred subsequent to the taking of the land, and secondly, it was a case in which the suppliant was entitled to compensation for the injurious affection of his property by reason of the obstruction of the highway, which was proximate and not remote. *Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 243; *Caledonian Rw. Co.* v. *Walker's Trustees*, 7 App. Cas. 259, and *Barry* v. *R.*, 2 Ex. C. R. 333, referred to. *McQuade* v. *R.*, 22 C. L. T. 87, 7 Ex. C. R. 318.

Injury to person — *Negligence—Common employment in Manitoba—Workmen's Compensation Act.*]—The effect of s. 16 (c) of the Exchequer Court Act is not to extend the Crown's liability so as to enable any one to impute negligence to the Crown itself, or to make it liable in any case in which a subject in like circumstances would not be liable.—2. In the province of Manitoba the Dominion Government is not liable for any injury to one of its servants arising from

the negligence of a fellow-servant. *Filion* v. *The Queen*, 24 S. C. R. 482, referred to. —3. With respect to the liability of the Dominion Government in cases involving the doctrine of common employment, nothing short of an Act of the Parliament of Canada can alter the law of Manitoba as it stood on that subject on the 15th July, 1870. The Workmen's Compensation Act, R. S. M. c. 178, does not apply to the Crown, the Crown not being mentioned therein. *Ryder* v. *R.*, 25 C. L. T. 85, 113, 9 Ex. C. R. 330, 36 S. C. R. 462.

Injury to property — *Barge wintering in Government canal—Lowering level of water —Omission to notify owner — Negligence— 50 & 51 V. c. 16, s. 16 (c).*]—In the autumn of 1900 the suppliant placed his barge for winter quarters at a place in the Lachine canal which he had before used for a similar purpose. The practice is now changed, but up to and including the year 1900 it was sufficient for any owner of a barge, without asking leave or notifying any one on behalf of the Crown, to leave his barge in the canal, and during the winter some officer of the canals department would take the name of the barge, measure it, make up an account based on the tonnage for such use of the canal, and in the spring collect the amount thereof from the owner of the barge before she was permitted to leave the canal, the whole in conformity with the provisions of Art. 32 of the tariff of tolls framed by that department and issued in the year 1895. Some time after the suppliant had so placed his barge in the canal, M., the superintending engineer for the province of Quebec of the canals department, wrote officially to O'B., the superintendent of the Lachine canal, directing him to have the water lowered on certain date during the winter to facilitate certain work then being done by the Grand Trunk Railway Company on their swing bridge at St. Henri. M. also gave an oral order to O'B. to comply with the usual practice of notifying the owners of barges wintering in the canal before lowering the water on any occasion. In pursuance of such order, O'B. directed one of the employees of the canal to notify the barge owners whenever the level of the water was to be lowered. This employee failed to notify the suppliant before the water was lowered on a certain date, and his barge was so injured by the lowering of the level of the water that she became a total loss:—*Held*, confirming the report of the registrar, that, as the canal was a public work, a case of negligence was established for which the Crown was liable under the provisions of s. 16 (c) of the Exchequer Court Act, 50 & 51 V. c. 16. *Gagnon* v. *R.*, 25 C. L. T. 56, 9 Ex. C. R. 189.

Lands injuriously affected — *Closing highway — Inconvenient Substitute.*]— The owner of land is not entitled to compensation where, by construction of a public work, he is deprived of a mode of reaching an adjoining district and obliged to use a substituted route, which is less convenient. The fact that the substituted route subjects the owner at times to delay does not give him a claim to be compensated, as it arises from the subsequent use of the work, and not its construction, and is an inconvenience common to the public generally. The general depreciation of property because of the vicinity of a public work does not give rise to a claim by any particular owner. Where there is a remedy by indictment, mere inconvenience to an individual or loss of trade or business is not the subject of compensation. Judgment of the Exchequer Court, 23 C. L. T. 213, 8 Ex. C. R. 245, reversed. *R.* v. *MacArthur*, 24 C. L. T. 201, 34 S. C. R. 570.

Negligence of Crown officials—*Right of action — Injury to land—Jurisdiction of Exchequer Court — Prescription.*] — Lands in the vicinity of a Government canal were injuriously affected through flooding caused by the negligence of the Crown officials in failing to keep a siphon-tunnel clear and in proper order to carry off the waters of a stream which had been diverted and carried under the canal, and also by part of the lands being spoiled by dumping matter upon it:—*Held*, reversing the judgment in 21 C. L. T. 277, 7 Ex. C. R. 1, that the owner had a right of action and was entitled to recover damages for the injuries sustained, and that the Exchequer Court of Canada had exclusive original jurisdiction under ss. 16, 23 and 58 of the Exchequer Court Act. *Regina* v. *Filion*, 24 S. C. R. 482, approved. *City of Quebec* v. *The Queen*, *ib.* 430, referred to. The prescription established by Art. 2261, C. C., applies to the damages claimed by the owner. *Letourneux* v. *R.*, 33 S. C. R. 335.

Non-repair—*Money voted by Parliament —Discretion of minister — Jurisdiction of Court—Improvement of navigation.*]—There is no law of Canada under which the Crown is liable in damages for the mere non-repair of a public work, or for failing to use in the repair of any public work money voted by Parliament for the purposes of such public work.—2. In such a case, whether the repair should be made or the money expended is within the discretion of the Governor in Council or of the Minister of the Crown under whose charge the work is; and for the exercise of that discretion he and they are responsible to Parliament alone, and such discretion cannot be reviewed by the Courts:—*Semble*, that, although the channel of a river may be considered a public work under the management, charge, and direction of the Minister of Public Works during the time that he is engaged in improving the navigation of such channel under the authority of s. 7 of the Public Works Act, R. S. C. c. 36, it does not follow that once the Minister has expended public money for such a purpose, the Crown is for all time bound to keep such channel clear and safe for navigation, or that for any failure to do so it must answer in damages. *Hamburg American Packet Co.* v. *R.*, 21 C. L. T. 517, 7 Ex. C. R. 150, affirmed 33 S. C. R. 252.

Rifle range — *Injury to person.*] — A rifle range under the control of the Department of Militia and Defence is not a "public work" within the meaning of the Exchequer Court Act, 50 & 51 V. c. 16, s. 16 (*c*). The words "any officer or servant of the Crown" in the section referred to, do not include officers and men of the militia. Judgment in

6 Ex. C. R. 425, 20 C. L. T. 424, affirmed. *Larose* v. *R.*, 21 C. L. T. 327, 31 S. C. R. 206.

Siphon-culvert—*Flooding of premises—Negligence.*]—The suppliants charged in their petition that their stock-in-trade had been damaged by the flooding of their premises near the river St. Pierre, in the city of St. Henri, district of Montreal, caused by an alleged defective siphon-culvert constructed by the Dominion Government to carry the waters of the river under the Lachine canal. The facts shewed that the siphon-culvert was not defective in its construction, and that there was no negligence on the part of the officers or servants of the Crown with respect to it, within the meaning of s. 16 (c) of the Exchequer Court Act; while, on the other hand, the evidence established that the lands adjacent to the suppliants' premises were of a porous character, and that the basement of their buildings had been connected by a drain with the river St. Pierre, which permitted the water to back up and flood the suppliants' premises, when the river rose to a certain height.—*Held*, that the allegations in the petition were not supported by the evidence, and that the petition must be dismissed with costs. *Alaska Feather & Down Co.* v. *R.*, 11 Ex. C. R. 204.

Tort by Crown's servants—*Diversion of flowing water — Liability — Amendment of petition of right — Practice.*]—The suppliant, by his petition of right, alleged, in substance, that the Crown, through the Minister of Railways and Canals, and his servants, agents, and employees, having no right to do so, had diverted the water of a certain brook, which flowed through his property in the parish of Dalhousie, N. B., and used the same for supplying the engines and locomotives of the Intercolonial Railway and vessels in the harbour of Dalhousie:—*Held*, that the suppliant's action was laid in tort, and a petition of right would not lie therefor.—Upon an application by the suppliant to amend his petition, the Court declined to grant the same until a draft of the proposed amendments was submitted, and the Court had an opportunity of considering how far it was necessary for the suppliant to depart from his original petition. *Montgomery* v. *R.*, 11 Ex. C. R. 158, 27 C. L. T. 668.

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5. Timber Licenses.

Renewal—*Manufacturing condition—Constitutional law — Petition of right—Amendment.*]—The Act 61 V. c. 19 (O.), making applicable to timber licenses the condition approved by Order in Council of the 17th February, 1897, that all pine timber cut under such licenses shall be manufactured into sawn lumber in Canada, is *intra vires*, and applies to licenses issued after the passing of the Act in renewal of licenses in force at the time of its passage.—The rights acquired under sales and licenses of timber limits under the Crown Timber Act, considered.—A petition of right may be amended at the trial.—Judgment in 31 O. R. 202, 19 C. L. T. 391, affirmed. *Smylie* v. *R.*, 20 C. L. T. 225, 27 A. R. 172.

Statute of Frauds—*Interest in land—Resulting trust.*]—An agreement under which a Crown land lumber license was bid in at public sale at the up-set price by the defendant, in whose name the license was issued, for the plaintiff, who had paid to the defendant the up-set price previous to the sale, does not relate to an interest in land within the Statute of Frauds, and if it does, as the purchase money for the license was paid by the plaintiff, and a trust thereby resulted in his favour by construction of law, it can be established by parol evidence under the Statute of Frauds, C. S. N. B. c. 76, s. 9. *McGregor* v. *Alexander*, 2 N. B. Eq. Reps. 54.

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6. Other Cases.

Action by Attorney-General—*Costs—Payment of, by relator or Attorney-General.*]—In an action by the Atty.-Gen. at the relation of a private individual, the Crown sues as *parens patriæ*, and the only object of inserting the name of the relator in the proceedings is to make him responsible for costs. The Act 18 and 19 V. c. 90 (Imperial), is not in force in B. C., and the machinery by which the Act is to be worked out could not be applied here. *Atty.-Gen. ex rel. Kent* v. *Ruffner*, 12 B. C. R. 299.

Agent of Crown — *Liability of — Evidence.*]—The defendant, the principal of an industrial school, an employee of the Dominion Government, entered into and signed in his own name a written agreement engaging the plaintiff for a certain period in a certain employment. The factory in which the plaintiff was employed being destroyed by fire, and the plaintiff thrown out of employment, he sued the defendant for wrongful dismissal:—*Held*, that evidence of the capacity in which the defendant entered into the agreement and the other surrounding circumstances was admissible. It appearing that the defendant acted merely as agent for the Government:—*Held*, that the defendant was not liable. *Bocz* v. *Hugonnard*, 4 Terr. L. R. 69.

Bounties on manufacture of "pig iron" and steel — *Statutes — Interpretation.*]—It is a general practice in the art of manufacturing steel to use the iron produce of the blast furnaces while still in a liquid or molten form for the manufacture of steel, the hot metal being taken direct from the blast furnaces to the steel mill. Among iron-masters and those who are familiar with the art of manufacturing iron and steel the term "pig iron" has come to mean that substance or material in a liquid as well as in a solid form. A question having arisen as to whether the iron when so used in a liquid or molten form was "pig iron" within the meaning of the term as employed in 60 & 61 V. c. 6 and 62 & 63 V. c. 8:—*Held*, that the term "pig iron" in the Act mentioned applied to the iron used in the manner described, and that a manufacturer of steel ingots therefrom was entitled to the bounty provided by the said Acts in respect of the manufacture of such iron. *Dominion Iron and Steel Co.* v. *R.*, 23 C. L. T. 1, 8 Ex. C. R. 107.

Breach of trust — *Purchase of debentures—Illegal purpose — Knowledge — Interest — Evasion of statute — Estoppel.*] — In an action by the Crown to recover interest due upon debentures purchased by the Government of the late province of Canada, with trust moneys belonging to the common school fund (of which the Crown is trustee) from the Quebec North Shore Turnpike Road Trustees, the defendants pleaded that the Crown was estopped from recovery, inasmuch as, at the time of their purchase, the advisers of the Crown were aware that these debentures were being issued in breach of a trust, and with the intention of misapplying the proceeds towards payment of interest on other debentures due by them, in violation of a statutory prohibition:—*Held*, affirming the judgment in 8 Ex. C. R. 390, that, as there was statutory authority for the issue of the debentures in question, knowledge of any such breach of trust, or misapplication of moneys in respect thereto, by such advisers of the Crown, could not be set up by the defendants as a defence to the action. *Quebec North Shore Turnpike Road Trustees* v. *R.*, 27 C. L. T. 156, 38 S. C. R. 62.

Canadian Pacific Railway Company —*Construction of branch line — Subsidy—Agreement to pay—Ascertainment of amount "Costs" — "Equipment."*] — By 3 Edw. VII. c. 57, s. 2, it was provided that the Governor in Council might grant the Canadian Pacific Railway Company, in aid of the construction of a certain branch line, a subsidy of $3,200 per mile, where the line did not cost more on the average than $15,000 per mile, and that where such cost was exceeded, a further subsidy might be given of 50 per cent. on so much of the average cost of the mileage subsidized as was in excess of $15,000 per mile, such subsidy not exceeding in the whole the sum of $6,400 per mile. By s. 1 of the Act the expression "cost" was defined to mean the "actual necessary and reasonable cost," to be determined by the Governor-General in Council, upon the recommendation of the Minister of Railways and Canals, and upon the report of the chief engineer of Government railways. The Minister of Railways and Canals, under authority of the Governor-General in Council, entered into a contract with the plaintiffs respecting the construction of the branch line and the subsidy therefor, by which it was agreed that the Crown would "in accordance with and subject to the provisions of ss. 1, 2, and 4 of the Subsidy Act, pay to the company so much of the subsidies or subsidy hereinbefore set forth or referred to, as the Governor-General in Council, having regard to the cost of the work performed, shall consider the company to be entitled to in pursuance of the said Act:"—*Held*, that, inasmuch as the Act and the agreement made thereunder for the payment of subsidy left the amount thereof to be determined by the Governor-General in Council, the decision of the Governor-General in Council was not open to revision by the Court. *Can. Pac. Rw. Co.* v. *R.*, 26 C. L. T. 778.

Cancellation of letters patent — *Action by Attorney-General—Order in Council pendente lite—Injunction — Crown.*]—The Court has no jurisdiction, at the suit of a subject, to restrain the Crown or its officers acting as its agents or servants or discharging discretionary functions committed to them by the Sovereign. *Attorney-General for Ontario* v. *Toronto Junction Recreation Club*, 24 C. L. T. 373, 8 O. L. R. 440, 3 O. W. R. 387, 4 O. W. R. 72.

Contract—*Bailment—Hire of horses for construction of public work—Loss of horses —Negligence—Liability — Petition of right —Demise of Crown.*] — 1. Where the suppliant's goods are in the possession of an officer or servant of the Crown under a contract of hiring made by him for the Crown, the obligation of the hirer in such a case is to take reasonable care of the goods according to the circumstances, and the hirer is liable for ordinary neglect. Where there is a breach of the hirer's obligation in such a case, the Crown is liable under the contract of its officer or servant.—2. Having regard to the circumstances in evidence, the hirer had acted imprudently in continuing the horses on the work after the grazing failed, and the Crown was liable therefor.—3. Wherever there is a breach of a contract binding on the Crown, a petition will lie for damages notwithstanding that the breach was occasioned by the wrongful acts of the Crown's officer or servant. *Windsor* v. *Annapolis Rw. Co.* v. *The Queen*, 11 App. Cas. 607, referred to.—4. The Crown is liable in respect of an obligation arising upon a contract implied by law. *R.* v. *Henderson*, 28 S. C. R. 425, referred to.—5. An action arising out of a contract for the hire of horses to be used in the construction of a public work of Canada lies against the executive authority of the Dominion, and is not affected or defeated by the demise of the Crown.—*Semble*, that the loss sustained by the suppliant in this case was an "injury to property on a public work" within the meaning of clause C. of s. 16 of the Exchequer Court Act. *Johnson* v. *R.*, 24 C. L. T. 2, 8 Ex. C. R. 360.

Contract — *Inland revenue stamps — Breach of contract—Acceptance by officer—Recovery of money paid—Deduction of cost of production—Set-off—Quantum meruit.*]—Revenue stamps are not articles of merchandise, and have no commercial value.—2. The defendants contracted to print for the Crown certain Inland Revenue stamps from steel plates, but delivered, instead, stamps produced from steel transferred to stone, which were accepted, paid for, and used by an officer of the Crown under the belief that they were produced by the process specified in the contract, the Crown not being bound by the acts of the officer: — *Held*, that the Crown was entitled to recover back the money paid. —3. *Semble*, that the defendants could not recover from the Crown on a *quantum meruit* the fair value of the stamps produced from stone; their right to an allowance therefor would be a right of set-off, which does not exist against the Crown; but the Crown having consented to allow the defendants the fair cost of production without profit, they must accept that or nothing; and the "fair cost of production" meant the fair cost to a competent person with the necessary capital, skill, means, and appliances for producing such stamps. *R.* v. *British American Bank Note Co.*, 7 Ex. C. R. 119.

Contract—*Surety—Omissions of officers—Discharge.*]—The defendants were sued as sureties for the performance of a contract to deliver hay to the N. W. M. Police. The defendants contended that they were relieved from liability because the police authorities failed to carry out their part of the contract in material particulars, viz., (1) by using a quantity of hay before it had been inspected by a board of officers, as provided by the contract; (2) by allowing a portion to be carried off by some of the constables, and another portion to be destroyed by cattle before the hay was weighed or measured, as provided by the contract; (3) by measuring instead of weighing the hay, as provided by the contract; the result by weighing being much in favour of the defendant's principal. —*Held*, that the third objection afforded a good defence.—*Held*, also, that the Crown was responsible for breaches of contract resulting from the acts or omissions of its servants, though not for their torts. *R.* v. *McFarlane*, 7 S. C. R. 217, and *Windsor and Annapolis Rw. Co.* v. *R.*, 11 A. C. 607, considered. *R.* v. *Mowat*, 1 Terr. L. R. 146.

Contract—*Yukon Territory year-book—Publication by private individual—Authority of Commissioner to bind Dominion Government.*]—The Commissioner of the Yukon Territory on the 24th November, 1903, had no authority to bind the Crown, as represented by the Government of Canada, by a contract entered into with a private individual for the printing and publication of a year-book relating to the Yukon Territory. *Pattullo* v. *R.*, 11 Ex. C. R. 263.

Costs against.] — See *R.* v. *Narain*, 8 W. L. R. 790; *In re Narian Singh*, 13 B. C. R. 477.

Customs legislation—*Conflict with Imperial enactment — Duty upon foreign-built ship—Construction of statutes—Crown—Interest—Tort—Servant of Crown.*]—The Parliament of Canada has legislative authority to impose a customs duty upon a foreign-built ship to be paid upon application by her in Canada for registration as a British ship. —2. The provision in item 409 of the Customs Tariff Act of 1897, which purports to impose a duty upon a foreign-built ship upon application by her for a Canadian register, is not a clear and unambiguous imposition of the duty, such as would support the right of the Crown to enact the payment of such duty.—3. Interest can only be recovered against the Crown by contract or under statute.—4. In the absence of statutory provision, the Crown is not liable to answer for the wrongful act of its officer or servant. *Algoma Central Rw. Co.* v. *R.*, 22 C. L. T. 85, 7 Ex. C. R. 239, affirmed, 32 S. C. R. 277, [1903] A. C. 478.

Franchise before Confederation—*Liability of province—Arbitration.*]—A toll-bridge, with its necessary buildings and approaches, was built and maintained by Y. at Chambly in the province of Quebec, in 1845, under a franchise granted to him by an Act of the province of Canada, 8 V. c. 90, in 1845, on the condition therein expressed that on the expiration of the term of fifty years the works should vest in the Crown as a free bridge for public use, and that Y. or his representatives should then be compensated by the Crown, provision being therein also made for ascertaining the value of the works by arbitration and award.—*Held*, affirming the judgment of the Exchequer Court of Canada, 6 Ex. C. R. 103, 18 C. L. T. 228, that the claim on the suppliants for the value of the works at the time they vested in the Crown, on the expiration of the fifty-year franchise, was a liability on the late province of Canada coming within the operation of s. 111 of the British North America Act, 1867, and thereby imposed on the Dominion; that there was no lien or right of retention charged upon the property; and that the fact that the liability was not presently payable at the date of the passing of the British North America Act, 1867, was immaterial. *Atty.-Gen. for Can.* v. *Atty.-Gen. for Ont.*, [1897] A. C. 199, followed.—*Held*, also, affirming the decision below, that the arbitration provided for by s. 3 of 8 V. c. 90, did not impose the necessity of obtaining an award as a condition precedent, but merely afforded a remedy for the recovery of the value of the works at a time when the parties interested could not have resorted to the present remedy by petition of right, and that the suppliants' claim for compensation under the provisions of 8 V. c. 90, was a proper subject of petition of right within the jurisdiction of the Exchequer Court of Canada. *Yule* v. *R.*, 19 C. L. T. 371, 30 S. C. R. 24.

Free grant lands—*Indirect alienation—Restraint on—Mistake of title—Statute.*]—Section 19 of the Free Grant and Homesteads Act, R. S. O. c. 29, which provide that "neither the locatee nor any one claiming under him, shall have power to alienate (otherwise than by devise), or to mortgage or pledge any land located as aforesaid, or any right or interest therein before the issue of the patent," does not prevent an agreement being entered into before the issue of a patent for the grant of land after the issue thereof, and, where such agreement was entered into, it was enforced after the issue of the patent, and where all the requisites of s. 8 of the Act had been complied with; Falconbridge, J., dissenting.—Judgment of MacMahon, J., 31 O. R. 54, 19 C. L. T. 318, reversed. *Meek* v. *Parsons* 20 C. L. T. 173, 31 O. R. 529.

Government of Yukon Territory — *Liability for acts or omissions of officers or servants — Respondeat superior — Government highway — Subsidence — Mining operations—Injury to private property—Arbitration and award.*]—Arbitration between Commissioner of the Yukon and A. B. Certain parties had mined under a Government road and under or near claimant's hotel property prior to claimant's purchase. After she bought the hotel subsided:—*Held*, no liability of the Crown. *Re Binnette* (1910), 12 W. L. R. 730.

Insolvent bank—*Winding-up Act—Sale of unrealised assets — Set-off — Funds in hands of Receiver-General — Estoppel.*] — Where funds belonging to the suppliants had gone to form part of a fund paid into the hands of the Minister of Finance and Receiver-General, as unadministered assets, in

the case of the insolvency of a bank, in proceedings under the Winding-up Act, R. S. C. c. 129, and it was objected that the suppliants were not entitled to such moneys because of judicial decision to the contrary in other litigation in respect to the fund:—*Held*, that, if it was clear that the matter had been really determined, effect should be given to the estoppel, but that where to give effect to it would work injustice, the Court, before applying the rule, ought to be sure that an estoppel arises by reason of such decision. In this case there was no estoppel. A reference to the Registrar was directed to ascertain what proportion of the fund in the hands of the Minister properly belonged to the suppliants. The rule as to estoppel stated by King, J., in *Farwell* v. *The Queen*, 22 S. C. R. 558, referred to.—2. One of the equities or conditions attaching to the sale to H. was that a debtor had a right to set off against his debt the amount which he had at his credit in the bank at the date of its insolvency. It appeared that at the time of the bank's insolvency certain of its debtors had at their credit in the bank's books sums which they would, on payment or settlement of their debts, have a right to apply in reduction thereof, and the suppliants claimed that they were entitled to be indemnified in respect of such reductions out of the fund in the hands of the Receiver-General:—*Held*, that the suppliants were not entitled to such indemnity. *Hogaboom* v. *R.*, 22 C. L. T. 88, 7 Ex. C. R. 292.

Liability as common carrier—*Loss of acid in tank car during transportation — Contract—Negligence—Costs.*] — The Crown is not, in regard to liability for loss of goods carried, in every respect in the position of an ordinary common carrier. The latter is in the position of an insurer of goods, and any special contract made is in general in mitigation of its common law obligation and liability. The Crown, on the other hand, is not liable at common law, and a petition will not lie against it for the loss of goods carried on its railway, except under a contract, or where the case falls within the statute under which it is in certain cases liable for the negligence of its servants (50 & 51 V. c. 16, s. 16), and in either case the burden is on the suppliant to make out his case.—2. By an arrangement between the consignee of the acid in question and the officers of the Intercolonial Railway, freight charges on goods carried by the latter were paid at stated times each month, and in case anything was found wrong a refund was made to the consignee. In the present case the consignee paid the freight on the acid, amounting to $135, no refund being made by the Crown. This amount was paid to the consignee by the suppliants, and they claimed recovery of the same from the Crown in their petition of right. The evidence shewed that by the arrangement above mentioned the freight was not payable on the transportation of the tank car, but on the acid contained in the car at the rate of 27 cents per 100 pounds of acid:—*Held*, that the Crown was only entitled to the freight on the number of pounds delivered to the consignee at Sydney; and that the balance of the amount paid by the consignee should be repaid to the suppliant with interest.—3. That, as the suppliant, while succeeding as to part of the amount claimed, had failed on the main issue in controversy, each party should bear their own costs. *Nicholls Chemical Co.* v. *R.*, 25 C. L. T. 82, 9 Ex. C. R. 272.

Officers—*Appointment of pilots—Inquiry into—Quo warranto.*]—The pilots for the district of Miramichi having resigned, the defendants were appointed pilots for the district by the Pilotage Commissioners. An injunction was sought to restrain the defendants from acting as pilots under licenses granted to them by the Commissioners, on the grounds (1) that the appointments were not made by by-law confirmed by the Governor-General in council and published in the Gazette, as required by the Pilotage Act, R. S. C. c. 80, s. 15; (2) that under that Act the Commissioners fixed by regulation a standard of qualification for a pilot, and that the defendants were not examined as to their competency; (3) that the defendants were not appointed at a regularly called meeting of the Commissioners, or by the Commissioners acting together as a body. A pilot appointed under the Act is appointed during good behaviour for a term not less than two years:—*Held*, that the office of pilot being a public and substantive independent office, and its source being mediately if not immediately from the Crown, and as the objections related to the validity of the defendants' appointments, and as there was no pretence that the appointments were made colourably and not in good faith, the remedy, if any, was not by injunction, but by information in the nature of a *quo warranto*. *Atty.-Gen. for N. B.* v. *Miller*, 19 C. L. T. 409, 2 N. B. Eq. R. 28.

Opinion of Court on case stated by Government.] — The opinion given to the Government by the Court of Appeal upon a question referred to the Court under 61 V. c. 11, is an opinion only, and cannot make a point passed upon *res judicata;* and is not even a compromise, a transaction, nor an arbitration, inasmuch as the question referred to the Court of Appeal is not by the consent of the parties, put upon the sole initiative of the Government. *Galindez* v. *Rex*, 26 Que. S. C. 171.

Payment for services as commissioner—*Servant—Public office.*]—A person appointed under the provisions of R. S. C. c. 115, as a commissioner to investigate and report upon improper conduct in office of an officer or servant of the Crown, cannot recover against the Crown payment for his services as such commissioner, there being no provision for such payment in that enactment or elsewhere.—2. The service in such a case is not rendered in virtue of any contract, but merely by virtue of appointment under the statute.—3. The appointment partakes more of the character of a public office, than of a mere employment to render a service under contract, express or implied. *Tucker* v. *R.*, 22 C. L. T. 201, 7 Ex. C. R. 351, affirmed 32 S. C. R. 722.

Petition of right—*Damage to lands—Subsidence—Release of claim.*]—In connection with the work of affording better terminal facilities for the Intercolonial Railway

at the port of St. John, N.B., the Dominion Government acquired a portion of the suppliant's land and a wharf; the latter being removed by the Crown in the course of carrying out such works. For the lands and wharf so taken by the Crown, the suppliant was paid a certain sum, and he released the Crown from all claims for damages arising from "the expropriation by Her Majesty of the lands and premises, or the construction and maintenance thereon of a railway or railway works of any nature." One of the effects of the removal of the wharf was to leave a wharf remaining on the suppliant's land more exposed than it formerly had been to the action of the waves and tides; but no sufficient measures were taken by the suppliant to protect his property or to keep it in a state of repair:—*Held*, that there was no obligation upon the Crown, under the circumstances, to construct works for the purpose of protecting the suppliant's property; and, as the injury complained of happened principally because the suppliant had failed to repair his wharf, the Crown was not liable therefor. *Vroom* v. *R.*, 24 C. L. T. 2, 8 Ex. C. R. 373.

Petition of right — *Suppliant—Locus standi.*]—The suppliant applied to be allowed to purchase certain lands under s. 31 of the Land Act, tendering the proper amount therefor. The application was refused on the ground that the lands had been granted to a railway company. The suppliant alleged that such grant was illegally issued and void, and the Crown allowed a petition of right to be brought:—*Held*, that the suppliant had no *locus standi* to obtain any relief. *Hall* v. *R.*, 7 B. C. R. 89, 480.

Postmaster's salary — *Allowances—Interest—Civil Service Act.*] — By the Civil Service Act, R. S. C. c. 17, schd. B., a city postmaster's salary, where the postage collections in his office amount to $20,000 and over, per annum, is fixed at a definite sum according to a scale therein provided. No discretion is vested in the Governor in Council or in the Postmaster-General to make the salary more or less than the amount provided. Notwithstanding the statute, it was the practice of the Postmaster-General to take a vote of Parliament for the payment of the salaries of postmasters. For the years between 1892 and 1900, except one, the amount of the appropriation for the suppliant's salary was less than the amount he was entitled to under the statute:—*Held*, that he was entitled to recover the difference.—2. That the provisions in s. 6 of the Civil Service Act to the effect that "the collective amount of the salaries of each department shall in no case exceed that provided for by the vote of Parliament for that purpose," was no bar to the suppliant's claim, even if it could be shewn that if in any year the full salary to which the suppliant was entitled had been paid, the total vote would have been exceeded. Such provision is in the nature of a direction to the officers of the treasury who are intrusted with the safe keeping and payment of the public money, and not to the Courts at law. *Collins* v. *United States*, 15 Ct. of Clms. 35, referred to.—3. The suppliant was not entitled to interest on his claim.—4. The provision in s. 12 of the Civil Service Amendment Act, 1888, to the effect that "no extra salary or additional remuneration of any kind whatsoever shall be paid to any deputy-head, officer, or employee in the civil service of Canada, or to any other person permanently employed in the public service," does not prevent Parliament at any time from voting any extra salary or remuneration, and where such an appropriation is made for such extra salary or remuneration, and the same is paid over to any officer, the Crown cannot recover it back. *Hargrave* v. *R.*, 22 C. L. T. 427, 8 Ex. C. R. 62.

Prerogative — *Attorney-General — Injunction to restrain action—Public harbour.*] —It is a prerogative right of the Crown to stop a suit between subjects in the subject-matter of which it is alleged that the Crown is or may be interested, and in respect of which suit has been brought in behalf of the Crown to have its interest declared.—If the Crown right alleged is a right in behalf of the province, then the Attorney-General for the province is the proper officer to exercise the prerogative.—Observations on the history of the Supreme Court of British Columbia. *Atty.-Gen. for B. C.* v. *Esquimalt & Nanaimo Rw. Co.*, 20 C. L. T. 268, 7 B. C. R. 221.

Public officer—*Assignment of salary—Public policy.*] — The provisions respecting the assignments of choses in action found in R. S. O. c. 51, s. 58 (5), (6), are not binding upon the Crown as represented by the Government of Canada.—2. On grounds of public policy the salary of a public officer is not assignable by him.—3. Neither the librarian of Parliament nor the Auditor-General of Canada has power to bind the Crown by acknowledging explicitly or implicitly an assignment of salary by an officer or clerk employed in the library of Parliament. *Powell* v. *R.*, 25 C. L. T. 140, 9 Ex. C. R. 364.

Public officer — *Judge of Yukon Court —Living expenses — "Appointee of Dominion"—Recovery of money paid.*]—The defendant was appointed a Judge of the Supreme Court of the Yukon Territory on the 12th September, 1898. By s. 5 of the Yukon Territorial Act, 1898 (61 V. c. 6), as such Judge he became a member of the council constituted to aid the Commissioner in his administration of the Territory. An order in council was passed on the 7th October, 1898, appointing him "to aid the Commissioner in the administration of the Territory," and since that time up to the action brought he had continued to act as a member of the council. In addition to the salary paid to him as such Judge, certain provision for living expenses was made from time to time by Parliament in his behalf. By orders in council of the 7th July, 1898, and the 5th September, 1899, relating to officers for the administration of the Yukon District, it was provided that such officers were, in addition to their salaries, to be furnished with "quarters and such living allowance as may from time to time be fixed by the Minister of the Interior;" and it was further provided therein that the provision mentioned should apply to all "appointees of the Dominion" who had been or might be appointed to the staff for the administration of the Yukon Terri-

tory:—*Held*, that the defendant was an "appointee of the Dominion" on the staff for the administration of the Yukon Territory within the meaning of the order in council of the 5th September, 1899, and so entitled to the quarters and a "living allowance" provided thereunder.—2. That the circumstances disclosed approval and ratification by the Minister of the Interior and the Minister of Public Works of the action of the Commissioner in making the expenditures in question for the benefit of the defendant. *R.* v. *Dugas*, 26 C. L. T. 460, 10 Ex. C. R. 67.

Railway subsidies—*Discretion of Governor in council—Construction of statute—Conditions of consent—Estimating cost of constructing line of railway—Rolling stock and equipment.*]—The provisions of the Act 3 Edw. VII. c. 57, authorizing the granting of subsidies in aid of the construction of railways, are not mandatory, but discretionary, in so far as the grant of the subsidies by the Governor in Council is concerned.—On a proper construction of the Act it does not appear to have been the intention of Parliament that the cost of rolling stock and equipment should be included in the cost of the construction in estimating the amount of subsidy payable to the company in aid of the "Pheasant Hills Branch" of their railway under the provisions of that Act, notwithstanding that the Act did not specially exclude the consideration of the cost of equipment in the making of such estimate as had been done in former subsidy Acts with similar objects, and that the Governor in council imposed the duty of efficient maintenance and equipment of the branch as a condition of the grant of the subsidy. Judgment in 26 C. L. T. 778, 10 Ex. C. R. 325, affirmed. *Can. Pac. Rw. Co.* v. *R.*, 38 S. C. R. 137.

Railway subsidies—*Statute—Construction — Compromise — Part payment—Petition of right.*]—The grant by a statute of a subsidy "to aid in completing and equipping a railway, throughout its whole length for the part not commenced and that not finished, about 80 miles going to or near Gaspé Basin," with a proviso that it shall be payable to a person or persons, etc., establishing that they are in a position to carry out the work, applies exclusively to the 80 miles of the road ending at or near Gaspé Basin.—A different construction of the statute by officers of the Crown, the effecting of a compromise in consequence, and even a part payment of the subsidy, afford no grounds to recover the balance from the Crown by petition of right. *De Galindez* v. *R.*, 15 Que. K. B. 320.

Affirmed, 39 S. C. R. 682.

See 26 Que. S. C. 17.

Return of moneys paid by mistake—*Action for.*]—The suppliant brought his petition of right to recover from the Crown the sum of $190, which he alleged he paid under mistake to the Crown in settlement of an information of intrusion in respect of certain lands occupied by him. He also claimed $500 for damages for the loss which he alleged resulted to him on the sale of the lands by reason of the proceedings taken against him by the Crown:—*Held*, that the suppliant's petition disclosed no right of action against the Crown, and that a demurrer should be allowed. *Moore* v. *Vestry of Fulham*, [1894] 1 Q. B. 399, followed. *Paget* v. *R.*, 21 C. L. T. 280, 7 Ex. C. R. 50.

Right of Crown to choose forum.]—It is a prerogative right of the Crown to bring a suit in a County Court, even though as between subject and subject such Court would not be open by reason of the defendant not residing or the cause of action not residing within the territory of such Court. *Rex* v. *Campbell*, 8 B. C. R. 208., 38 C. L. J. 54.

Scire facias—*Annulling letters patent.*]—An information of Atty.-Gen. for annulling letters patent is simply a statement of claim with conclusions as in the declaration in an ordinary action.—(2) Summons in matters of *scire facias* or actions to annul letters patent is made by writ issued in the usual manner, without affidavit of petitioner, order of a Judge or *fiat* of Atty.-Gen.—(3) Want of authorization, by the Atty.-Gen., of attorneys signing the information for him is not a ground of exception. If necessary, the Atty.-Gen. may file a disavowal of the attorneys *ad litem*. *Gouin* v. *McManamy*, 28 Que. S. C. 216.

Settlers' Rights Act, 1904—*Costs — Indemnity — Vancouver Island.*]—In a statute declaring certain settlers entitled to mineral rights on their lands, there was a provision that any action attacking such rights should be defended by and at the expense of the Crown. On action taken by plaintiff company to test the statute, judgment was given in favour of defendant. Company's appeal was dismissed:—*Held*, as to costs, that defendant was not in a position to claim any costs against plaintiff company as his rights were being asserted by and defended at expense of the Crown. *Esquimalt & Nanaimo Rw. Co.* v. *Hoggan*, 14 B. C. R. 49.

Succession duty — *Property exempt — Sale under will—Duty on proceeds—Costs—Crown.*] — Debentures of the province of Nova Scotia are, by statute, "not liable to taxation for provincial, local, or municipal purposes" in the province. L., by his will, after making certain bequests, directed that the residue of his property, which included some of these debentures, should be converted into money to be invested by the executors and held on certain specified trusts. This direction was carried out after his death, and the Attorney-General claimed succession duty on the whole estate:—*Held*, affirming the judgment appealed against, 35 N. S. R. 223, Sedgewick and Mills, JJ., dissenting, that, although the debentures themselves were not liable to the duty either in the hands of the executors or of the purchasers, the proceeds of their sale, when passing to legatees, were. Costs will be given for or against the Crown as in other cases. *Lovitt* v. *Atty.-Gen. for N. S.*, 23 C. L. T. 212, 33 S. C. R. 350.

CROWN CASE RESERVED.

See CRIMINAL LAW.

CROWN DUES.

See CONTRACT.

CROWN LANDS.

See CONTRACT—CROWN—VENDOR AND PURCHASER.

CROWN OFFICE RULES.

See APPEAL.

CROWN PATENT.

See CROWN—LAND TITLES ACT—MINES AND MINERALS — PATENT FOR INVENTION——WATER AND WATERCOURSES—WAY.

CROWN PROCEDURE ACT.

See CONSTITUTIONAL LAW.

CROWN RULES.

See CRIMINAL LAW.

CRUELTY.

See HUSBAND AND WIFE.

CULVERT.

See MUNICIPAL CORPORATIONS.

CURATOR.

Appointment — *Vacant succession — Status of applicant—Family council.*]—No person has an interest entitling him to take proceedings for the appointment of a curator to a vacant succession who is not either a relation or a creditor of the person from whom such succession devolves.—2. The provisions relating to family councils do not apply to the proceedings for the appointment of a curator to a vacant succession, and only relations and creditors are competent to advise the Judge as to the appointment of a curator to a vacant succession. *Ex p. Confederation Life Assoc.*, 3 Que. P. R. 214.

See BANKRUPTCY AND INSOLVENCY.

CURTESY, ESTATE BY.

See HUSBAND AND WIFE.

CUSTOM.

See BROKER — CONFLICT OF LAWS — CONTRACT — PRINCIPAL AND AGENT—SALE OF GOODS—SHIP—WEIGHTS AND MEASURES.

CUSTOMER.

See BANKS AND BANKING—BROKER.

CUSTOMS.

See FISHERIES—RAILWAY—REVENUE.

DAM.

See WATER AND WATERCOURSES.

DAMAGES.

Alternative remedy. *See* INJUNCTION.

Fraud. *See* FRAUD AND MISREPRESENTATION.

Liquidated damages or penalty. *See* CONTRACT—PENALTY.

Negligence. *See* MASTER AND SERVANT —NEGLIGENCE — RAILWAYS—STREET RAILWAYS.

Remoteness of. *See* NEGLIGENCE.

Appeal from conviction — *Dismissal for want of jurisdiction—Action for costs of.*]—The present defendant took an appeal, under the provisions of the Criminal Code, to the Court of Queen's Bench, Crown side, from a conviction by a district magistrate for failing to keep in repair a certain road. This appeal was quashed for want of jurisdiction. Costs were not granted. The present action was brought by the complainant in the previous proceeding, to recover by way of damages the expenses to which the plaintiff had been subjected by the appeal. The Court below awarded $50:—*Held* (modifying the judgment as to the amount of damages, and granting $200), that the defendants by bringing an appeal in a case in which the Court of Queen's Bench had no jurisdiction, became liable for all legitimate costs and expenses incurred by the present plaintiff in resisting the appeal, including fees of counsel, taxation of witnesses, service of subpœnas, and travelling expenses.—*Quære*, as to the power of the Court to grant costs where an appeal is quashed for want of jurisdiction. *Beauchesne* v. *Scotstown*, 16 Que. S. C. 316.

Assessment of — *Writ of summons — Statement of claim—Non-conformity — Substituted service—Order for.*] — By the indorsement on the writ of summons the plaintiff claimed damages for breach of an agreement by the defendant to convey certain land to the plaintiff. By the statement of claim

and the plaintiff's evidence it appeared that her real claim was for breach of a subsequent parol contract. Under an order of a local Judge service of the writ and statement of claim were effected by posting them on the 30th November, 1909, in an envelope addressed to the defendant at a place in Ontario. On the 28th December, 1909, judgment was entered for the plaintiff for default of appearance to the writ, for damages to be assessed. No proceedings were taken upon the statement of claim either to enter judgment or a default note:—*Held*, that, according to the practice, no assessment could be made except upon the judgment for default of appearance, for nothing else was ripe for assessment; and the plaintiff could not have damages pursuant to the claim indorsed on the writ, because it appeared by the evidence that she had consented to the defendant conveying the land in breach of his covenant. The action was, therefore, dismissed, but without costs and without prejudice to a new action being brought upon the causes of action set forth in the statement of claim:—*Semble*, that the order for service by posting should not have been made, the material being quite insufficient, and there being no probability that the papers would reach him. *Alexander* v. *Alexander*, 21 C. L. T. 338, 1 O. L. R. 639.

Assignment of claim for damages ex delicto—*Chose in action.*]—The plaintiff brought this action for damages for personal injuries sustained by his being run down by a car of the defendants, and for the killing of his master's horse which he was riding at the time, and in respect to which he claimed under assignment from his master:—*Held*, that the action was properly dismissed as to the latter claim, upon the ground that it was not an assignable chose in action. *McCormack* v. *Toronto Rw. Co.*, 8 O. W. R. 467, 9 O. W. R. 300, 13 O. L. R. 656.

Breach of charter party—*Hire of ship for season—Failure of owners to fulfil contract—Measure of damages — Principle of assessment.*]—A term of the charter party required defendants, the shipowners, to have the ship pass Canadian Government inspection, which it failed to do:—*Held*, that the damages should not be the difference between the plaintiff's operating expenses and receipts, but such sum as would put him in same position as he would have been in had he not been prevented from running the steamship for the whole term for which he had hired it, but had been able to run it during the whole of that term if he had been so minded. *Colbeck* v. *Ontario* (1909), 13 O. W. R. 1027.

Varied on appeal by consent, 14 O. W. R. 141.

Breach of contract—*Delivery of railway bonds.*]—*Ray* v. *Pt. Arthur, Duluth, & Western Rw. Co.*, *Ray* v. *Middleton*, 2 O. W. R. 345, 3 O. W. R. 160, 724.

Breach of contract—*Remoteness—Carriers — Loss of machinery—Profits.*]—Damages for breach of contract must be direct, and none are recoverable that are indirect or remote. Hence, where a carrier for hire loses a piece of machinery, sent through him for repairs, the owner is not entitled to recover from him, as damages, the loss incurred through having been deprived of the use of it for a season. *Thiauville* v. *Can. Ex. Co.*, 33 Que. S. C. 403, 4 E. L. R. 433.

Breach of covenant — Restraint of trade — Method of estimating damages—Master's report — Appeal — General damages—Nominal damages. *Anderson* v. *Ross*, 11 O. W. R. 852.

Breach of promise of marriage — *Proof of damages — Jury — Excessive damages—Reduction by Court.*]—The Court will not allow the verdict of a jury awarding $3,250 damages to the plaintiff for breach of promise of marriage to stand, where she has proved no special damage unless the annoyance which she has suffered by the marriage of the defendant to a rival whom she knew. A sum of $1,500 would be, in the circumstances, amply sufficient. *Sims* v. *Bach*, 10 Que. P. R. 178.

Contract—*Breach—Assessment by Judge —Evidence—Guess — Appeal — Concurrent findings of Courts below.*]—The evidence in an action for breach of contract being insufficient to enable the trial Judge to assess damages, he was obliged to guess, as he stated, and his guess was $5,000. This was affirmed by a provincial appellate tribunal. The Supreme Court of Canada allowed an appeal and dismissed the action, the majority holding that the result of the absence of evidence was that the damages could be no more than nominal. Armour, J., dissenting, was of opinion that there should be a new trial. *Williams* v. *Stephenson*, 33 S. C. R. 323.

Conversion of mining shares—*Shares of no market value—Measure of damages—Estimate as if trial by jury.*]—Defendant sold 20,000 shares of mining stock having no market value in breach of contract with plaintiff. Reference was had before Referee to assess damages to be awarded plaintiff for conversion of said shares. Referee fixed the amount at $8,000, or 40 cents per share, the highest price which had been obtained for such shares. He also found that defendant had paid plaintiff $5,100, which should be deducted from amount so assessed, and that the balance, $2,900, should bear interest at 5% from 17th March, 1909.—Meredith, C.J.C.P., *held*, that the above assessment was too high, and reduced the damages to 26 cents per share, the price obtained by defendant for such shares.—Divisional Court *held* (16 O. W. R. 820, 21 O. L. R. 614, 1 O. W. N. 1131), that the sale was exceptional, and that plaintiff was entitled to damages, but the question should be dealt with as a jury probably would, taking into consideration the fact of a sale at a higher price than that obtained by defendant, and a fair assessment of damages would be to increase the assessment appealed from by $1,500.—*In re Bahia & San Francisco Rw. Co.* (1868), L. R. 3 Q. B. 584, followed.—*Mitchell* v. *Hart*, [1901] 2 K. B. 867, [1902] 1 K. B. 482, considered. — Court of Appeal affirmed assessment by Divisional Court, Meredith, J.A. (dissenting), being in favour of restoring the assessment of Meredith, C. J. C. P. *Goodall* v. *Clarke* (1911), 18 O. W. R. 185, 2 O. W. N. 567, O. L. R.

Death of child—Fatal Accidents Act—Quantum of damages—Assessment by jury—Motion for new trial. *Renwick* v. *Galt, Preston & Hespeler Street Rw. Co.*, 6 O. W. R. 413, 11 O. L. R. 158.

Death of child—*Plea that life insurance moneys reduce damages.*]—In an action for damages by parents for the death of their infant son, it is not legal to allege in defence that the plaintiffs have already received a certain sum from an insurance on the life of their son. *Gauthier* v. *Bouchard*, 9 Que. P. R. 385.

Death of husband—*Estimate of damages—Insurance moneys received by plaintiff.*] — In an action by the widow of the victim for damages resulting from a *quasi-délit*, the Court or jury may take into consideration the amount of insurance paid to the plaintiff in their estimate of the damages which will be allowed, and it is open to the author of the injury to plead that the plaintiff has already received a considerable amount for insurance on the life of her husband. *Dom. Bridge Co.* v. *Konwaketasion*, 7 Que. P. R. 232.

See 5 Que. P. R. 320.

Death of husband—*Negligence—Solatium—Protection.*]—A widow in an action for the death of her husband by the defendant's negligence cannot claim damages as *solatium doloris*.—2. She may claim damages for the loss of protection and personal care of her husband. *Renaud* v. *Furness, Whithy & Co.*, 6 Que. P. R. 76.

Death of son—*Elements of damages — Cost of bringing up.*] — A father suing for damages for the death of his son cannot include in the damages sustained, the amounts paid by him for the bringing up, clothing, maintenance, and education of the son, or for similar expenses. *Beaudet* v. *William Grace Co.*, 7 Que. P. R. 82.

Deceit—Measure of—Purchase of shares in company—Ascertainment of value — Subsequent events. *Pohnl* v. *Miller*, 5 O. W. R. 358.

Distribution of—*Tort causing death—Action by widow — Intervention of parent.*] —Where the wife of a person who has died in consequence of a tort or *quasi tort*, has begun, by virtue of Art. 1056, C. C., an action for damages against the tort-feasors, the father or other relation of the deceased mentioned in such article, may intervene in the action to claim from the defendants damages for the loss which he suffers personally on account of such death, and may even, by such intervention, contest the right of the plaintiff to the damages which she claims. *Morin* v. *Mills*, 18 Que. S. C. 196, 3 Que. P. R. 138.

Ejection from church pew.]—A plaintiff in a suit to recover damages for personal injuries because of a special reason, in the present case, for having been forcibly ejected from his pew in church by the defendant during divine service, cannot allege that the defendant, for a long time past, has shewn his hatred of the plaintiff by writing libellous articles against him in the newspapers. —Such a statement is foreign to the issues in the case, and will be dismissed on inscription in law. *Lavallee* v. *Lafreniere*, 11 Que. P. R. 73.

Enticing and harbouring plaintiffs' servants—Quantum of damages — General damage — Evidence—Assessment by Referee —Appeal. *Gurney Foundry Co.* v. *Western Foundry Co.*, 6 O. W. R. 959.

Excessive damages—*Misdirection—Appeal to Supreme Court of Canada—Reduction —Consent—New trial.*]—Where there was misdirection as to the assessment of damages merely, and it appeared that the damages assessed by the jury were grossly excessive, the Supreme Court of Canada made a special order, applying the principle of Art. 503, C. C. P., directing that the appeal should be allowed and a new trial had to assess damages, unless the plaintiff consented to the damages being reduced to a stated sum. *Central Vermont Rw. Co.* v. *Franchere*, 35 S. C. R. 68.

Excessive damages—*Misdirection—New trial.*] — If, in charging a jury, the Judge makes a statement calculated unnecessarily to magnify the importance of the matter in dispute, and suggests excessive damages, a new trial will not be granted, even though the Judge was in error in making the statement, if it appears from the verdict found that the jury, in assessing the damages, were not influenced by the charge. *Cormier* v. *Boudreau*, 35 N. B. R. 645.

Excessive damages—*Trespass — Evidence—Findings of jury—Equal division of Court—Costs.*]—An action to recover damages for a wrongful and violent entry by the defendants' servants upon the plaintiff's property and the wrongful seizure and appropriation of the plaintiff's chattels. The jury found that the defendants, by their servants, took possession of the property illegally and in violation of their agreement, and that the plaintiff was entitled to the value of the property taken, and they assessed the damages at $730, for which judgment was given by the trial Judge with costs. The evidence as reported did not disclose proof of the value of several of the chattels for the taking of which damages were claimed, and it did not appear anywhere how the $730 was made up. Upon a motion by the defendants to set aside the judgment and for a new trial:—*Held, per* Meagher and Ritchie, JJ., that the evidence of damage which was before the jury not having been reported to the Court, and in view of the violent and illegal manner of entry upon the premises, the Court was not in a position to decide that the damages were excessive. *Per* Townshend and Graham, JJ., that the damages should be reduced to conform with the proof of loss suffered disclosed in the evidence before the Court. Owing to the equal division of opinion, the motion was dismissed, but without costs. *Johnston* v. *Dom. Steel & Iron Co.*, 21 C. L. T. 311.

Expropriation of land—*Assessment — Reservation of recourse for future damages — Res judicata — Right of action.*] — A lessee of premises used as an ice house recovered damages from a city corporation for injuries by the expropriation of part of the

premises. In his statement of claim he had expressly reserved the right of further recourse for damages. In an action brought after his death by his universal legatee to recover damages for loss of the use of the ice house during the unexpired term:—*Held*, that the reservation did not preserve any further right of action in respect of the expropriation, and the plaintiff's action was properly dismissed, as, in such cases, all damages capable of being foreseen must be assessed once for all, and a defendant cannot be twice sued for the same cause. *City of Montreal* v. *McGee*, 30 S. C. R. 582, and *Chaudière Machine & Foundry Co.* v. *Canada Atlantic Rw. Co.*, 33 S. C. R. 11, followed. *Anctil* v. *Quebec*, 33 S. C. R. 347.

Faits et articles—*Default of defendant to reply—Evidence—Effect on assessment of damages.*]—In an action for damages the proof arising from the default of the defendant to answer *faits et articles* does not bind the Court by which the damages are assessed. See Art. 364, C. P. *Fortin* v. *Say*, 3 L. N. 331, referred to. *Desnoyers* v. *Gagné*, 9 Que. P. R. 143.

Fatal Accidents Act—Action by married woman for death of aged father—Reasonable expectation of pecuniary benefit from continuance of life—Reduction of verdict—New trial. *Dewey* v. *Hamilton & Dundas St. Rw. Co.*, 9 O. W. R. 511, 10 O. W. R. 535.

Fatal Accidents Act—Action for death of engine-driver — Settlement — Payment of lump sum—Approval of Court—Apportionment—Shares of widow and infant children — Consideration of benefit received by widow under will of deceased. *O'Donnell* v. *Can. Pac. Rw. Co.*, 12 O. W. R. 110.

Fatal Accidents Act—Death of boy of 13—Action by father—Expectation of pecuniary benefit by continuance of life—Quantum of damages. *Thompson* v. *Trenton Electric & Water Power Co.*, 11 O. W. R. 1009.

Fatal Accidents Act—*Death of child—Expectation of pecuniary benefit—Pleading.*]—In an action for damages brought by a father for the death of his child, it is not irrelevant to allege that he and his wife have suffered loss and damage by the death of their child, through loss of maintenance which they were entitled to expect from him. *Anderson* v. *Protestant Board of School Commissioners*, 8 Que. P. R. 341.

Fatal Accidents Act—*Death of child—Expenses of education and maintenance.*]—The maintenance and education of a minor son being obligations imposed by law upon the father, he cannot, in an action in damages for the death of his son, recover the amounts so disbursed in connection therewith. *Clough* v. *Fabre*, 9 Que. P. R. 18.

Fatal Accidents Act—*Death of infant—Negligence of tramway company—Measure of damages of father.*]—The father of an infant killed in a tramway accident can recover from the tramway company responsible for the accident only actual damages established by evidence. He has no right to damages for moral prejudice nor *in solatium doloris*. *Quebec Rw., Light & Power Co.* v. *Poitras*, 14 Que. K. B. 429.

Fatal Accidents Act—*Loss of child—Right of mother while father living—Excessive damages—Reasonable expectation of pecuniary benefit—New trial.*]—The mother of the deceased is a person for whose benefit an action can be brought under the Fatal Accidents Act, although the father is living. —Damages assessed by a jury at $3,000 for the loss of a daughter seventeen years old by reason of the negligence of the defendants, were held to be excessive, and a new trial was directed unless both parties would agree to have the damages fixed at $1,500. Order of a Divisional Court, 11 O. L. R. 158, 6 O. W. R. 413, reversed. *Renwick* v. *Galt, Preston & Hespeler St. Rw. Co.*, 12 O. L. R. 35, 7 O. W. R. 673.

Fatal Accidents Act — *Negligence — Quantum — Death of person — Insurance moneys — Deduction.*] — Defendants responsible for an accident causing loss of life, not contesting a claim for damages for such loss except as to the amount of damages recoverable, are not in a position to invoke in mitigation of damages the payment to the plaintiff of the amount of an insurance upon the life of the deceased, the existence of which was brought out in the course of the trial only, without having been alleged in the defence. *Quebec Central Rw. Co.* v. *Gillanders*, 15 Que. K. B. 414.

Fatal Accidents Act—*Parent and child—Excessive amount—Suggested reduction—New trial — Evidence — Admissibility — Intention of deceased.*] — Damages to the amount of $2,100 were recovered by the plaintiff suing as the father and administrator of his deceased son, 22 years of age, who was killed through defendants' negligence. The son's occupation was principally that of a labourer, the highest rate of wages received by him being for a few days at the rate of $35 a month. His mother was dead and his father had married again. He lived with a widowed sister, but was on good terms with his father and step-mother, whom he visited once or twice a month, on such occasions giving his father from $2 to $4, and once $5. His habits were good and he was of a generous disposition. Evidence was received of his intention of helping his father to build a house, of assisting him in paying off a mortgage of $650 on his property, as well as a debt of $400, which he owed another son, and for which the father had given his promissory notes:—*Held*, that the evidence of such expressed intention was properly admitted, not necessarily as shewing a promise to make the payments, but of his being well disposed to his father; the amount awarded the plaintiff for damages however was clearly excessive, and a new trial was ordered unless the parties agreed to a reduction of the damages to $500. *Stephens* v. *Toronto Rw. Co.*, 11 O. L. R. 19, 6 O. W. R. 657.

Fatal Accidents Act — Trial without jury — Finding of Judge — Expectation of benefit—Nominal damages—Dismissal of action without costs—Appeal. *Wood* v. *London St. Rw. Co.*, 7 O. W. R. 601.

Flooding land—*Measure of damages — Duty of claimant to diminish.*] — Where there is, in the power of the person complaining, an obvious and inexpensive method or reducing, diminishing, or wholly doing away with the damages complained of, *e.g.*, by a short transverse drain to prevent flooding of land, it is his duty to adopt it, and, in default of his doing so, he is only entitled to recover such loss as he would have suffered if he had taken proper measures to prevent or diminish the damages. *Filiatrault* v. *Coteau Landing*, 23 Que. S. C. 62.

Fraud and misrepresentation — *Sale of two creameries — Representations as to amount of output, expenses and profit—Measure of damages—Reference to ascertain damages—Appeal from report — Costs.*]—Meredith, C.J.C.P., *held* (14 O. W. R. 984, 1 O. W. N. 177), that the measure of damages, in an action for misrepresentation in the sale of two creameries to plaintiff, was the difference between the purchase price and their actual value at the time of purchase, and that the Master erred in allowing damages for loss sustained by plaintiffs in the operation of the creameries. Reference to Local Master to ascertain the damages. — Local Master found that the creameries had no value as creameries when sold to plaintiffs; that defendants should be allowed only for the value of the land, buildings, etc. Master allowed plaintiffs $3,930 damages with interest at 5%, amounting to $715.65, and also allowed plaintiffs $3,440.14 as damages sustained by plaintiffs in operating the creameries after the purchase. This latter item was disallowed in above judgment. Defendant appealed as to the other items. Meredith, C.J.C.P., dismissed defendant's appeal, but *held*, that as he had succeeded as to the item for damages for loss in operation of the creameries, the plaintiffs should be allowed only three-fourths of their costs of the appeal and should pay one-fourth of defendant's costs. *Lamont* v. *Wenger* (1911), 18 O. W. R. 170, 2 O. W. N. 519. O. L. R.

Future damages.] — In an action for damages resulting from injuries to the property of another, future damages cannot be claimed, seeing that they are not permanent (at least in the case at bar), and that they are in consequence inappreciable both as to their duration and nature. *Duggan* v. *Stadacona Water Co.*, 2 Que. P. R. 385.

Inadequacy—*New trial — Compromise verdict.*] — A new trial on the ground of the insufficiency of the damages will not be granted unless it appears clearly to the Court that the smallness of the damages has arisen from mistake upon the part of either the Judge or jury, or from some unfair practice on the part of the defendant.—A verdict will not be set aside on the ground that it is a compromise verdict if it can be justified upon any hypothesis presented by the evidence. *Currie* v. *St. John Ry. Co.*, 36 N. B. R. 194.

Inciting or procuring breach of contract—*Actionable wrong — Sale of goods subject to restriction.*]—Plaintiffs were manufacturers of loose leaf system. Defendant company was formed of four employees of plaintiffs to compete with plaintiffs. When plaintiffs sold binders they had purchasers sign contracts to purchase loose leaves from them. Defendants' agents induced different purchasers to buy loose leaves from defendants:—*Held*, that plaintiffs were entitled to damages for defendants' interference with the contractual rights between plaintiffs and their customers. *Copeland-Chatterson* v. *Business Systems*, 13 O. W. R. 259.

On appeal above judgment varied by narrowing injunction so as to restrain defendants from making contracts with persons whom they know to have made contracts with plaintiffs. *Copeland-Chatterson* v. *Business Systems*, 13 O. W. R. 1211.

Injury to land—*Future damages—Indemnity—Warranty.*]—A plaintiff who sues his neighbour for damages in respect of injury to his property by the construction of a new house, cannot require the defendant to sign a promise of indemnity against future damages, and give him security therefor by a hypothec, unless he alleges and proves that he is entitled to such a warranty by law or by a special agreement. *Onofrio* v. *La Patrie Pub. Co.*, 8 Que. P. R. 365.

Injury to property—*Elements of damages—Fees of expert witnesses — Notarial protests.*] — The fees of expert witnesses employed to make examinations of property, plans, etc., necessary for the proof of the plaintiff's allegations of damage to property caused by the defendants' illegal acts, and also the costs of notarial protests, form part of the damages which the plaintiff is entitled to recover from the adverse party. *Décarie* v. *Montreal West*, 26 Que. S. C. 16.

Injury to servant through negligence of master—Excessive damages — Permanent injury—Partial disability—Earning power—Incurable disease—New trial for assessment of damages for permanent injuries—Amount claimed by plaintiff—Stating to jury—Rule of practice—Direction of trial Judge. *Tinsley* v. *Canada West Coal Co.* (Alta.), 9 W. L. R. 706.

Interlocutory injunction — Dissolution—Time for applying for reference—Evidence — New agreement — Costs — Stay of proceedings—Appeal. *McLeod* v. *Lawson*, 8 O. W. R. 335.

Jury—*Increase on second trial—Excess—Perverse verdict.*]—The increase of damages on the second trial of an action for the loss of a foot from $3,500 to $6,500:—*Held*, not perverse or wrong, and that the latter amount was not, in the circumstances, excessive. *Hansen* v. *Can. Pac. Ry. Co.*, 6 Terr. L. R. 420.

Landlord and tenant—House infested with vermin. *Middleton* v. *Allard*, *Allard* v. *Middleton*, 3 E. L. R. 144.

Lord Campbell's Act—*Action — Bar—Life insurance.*]—The fact that a widow has, upon the death of her husband, obtained the proceeds of a policy of insurance upon his life, is not a bar to her recovering damages from the person responsible for the accident which caused his death. *Konwaketasion* v. *Dom. Bridge Co.*, 5 Que. P. R. 320.

See 7 Que. P. R. 232.

Lord Campbell's Act—*Apportionment between widow and children — Other provision for widow.*] — An action brought against a railway company by a widow on behalf of herself and four infant children, aged respectively seven, five, three, and one year, to recover damages for the death of her husband through the company's alleged negligence, was settled by the company paying $4,800. On application to a Judge, the amount was apportioned by giving the widow $1,200, and each of the children $900, the widow also to be paid for the children's maintenance $200 a year half-yearly for three years, the fact of the widow having already received $1,000 for insurance on the husband's life being taken into consideration. *Burkholder* v. *Grand Trunk Rw. Co.*, 23 C. L. T. 155, 5 O. L. R. 428, 2 O. W. R. 267.

Lord Campbell's Act—*Death of relative — Reasonable expectation of pecuniary benefit.*]—The parents and sisters of a man who was killed by an electric shock whilst working in the defendants' works, and in consequence, as it was alleged, of defects in the appliances supplied by the defendants at the works, sued for damages for his death. The deceased, who was the only son of the rector of a small parish near Montreal, with an income of about $600 a year, had been given a college education and had returned home when about 21 years old. For a time he remained at home, earning nothing. Then he spent some time in the insurance business in Vermont. Then, on account of his father's illness, he went home, but soon left for Manitoba in search of occupation. There, after working at several things for about three years, he was employed by the defendants to manage their electric works at a salary of $115 a month, out of which he had to pay $45 a month to an engineer and sometimes to hire other assistance. He had been thus employed about three months when he met his death. The parents were getting old and were in failing health and it was not shewn whether they had or had not any means beyond the income of $600 a year. The deceased contributed nothing to the support of the family during all the time he was in Manitoba; but, according to the father's evidence, he had been a great help to him when at home, and had assisted him in many ways in his parish work and in matters of business, and was "a noble, faithful son," efficient in every way, steady and industrious, and "an affectionate son and brother:"—*Held*, that there was nothing in all this to warrant the inference of a reasonable expectation of any pecuniary benefit to the plaintiffs from a continuance of the life of the deceased, and that the verdict of the jury, in favour of the plaintiffs should be set aside. *Sykes* v. *North Eastern Rw. Co.*, 44 L. J. C. P. 191, and *Mason* v. *Bertram*, 18 O. R. 1, followed. *Davidson* v. *Stuart*, 22 C. L. T. 266, 14 Man. L. R. 74.

Lord Campbell's Act—*Pecuniary loss from death of son — Negligence—Evidence—Judge's charge—Excessive damages—New trial.*]—In an action under Lord Campbell's Act for the benefit of the father of a man who lost his life as alleged by the negligence of the defendants, evidence was given to shew that the father, who was about 70 years old, was unable to earn his own living; that the son, who was 26, had always lived with his father, and for many years had paid for his board and lodging; that for the 15 months previous to his death, he had paid nothing, because, having gone into business for himself, his father wished him to keep the money to put into the business; that when the son went into business, the father advanced him $700; that the sale of the son's business realised $1,100, of which the father got $400 on account of his advance. The trial Judge left it to the jury in general terms to estimate what, if any, pecuniary damage the father had sustained by the death of his son; and the jury found a verdict for $3,500:—*Held*, that the amount of the verdict shewed either that the charge was too general in its terms, or the jury misunderstood the principles upon which damages should be assessed in cases such as this, and, therefore, that there must be a new trial on the question of damages, and, as the evidence of negligence on the part of the defendants was not altogether satisfactory, and the finding of the jury on the question of the damages did not entitle their opinion on the question of negligence to much weight, there must be a new trial on this point as well.—2. That, as a claim for $300, the balance due the father upon his advance, had not been mentioned in the particulars delivered under the Act, and was not referred to either in the plaintiff's opening, the Judge's charge, or in any other part of the case, it was impossible to say that the jury in assessing the damages had included this item; therefore, even admitting this claim to be a proper element of damage in cases under the Act, it must be submitted to the consideration of another jury.—3. That, outside of the debt, there was sufficient evidence to go to the jury of a pecuniary loss to the father by the son's death. *Runciman* v. *Star Line S.S. Co.*, 35 N. B. R. 123.

Measure of—*Accident to person—Negligence of Crown's servants—Pecuniary benefit.*]—In the case of death resulting from negligence, and an action by the party entitled to launch the same under the provisions of R. S. N. S. 1900, c. 178, s. 5, the damage should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life.—2. Such party is not to be compensated for any pain or suffering arising from the loss of the deceased; or for the expenses of medical treatment of the deceased or for his burial expenses, or for family mourning. *Osborn* v. *Gillett*, L. R. 8 Ex. 88, distinguished. *McDonald* v. *R.*, 21 C. L. T. 581, 7 Ex. C. R. 216.

Measure of—*Breach of contract—Evidence—New trial.*]—In an action brought by the plaintiff to recover an amount claimed by him for work done and materials supplied in constructing a mill for the defendants, the defendants counterclaimed for damages arising from the defective performance of the work which the plaintiff was employed to do:—*Held*, that the defendants were entitled to damages suffered by reason of the loss of the use of the mill during the sawing season, but, as there was no evidence to fix the amount, and as damages were allowed to

which the defendants were not legally entitled, there must be a new trial:—*Held*, that the plaintiff was not liable for damages not in contemplation of the parties, or not being the immediate result of the breach of contract, such as additional cost of sawing, or logs sold at a loss. *Bruhm* v. *Ford*, 33 N. S. R. 323.

Negligence—*Injury — Impairment of prospects of marriage—Remoteness—Excessive damages.*]—In an action for negligence, impairment of the prospects of matrimony, in the case of a young woman, by reason of physical injuries, may be taken into consideration by the jury in estimating the damages.—In such a case of accident to a young woman of about 21 years of age, living with her father, but earning $6 a week as a stenographer, which accident resulted in the amputation of her left leg at the knee, paresis in a hand and arm, of which there might never be complete recovery, injury to her back, and a very serious shock to her nervous system:—*Held*, that a verdict of $5,500 damages was not so excessive as to necessitate a new trial. *Morin* v. *Ottawa Electric Ry. Co.*, 18 O. L. R. 269, 13 O. W. R. 850.

Negligence—Master and servant—Explosion of tea urn. *Richelieu & Ont. Nav. Co.* v. *Darman*, 3 E. L. R. 128.

Negligence—Master and servant — Injury sustained by workman—Dangerous machinery — Compensation — Deducting insurance moneys. *Cameron* v. *Royal Paper Mills*, 3 E. L. R. 35.

Negligence—Operating elevator. *Odell* v. *Windsor Hotel Co.*, 3 E. L. R. 82.

Negligence—Personal injuries — Assessment by jury—Quantum—Elements of damage—Appeal. *Hamilton* v. *Hamilton, Grimsby & Beamsville Electric Ry. Co.*, 9 O. W. R. 807.

Nervous shock — *Impact without outward injury—Railway—Findings of jury.*]—Action for damages for negligence. Plaintiffs (husband and wife) were being driven in an enclosed omnibus when crossing the tracks of the defendants; the omnibus was caught between the two parts of a freight train which was about to be coupled, when the driver of the omnibus was caught between the two sections of the train, and while considerable damage was done to the omnibus, neither of the plaintiffs suffered visible bodily injury, beyond a few slight bruises, but both complained of serious injury to their nervous systems as a result of fright:—*Held*, action should be dismissed as damages were result of mental shock only. *Henderson* v. *Canada Atlantic Ry. Co.*, 25 A. R. 437, and *Victorian Ry. Commissioners* v. *Coultas*, 13 App. Cas. 222, followed, but, in view of the unsatisfactory state of the law and the conflict in the decisions, no costs were allowed. *Geiger* v. *Grand Trunk Ry. Co.*, 5 O. W. R. 434, 6 O. W. R. 482, 10 O. L. R. 511.

Nervous shock — *Personal injuries — Damages not severable — Judgment—Appeal —Waiver.*]—The movable portion of a fence erected by the defendant fell upon the plaintiff while passing along the street, and caused injuries for which damages were claimed. The trial Judge assessed the damages at $25, and ordered judgment in favour of the plaintiff for that amount. The plaintiff's solicitor took an order for judgment for the amount awarded, taxed his costs, and immediately demanded payment from the defendant under threat that, if not paid, judgment would be entered, and execution issued. Subsequently the plaintiff appealed from the judgment, in so far as it restricted the damages awarded to external injuries suffered by the plaintiff, and refused to allow damages for shock consequent upon such external injuries:—*Held*, dismissing the appeal, that, in order to succeed, the plaintiff must have the whole judgment set aside, for errors alleged in the assessment of damages; that the case was not one in which the damages were severable; and that, if the trial Judge erred in not awarding greater damages, the only course open to the plaintiff was to appeal. *Flinn* v. *Keefe*, 37 N. S. R. 67.

Nervous shock—*Physical injury — Liability for.*]—Fear or nervous shock resulting in physical injury may render him who occasions it liable in an action for damages. Fear is not of itself a basis of an action for damages, because ordinarily it does not produce any physical injury, but if such injury results there is liability. *Victorian Railway Commissioners* v. *Coultas*, 13 App. Cas. 222, discussed. *Montreal St. Ry. Co.* v. *Walker*, 13 Que. K. B. 324.

Nuisance—*Exemplary damages — Evidence—Appeal.*] — Where there has been a manifest disturbance of enjoyment and violation of rights of ownership, *e.g.*, by the smoke, noise, and vibration caused by the operation of machinery on an adjoining property, the person so disturbed in his enjoyment is, even without proof of any precise amount of damages suffered, entitled to nominal or exemplary damages. — 2. Moreover, on a question of the application of damages, the Court of Appeal will not disturb the award of the Court below, in the absence of any special ground for doing so. *Montreal St. Ry. Co.* v. *Garceau*, 13 Que. K. B. 12.

Nuisance—*Injury to orchard by smoke —Value of fruit—Assessment of damages by trial Judge—Appeal—Principle of computation or allowance.*]—Action for damages for injury to plaintiff's orchard and land owing to noxious fumes and smoke emitted from defendant's smelter. The trial Judge gave judgment for plaintiffs. An appeal was dismissed. *Smith* v. *Consolidated*, 11 W. L. R. 488.

Personal injuries—*Pecuniary loss — Earning power of plaintiff—Pain and suffering.*]—In an action for damages for personal injuries sustained by plaintiff owing to alleged negligence, the jury awarded $30,000. Plaintiff was 37, strong, healthy, a mining expert earning $6,000 a year with a 5 years' engagement. The fact that the trial Judge, in his charge, spoke of $25,000 by way of illustration, and that he and plaintiff's counsel mentioned the amount claimed in the statement of claim, namely, $50,000, does not

affect the result. Appeal dismissed. *Bradenburg* v. *Ottawa* (1909), 14 O. W. R. 318, 19 O. L. R. 34.

Personal injuries—Quantum of damages—Injury to knee—Conflicting testimony as to permanent or temporary disability — Assessment of damages by jury—Refusal to disturb—Address of counsel to jury—Inflammatory remarks — Reference to amount claimed in action—Rejection of evidence—Rule 785—No substantial wrong or miscarriage—Judge's charge — Allowance or consideration of sums received by plaintiff from benefit and accident insurance. *Misner* v. *Toronto & York Radial Rw. Co.*, 11 O. W R. 1064.

Petition of right — *Provincial secretary refused to present petition to Lieutenant-Governor—Presentation of petition after issue of writ—Damages for breach of Crown Procedure Act, R. S. B. C., 1897, c. 57, s. 4, to be assessed by jury.*]—Plaintiff being refused a renewal of a license to cut and carry away timber from a tract of land by the Chief Commissioner of Lands and Works, prepared a petition of right setting forth the application and refusal and left it with the defendant Provincial Secretary for submission to the Lieutenant-Governor for his *fiat*, in accordance with s. 4 of the Crown Procedure Act of B. C. The defendant Provincial Secretary refused to submit the petition to the Lieutenant-Governor, and the plaintiff brought action claiming damages for the refusal to submit plaintiff's petition in accordance with said Act. Defendant before delivering his defence submitted the petition to the Lieutenant-Governor who refused his *fiat*. The trial Judge withdrew the case from the jury on the ground that there was no evidence to go to the jury:—*Held*, that the Crown Procedure Act, R. S. B. C., 1897, c. 57, s. 4, imposes an imperative duty upon the Provincial Secretary, to submit to the Lieutenant-Governor a petition left with him. The failure to do so within a reasonable time after presentation gives a right of action to recover damages not necessarily nominal and it is for the jury to say what damages, if any, followed therefrom. The Supreme Court of Canada ordered a new trial. Judgment of the Supreme Court of Canada, 39 S. C. R. 202, affirmed, judgments of the Supreme Court of B. C., 12 B. C. R. 476, 5 W. L. R. 203, and Morrison, J., at trial, discharged. *Norton* v. *Fulton*, C. R., [1908] A. C. 416.

Powers of Civil Courts—*Liability for damages — Assessment of as indemnity—Repressive or correctional power—Penalties or punishments—Appeal as to damages—Jury—Grounds of appeal.*]—Civil Courts, in adjudicating upon claims involving liability for damages, have no other power than to fix the sum which represents the injury suffered and to order the party liable to pay it to the party injured. They are not called upon in any way to exercise a repressive or correctional power by the infliction of penalties or punishments, which are of the competence of Criminal Courts.—2. Court of Review or of Appeal cannot modify the judgment of the Court of first instance as to the amount of damages in such actions except upon grounds mentioned in the Code of Procedure as grounds for the setting aside of the verdict of a jury. *French* v. *Hétu*, 17 Que. K. B. 429.

Public officer — *Notice before taking suit—Bad faith—C. C. P. 88.*]—No public officer can be sued for damages alleged to have been caused by him while acting in his official capacity, even if done in bad faith, unless a notice of suit one month before the writ was issued is given him. *Deschenes* v. *Julien*, 11 Que. P. R. 35.

Public work—*Injury to the person — Negligence—Aggravation of injury by unskilful treatment—Crown.*] — Where a person who is injured through the negligence of a servant of the Crown on a public work, voluntarily submits himself to unprofessional medical treatment, proper skilled treatment being available, and the natural results of the injury are aggravated by such unskilled or improper treatment, he is entitled to such damages as would, with proper treatment, have resulted from the injury, but not to damages resulting from the improper treatment he subjected himself to. *Vinet* v. *R.*, 25 C. L. T. 139, 9 Ex. C. R. 352.

Quasi delict—*Act resulting from error, but without malice—Purely moral prejudice.*] —An action in damages will be against a person who, through error and without malice, does an act which causes a prejudice to the injured party. *Lavallé* v. *Lefrevière*, 16 R. de J. 30.

Railway accident—*Nervous shock.*]—A railway company is liable, in an action by one injured in an accident while a passenger in the company's train, for damages and pecuniary loss consequent upon a fright resulting in a shock to the nervous system causing physical injury, if the fright was the result of the accident, and was reasonable and natural. *Kirkpatrick* v. *Can. Pac. Rw. Co.*, 35 N. B. R. 598.

Reduction—*Consent—Costs.*] — The defendant company, instead of paying to the plaintiff the amount of damages sustained by a fire in her bakery, undertook to repair the damage, and on account of the faulty manner in which the work was carried out the plaintiff sued for the amount of the damages caused by the fire, and also for damages in respect of loss occasioned by reason of being unable to carry on the business. The plaintiff's chief witness stated that the injury to the business was $3,000, and the jury returned a verdict for her for that amount. On appeal the full Court, being of opinion that the amount of the damages was excessive, with the plaintiff's consent, reduced it to $1,000. Precise directions should have been given to the jury as to what they should have taken into account in estimating the damages, and, as the case had been allowed to go to the jury without such directions, without objection by the defendants' counsel and without contradiction of the statement as to the damage being $3,000, no costs of the appeal were allowed. *Murray* v. *Royal Ins. Co.*, 11 B. C. R. 212.

Reduction—*Consent—New trial.*]—*Held* following *Watt* v. *Watt*, [1905] A. C. 115, that the Court has no jurisdiction, without

the defendant's consent, to make a new trial dependent upon the consent of the plaintiff to reduce the damages. *Barter* v. *Sprague's Falls Mfg. Co.*, 3 E. L. R. 353, 38 N. B. R. 207.

Reduction—*Consent—New Trial as to quantum of damages only.*]—Court of Appeal pronounced judgment (5 O. W. R. 572), directing a new trial unless plaintiff consented to reduce the amount of the judgment recovered by plaintiff at the trial to $4,000, holding the amount of damages excessive. The certificate of this judgment not having issued, the Court reviewed the case and having regard to Con. Rule 786 ordered a new trial confined to the question of quantum of damages only. *Watt* v. *Watt*, [1905] A. C. 115, followed, which held the Court had no jurisdiction to order new trial (without defendant's consent), depending upon the plaintiff reducing the damages recovered. *Hockley* v. *Grand Trunk Rw. Co.*, 6 O. W. R. 57, 10 O. L. R. 363.

Reference to official referee—*Report — Appeal therefrom — Question of fact — Question of law — Further directions — Costs.*]—Riddell, J. (12 O. W. R. 1243), ordered a reference to determine damages.—Official Referee awarded defendants damages in respect of certain apples shipped to Niagara Falls and Glasgow, and refused to award plaintiff damages for defendants' failure to supply funds.—Falconbridge, C.J.K.B. (16 O. W. R. 639, 1 O. W. N. 1052), confirmed above report, as Official Referee's findings were on questions of fact, and it had not been shewn that he had gone wrong in law. —Divisional Court allowed the appeal in part and varied the report of the Official Referee by deducting from the amount of damages allowed for the Glasgow shipment of 4,029 barrels, 25 cents per barrel, amounting to $1,007.25, and by reducing the damages allowed for the New York shipment to $2,025.50. In other respects appeal dismissed. No costs of appeal. By consent of counsel, judgment on further directions for the plaintiff for $2,607 and for the defendants for counterclaim for $11,403.35. No costs of action or counterclaim. *Lang* v. *Williams* (1910), 17 O. W. R. 316, 2 O. W. N. 185.

Remoteness—*False representation—Costs of action brought on faith of.*]—The plaintiff, on the representation of the defendant, then president of the Accident and Guarantee Co. of Canada, that he was appointed manager of the company, resigned his position at the Canada Life Assurance Co. Later on, however, the accident company declined to ratify the contract made by their president. An action for salary brought by the plaintiff against the company was dismissed. Now the plaintiff sought to recover from the defendant, among other amounts, the sum of $225, costs of that action. The defendant pleaded by inscription in law that there was no *lien de droit* between him and the plaintiff, these damages being indirect and too remote: —*Held*, that the claim of the plaintiff for recoupment of the costs of the proceedings was legally impossible of assertion as resulting from the alleged united false representations of the defendant and his co-directors. *Stewart* v. *Nelson*, 7 Que. P. R. 472.

Sale of goods—Breach of warranty—Loss of profits. *Thompson* v. *Corbin*, 3 E. L. R. 111.

Sale of goods—*Non-delivery—Measure of damages.*]—The measure of damages for non-delivery of goods sold is ascertained by the difference between the contract price and the market or current price thereof at the time the breach of contract takes place. In a case of a sale of hay to be delivered between December and May following, the seller having given notice in February that he would make no further delivery, and the buyer having written in answer that he would make up his claim and send it in the near future, the date of the breach is in February, and the damages, if any, are to be determined by the price current of hay in that month at the place of delivery. *McGillis* v. *Huot*, 29 Que. S. C. 350.

Sale of horse — *Breach of warranty — Misrepresentation—Costs of uselessly defending suit.*]—The plaintiffs, according to the findings of fact, had been induced by the misrepresentations and fraud of the defendants to purchase a horse for $1,200 and to give the defendants their promissory notes therefor, but such notes had been indorsed for value to the Bank of Hamilton before maturity, so that the plaintiffs had no defence to the bank's claim on the notes, and they had ample means of informing themselves on that point. They, however, defended the bank's suit, but unsuccessfully:—*Held*, that in this action, which was brought to recover damages for the defendants' misrepresentations, the plaintiffs could not add their costs of needlessly defending the bank's suit to their other damages, but must be limited to the amount due on the promissory notes, together with the costs of the present action only. *Godwin* v. *Francis*, L. R. 5 C. P. at pp. 305 and 307, and *Roach* v. *Thompson*, 4 C. & P. 194, followed. *Morwick* v. *Walton*, 18 Man. L. R. 245, 9 W. L. R. 389.

Severance and distribution — *Joint and several trespasses — Several defendants guilty of different acts — Apportionment of damages—Rules 219, 220, 257—Costs.*]—In an action for damages for trespassing upon the plaintiffs' lands and cutting and removing timber therefrom, there were 4 defendants; W. T. was the principal, and the other 3 were workmen under him. In addition, there were 6 other workmen engaged in cutting and removing the timber, making 10 persons in all. The trial Judge assessed the plaintiff's damages at $1,000, and gave judgment for that sum against all the defendants. Upon appeal by the defendants, it was contended that the damages against the defendants other than W. T. should be restricted to such as were actually occasioned by them, that is to say, to the value of the trees cut by them. The commission of the wrong extended over a period of 8 days; two of the defendants other than W. T. worked for the whole 8 days, but the third, K., worked for 2 days only:—*Held*, that to entitle the plaintiffs to recover judgment against K. and the other defendants for joint trespasses, the plaintiffs must prove that all took part in them as wrong-doers, and the liability of K. must be limited to those acts in the commission of which he joined. The damages

against all for a joint trespass would, therefore, be limited to those for which all were jointly liable, namely, the 2 days in which K., together with the other defendants, jointly committed acts of trespass. And the plaintiffs were entitled to a separate judgment against the defendants other than K. for the damages caused during the time in which they were wrongfully cutting the plaintiffs' trees. There was no evidence upon which the Court could arrive at the amount of the damages for which K. was liable with the others; but K. had, by paying into Court along with the others the sum of $91 to answer the plaintiffs' damages, admitted a liability to that amount. There should, therefore, be judgment against K. for the amount paid into Court; and judgment against the other defendants for $909, being the balance of the verdict, and costs of suit; the defendant K. to have his costs in the Court below subsequent to the payment into Court; no costs of appeal.—*O'Keefe* v. *Walsh*, [1903] 2 I. R. 681, followed.—Rules 219, 220, and 257 authorise the severance and distribution of the damages according to the respective liabilities of the defendants.—Judgment of Meredith, J., varied. *Stewart* v. *Teskee* (1910), 15 W. L. R. 604, 20 Man. L. R. 167.

Special machine manufactured by defendants for plaintiffs — *Contract — Warranty—Breach.*]—Action for damages for breach of warranty given by defendants with a special hammer manufactured for plaintiffs. The trial Judge gave $400 damages. The Court of Appeal held it to be a pure question of fact, and as there was ample evidence to sustain the findings of trial Judge, an appeal was dismissed. *Can. Fairbanks Co.* v. *London Machine Tool Co.*, 13 O. W. R. 133.

Street railway—*Negligence — Married woman—Personal injury—Damages awarded husband—Excessive amount—New trial.*] — The female plaintiff, 62 years of age, wife of the male plaintiff, who was 70 years of age, in attempting to alight from one of the defendants' cars, was through the defendants' negligence thrown to the ground and seriously injured. She was in the doctor's hands for several months, and her arm and hand which were injured were not likely to be as useful to her as before the accident. The jury awarded the wife $1,000 and the husband $1,200:—*Held*, that the amount awarded the wife could not be deemed to be unreasonable; but, as regarded the husband, after due allowance for the medical expenses and for nursing and attendance, and considering the age of the parties, the amount awarded him was excessive, and a new assessment was ordered, unless an agreement was come to between the parties, that the damages should be reduced to $400. *Clarke* v. *London St. Rw. Co.*, 12 O. L. R. 279, 8 O. W. R. 185.

Street railway—Personal injuries—Excessive damages—New trial. *Witty* v. *London St. Rw. Co.*, 1 O. W. R. 288, 2 O. W. R. 578.

Timber—Quantum — Master's report — Appeal—Absence of order of reference — Order made *nunc pro tunc*—Timber cut off lands of plaintiff. *Carter* v. *Can. Pac. Rw. Co.*, 9 O. W. R. 690.

Tort — *Jury — Misdirection.*]—In an action for damages for tort tried before a jury, the verdict will not be set aside on the ground of misdirection by the Judge, because he told them they might if they chose allow the full amount of the loss which the plaintiff contended he had sustained, or the amount which, from actuarial tables, would be required to yield an annuity equivalent to and representing the full loss. *Sadlier* v. *Grand Trunk Rw. Co.*, 28 Que. S. C. 501.

Trespass—*Wilful acts—Measure of damages.*]—The defendant company entered upon land and cut down trees and removed gravel therefrom, without giving the notice required by statute of their intention to take the property. The plaintiffs, the owners, claimed in this action the amount of an award made by arbitrators, or, in the alternative, damages for trespass. The claim on the award having been dismissed, on the ground that the award was void for want of a proper submission, a new trial was ordered as to the amount of damages for the trespass. See 38 N. S. R. 80 and 37 N. S. R. 134:—*Held*, as the trespasses were committed in wilful disregard of the plaintiffs' right, and were continued in defiance of repeated protests of the plaintiffs, for the pecuniary benefit of the defendants, that the measure of damages, as to part of the land excavated, was its value for the purposes for which it was used by the wrongdoers, and as to the remaining land the measure of damages was the diminution in value to the plaintiffs by reason of the wrongful acts of the defendants. *McIsaac* v. *Inverness Rw., etc., Co.*, 40 N. S. R. 579.

Trespass — *"Wilful" acts—Measure of damages—Judgment.*]—In an action of trespass for taking coal from a mine the judgment declared that the plaintiffs were entitled to recover damages from the defendants for and in respect of the wrongful and wilful trespass and conversion complained of in the plaintiffs' statement of claim:—*Held*, that "wilful" was not intended as an adjudication that the trespasses were wilful in the sense that would render the defendants liable to have damages assessed against them on the sterner rule; and, the defendants having entered the mine under a mistaken idea as to their rights, the milder rule was applied. The measure of damages should be the value of the coal at the mouth of the mine, less the cost of digging (hewing) it and transporting it there as a merchantable article. *Fleming* v. *McNeil Co.*, 23 C. L. T. 312.

Warranty — *Breach—Manufacture and sale of machine—Defects—Loss of profits — Property not passing.*]—The plaintiffs agreed to manufacture a goring loom fit for certain special work required by the defendants, and to deliver it by a certain time. The machine was not delivered until after the time fixed, and when delivered did not have certain fittings which were necessary for its proper working, and there were certain defects in it which the defendants, after applying to the plaintiffs to remedy them, had to rectify themselves. In an action for the price of the loom:—*Held*, that the defendants should be allowed the sums paid in supplying the missing portions of the machine and for the services of

an expert to put it in working order; that, notwithstanding that the property in the machine remained in the plaintiffs until paid for, the plaintiffs never had supplied a loom properly constructed to do the work required of it, and to do which the plaintiffs well knew the machine had been ordered; that there was a warranty that it should be fit for the purpose; that the defendants were prevented from earning the profits they would have earned if the loom had been complete; and that, under the circumstances, the plaintiffs were liable to make such profit good. *Crompton & Knowles Loom Works* v. *Hoffman*, 23 C. L. T. 188, 5 O. L. R. 554, 1 O. W. R. 717, 2 O. W. R. 273.

Wrongful distress—*Seizure of goods*—Replevin—Measure of damages. *Lee* v. *Ianson* (1910), 1 O. W. N. 586.

DANGEROUS MACHINERY.

See MASTER AND SERVANT—NEGLIGENCE.

DAYS OF GRACE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

DEAD LETTER.

See BAILMENT.

DEATH.

Presumption—Seven years' absence — Declaration under s. 148 (3) of Insurance Act — Evidence — Statutory declarations — Hearsay—Information and belief—Presumption not established — Order directing issue. *Re Dancey and Ancient Order of United Workmen*, 11 O. W. R. 833, 12 O. W. R. 417.

Presumption—*Seven years' absence — Insurance Act, s. 148 (3) — Evidence.*] — In order to establish the presumption of the death of the claimant's husband, on account of his not having been heard of for seven years, it was proved that in May, 1900, he had gone in a sail-boat to an island adjacent to where he lived to procure some lumber to be used in his business, and that while on this island a violent storm having arisen, he had telephoned his wife that he would probably be detained. He did not, however, return, and his wife had not heard of him since. The boat was subsequently found with the sail set and having some lumber and his cap in it. On the following morning he was supposed to have been seen at the railway station, but the person who thought he saw him would not swear to his identity. It was said that a person who had lost some chairs suspected him of having stolen them, but, it did not appear that he knew that he was suspected, while it appears that the detectives suspected some one else. In 1901 a letter was received from a favourite aunt in England, with whom he was in the habit of corresponding, asking about him, and stating that she had not heard from him for some time past. On the case coming before the Court of Appeal, the giving of judgment was stated, at the claimant's request, to enable her to furnish an affidavit from the aunt verifying her letter:—*Held*, affirming the judgment of a Divisional Court, 12 O. W. R. 153, reversing the judgment of Riddell, J., 11 O. W. R. 1078, that there was sufficient evidence to raise the presumption of death, even without the affidavit subsequently furnished.—[Meredith, J.A., dissented on the question of the need of the further evidence.] *Re Ancient Order of United Workmen and Marshall*, 18 O. L. R. 129, 13 O. W. R. 306.

Presumption of death of absentee—*Money in Court—Jurisdiction of Surrogate Court — Letters of administration.*] — The Surrogate Court alone has jurisdiction to determine whether an absentee is dead, and whether he died intestate, and if so to appoint an administrator. — *In re Jackson*, [1907], 2 Ch. 354, followed. *Re Coots; Re Dwyer; Re Hocking* (1910), 17 O. W. R. 727, 1 O. W. N. 807, 889, 2 O. W. N. 380.

Proof of—*Acte de procuration — Civil Code, Art. 51.*] — Proof of death cannot be made by means of the declaration thereof made in an act of procuration, but only in the manner provided by law, i.e., by acts of the civil state, or pursuant to the provisions of Art. 51, C. C. *Lefebvre-Descoteaux* v. *Lefebvre-Descoteaux*, 8 Que. P. R. 291.

DEATH OF JUDGE.

See TRIAL.

DEBENTURES.

Company Debentures. *See* COMPANY.

Company's mortgage bonds—*Interest —Action for—Evidence.*]—An action for interest upon a company's mortgage bonds may succeed upon production of the coupons, without the bonds from which they have been detached. *Connolly* v. *Montreal Park and Island Rw. Co.*, 20 Que. S. C. 1.

Illegal issue—*Innocent holder — Liability of school trustees—Negligence — Finding of jury—Charge.*]—A debenture of the defendants payable to bearer sealed with their corporate seal and signed by their chairman and secretary, was allowed to get into circulation without the authority or knowledge of the defendants, and without their receiving any value therefor. It was finally purchased by the plaintiff before maturity, who took it in good faith and gave full market value for it. In an action brought upon two of the interest coupons attached to the debenture, the trial Judge asked the jury the two following questions (among others), which were answered in the affirmative: "Did the bond come into the hands of the plaintiff as an innocent holder for value through the carelessness and neglect of the defendants, or

those of their officers whose duty it was to have the bonds properly executed and issued, and in whose hands or custody the bonds should be detained until delivered to *bona fide* purchasers?" "Do you find that the board of school trustees, or their officers, were guilty of such negligence in connection with this bond, as that in your opinion it would be inequitable and unjust that the defendants should be permitted as against the plaintiff to set up a defence that the bond was not duty executed, or the issue thereof authorised by the board?" A verdict was thereupon entered for the plaintiff:—*Held*, that the verdict was rightly so entered. 60 V. c. 24, s. 159, in reference to the trial Judge unnecessarily expressing his own opinion upon the facts, commented upon. *Robinson* v. *St. John School Trustees*, 34 N. B. R. 503.

Municipal Debentures. *See* MUNICIPAL CORPORATIONS.

Railway Debentures. *See* RAILWAY.

DEBTOR AND CREDITOR.

Abandonment of property — *Insolvent's immovable property—Can it be sold at the suit of a creditor?—Costs—C. P. 549, 863, 870, 871.*]—After his debtor has made an abandonment of his estate, a creditor cannot bring the debtor's immovable property to sale, and the curator, acting in his quality as such, may oppose such sale, and this even when the seizure of the immovables was effected before the abandonment.—Costs incurred by the seizure of immovable property of an insolvent prior to the abandonment of his estate are privileged. *Re Taylor & Wilks* (1910), 11 Que. P. R. 270.

Absent debtor attachment set aside as (1) debtor only temporarily absent; (2) the affidavit on which attachment founded was insufficient in not shewing whether attachment issued for goods bargained and sold or sold and delivered, or how much due in either case; (3) the affidavit should not have been sworn before the deputy prothonotary. *Hewitt* v. *Gray*, 7 E. L. R. 355.

Acknowledgement of debt—*Promise to pay—Particulars—Appeal, C. C. P. 46, 123.*]—(Lavergne, J., diss.) The Court of Appeals will not interfere in a matter respecting the discipline of one of the lower Courts, and will not grant permission for leave to appeal from a judgment of the Superior Court, which refused to allow a motion for particulars as to a general allegation of acknowledgment of indebtedness and a promise of payment. *Tranchemontagne* v. *Legare*, 11 Que. P. R. 30.

Agent—*Declaration by agent of principal's indebtedness.*]—The agent admitted an indebtedness of at least $140 to the absent debtor. Judgment entered and execution applied for. Agent now seeks to change declaration, denying any indebtedness. As a *prima facie* case not made out, application refused. *Fuller* v. *Webber*, 7 E. L. R. 1.

Assignment for benefit of creditors —*Mechanics' lien—Lien registered after assignment.*]—The assignment for benefit of creditors was registered on the 20th January. The mechanics' lien in question was not registered until the 23rd January. There was nothing, therefore, for the lien to attach to. Creditor not allowed to rank for costs in obtaining judgment in connection with this mechanics' lien proceedings. *Re Archibald*, 6 E. L. R. 454.

Assignment for benefit of creditors —*Right of assignee to possession of goods as against landlord — Unlawful detention of goods by lessors.*]—Before any rent was due, defendant seized the goods of B. for three months' rent and took possession. This was the immediate cause of B. making an assignment to plaintiff. At first, defendant refused to allow plaintiff to take possession, but, relenting, plaintiff entered and on the same day, defendant again seized for one month's rent in advance, and three months' accelerated rent:—*Held*, that an official assignee is not bound to accept a leasehold estate included in the assignment.—*Held*, further, that defendant's seizure for four months' rent is not effective as against plaintiff, but he has a claim for one month's rent. Plaintiff given judgment for value of goods less one month's rent. *Greenwell* v. *McKay*, 7 E. L. R. 85.

Capias—*Arrest—Fraud upon creditors—Secretion of property — Motion to quash capias.*] — Capias quashed as no debt due plaintiff who has failed to prove that defendant has secreted his property or intended to do so, or that defendant was about to leave the country with intent to defraud plaintiff. *Eliasaph* v. *David*, 6 E. L. R. 252.

Collection Act, N. S. s. 28—*Absence of finding of fraud — Appeal by defendant from order for payment by instalments—No cross-appeal by plaintiff—Right of plaintiff on appeal to set up fraud—Right of wife to employ husband—Liability to support family before paying creditors.*]—Defendant has been ordered to pay plaintiff $75 per month on plaintiff's judgment. On appeal:—*Held*, that as defendant has no prospective income order must be set aside. Defendant to execute an assignment to plaintiff under above section. *Chipman* v. *Durlin*, 7 E. L. R. 443.

Debtor committed to gaol—*Application for release refused.*]—Judgment was recovered against two defendants, and both were summoned for examination under N. S. Collection Act. Both appeared and an order to pay by instalments was made against one. The other sought an adjournment, and further costs were incurred. Later order was made committing defendant to gaol for 3 months unless he sooner paid the debt and extra costs. On application under Liability of Subject Act, R. S. N. S. (1900), c. 181, for release of debtor, Meagher, J., *held*, that the delay and the severance of the proceedings were due to debtor's application therefor and in his own interests, and the costs thereof were rightly charged against him. Discharge of debtor from custody refused. *Re White* (1910), 8 E. L. R. 543.

Equitable assignment of debt—*Order to pay moneys—Novation.*]—One T., a contractor, gave to his sub-contractor, the plain-

tiff, the following order on the defendant, the owner of the property: "Pay F. (the plaintiff) $705 and charge to my account on building Lucknow St." Defendant said, "It would be all right." The Supreme Court of Canada held that there was a novation and defendant liable. It was also a good equitable assignment. Appeal allowed, and judgment of trial Judge in favour of plaintiff restored. *Farquhar* v. *Zwicker*, 6 E. L. R. 75.

Execution—*Commitment of debtor — Irregularity—Discharge — Examiner — R. S. N. S. c. 182, s. 29.*]—Proceeding on behalf of prisoner, who was confined as a judgment debtor, for his discharge:—*Held*, that subsection 4 above requires execution to be directed to the sheriff. As it was not in this case, prisoner discharged. *In re Angus Macdonald*, 7 E. L. R. 92.

Interrogatories upon articulated facts—*Must be clear and precise — C. P. 365.*]—*Held*, an articulated fact reading as follows: "If you don't recognise to owe the said amount, state how much you recognise to owe," is irregular and contrary to Art. 365 C. P. *Comet Motor Co.* v. *Dom. Mutual Fire Ins. Co.* (1910), 11 Que. P. R. 297.

Judgment—*Execution—Arrest of debtor —Discharge—Statute of Limitations —Effect of execution in keeping judgment alive—R. S. N. S. c. 167, s. 22.*]—Judgment recovered on October 11, 1888. Execution issued thereunder on 3rd September, 1890, under which defendant was arrested and imprisoned, but two days later was discharged under Judgment Debtor's Act. Nothing further was done under judgment until 26th November, 1908, except the issue of execution, when defendant was summoned to appear for examination as a judgment debtor:—*Held*, that the issuing of the execution did not keep the judgment alive under sec. 22 above. *Boak* v. *Fleming*, 6 E. L. R. 503.

Judgment—*Refusal by commissioner to commit debtor—Circumstances shewing debtor's ability to pay — Lack of income—Debt for board.*]—Debtor, a bankrupt, owed 49 weeks' board. His son, for whom he worked, had previously paid his father's board. As it was a continuous and increasing liability it was not beyond doubt that there was no reasonable expectation of paying. Committal refused. *McKenzie* v. *Curry*, 7 E. L. R. 235.

Partnership debts assumed by new company.]—This action was for goods sold and delivered to Herold & Kusterman, carrying on business as The Ontario Seed Co., which debt was assumed, it was alleged, by the defendant company, on its incorporation as successor to the former company. At the trial judgment was given for plaintiff for $1,621.20, with interest on $1,574.32 from November 29, 1909, and costs:—*Held*, that the defendant company had assumed the debts of the old concern on incorporation and had promised to pay plaintiffs, and that plaintiffs had by letter elected to look to defendant company for their pay. Judgment of Falconbridge, C.J.K.B., affirmed. *Stecker Co.* v. *Ont. Seed Co.* (1910), 15 O. W. R. 374, 20 O. L. R. 359.

Petition by imprisoned debtor for allowance—*Reasons for imprisonment—C. P. 833, 834, 843, 885, 886, 887, 888.*]—A person imprisoned by virtue of Arts. 833 and 834 C. P. has alone the right to demand the allowance provided for by Art. 834 C. P.; a person condemned to imprisonment for fraud, after his statement of assets and liabilities has been contested, according to the provisions of Arts. 885 to 888 C. P., has no right to such allowance. *Desbiens* v. *Desmarteau & Cabana*, 16 R. de J. 224.

DECEIT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES — CONTRACT — PRINCIPAL AND AGENT.

DECLARATION.

See ELECTIONS—PLEADING.

DECLARATION OF TRUST.

See PARTNERSHIP—TRUSTS AND TRUSTEES.

DECLARATORY JUDGMENT.

See JUDGMENT.

DECLARATORY ORDER.

See DEATH.

DEDICATION.

See CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—RAILWAY—WAY.

DEED.

Absolute conveyance—*Cutting down to mortgage—Evidence—Redemption.*]—Land of the plaintiff worth $1,500, subject to a mortgage for $900, and other charges for $300, was conveyed to the defendant in consideration of his paying $140 due for instalments under the mortgage, for the recovery of which an action had been brought. The costs of the action were paid by the plaintiff. The Court, finding under the evidence that the deed, though absolute in form, was intended as a mortgage, allowed the plaintiff to redeem. *Beaton* v. *Wilbur*, 3 N. B. Eq. 309, 1 E. L. R. 472.

Absolute conveyance—*Cutting down to mortgage as against devisee of grantee — Abandonment of right of redemption.*]—Action against widow and devisees of deceased for declaration that a deed was intended only as security and for redemption. Plaintiff declared entitled to a deed. *Whitlow* v. *Stimson*, 1 W. L. R. 12.

Absolute conveyance of land—Collateral security—Redemption — Waiver—Counsel—Mistake at trial. *Sherlock* v. *Wallace*, 1 O. W. R. 54, 393.

Absolute in form—*Only mortgage in effect—Notice—Parol evidence—Admissibility of, on question of mortgage or no mortgage.*]—Where a tenant is in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor. This equity of the tenant extends not only to interests connected with his tenancy, but also to interests under collateral agreements. The principle is the same in both classes of cases, that the possession of the tenant is notice that he has some interest in the land, and a purchaser having notice of that fact is bound to inquire what that interest is. But, a purchaser is not bound to attend to vague rumours, or to statements by mere strangers. A notice to be binding must proceed from some person interested in the property. B., the owner of land in West Canada, under a contract of sale from the Chancellor and scholars of King's College, being indebted to T. & Co., induced P. to assume the debt, and to secure him from any loss in consequence of such assumption, by deed poll endorsed on his original contract of sale, absolutely assigned the land to P. Up to the time of this assignment, B. himself had never been in the actual possession of the land, his father having managed the same as his agent. P. afterwards, in satisfaction of certain debts due by him, assigned the land conveyed to him by B., with other property, to G. This assignment was also endorsed on the original contract of sale. Prior to the execution of this assignment, G. made some inquiries about the ownership of the property, but it did not appear that he received any information that B. was the owner. In a suit by B. against P. and G. for redemption:—*Held*, upon appeal (affirming the decree of the Court of Error and Appeal in Canada).—First, that under the circumstances, the transaction between B. and P., although in form an absolute assignment and sale, was in effect a mortgage only. Second, that as G. had acted with proper *bona fides*, taking the assignment from a party who had the original contract of sale in his possession, and who had taken an absolute assignment of that contract, he had no notice, actual or constructive, of B.'s title.—*Semble*, where the receipt of the consideration-money is acknowledged in the body of the deed, it is not the custom in Canada to have an additional acknowledgment endorsed on the deed. Judgment of the Court of Error and Appeal for Upper Canada (5 Grant 1) and of the Court of Chancery for Upper Canada (1 Grant 459) affirmed. *Greenshields* v. *Barnhart* (1853), C. R. 2, A. C. 91.

Absolute in form—*Parol evidence — Admissibility of, on question of mortgage or no mortgage.*]—A. contracted for the grant of certain lots of land from the Government in Upper Canada, and paid part of the purchase-money, and being indebted to B., he assigned by deed his interest in those plots to B. in consideration of the sum of £100. B. took possession of the lots, and afterwards obtained a grant of them by Letters Patent from the Crown in fee with the privity of A. A. subsequently became bankrupt, and B. was appointed assignee to his estate. No mention was made of any claim on the part of A. for right to redeem, or interest in the lots, in his affidavit of debts and assets, nor was any claim then made by him or his creditors. B. remained in possession until his death, and the property having greatly increased in value, A. procured the appointment of a new assignee of his estate, who filed a bill against the devisee of B. for redemption of the lots in question, upon the ground that the original transaction was one of mortgage and not of absolute sale. The original deed of arrangement was lost, and no evidence of its contents could be produced, except a memorandum of account between the parties, made by the solicitor who acted for A. and B., upon which the assignment in the deed was based. Parol evidence was admitted to prove the nature and terms of the transaction, but the Court of Error and Appeal in Upper Canada dismissed the bill. Such decision affirmed on appeal by the Judicial Committee. *Mathews* v. *Holmes* (1855), C. R. 2 A. C. 230.

Acknowledgment—*Justice of the Peace — Territorial jurisdiction — Execution and delivery of deed.*]—A justice of the peace has no power to take an acknowledgment of a deed out of the county for which he is appointed a justice, and an acknowledgment stating that it was taken before W. E., "one of Her Majesty's justices in and for the county of V.," without anything further to shew that it was taken in the county, is bad: and an acknowledgment that the grantor "signed and sealed the within instrument," without stating that it was delivered or executed, is bad. *Tobique Salmon Club* v. *McDonald*, 36 N. B. R. 589.

Action for possession — *Evidence of possession.*]—Action for possession of a certain lot:—*Held*, upon the evidence, that defendants have recognised plaintiff's title. There being no pretence of adverse possession by defendants plaintiff is entitled to recover possession with nominal damages. *Laffin* v. *Elsworth*, 7 E. L. R. 89.

Acts of enjoyment can only be made use of to explain the terms of a grant, supposing them to be ambiguous. *Chandler* v. *Atty.-Genl. for Que.* (1835), C. R. 3 A. C. 1, 3 R. de J. 371, 2 R. J. R. Que. 304.

Administrator's deed—*License to sell —Proof of title — Registration—Trespass—Acts of possession.*]—An administrator's deed duly proved and registered under 3 V. c. 61, s. 56, reciting all the facts required by the statute, and having the affidavit of the administrator indorsed thereon that the premises mentioned in the deed had been duly advertised and sold according to law, is not sufficient proof of title in one claiming thereunder without proof of the license to sell.—A registered deed of lands held adversely to the legal owner at the time the deal was given will not inure to give title or possession to the grantee so as to enable him to maintain trespass against the person in actual possession, although there is evidence of isolated acts of ownership on the land by the grantee after the deed was given. *Johnson* v. *Calnan*, 3 E. L. R. 65, 38 N. B. R. 52.

Alteration after execution—*Addition of provision for interest — Inscription en faux.*] — The defendant inscribed *en faux* against the copy of a deed of donation filed in the suit and also against the original minute, alleging that the words "*avec intérêt légal*" had been inserted illegally after the execution of the deed. The terms of the deed had been discussed between the parties during two days, and there was a strong presumption that the subject of interest on the instalments payable under the deed had not been overlooked. In the original minute the words "*avec intérêt légal*" were added at the end of a line where there was barely space to crowd them in and moreover these words did not appear in a copy made by the notary a few days after the execution of the deed: — *Held*, that, under the circumstances and the facts apparent on the face of the original minute, the words "*avec intérêt légal*" constitute an addition (*ajouté*), which is null under the law regarding the execution of notarial instruments unless it be clearly identified or confirmed by the contracting parties; R. S. Q. Art. 3648. *Nadon* v. *Auclair*, 9 Que. Q. B. 462.

Annulment for fraud as against creditors—*Effect as between parties.*] — A deed which is annulled is made in fraud of creditors, is annulled only as against creditors; as to those who were parties to it, it continues to subsist. *Gaudet* v. *Tremblay*, 35 Que. S. C. 303.

Condition subsequent — *Breach—Forfeiture—Assignment by vendor before revesting — Validity.*]—On the grant of a fee simple defeasible on breach of a condition, no estate is left in the grantor, but only a possibility of reverter, and therefore, before breach there is nothing capable of assignment. After breach, where the deed does not provide for *ipso facto* forfeiture, the fee does not revest automatically, and until revesting by suit or otherwise there is nothing capable of assignment. Land was conveyed subject to certain conditions to be performed by the purchasers, and, in default of the performance of such conditions, the purchasers were to hold the land in trust for the grantor, and reconvey to him, notwithstanding that any prior breach may have been waived. The conditions were not performed. In an action by the assignee under seal of the vendor for a declaration that the purchasers held the land in trust for him, and for an order for the conveyance thereof to him:—*Held*, that after the conveyance there was no estate left in the grantor, but only a possibility of reverter, which was not assignable, and no action lay. *Clarke* v. *Vancouver*, 10 B. C. R. 31.

Construction—*Ambiguity — Discharge of debtor—Contract — Illegal consideration —Right of action.*]—Where the language of an instrument is ambiguous or obscure, the intention of the parties should be ascertained by consideration of the circumstances attending the execution of the agreement—A deed of settlement between B. and a bank declared that he owed the bank $4,731.61 for interest on an advance in respect to a lottery scheme, and a further sum of $18,762.02 for advances on an account for the purchase of stock, two notes being given for these amounts, respectively, and the shares of stock being pledged as security for the larger note only. Subsequently the directors of the bank passed a resolution authorising the discharge of B. on payment of $15,000 by one V., "*jusqu' a concurrence de la dite somme de* $15,000," and the transfer of the shares to V. This resolution was followed by a deed of compromise, V. paying the $15,000, and obtaining a transfer of the shares; and it was thereby declared that by the transaction B. was discharged in so far as concerned the bank's advances on the stock account "*vis-à-vis la banque des advances qu-elle lui a faites du chef susdit mentionées en un acte de réglement*," etc., the resolution being annexed and the deed of settlement referred to for imputation of the payment, and V. was to become creditor of B. under conditions mentioned "*jusqu' à concurrence de* $15,000." In an action by D., to whom the notes held by the bank were assigned: — *Held*, reversing the judgment appealed from, that the effect of the deed of compromise was to discharge B. merely to the extent of the $15,000 on account of the larger note; and further, affirming the judgment appealed from, that no action could lie upon the smaller note, as it represented interest on a claim in relation to a contract of an illegal nature *L'Association St. Jean Baptiste* v. *Brault*, 30 S. C. R. 598, followed. *Deserres* v. *Brault*, 26 C. L. T. 848, 37 S. C. R. 613.

Construction—*Contradictory description —Falsa demonstratio non nocet.*]—The description in a deed described the land by metes and bounds which included the lot in question, and these words were added, "being the same land and premises . . . sold and conveyed by F. to P. The conveyance from F. to P. excepted this 'lot.'"—*Held*, the description by metes and bounds would govern, and the title to the "lot" would pass under the deed. *Chute* v. *Adney* (1908), 39 N. B. R. 113, 6 E. L. R. 244.

Construction—*Erroneous description — Latent ambiguity — Evidence — Mortgage—Power of sale—Assignment.*]—In a deed from T. H. to S. the lands were described as beginning at a stake standing on the west side of the highway road, being 6.86 chains at right angles from T. H.'s south line, thence north 84° 45′ west 25 chains to a cedar post standing on Lenihan's east line, thence north 5° 45′ east along said line 6.86 chains to T. H's *south* line, thence south 84° 45′ east along said line to west side of said highway road, thence southerly along west side of said road to the place of beginning, containing 20 acres more or less. The description as it stood could not be applied to the land, and evidence was admitted as to the location of the stake and post and of a former survey:—*Held*, on the evidence, that the words T. H.'s "*south* line" in the description, intended to describe the northern boundary of the lot, were an error, and the lot bounded on the north by T. H.'s north line would pass under the deed.—*Semble*, that the assignment of a mortgage containing a power of sale to be exercised by the mortgagee and assigns, transfers the power of sale unless it is expressly excepted. *Chute* v. *Adney* (No. 2), 39 N. B. R. 93, 7 E. L. R. 36.

Construction — *General expression — Special stipulations — Interpretations — Reference to draft.*]—If on the comparison of a deed of sale with a defeasance drawn up and signed on the same day, there is a doubt as to the meaning or extent of an expression in the former, the Court can, in order to explain it, have recourse to a draft of the deed under private seal, signed by the parties the night before in the same transaction.—Therefore, where in the deed of sale of an hotel, it is declared that all the movable effects in the house are included in it, and that in the defeasance are found the special stipulations as to liquors, incompatible with the idea that they were included in the general expression "movable effects" in the sale, the declaration in a draft of the latter, signed by the parties the night before, that the "liquors should be payable separately," establishes sufficiently the fact that they were not included in the sale. *Larouche* v. *Bouthillier*, 34 Que. S. C. 450.

Construction—*Gravel—Deposit — New trial.*]—On appeal by the defendants from the judgment in 32 O. R. 240, 21 C. L. T. 30, the Court, on the ground that there had been a misunderstanding as to the extent of the defendants' admission as to the removal of gravel, gave them the option of a new trial upon payment of the costs of the former trial and of the appeal, and in default dismissed the appeal with costs. *Mann* v. *Grand Trunk Rw. Co.*, 21 C. L. T. 226, 1 O. L. R. 487, 1 O. W. R. 230, 2 O. W. R. 361.

Construction—*Land granted by Canada Company in fee simple—Reservations in deed—Mines—Oil springs—Rock or coal oil—Natural gas—Question as to powers of Canada Company—Right to confer mining rights—Right of entry—Statute of Limitations—Action for trespass and damages — Evidence—Findings of facts—Costs.*]—This was a test case to determine as between the Canada Co. and purchasers from that company what rights were reserved under a standard form of conveyance adopted by the company in disposing of lands in the oil regions of western Ontario, in which they "excepted and reserved to said company all mines and quarries of metals and minerals, and all springs of oil in or under the said land, whether already discovered or not, with liberty of ingress, etc., to said company, to search for, work, win, or carry away the same, and for this purpose to make and use all needful roads and other works, doing no other unnecessary damage and making reasonable compensation for all damages actually occasioned.—Boyd, C., *held*, that there was a valid reservation of all oil upon the lot which could be possessed and enjoyed by defendants, but that there was no reservation of natural gas, which remained the property of the land owner; that there was no legal difficulty in allocating the different strata bearing gas and oil to different owners, and no difficulty in making the legal distinction of ownership as to gas and oil in the same well. With this limitation, however, that when the well should be distinctly an oil well and the amount of gas merely a subsidiary concomitant, the gas element should be disregarded and the whole go under the reservation, and the like limitation as to a distinctly gas well; that the defendants should account for net profits made from all gas obtained from the lot, and the Canada Co. for all royalties from the same. No costs allowed either party, the success being divided. *Farquharson* v. *Barnard Argue Roth Stearns Oil & Gas Co.* (1910), 17 O. W. R. 533, 2 O. W. N. 276, O. L. R. .

Construction—*Life estate—Remainder in fee—Grant of land — Habendum — Repugnancy—Remaindermen not named—Description of, as "children" of life tenant—Sufficiency.*]—A grantor by deed granted to the grantee "for and during the term of his natural life, the lands and premises hereinafter mentioned," and upon his death "unto those of his children who shall survive him or shall have died before him, leaving lineal descendants surviving" at his death, "their heirs and assigns forever, in equal shares in fee simple as tenants in common; the said estate granted to the children (of the grantee) to be subject, however, to the support and maintenance of the said lands hereinafter mentioned of the wife (of the grantee) during such time as she shall remain widow (of the grantee);" "to have and to hold unto" (the grantee), "his heirs and assigns, to and for his and their sole and only use forever:"—*Held*, that the grantee took only a life estate, his children having the remainer in fee simple. The rule in Shelley's case did not apply; otherwise, there would be no estate in the children charged with the support and maintenance of the widow, and there was an express grant of the fee in remainder to the children. The intent was clear that the grantee should only take a life estate; and the *habendum*, being repugnant to the grant, was void. *Purcell* v. *Tully*, 12 O. L. R. 5, 7 O. W. R. 848.

Construction—Motion for under Vendors and Purchasers' Act—Variance between grant and habendum—Estate—Right of survivorship—Not tenants in common—R. S. O. (1897), c. 119, s. 11. *Re Fingerhut & Barnick* (1910), 17 O. W. R. 730, 2 O. W. N. 372.

Construction—*Reservation — Right of way.*]—J. H., sole owner and in possession of lot 267, sold to J. P., a certain parcel of land situated in the parish, etc., containing, etc., and bounded, etc., and being the north-east part of the lot 267, "with a reservation in favour of H. D., present for himself and his ayant cause, of twenty feet in the alley which is upon the land sold leading from the public road running south. H. D., although the act of sale recited that he was present, and although in fact he was present with the parties, did not sign it, and was not called upon to do so:—*Held*, that, in view of the ambiguity of the terms of the contract, and in order to give effect according to what appears to have been the intention of the parties, in the special circumstances shewn by the evidence, the clause containing the reservation should be construed thus: "With a reservation in favour of H. D. of the use of the alley which is upon the land sold for a length of twenty feet leading from the public road. *Dumais* v. *Thibault*, 10 Que. Q. B. 7.

Construction—Temporary grant of strip of land—Erection of building—Destruction or damage by fire—"Shall remain standing"—Rebuilding or repair. *Christie* v. *Cooley*, 4 O. W. R. 79, 6 O. W. R. 214.

Construction—*Title to land—Servitude—Acquiescence—Estoppel by conduct—Actio negatoria servitutis — Operation of waterworks.*]—By a deed executed in 1879 C. granted to R. the right of building a reservoir in connection with a system of waterworks, laying pipes and taking water from a stream on his land, and in 1897 executed a deed of lease of the same land to him, with the right, for the purposes of the waterworks established thereon, "*de vaquer sur tout le terrain . . . et le droit d'y conduire des tuyaux, y faire des citernes et autres travaux, en rapport au dit acqueduc et aux réparations d'icelui*:"—*Held*, that the deed executed in 1897 gave R. the right of bringing water from adjoining lands through pipes laid on the lands so leased. *Cliche* v. *Roy*, 27 C. L. T. 658, 39 S. C. R. 244.

Conveyance of land—*Action to rescind—Grounds—Interest of notary—Land bought for immoral purposes.*]—When a party demands the cancellation of an authentic deed of land, he may allege that the notary who acted was at the time president of the defendant company, and that the land was bought for immoral purposes, to wit, for a lottery. *Bédard* v. *Phœnix Land Improvement Co.*, 10 Que. P. R. 278.

Conveyance of land—Action to set aside—Contest as to execution by person since deceased — Conflicting evidence — Action dismissed without prejudice to a new action. *McDonald* v. *McDonald*, 2 O. W. R. 708, 3 O. W. R. 552.

Conveyance of land—Cutting down to mortgage—Account—Reference. *O'Brien* v. *Cornell*, 2 O. W. R. 544, 3 O. W. R. 161.

Conveyance of land—*Cutting down to mortgage—Evidence — Declaration.*]—In an action to have a deed given by one defendant to another defendant declared a mortgage, evidence was offered of a declaration made by the grantor two years after the deed had been given and recorded, to the effect that the deed was in reality only a mortgage to secure the repayment of $200:—*Held*, that this declaration could not operate to affect the rights of the grantee or derogate from the conveyance to him. *Kavanagh* v. *Slavin*, 40 N. S. R. 150*n*., followed. *Linton* v. *Sutherland*, 40 N. S. R. 149.

Conveyance of land—Failure to register—Conveyance by vendor to another—Registration of second deed—Fraud—Priority—Notice — Registry laws—Evidence. *MacLennan* v. *Foucault*, 11 O. W. R. 659.

Conveyance of land—*Incompetence of grantor—Insufficient consideration—Improvidence—Setting aside.*]—A deed of real estate for valuable consideration was given to a purchaser by a person of very weak mind, unfit for business, which required judgment and discretion. The amount of the actual consideration was considerably less than the value of the property, and there was evidence that the bargain was an exceedingly improvident one for the grantor:—*Held*, that the deed should be set aside. *Chisholm* v. *Schroeder*, 40 N. S. R. 8.

Conveyance of land—*Recital—Garantie—Property not passing — Cutting down to security—Presumption.*]—When it is recited in an acte d'obligation that an immovable is transferred to a creditor by way of garantie, it must be presumed, in the absence of a clear and precise agreement to the contrary, that the parties have intended to make a contract of security only, and that what the debtor intends to pass to his creditor is the possession of and not the absolute property in the immovable.—2. The creditor does not become the proprietor of the immovable if it is not paid for, but has only the right to possession for the purposes of his security, to receive the profits, and to apply them first upon the interest and then upon the principal amount. *Eglauch* v. *Labadie*, 21 Que. S. C. 481.

Conveyance of land—*Rectification — Mistake in description—Excessive acreage—Insufficient evidence—New trial.*]—The plaintiff purchased from P. one-half of a piece of land, said to contain 82 acres, being a portion of lot 119, group 2, New Westminster district. The description and the conveyance of the land, which were drawn by a real estate broker, who was neither a solicitor nor a surveyor, purported to state the metes and bounds, but declared the parcel to contain 41 acres more or less. There was also a mortgage of the parcel given by the plaintiff, containing the same description as the deed, and drawn by the same person. The deed was registered without any description. The plaintiff sold to the defendant on the basis of there being 41 acres, and the same description was used. The defendant inspected the property both before and after the sale; had no idea that the acreage was any more than stated, and so admitted at the trial. There was up to this time no proper survey of the subdivision, beyond a middle line drawn by a surveyor with a view to dividing the land into halves. The defendant, on seeing the location of this line, perceived that it excluded him from a piece of cleared land which he alleged was on his half. The surveyor, on this, ran another line, the plan from which shewed that the defendant had within his line some 48 instead of 41 acres. Neither the surveyor, the draftsman of the conveyance, nor the parties could say that the original parcel contained 82 acres. The trial Judge came to the conclusion that there was a mutual mistake, and directed the rectification of the conveyance:—*Held*, on appeal, that there was a lack of conclusive evidence as to the true area of the original parcel on which to direct the rectification of the deed, and that there should be a new trial. *Falk* v. *Swenson*, 8 W. L. R. 376, 13 B. C. R. 359.

Conveyance of land—Setting aside — Undue influence—Parent and child—Fraud—Consideration. *Vandusen* v. *Young*, 1 O. W. R. 55.

Conveyance of land—Undue influence—Full disclosure. *Christian* v. *Poulin*, 1 O. W. R. 275.

Conveyance of land from father to son—Title to land—Consideration — Evidence—Assessment—Moneys expended by son —Subsequent devise by father to another son —Registration of will—Cloud on title—Removal — Declaratory judgment. *Hodder* v. *Hodder*, 11 O. W. R. 1098, 12 O. W. R. 309.

Crown grant—*Adverse possession—Rents and profits—Account.*]—Defendant set up adverse possession but failed to establish it. He was allowed $1,016 for expenditure on the property, and plaintiff was given $1,080 for *mesne* profits. *Angle* v. *Musgrave*, 7 E. L. R. 83.

Crown grant — Water lot — Trespass — Public harbour—Navigation. *Zwicker* v. *Lahave S.S. Co.* (N.S.) (1910), 9 E. L. R. 114.

Cutting down to mortgage—Absolute deed in form with—Bond to reconvey—Held only a mortgage. *Burr* v. *Bullock*, 2 O. W. R. 428.

Cutting down to mortgage—Improvidence—Fraud. *Holmes* v. *Russell*, 1 O. W. R. 655, 744, 2 O. W. R. 334.

Cutting down to mortgage—Redemption—Condition—Revival of debt thrown off —Costs. *Rutherford* v. *Warbrick*, 2 O. W. R. 274.

Debtor and creditor—*Judgment lien —Execution—Marshalling — Contribution— Order of alienation.*]—A judgment was registered against certain lands. The debtor and his trustee subsequently sold 4 parcels to A., B., C. and D., the latter discovering the judgment. C. and D. got releases from the assignee of the judgment creditor. B. is not entitled to have the judgment thrown on the later purchasers in inverse order of alienation. He is entitled to have the judgment apportioned over all the parcels according to values to be ascertained and to have contribution. The judgment creditor must lose the proportion which would have been borne according to values by the two lots. *Re Liquidators Bank of Liverpool* v. *Higgins*, 6 E. L. R. 321.

Declaration of trust — *Injunction — Counterclaim — Striking out—Costs—Practice—N. S. Rule 2, Order 18, Rule 3, Order 19.*]—Action to have it declared that the defendant held certain land as trustee for plaintiff. Counterclaim for moneys advanced for plaintiff and commissions on various transactions between the parties. Application to strike out paragraph of counterclaim dealing with above matters dismissed. *Fraser* v. *McColl*, 7 E. L. R. 159.

Delivery—Retention by grantor—Possession by grantee—Evidence—Improvements—Executor and trustee — Breach of trust. *Humphries* v. *Aggett*, 1 O. W. R. 33.

Delivery to grantee — Presumption—Grantee in possession and exercising acts of ownership with knowledge of grantor—Declaration of right. *Hubley* v. *Hubley*, 4 E. L. R. 392.

Description — *Ambiguity — Charge on homestead before patent — Dominion Lands Act.*]—The written contract signed by the defendant for the purchase of machinery from the plaintiff provided for a lien or charge upon the "N. E. ¼ Section 2, Township 4, Range 14," without stating whether the range meant was 14 west or east of the principal meridian, both of which ranges are in this province, but the evidence shewed that it was range 14 west that was intended:—*Held*, that the expression "N. E. ¼" sufficiently designated the north-east quarter, as such contractions are in daily use.—2. That in this case the description was sufficient to warrant the order for a charge on the N. E. ¼ 24-14 W.; for, (a) if judicial notice should be taken of the surveys that had been already made in Manitoba and of those which had not been made, then, as township 4 in range 14 east had not been surveyed into sections, township 4 in range 14 west must have been the one intended by the contract, and there was no ambiguity requiring evidence to explain; and (b), if judicial notice of such surveys could not be taken, then the ambiguity, if any, was a latent one, and oral testimony was admissible to ascertain what land was meant. It was suggested in argument that the defendant was merely a homesteader under the Dominion Lands Act, and had not received his patent, and that, under s. 42 of that Act, he could not validly create a charge on the land:—*Held*, that the defendant could not raise such an objection in this action, and that the plaintiff was entitled to an order for the charge on the land and the chance of realising on it, though he might afterwards be defeated by the action of the Dominion Government. *Abell* v. *McLaren*, 21 C. L. T. 453, 13 Man. L. R. 463.

Description — Ambiguity — Description aided by occupation—Trespass. *Fulton* v. *Davidson*, 3 E. L. R. 153.

Description — *Boundary—Medium filum aquæ — Ascertainment of centre line.*]—The plaintiff and the defendant were owners of adjoining farms; the division line was a small stream. The dispute was as to the ownership of an island in the stream. Down to the 5th March, 1883, both parcels were owned by R., who on that day conveyed to the defendant the land lying south-east of the stream, describing it by metes and bounds, the boundary on the north-west being "the southerly edge of the stream." In 1884 R. conveyed to the plaintiff the residue of the lot by a description which expressly crossed the stream and ran along its south-easterly edge. At the time of this action there were signs of a channel on each side of the island, but the main stream at all times, and the whole stream in the dry seasons, flowed in a channel on the north-west side. It was contended by the plaintiff that in 1883 and 1884 the stream ran very largely in the southerly channel, and by the plaintiff that the northerly channel had always been the only regular one:—*Held*, that the description in the conveyance to the defendant entitled him to the medium *filum aquæ* as his boundary, and the plaintiff's deed, being subsequent, could not entitle him to claim anything beyond that boundary. The boundary line was, therefore, the centre line of the stream, and the position of that line

was the matter to be determined. The centre line of whichever channel was the main channel in 1883 would be the centre line of the stream. The question left to the jury was whether there was any southerly channel at all, and they were told that, if they found there was, the plaintiff was entitled to succeed. They should have been asked to find, if there were two channels, which was the main channel in 1883. *Wason* v. *Douglas*, 21 C. L. T. 521, 1 O. W. R. 552, 2 O. W. R. 688, 3 O. W. R. 456.

Description — *Falsa demonstratio — Water rights.*] — By an indenture of lease lessees were given the right to "a sufficient supply of water for the purpose of propelling a wheel not exceeding forty-four inches in diameter, being the size of the present wheel upon the premises." The "present wheel" was forty inches in diameter:—*Held*, that the governing words were "not exceeding forty-four inches in diameter," and that the subsequent words "being the size of the present wheel upon the premises," should be rejected as *falsa demonstratio*. *Brantford Electric and Operating Co.* v. *Brantford Starch Works*, 22 C. L. T. 13, 3 O. L. R. 118.

Description—"*Intersection*" — *Dividing line between houses — Production — Ejectment—Tender of deed after action—Costs.*] —Action of ejectment brought to determine the boundary line between adjoining lots conveyed to the plaintiff and defendant respectively. Dispute over a nine-inch case of brick put around one of the houses, which extended that distance beyond what would have otherwise been the boundary between two houses. The deed from the North British Canadian Investment Co. to plaintiff describes the land sold to plaintiff as "commencing at a point on the western limit of Euclid avenue where it is intersected by the production easterly of the southern face of the southern wall of house number 232 (that is, where the northern wall of number 230 joins the southern wall of 232), said point being distant 32 feet and 6 inches more or less measured northerly along said limit of Euclid avenue from southern limit of said lot number 1; thence northerly along said avenue 20 feet 6 inches more or less to the intersection of production easterly of northern face of northern wall of house 232; thence westerly along said last production face of wall and limit between premises in rear of house numbers 232 and 234, in all 129 feet to eastern limit of lane; thence southerly, etc.:—*Held*, the word "intersect has a meaning, although rarely applied to it, to divide or separate two things, by passing between them:" Murray's Dictionary; and it was in this latter sense that "intersection" was intended to be used in the above description, viz., "the dividing line between the two houses," and it must be followed no matter how obvious its course may be. Judgment for plaintiff for land covered by the deed from defendant to him. *Weston* v. *Smythe*, 5 O. W. R. 537, 10 O. L. R. 1.

Description — Mistake—Reformation—Declaratory judgment — Building on land conveyed—Registry laws—Estoppel — Covenant—Costs. *Ruetsch* v. *Spry*, 7 O. W. R. 705.

Description of land—*Ambiguity—Evidence—Parol agreement for division of land ineffective to pass title—Conventional line—Disputed boundary — Limitation of actions—Occasional acts of ownership.*]—The plaintiff claimed land in dispute under a deed from P. O. of one full half or moiety of the farm lot on which he resided, and also one full half or moiety of all the woods, &c., thereunto in any wise belonging or appertaining. The land in dispute was a wood lot situated about two miles from the farm lot and separated from it by lands of other proprietors, and upon which P. O. was shewn to have cut from time to time, but as to which there was no general user as part and parcel of the farm, there being another wood lot connected with the farm which was generally used for that purpose:—*Held*, that in order to pass under the words used the land must be an integral part of the farm itself.—There being an ambiguity in this case as to what was included in the words "farm lot" and as to what was appurtenant thereto:—*Held*, that there was no objection to evidence of the user to enable the Court to interpret the language used, but that the trial Judge erred in allowing evidence to be given of declarations made by the grantor as to what he meant to convey or that he had conveyed.—2. That the plaintiff having no title to the lot in dispute, an agreement made between him and the grantee under P. O. for the division of the lot was ineffective to pass title, and the doctrine of conventional line for the settlement of questions of disputed boundary had no application.—(3) That, in the absence of 20 years' continuous and exclusive enjoyment by the plaintiff, occasional acts of cutting must be regarded as acts of trespass, or, at the highest, as having been done with the consent of the owner. *Ogilvie* v. *Grant*, 1 E. L. R. 117, 2 E. L. R. 196, 41 N. S. R. 1.

Description of land—*Ambiguity—Falsa demonstratio — General followed by specific description—Evidence — Boundary — Election.*]—The plaintiff and defendant were entitled, under deeds of conveyance to their predecessors in title respectively, to the western and eastern parts respectively of a fractional quarter section of land of an irregular shape bordering on a lake at the east side, and containing about 132 acres. The land was crossed by a highway called the Gimli road running in a somewhat oblique direction from north to south. The conveyance on which the plaintiff relied described his land as the west half of the quarter section or that part lying on the west side of the Gimli road, and the defendant's title was for the east half, &c., or that part lying on the east side of the Gimli road. Possession had continued in accordance with the belief on both sides that the Gimli road divided the fractional quarter section into nearly equal portions.—On discovering that there was in fact a larger area on the east side of the road than on the west, the plaintiff brought this action for possession of such excess, being part of the land on the east side in the possession of the defendant:—*Held*, that, as applied to the land in question, the words "east half" were not sufficient to describe with clearness the land intended to be conveyed, and, consequently, the words which follow could not be rejected as *falsa demonstratio*. *Gillen* v.

Haynes, 33 U. C. R. 516, *Iler* v. *Nolan*, 21 U. C. R. 309, and *Cartwright* v. *Detlor*, 19 U. C. R. 210, distinguished.—2. This was a proper case for the application of the rule that, when there is a general description followed by a specific one, the specific and not the general description must be taken to govern, and the expression "east half" in this case was a general description that must yield to the specific description that follows. *Murray* v. *Smith*, 5 U. C. R. 225, and *Smith* v. *Galloway*, 5 B. & Ad. 43, followed.—3. The ambiguity in the description in question was a latent one, only becoming patent when evidence was given of the irregular shape of the land, and therefore extrinsic evidence was admissible to shew the intention of the parties.—*Semble*, that the defendant might also succeed on the doctrine of election as set forth in Elphinstone on Deeds, 105 Vin. Ab., Grant, H. 5, and Shep. Touch., 106, 251, on the ground that his deed gave him the option of taking the east half or the land on the east side of the road, and he had elected to take the latter. *Oleson* v. *Jonasson*, 3 W. L. R. 466, 16 Man. L. R. 94.

Description of land — *Construction—Boundary—Trespass—Street line—Encroachment.*]—In construing documents of title, giving the length of a course in feet or other denomination, with the addition "or until it comes to an object," that object, be it less or more than the length given, is the boundary. Therefore, where a town justified a trespass, on the ground that the act complained of was to remove or prevent an encroachment on R. street, the western boundary of the plaintiff's property, the burden of proving the street boundary is on the town, though the point to which the plaintiff claims is some 5 feet beyond the number of feet given in the plaintiff's deed as the distance from the starting point to R. street. *Milmore* v. *Woodstock*, 3 E. L. R. 204, 38 N. B. R. 133.

Description of land — *Evidence—Burden of proof — Jurisdiction—New trial.*]—In an action for damages for the mining and removal by the defendants of iron ore from land claimed by the plaintiff under lease from the Crown, the description in the plaintiff's lease bounded him on the north by "the south line of P. G." The trial Judge having directed the jury, among other things, that it was not necessary for the plaintiff to prove this line:—*Held*, that, the burden of proof being on plaintiff, this was misdirection necessitating a new trial. *Bartlett* v. *Nova Scotia Steel Co.*, 1 E. L. R. 226, 293, 39 N. S. R. 456.

Description of land—*False demonstratio.*]—The land was described as commencing at a stake on the O'Leary road, about thirty chains from M.'s north-east angle, when in fact the nearest point of the locus was not within ninety chains of M.'s north-east angle. The question was (1) whether the words "from M.'s north-east angle" could be rejected as a *falsa demonstratio*.—(2) Could the location of the land be shifted from the locality described in a deed executed by the sheriff under the Land Assessment Act.—*Held*, Peters, J., in the negative on both points. *McPherson* v. *Ramsay* (1869), 1 P. E. I. R. 288.

Description of land—Fraud—Delay—Laches — Statute of Frauds — Reforming contract. *Brookes* v. *Brookes* (N.S.) (1910), 9 E. L. R. 44.

Discharge of mortgage — Execution without understanding or advice — Repudiation—Setting aside—Evidence. *Bailey* v. *Bailey*, 5 O. W. R. 204.

Easement — *Agreement — Purchasers—License—Revocation—Repairs.*]—The lower and the upper half of a lot of land were respectively conveyed to separate purchasers. In the deed of the lower half the grantor reserved the right of way to convey water by aqueduct or otherwise from one of the springs on the lower lot to the upper lot. The easement was assigned in the deed of the upper lot. On the lower lot were two springs known as the front and back springs. It was agreed, and acted upon, by the purchasers of the lots that the back spring should be set apart for the exclusive use of the owner of the upper lot under the reservation in the deed of the lower lot. The plaintiff and defendant, becoming respectively the owners of the lots, entered into a parol agreement for the construction by the defendant of a pipe from the front spring to her house, to be tapped on her land by a pipe leading to the plaintiff's house:—*Held*, that the agreement between the original purchasers of the lots to limit the easement to the back spring was binding upon the defendant; and that the license to the defendant to use the front spring was revocable upon the plaintiff making equitable compensation fixed by the Court to the defendant for her expenditure under the license. Where license is given to lay pipes on another's land to convey water to the licensee's land, the burden of repair rests in law upon the licensee, and it is a revocation of the license to refuse to the licensee permission to go upon the licensor's land for the purpose of making repairs. *Miller* v. *Cronkite*, 21 C. L. T. 150, 2 N. B. Eq. 203.

Ejectment — *Delivery — Marksman — Burden of proof of deed having been read is on party impeaching it.*]—Defendant claimed under a deed from Francis Chiverie, the plaintiffs as his heirs. The grantor was a marksman, and the attestation clause was simply "Witness." It was objected to the deed that there was no evidence of delivery, (2) that the grantor being illiterate the attestation clause should have stated it to have been read or explained to him, and unless this was proved to have been done the deed was void. Defendant stated that the subscribing witness, who is since dead, was his clerk at the date of the deed. Defendant did not remember if he himself was present when the deed was signed, or whether the grantor delivered it to him, but he thought the grantor gave it to the subscribing witness, defendant's clerk, but in one of these two ways it came into his possession. The Judge left the question of delivery to the jury, who found for plaintiff. Defendant moved to set aside the verdict as contrary to evidence

and for a new trial:—*Held*, Peters, J., that the evidence did not warrant the finding of the jury; that the rule that an illiterate person has a right to have a deed read or explained to him is subject to the qualification that he should require it to be read or explained, and the burden of proof lies on the party impeaching the deed. *Chiverie* v. *Knight* (1873), 1 P. E. I. R. 448.

Ejectment—*Escrow—Estoppel by acts.*]—The *locus* had been granted to plaintiff, whose father agreed to give him a deed of property called the S. place, provided plaintiff would convey the *locus* to his sister, the defendant's wife. The father, to secure performance of this agreement, gave the deed of the S. place to his wife, as an escrow, to be delivered to the plaintiff on his conveying the *locus* to his sister. A deed from plaintiff to his father had been prepared but not executed in the father's lifetime. After the father's death, plaintiff obtained the deed of the S. place from his mother, at the same time executing and delivering to her the deed to his father (then dead), on the understanding that in pursuance of his agreement with his father, he thereby resigned his title to the *locus* to his sister. The jury found a verdict for the defendant, and on the argument upon a rule *nisi* for a new trial, the only question undisposed of was whether the plaintiff was estopped by his own acts, from treating defendant as a trespasser:—*Held*, Peters, J., that plaintiff was estopped. *McKinnon* v. *McKinnon* (1852), 1 P. E. I. R. 59.

Ejectment—*Fore-shore—Grant from the Crown.*]—Plaintiffs claimed title to part of fore-shore between high and low water mark of the town of Summerside under grant from the Crown, in feé under Great Seal of the Province of Prince Edward Island, issued under 25 Vic., ch. 19. Defendant under an authority in writing of town clerk of Summerside erected a wharf or breastwork over part of the *locus* claimed by plaintiffs. In action of ejectment brought to recover possession of site of defendant's wharf, plaintiffs obtained verdict. Rule *nisi* granted to enter non-suit or set aside verdict on several grounds, and amongst others on the following, namely: That the grant under which plaintiffs claimed was void because the price or consideration mentioned in the grant did not on its face appear to have been settled by the Governor in Council and no evidence was given to shew that it had been. That the grant was void because no consent in writing was given by owners of land in front of which *locus* lay before grant was made pursuant to the Act 25 Vic., c. 19, s. 2. That the grant was void because at the time it was made the plaintiffs were not in possession of the whole of the land in front of which the *locus* lay. That the grant was void because the *locus* was in front of and abutted the railway which was vested in the Dominion of Canada, and no consent had been obtained from the Dominion Government. That the grant was void because since Confederation the Lieutenant-Governor had no power to make grants of the foreshores of this province. That the grant was void because by the British North America Act all public harbours are vested in Canada, and Summerside is a public harbour. For the improper admission of evidence:—*Held*, (Peters, J.), that the grant was void because the *locus* was in front of the railway lands vested in the Dominion Government, and no consent had been obtained from the Government. *Holman* v. *Green* (No. 1) (1880), 2 P. E. I. R. 329.

Ejectment — *Proof of deed—Burden on party impeaching it.*] — Defendant claimed under deed executed by marksman, attestation clause was "Witness." Objected on trial that there was not sufficient evidence of delivery. Defendant stated that he was present when deed was executed, and that it was delivered to himself at the time, and that grantor afterwards assisted him to run off the land. The Judge left the question of delivery to jury, who found verdict for plaintiff. Defendant moved to set aside verdict as contrary to evidence, and for a new trial:—*Held*, Hensley, J., that the verdict was contrary to the evidence and the law. *Chiverie* v. *Knight* (1876), 2 P. E. I. R. 108.

Erroneous description of land—Obvious mistake — Title—Vendor and purchaser—Description declared sufficient without rectification. *Re Blight and Ockenden*, 12 O. W. R. 673.

Error of law.]—He, who, through error of law, has become the holder of the title to the property of another, is bound under Art. 1047 C. C., to sign, or agree to, such documentary evidence as may be required to pass the title to the legitimate owner. Hence, when, upon his refusal so to do, an action is brought by the owner for a judicial declaration of his proprietary rights, the holder will be condemned to pay the costs. *Greece* v. *Greece* (1910), 39 Que. S. C. 233.

Fraud—*Conveyance of same land to two purchasers—Priorities—Option — Agreement—Registration—Action to remove cloud on title — Leave to amend—Parties—Grantor—Specific performance—Terms.*]—By a writing under seal, but without consideration, dated the 2nd January, 1907, M. covenanted and agreed with the plaintiff that if at any time he (M.) should be desirous of selling the land described in the document, he would give the plaintiff the option of first chance to purchase the same at $40 per acre, and to give the plaintiff 30 days' notice in writing of intention to sell the property, etc. On the 14th January, 1907, M. signed a written offer, binding for three months from the date, to sell the same land to the defendant at a larger price. On the following day, but after the defendant had express notice of the agreement with the plaintiff, M. executed a formal written agreement to sell the land to the defendant, and the defendant, two days later, paid part of the consideration named, and received from M. a conveyance of the land. The plaintiff's agreement or option and the defendant's agreement of the 15th January were both registered on the 15th January, and the defendant's deed on the 17th January. On the 22nd April, 1907, M. conveyed the same land to the plaintiff, and received a payment on account from the plaintiff; this conveyance was registered on the 24th April, 1907.—In an action to set aside the defend-

ant's agreement of the 15th January and the deed registered the 17th January as being void, and to remove the same as a cloud upon the plaintiff's title. M. being brought in as a third party:—*Held*, that the writing of the 2nd January was not a mere option, but a contract with the plaintiff to give him a binding option for 30 days after notice of desire to sell, and, being under seal, there was no need for a consideration; that the defendant took his agreement and conveyance subject to the rights of the plaintiff; but that these instruments were not tainted with fraud, and could not be declared void; as the defendant had full notice of the agreement of the 2nd January, he was thereafter in the same position *quoad* the plaintiff as M. had previously been, and was bound to do the same acts as M. in respect of the land: and, while the plaintiff's action as framed failed, his remedy lay in a claim for specific performance against the defendant and M.; and he was allowed to amend, upon terms, by adding M. as a party defendant, and seeking the remedy suggested. —Judgment of Teetzel, J., reversed. *Savereux* v. *Tourangeau*, 16 O. L. R. 600, 11 O. W. R. 994.

Gift — *Construction—"Tous les meubles et effets mobiliers"—Bank deposit.*] — The provisions of Arts. 395, 396, and 397, C. C., defining the sense of the words "*meubles*," "*meubles meublant*," "*biens meubles*," "*mobiliers*," and "*effets mobiliers*," when they are employed by themselves, are declaratory, and the words are given as examples to aid the interpretation of the Judge in doubtful cases. When the parties to a deed employ several times the words, "*meubles et effets mobiliers*" to indicate only movable effects, and not money or choses in action, the same words repeated anew in the same provision, even where preceded by the word "all," will be presumed to have been employed in the restricted sense which the parties have already given them, and will not be construed to include a deposit of money in a bank. *Sabourin* v. *Montreal City and District Savings Bank*, 12 Que. K. B. 380.

Gift inter vivos of immovable property, with substitution to the children of the donee, made in 1849, and at any time previous to the Act 18 Vict. c. cl. (1855), could only become valid and effective, though registered by publication and transcription (insinuation) of the deed, in the office of the Superior Court in the district in which the property was situated. *St. Denis* v. *Trudeau* (1909), 18 Que. K. B. 434.

Habendum— *Reservation of way—Deed not executed by grantee — Acceptance.*]—A deed contained in the *habendum* clause a reservation to the grantee of a right of way. The deed was not executed by the grantee but had been accepted by him. It was contended that not having been executed by the grantee, there was no grant of the right of way:—*Held*, that the plaintiffs, by accepting the deed, were bound by the reservation it contained. *Loyal Prince of Wales Lodge* v. *Sinfield*, 40 N. S. R. 30.

Incapacity of grantor — *Absence of consideration—Conflict of evidence—Relief.*] —Where at the time of the execution of a deed of conveyance the grantor was 70 years of age, was sick and in feeble health, and it was the opinion of some witnesses, though not of others, that he did not understand the nature of his act, and the effect of the deed was to deprive him of means of support, and the evidence was uncertain respecting the existence of adequate consideration for the deed and favoured the view that it was intended as a gift, the deed was set aside. *Winstowe* v. *McKay*, 25 C. L. T. 88, 3 N. B Eq. 84.

Affirmed 37 N. B. R. 213.

Inscription en faux — *Production of original.*]—If an authentic deed is alleged to be false, an order will be made upon the person in custody of such deed to produce it in order that it may form part of the record in the case for the purposes of the inscription *en faux*. *Awde* v. *Charest*, 5 Que. P. R. 319.

Lost deed—*Inference as to—Maintenance of dyke — Liability for—Covenant running with land.*]—In 1847 T. R. purchased from R. a portion of a large tract of marsh land of which R. was owner. From the time of the purchase down to the time of his death, in 1886, T. R. contributed, either by the performance of work or in cash, in the proportion of one-seventh of the whole amount, towards the maintenance and repair of a dyke and aboiteau erected, prior to the time of the purchase, for the protection of the land against the sea. In an action brought by the plaintiffs, claiming under R., against defendant, claiming under T. R., to recover a proportion of the cost of rebuilding the aboiteau, it appeared that the dyke in question had never been brought under the operation of the Act, R. S. c. 42, "Of Commissioners of Sewers and Dyked and Marsh Lands," but that the provisions of the Act had been followed in relation to the calling of meetings, of proprietors, the summoning of proprietors to perform work, and the apportionment of the cost of such work among the proprietors according to their acreage. There was some evidence of the existence of an agreement signed T. R., having reference to his liability to contribute towards the keeping up of the dyke and aboiteau, but, at the time of the commencement of the action, the agreement had been lost, and there was no evidence to shew the exact contents of the agreement:—*Held*, that, after the lapse of time, in view of the position of the parties, and the necessity of the work for their protection, the requirements of the Act, and the facts shewn in relation to payments made and work done, there was evidence from which to infer the existence of an agreement touching the keeping up and repair of the dyke and aboiteau, constituting a covenant running with the land by which the defendant was bound:—*Held*, also, the Judge of the County Court having found that the amount which the defendant was required to pay was not excessive, that such finding was supported by the evidence and should be affirmed. *Roach* v. *Ripley*, 34 N. S. R. 352.

Maintenance — *Enforcement of agreement—Breach — Onus of proof.*]—In a suit to enforce performance of an agreement by the defendant to maintain the plaintiffs, hus-

band and wife, in consideration of a conveyance of land by them to the defendant, the onus of proving a breach of the agreement is upon the plaintiffs. *Ouilette* v. *LeBel*, 26 C. L. T. 466, 3 N. B. Eq. 205.

Maintenance bond — *Declaration of lien.*]—Where land was conveyed in consideration of a bond by the vendee to maintain the vendor and wife for life, but the consideration was not expressed in the deed, a decree was made charging the land with a lien for the performance of the agreement in the bond. *Duguay* v. *Lanteigne*, 25 C. L. T. 92, 3 N. B. Eq. 132.

Notarial act — *Authentication — False date—Nullity.*]—A notarial act binds the parties who have signed it, and the signature of the notary only has the effect of authenticating it. 2. The date of a notarial act is an integral and essential part of it, and the want of it nullifies the instrument. 3. When an act, to which several persons are parties, has been signed and executed by each of them on different days, a single date may be added to the act, namely, that of the day of the last signature, but it is more proper to give the several dates in the act. 4. A notarial act must bear the date of the signature of the parties, allowing the notary, if he has delayed his signature, to mention the day on which he has affixed it. Therefore a notarial act signed by all the parties on the 2nd July, 1902, but signed by the notary on the 3rd July, 1902, should be dated the 2nd July, 1902, and if the notary dates the act on the 3rd July, 1902, because that is the date on which he has closed the transaction, the act will be declared false as an authentic act, the Court having no other alternative, and not having the power to substitute the true date of the completion of the act for the erroneous date which the notary has put to it. *Ordway* v. *Veilleux*, 22 Que. S. C. 197.

Notarial act — *Illiterate parties—Assent —Notary — Witness.*] — In order that a notarial act may be considered authentic, it is necessary that the assent thereto of parties who declare that they are not able to write, shall have been received in presence of the notary who is acting in the matter, and of a witness who has signed. 2. Such obligation in regard to the notary imports that the act has been read to the parties in the presence of the witness, or that a sufficient mention, in the presence of the parties, of what the act contains shall have been made to the witness before he attaches his signature, in order that he may be able to state that the parties who are not able to sign have given their consent; if it is otherwise, the act is not an authentic act, and will be declared invalid. *Cloutier* v. *Dulac*, 24 Que. S. C. 153.

Notarial act — *Impeaching—Remedy—Inscription de faux.*]—The remedy of inscription *de faux* is not open to a party who simply attacks the truth of statements made in an authentic deed, where the party admits that the notary has set out the facts as he was instructed. In such a case the party must make his proof in the ordinary way. *Anderson* v. *Prévost*, 28 Que. S. C. 443.

Notary — *Copy — Translation.*]—A notary ought to deliver exact copies of his deeds, in the language in which they are written, and not translations certified to be correct. *Baker* v. *Gagnon*, 7 Que. P. R. 100.

Not delivered — *Evidence—Laches.*]—Where a conveyance has been executed by some of the parties, but not by all, and there has been no delivery, it is not a deed, and is not evidence against the parties who have executed it. Where plaintiffs had an agreement for a low rate of interest for a limited time, and after that time expired rested on their rights for seventeen years, they were held guilty of laches, and the Court would not allow them a higher even though a legal rate of interest for the seventeen years. *Pope* v. *Commissioner of Crown Lands for P. E. I.* (1872), 1 P. E. I. R. 414.

Obtained from commissioner *of public lands by misrepresentation or misstatement— Land Purchase Act, 16 Vict. c. 18.*] — The commissioner cannot be sued in this form of action, but only by *scire facias* or petition of right. Deeds obtained by misstatement or misrepresentation to be reformed and rectified by the commissioner. *Dodson* v. *White*, 6 E. L. R. 144.

Parent and child—Consideration—Notice—Evidence — Veracity — Agreement — Laches — Possession of land. *Martin* v. *Kirby*, 6 O. W. R. 107.

Quit-claim—*Competing purchasers—Priorities — Registry Act.*]—It is not a deed of quit-claim where the grantor remises, releases, and quit-claims unto the grantee, his heirs and assigns, a lot of land, and covenants that the land is free from incumbrances made by him, and that he will warrant and defend the same to the grantee, his heirs and assigns, against the demands of all persons claiming by or through the grantor; and the grantee under such a deed, if registered, will not be postponed under the Registry Act, 57 V. c. 20, to the equities of a prior purchaser, of which he had no notice. *Bourque* v. *Chappell*, 21 C. L. T. 132, 2 N. B. Eq. 187.

Rectification—Conveyance of more land than vendor intended—Unilateral mistake no ground for relief—Fraud—Knowledge of purchaser of intention of vendor—Importunity —Absence of independent advice. *Stevenson* v. *Cameron*, 10 O. W. R. 432.

Rectification — *False representation — Boundaries of land conveyed—Damages.*]—The plaintiff purchased from the defendant a tract of land which was supposed by the plaintiff, at the time of the purchase, to be bounded on the east by the La Have river. In the deed to the defendant from his father the eastern boundary line was described as beginning at an oak tree on the western bank of the river, and running south nine degrees west, &c. This line was not identical with the course of the river, and left the title to a strip of land between the line described in the deed and the river still in the father. The defendant occupied and cultivated this strip for thirteen years after the making of his deed, and plaintiff continued the occupa-

tion and cultivation for a further period of five or six years, after the conveyance to him, when he was ejected. In the deed from defendant to plaintiff the description in defendant's deed was repeated with an addition in which it was stated that the land conveyed was "bounded on the east by the La Have river." In an action for rectification of the deed, and damages, on the ground of the defect in the defendant's title, the trial Judge found that the defendant represented that the land he was selling was bounded on the east by the river, and that this representation, which was false in fact, was material, and was relied on by the plaintiff, and he held the plaintiff entitled to the rectification claimed, and fixed the damages at $150. An appeal was dismissed, the Court (four Judges) being divided in opinion. *Ramsay* v. *Meisners*, 33 N. S. R. 339.

Rectification—*Mistake.*]—The plaintiff, intending to sell the whole of a piece of land, sold it under an oral contract describing it as the D. lot. The deed to the purchaser followed the description in the vendor's deed. After the vendee's death, and about ten years after the contract of sale was made, the vendor sought to have the deed rectified, on the ground that it contained more land than that known as the D. lot. The evidence did not shew that the D. lot did not embrace the whole of the land conveyed:—*Held*, that the bill should be dismissed. Principles upon which the Court proceeds in reforming deeds, considered. *Carman* v. *Smith*, 25 C. L. T. 75, 3 N. B. Eq. 44.

Rectification — *Mistake—Description of land.*]—A mortgage deed executed by the defendant in favour of the plaintiffs described the land as lots 19 and 20 in the parish of Headingly, containing by admeasurement 418 acres more or less. The plaintiffs sought rectification so as to make it cover the outer 2 miles of the lot as well as the inner, the plaintiffs alleging that such was the intention of the parties at the time the loan was made, and that the outer 2 miles had been omitted by mutual mistake:—*Held*, that rectification should be ordered, because the defendant, who was a man of intelligence and good education, had signed the mortgage giving the acreage as 418 more or less, whereas without the outer 2 miles the 2 lots only contained 223.65 acres, and with them only 421.22 acres; and because the defendant had, 3 years after the date of the mortgage, asked the plaintiffs to discharge it as against the right of way of a railway running, to his knowledge, only through the outer 2 miles of the lots, and had arranged that the price of such right of way should be paid by the railway company to the plaintiffs in reduction of the mortgage debt. *Br. Can. Loan & Agency Co.* v. *Farmer*, 15 Man. L. R. 593, 24 C. L. T. 273.

Rectification — *Mistake—Equity—Assignment of chose in action—Amendment—Breach of trust.*]—A stipulation contrary to the real intention of the parties having been inserted in a conveyance without the knowledge of the parties to the conveyance or through a misapprehension as to its effect, a party can have the conveyance rectified where it would be against equity and good conscience for the other party to retain the benefit. The defendant took an assignment of this conveyance in good faith, without knowledge of the parol contemporaneous agreement absolving one of the parties from personal responsibility on his covenant:—*Held*, that the assignment of what was a chose in action was subject to all the equities affecting it.—An application by the defendants, made after trial, to allow an amendment alleging that the plaintiff was party to a breach of trust, in assisting an illegal loan by the trustees, was refused. *Lawson* v. *Jones*, 40 N. S. R. 303.

Reformation — Conveyances and mortgages of land—Mistake in description — Execution — *Fi. fa.* lands—Sheriff's sale—Assignment of judgment—*Bona fides*—Notice—Setting aside sale—Laches—Estoppel—Division Courts Act—Costs. *Sheppard* v. *Sheppard*, 12 O. W. R. 186.

Reformation — Mistake. *Girardot* v. *Curry*, 1 O. W. R. 21.

Reformation — Mortgage — Non-conformity with contract for—Mistake. *Richardson* v. *West*, 1 O. W. R. 670.

Replevin—*Grantor using same seal as notary attesting instrument—Dower—Rent—Variance.*]—C. claimed as heir. The deed to his father was executed in France before a notary, whose seal was affixed at the bottom of the deed opposite both his own and the grantor's names, and there was no other seal. It was objected that this was not the grantor's seal, and that, therefore, there was no deed and no estate under it to descend. It was also objected that C.'s mother was entitled to dower, and that C. was only entitled to two-thirds of the rent, and having avowed for the whole there was a variance. The rent reserved was £5 a year and a ton of hay, and the averment only alleged the money to be due without acknowledging satisfaction for the hay, and it was contended that this was a variance:—*Held*, Peters, J., that the seal was sufficient, and that more than one person might lawfully use the same seal.—That there was no variance on account of the dower, as, until assignment, the heir was entitled to receive the rent.—That the omission to acknowledge satisfaction for the hay was not a material variance, and if it were it should have been taken advantage of by special demurrer. *Compton* v. *Crossman* (1800), 1 P. E. I. R. 174.

Reservation — *Use of part of building—Access—Usage.*]—The reservation in a deed of the usufruct of the garrets in a building being silent as to the manner of gaining access thereto, the condition of the premises and the usage established at the time of the reservation of the usufruct will determine the mode of access. *Godbout* v. *Godbout*, 28 Que. S. C. 481.

Riparian rights — *Building dams — Penning back waters — Warranty—Improvement of watercourses—Condition precedent—New grounds taken on appeal—Assessment of damages—Interference by appellate Court.*]—A deed of sale of lands bordering on a stream, with the privilege of constructing dams, &c., therein, provided that, in case of damages

being caused through the construction of any such works, the seller or his successors in title to the adjoining lands should be entitled to have the damage assessed by arbitrators, and the purchasers should pay the amount awarded: — *Held*, that, under the deed, the purchasers were liable not only for damages caused by the flooding of the lands, but also for all other damages occasioned by their building dams and other works in the stream; and that the provisions of Art. 5535, R. S. Q., did not entitle them to construct or raise such dams without liability for all damages thereby caused:—*Held*, also, that an objection as to arbitration and award being a condition precedent to an action for such damages, which have been waived or abandoned in the Court of Queen's Bench, could not be invoked on an appeal to the Superior Court. On a cross-appeal, the Supreme Court refused to interfere with the amount awarded for damages in the Court below upon its appreciation of contradictory evidence. *Hamelin* v. *Bannerman*, 22 C. L. T. 7, 31 S. C. R. 534.

Sale of immovable.]—A deed of sale of immovable property, without consideration, made collusively between the parties, as an expedient to bring in the name of the purchaser, an action in which the seller must have failed, is not a valid title and cannot avail as a foundation for such an action. *Lacroix & Nault* v. *Rousseau* (1909), 18 Que. K. B. 455.

Sale of land — *Construction of deed—Reservation of growing timber — Rights of vendor and purchaser—Resolutive condition.*]—A deed of sale of wild lands to be used for agricultural purposes clearly expressed certain specific reservations, and contained in addition, a clause as follows: "*Et de plus la présente vente est faite à la condition expresse que le dit acquéreur n'oura pas le droit de couper, enlever, ou charroyer aucun bois sur le terrain ci-dessus vendue autrement que pour son propre usage pour faire des bâtisses sur le terrain, des clotures, et du bois de chauffage; il est, en conséquence, convenu que si l'acquéreur coupait du bois en violation de la présente clause, les vendeurs auront droit de demander la résiliation des présentes et de reprendre possession des immeubles ci-dessus vendus, sans rien payer à l'acquéreur pour les améliorations qu'il pourra avoir faites. Et tout bois coupé en violation des présentes deviendra, ousitit coupe, la propriété des vendeurs, car tel est la convention expresse des parties et sans laquelle des présentes n'auraient pas eu lieu*:"—*Held*, that, in the absence of any contrary intention expressed in the deed, the title to the lot of land sold passed absolutely to the purchaser with the exception of the special reservations.—*Held*, also, that the clause in question had not the effect of reserving to the vendors all the timber standing upon the land sold, nor could it be construed as giving them the right (without rescission upon breach of the resolutive condition) to re-enter on said land for the purpose of removing stumps or second growth timber. *Rioux* v. *St. Lawrence Terminal Co.*, 40 S. C. R. 98, 4 E. L. R. 581.

Sale of mine — *Bona fide* purchaser — Defective title—Notice — Improvements — Compensation—Estoppel. *Empire Coal & Tramway Co.* v. *Patrick* (N.S.), 6 E. L. R. 266.

Security—Conveyance of lands—Cutting down to mortgage — Improvidence — Fraud. *Holness* v. *Russell*, 1 O. W. R. 655, 744, 2 O. W. R. 334.

Setting aside—Improvidence — Family settlement—Costs. *Lockhart* v. *Lockhart*, 1 O. W. R. 819.

Sheriff's deed — *Condition — Usufruct —Rés inter alios acta — Default of acceptance — Pleading — Reply — Fraud.*]—The plaintiff alleged that in another suit, in which her husband was defendant, the present defendant purchased at sheriff's sale certain immovables subject to a right of usufruct in her favour during her life, but that the defendant had entered into possession of the property and deprived her of the usufruct; and she asked that the defendant be ordered to give the possession of the property to her, and render her an account of the rents and profits. The defendant, by his plea, admitted that a clause existed in the sheriff's deed to the effect that the property was sold subject to a right of usufruct in favour of the plaintiff during her life, but that such clause was of the nature of *res inter alios acta*, and had never been accepted by the plaintiff, and that the defendant had since protested against the clause and repudiated it, — the plaintiff not being, in fact, entitled to the immediate usufruct, but only from the death of her husband, who was still living. The defendant further pleaded that previous to the sheriff's sale he became hypothecary creditor upon the property in question, by obligations granted to him by the husband, in which the plaintiff intervened and renounced all her rights upon the property in favour of the defendant. To this the plaintiff replied that it was the defendant himself who arranged for the sheriff's sale and contrived that the property should be sold subject to the plaintiff's rights as expressed in the sheriff's deed, his object being to keep bidders away and acquire the property much below its value. The defendant demurred to this part of the reply:—*Held*, that the demurrer was well founded, the allegations of fraud not being properly urged by reply to plead, in an action on a contract, but being grounds rather to support an action to set aside the sheriff's sale.—2. That the clause in the sheriff's deed relating to the plaintiff's right of usufruct was *res inter alios acta*, and could not avail her without acceptance by her, which had not been signified before the clause was repudiated by the defendant. *Hope* v. *Leroux*, 18 Que. S. C. 556.

Title to land — *Quieting—Subject to trust—Rule against perpetuities.*]—City of Toronto applied for a certificate of title to the land known as St. Patrick's Market. Appellants filed claims to a contingent reversionary interest. Their claim was disallowed, as this case is not distinguishable from *In re the Trustees of Hollis Hospital and Hague's Contract*, [1899] 2 Ch. 540; *Re St. Patrick's Market* (1909), 14 O. W. R. 794, 1 O. W. N. 92.

Verbal agreement by father to convey to son—*Consideration of maintenance and support — Moneys expended by son on land—Subsequent repudiation of agreement.*] —Action by son to recover from father money expended by son in erection of a dwelling house on the father's farm, on the faith of a promise by the father to give the son a deed of the farm upon which the house was built:—*Held*, that the father having repudiated his promise the son must succeed. *Morrison* v. *Morrison*, 6 E. L. R. 407.

Voluntary conveyance—*Ex post facto consideration — Subsequent purchaser — Specific performance — Trust.*] — The defendant N. made a contract with the plaintiff to sell to the plaintiff an equity of redemption in land which N. had a year earlier conveyed to his brother-in-law, the defendant P., in trust for the maintenance of N.'s infant children. P. had taken the children about 8 months before the conveyance, and had been maintaining them. The action was for specific performance of the contract and to have P. declared a bare trustee for N. It was contended that the conveyance to P. was voluntary under 27 Eliz. c. 4:—*Held*, that the conveyance was not voluntary in its inception; and, even if it were, there was an *ex post facto* consideration sufficient to support it.—Review of the authorities. *Eggertson* v. *Nicastro* (1910), 15 W. L. R. 106.

Voluntary conveyance of land—*Absence of fraud—Improvidence—Lack of independent advice.*]—Plaintiff, a woman sixty-six years of age, gave to defendant's neighbours, who occasionally worked for her, a deed of her property subject to a life interest reserved to her:—*Held*, the improvidence of the deed being manifest, its voluntary character being indisputable, and the evidence warranting findings that plaintiff acted without independent advice, and did not understand nature and effect of the instruments, it was set aside. *Smith* v. *Alexander*, 12 O. W. R. 1144.

Voluntary conveyance of land—Action to set aside—Absence of fraud—Improvidence—Lack of independent advice—Failure of grantor to understand effect of deed—Delay in bringing action—Counterclaim—Reference. *Smith* v. *Alexander*, 12 O. W. R. 1144.

DEER.

See GAME.

DEFAMATION.

1. LIBEL, 1440.
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  iii. *Pleadings*, 1470.
    (a) Generally, 1470.
    (b) Privilege, 1474.

1. LIBEL.

i. *Evidence.*

Admissibility—*Previous and subsequent publications.*]—In an action for libel evidence may be given by the defendant of a previous publication by the plaintiff connected with the libel complained of, but not of a publication subsequent to the libel—at any rate, where it makes no difference to the defendant. *Stirton* v. *Gummer*, 31 O. R. 277, and *Downey* v. *Stirton*, 1 O. L. R. 186, followed. *Downey* v. *Armstrong*, 1 O. L. R. 237.

Admissibility — *Publication of previous libel — Provocation — Subsequent libel — Mitigation of damages.*]—In a libel action the defendant, in order to mitigate the plaintiff's damages, may shew that he was provoked to libel the plaintiff, because the plaintiff had previously libelled him, but (Rose, J., *dissentiente*) no subsequent libel or slander can be given in evidence. Nor can the defendant be permitted to shew that the plaintiff has attacked the character and reputation of others. It having been elicited in cross-examination of the plaintiff that the defendant had recovered damages for previous and subsequent libels before mentioned in an action against the proprietor of the newspaper of which the plaintiff was editor, the Judge told the jury to take that fact into consideration:—*Held*, not misdirection. *Downey* v. *Stirton*, 21 C. L. T. 119, 1 O. L. R. 186.

Application to plaintiff—*Proof of innuendo.*]—An action for libel will be dismissed when the publication complained of does not on the face of it apply to the plaintiff, and he fails to prove the innuendo that it was meant to apply to him. *Morrell* v. *Grant*, 30 Que. S. C. 327.

Discovery — Examination of defendant—Admission of publication — Refusal to give name of informant. *Sangster* v. *Aikenhead*, 5 O. W. R. 438, 495.

Discovery — Examination of defendant—Information as to source of libel. *Schmuck* v. *McIntosh*, 2 O. W. R. 237.

Discovery — Report of proceedings in Court—Examination of defendant—Malice or motive. *Bateman* v. *Mail Printing Co.*, 2 O. W. R. 242.

Evidence — *Discovery — Circular — Names of recipients—Source of information.*] —In an action for damages alleged to have been sustained by reason of the sending out by the defendants of a circular stating that they had been "advised that the (plaintiffs) had decided to discontinue their separator business," the defendants' manager was or-

dered to give on his examination for discovery the names of the persons to whom the circular had been sent and the name of the person who had "advised" the defendants of the fact alleged, this information being relevant to and important on the pleaded defences of *bona fides* and privilege. *Massey-Harris Co.* v. *DeLaval Separator Co.*, 11 O. L. R. 227, 7 O. W. R. 59.

Findings of jury — Meaning of words published — Defamatory sense — Damages. *Stone* v. *Jaffray*, 5 O. W. R. 725.

Newspaper — Discovery — Examination of defendant—Refusal to disclose name of correspondent. *Marsh* v. *McKay*, 2 O. W. R. 522, 614, 3 O. W. R. 48.

Newspaper—Article signed by defendant —Identity of plaintiff with person mentioned in article — Article published in words of manuscript of defendant—Proof of—Damages—Costs. *Levallee* v. *Lannic* (Alta.), 7 W. L. R. 281.

Notarial notice — *Absence of malice—Publication—Service.*]—A notification to a member of a municipal council not to take any part in a certain discussion and vote in the council, given by an interested party by means of a notice served by a notary, upon the ground that this member, having received favours from the party opposed to the one giving the notice, will not be impartial, is given in the exercise of a right, and, in default of proof of fraudulent or malicious intention, will not support an action for defamation.—The service by a notary of a notice upon a party is not a publication of the matter which it contains, and is not therefore ground for an action of defamation. *Montreal Brewing Co.* v. *Vallières*, 15 Que. K. B. 201.

Plaintiff not named — *Circumstances pointing to identity—Imputation of incendiarism.*]—There is defamation when the plaintiff, without being named, is sufficiently indicated. The indication may result from circumstances left to the consideration of the tribunal. A paragraph in a newspaper, under the form of a telegraphic despatch from a named village, in which it was announced that "*un personnage fort en vue*" in that place was to be arrested as the result of an enquiry upon the subject of a "mysterious fire, and that a sensational scandal may be expected when the affair becomes known," sufficiently indicates the mayor of the village, owner of a house burned down some time before, where the fire had provoked an enquiry on the part of the insurers. The writing complained of contained, in a disguised form and by way of insinuation, a sufficiently marked imputation of fraudulent or criminal incendiarism to amount to a libel. *La Presse Publishing Co.* v. *Giguère*, 17 Que. K. B. 268.

Previous writings — *Provocation — Mitigation of damages—Meaning of words.*]—In libel for two articles which were printed in the defendant's newspaper reflecting upon the character and conduct of the plaintiff:—*Held*, that an article in another newspaper, published before the first of the alleged libels, purporting to be an account of an interview with the plaintiff in which he made an attack upon the defendant's newspaper by its name, and a letter signed by the plaintiff, published in two newspapers before the second of the alleged libels, in which the defendant's newspaper and the editor thereof—not the defendant himself—were referred to in abusive language, were admissible in evidence upon the part of the defendant, in mitigation of damages.—*Percy* v. *Gasco*, 22 C. P. 521, followed.—*Held*, also, *per* Rose, J., that editorial articles which appeared on the same day in the newspapers which published the plaintiff's letter, referring to it and to the defendant's newspaper, were admissible too, as furnishing provocation for the second of the alleged libels; Meredith, C.J., *contra*.—In the first of the alleged libels one of the statements made about the plaintiff was "that during an election campaign the party managers had to lock him up to keep him from disgracing them on the stump." —*Held*, that evidence was admissible on the part of the defendant to explain the meaning of the words "lock him up." *Stirton* v. *Gummer*, 20 C. L. T. 5, 31 O. R. 227.

Trial — *Nonsuit after verdict—Innuendo —Onus — Contradictory evidence—"Blackmailing."*] — The word "blackmailing" is libellous *per se*, requiring no innuendo, and it does not lie upon the plaintiff to prove the falsity of the charge; for the purposes of the trial it is presumed in his favour, and the onus is on the defendant to prove it to be true, if justification is pleaded.—*Semble*, the better view is, that colloquial use has broadened the meaning of the word so that it may not have a criminal connotation. In an action for two libels, where the words used in one were not libellous *per se*, and were not, fairly taken, capable of the meaning alleged in the innuendo:—*Held*, as to that, that where motions were made for a nonsuit both at the close of the plaintiff's case and after all the evidence was in, upon which judgment was reserved, the trial Judge had a right to give judgment dismissing the action, after a verdict rendered by the jury in favour of the plaintiff. But as to the other libel, where the truth of the charge was not admitted by the plaintiff or proved on uncontroverted evidence, and where the evidence as to the use of the word "blackmailing" was contradictory:—*Held*, that it was for the jury to pass upon the evidence, and the judgment dismissing the action on the ground that there was no evidence to go to the jury, should be set aside and the verdict of the jury in favour of the plaintiff for $50 restored. Judgment in 32 O. R. 163, 20 C. L. T. 404, reversed in part. *Macdonald* v. *Mail Printing Co.*, 21 C. L. T. 495, 2 O. L. R. 278.

Verdict for defendant—Motion to set aside—Weight of evidence—Innuendo—Proof of — Jury — Reasonable verdict. *Kelly* v. *Journal Printing Co. of Ottawa*, 5 O. W. R. 83.

Words of abuse—*Natural signification—Innuendo — Necessity for shewing sense in which words understood.*]—The defendant, a tax-collector, having applied to the plaintiff for payment of certain taxes, was told by him that J. S. should pay them. He subse-

quently wrote and posted to the plaintiff a post-card stating: "I saw J. S. this morning; he said make the S. B. pay it." In an action for libel in which the plaintiff alleged that "S. B." applied to him and means "son of a bitch:"—*Held*, that there was no reasonable evidence to go to the jury that the letters conveyed the meaning attributed to them by the plaintiff; they are words of abuse, but are, as often used, absolutely meaningless; they do not impute anything against the character of the mother, and are not a statement of a fact; and in their natural significance are not actionable; and the plaintiff had failed to prove his innuendo. *Major* v. *McGregor*, 23 C. L. T. 47, 305, 5 O. L. R. 81, 6 O. L. R. 528, 1 O. W. R. 839, 2 O. W. R. 866.

ii. *Practice.*

Action for libel, slander and conspiracy—Parties—Joinder of defendants—Motion to set aside statement of claim as embarrassing and improper joinder of causes of action—Master in Chambers *held* that conspiracy and slander could not be joined—Meredith, C.J.C.P., affirmed above holding—Plaintiffs amended statement of claim—New motion to strike out amended statement of claim — Master struck out "many other slanders and libels, particulars and details of which are unknown to the plaintiff" — In other respects motion dismissed—Costs in cause—Trial resulted in defendants' favour —Costs taxed by senior taxing officer at Toronto—Con. Rule 1162—Severing defences—Appeal to Boyd, C., dismissed with costs. *Devaney* v. *The World* (1911), 18 O. W. R. 919, 1 O. W. N. 454, 472, 547, 2 O. W. N. 880.

Criminal information.]—A party seeking a criminal information against another must himself be free from blame. *R.* v. *Whelan* (1863), 1 P. E. I. R. 223.

Criminal information.] — Where the libel charges the person libelled with having, by a previous writing, provoked it, the latter, by his affidavit on which he moves for a criminal information, is bound to answer it, otherwise the affidavit is insufficient, and the rule must be discharged. *R.* v. *Whelan* (1862), 1 P. E. I. R. 220.

C. S. N. B. 1903, c. 136, s. 4—*Notice of action—Newspaper correspondence.*]—Action for libel contained in a letter signed by a fictitious name, said to be written by defendant and published in a newspaper of which defendant was a correspondent: — *Held*, that defendant is not entitled to notice of action under s. 4 above. Appeal allowed. Nonsuit set aside. *Underwood* v. *Roach*, 6 E. L. R. 561.

Damages.]—In an action for libel, where no material or actual damage is proved, the plaintiff may recover exemplary damages. *Filiatrault* v. *"La Patrie" Publication Co.*, 28 Que. S. C. 380.

Damages — *Particulars.*]—Where in an action for libel the plaintiff claims damages generally, and makes no special allegation of real damages, the Court should assume that the damages sought are vindictive, and should not order particulars. *Gauvreau* v. *Chapais*, 18 Que. S. C 135.

Defamatory statement in pleading—*Right of action — Good faith—Relevancy — Determination of previous suit.*]—An action against a party for a libellous statement in a judicial proceeding, raises matters concerning the relation of the subject to the administration of justice, and, as such, is governed by the law of England.—2. Under the law of England, no damages can be recovered for injurious words, forming part of a judicial proceeding, pleaded in good faith, with probable cause and without malice, the words being relevant to the issue, although they may be subsequently shewn to be false and injurious:—*Semble*, an action for such injurious statements, instituted before the determination of the suit in which they were pleaded, is premature; but, in the present case, it was unnecessary to pronounce formally upon this point, the action being dismissed on other grounds. *Wilkins* v. *Major*, 22 Que. S. C. 264.

Defamatory statement in pleading—*—Right of action—Prescription.*]—A person complaining of a libellous statement in a pleading filed in a suit is not bound to postpone his action for damages until final judgment has been rendered in that suit:—*Semble*, were he so to delay, his action might be prescribed. *Wilkins* v. *Major*, 22 Que. S. C. 263, 4 Que. P. R. 172.

Injunction to restrain publication—*Remedy restricted to particular libels—Motion too wide.*]—Middleton, J., *held*, that the Court cannot grant an *interim* injunction restraining the publication of libels generally. The most that can properly be asked for in any case is an injunction restraining further publication of particular libels. *Natural Resources* v. *Saturday Night* (1910), 16 O. W. R. 927, 2 O. W. N. 9.

Joinder of claim for wages—*Particulars.*]—A claim for damages for defamation may be joined with a claim for wages due. —2. The plaintiff in an action for damages for defamation, who alleges that he has been defamed to certain institutions and persons, must give particulars shewing what institutions and what persons employed in such institutions are intended. *Gray* v. *Brommell*, 6 Que. P. R. 234.

Newspaper—*Notice of action—Libel Act, s. 4—Anonymous correspondent.*]—Section 4 of the Libel Act, C. S. N. B. 1903, c. 136, providing for notice of action, does not apply to an anonymous correspondent, not being a regular correspondent of a newspaper, who causes a libel to be published therein.—*Quære*, whether this section applies to an editor or to a regular correspondent of a newspaper. *Underwood* v. *Roach*, 39 N. B. R. 27, 6 E. L. R. 561.

Newspaper — *Place of publication—Superior Court—Territorial jurisdiction—Judicial districts—Definition of "newspaper."*]—An action for libel may be begun before the Court of the district in which the newspaper wherein the libel has been published circulates, and where the plaintiff resides.—A newspaper is a paper containing news, and literary, scientific, commercial, and industrial matters, published and circulated periodically

as a commercial enterprise, and with the object of making money. *Humphrey* v. *Success Co.*, 9 Que. P. R. 24.

Newspaper—*Publication in different districts — Several actions — Litispendence.*]—A plaintiff may sue the publisher of a newspaper in several districts at the same time for damages for the particular injury which he has suffered in each of these districts by the publication of a libellous article in the newspaper. *Casgrain* v. *Le Soleil Publishing Co.*, 9 Que. P. R. 34.

Newspaper—*Criminal charge—Innuendo—Security for costs.*] — On a motion for security for costs in an action for libel contained in a public newspaper, it was held, that if the words which plaintiff charges to have been used in a sense which involves the making by the person using them, of a criminal charge against the plaintiff, and may have that meaning, the case is brought within the exception contained in R. S. O. 1897, c. 68, s. 10 (a), and the defendant is not entitled to security for costs. *Smyth* v. *Stevenson* (1897), 17 P. R. 374, followed. *Kelly* v. *Ross* (1909), 14 O. W. R. 617.

Affirmed, 698, 1 O. W. N. 48.

Leave to appeal to Divisional Court refused, 14 O. W. R. 823, 1 O. W. N. 116.

Newspaper innuendo—*Verdict for defendant—New trial—R. S. C. c. 146, s. 265.*]—Action for libel. In the defendant's newspaper there appeared a letter which it was claimed charged plaintiff with having been corruptly induced not to be a candidate at the Dominion election. The jury brought in a verdict for defendant. On appeal a new trial was ordered, it being held that a criminal charge was imputed, and that all the jury had to do was to assess the damages. *Kendall* v. *Sydney Post*, 7 E. L. R. 410.

Pleading — Defence—Offer of apology—6 & 7 V. c. 96 (Imp.)—Newspaper libel—Appeal to Court *en banc* from order in Chambers — Necessity for consent of Judge in Chambers—Costs. *Goode* v. *Journal Publishing Co.* (N.W.T.), 6 W. L. R. 511.

Publication—*Place where damages arise—Superior Court — District.*]—An action based upon a libel, and claiming damages incurred in a certain district other than that in which the defendant has his domicil and in which the newspaper containing the alleged libel is printed, may be begun in such district. *Gosselin* v. *Belley*, 4 Que. P. R. 233.

Security for costs—*Right of sub-editor to security—Application first made to Master in Chambers—Finality of decision—"Judge of the High Court"—Leave to appeal from order of Judge in Chambers—Con. Rule 1278—Affidavit in support of motion for security—Sufficiency—R. S. O. 1897, c. 68, ss. 10, 15.*]—In an action for libels contained in a newspaper the defendant moved for security for costs under R. S. O. 1897, c. 68, s. 10, alleging in his affidavit that he was the "sporting editor of the newspaper, and that he had the sole control and editorship of the sporting and dramatic intelligence:—*Held*, that as the editor of a department of a newspaper, he was entitled to security for costs. —*Semble*, that all who are engaged in any capacity in the work of publishing the newspaper in which an alleged libel appears are entitled to the protection given by the statute. *Egan* v. *Miller* (1887), 7 C. L. T. 443, and *Neil* v. *Norman* (1901), 21 C. L. T. 293, distinguished. The plaintiff having moved under Con. Rule 1278 for leave to appeal from the above decision, *held*, that leave could not be given under either branch of the Rule, as there were no "conflicting decisions by Judges of the High Court upon the matter involved in the proposed appeal," and there appeared to be no "good reason to doubt the correctness" of the order sought to be appealed from. The defendants' affidavit as to merits said, "I am advised by my solicitor, and I believe that I have a good defence on the merits," the statute requiring "an affidavit by the defendant or his agent . . . that the defendant has a good defence upon the merits."—*Held*, that the affidavit was sufficient. *Crossby* v. *Innes* (1837), 5 Dowl. P. C. 566, followed. *Robinson* v. *Morris* (1908), 15 O. L. R. 649, distinguished. The statute requires that the defendants' affidavit should shew "that the statements complained of were published in good faith, or that the grounds of action are trivial or frivolous." The defendant swore that the words used by him were "innocent and harmless." *Robinson* v. *Mills* (1909), 13 O. W. R. 606, 763, 853, 19 O. L. R. 162.

Settlement of action—*Renewal of libel Opening of settlement.*]—The defendant in an action for libel, who, after pleading justification, makes terms with the plaintiff, and signs an explanatory admission, with the understanding that a judgment of the Court in accordance therewith will be applied for later, impliedly engages not to renew his libellous attacks in the interval, and, if he does so, he violates the agreement, and matters are remitted to the *status quo ante*. *Choquette* v. *Parent*, 16 Que. K. B. 481.

Several actions against different defendants — Consolidation—R. S. O. 1897, c. 68, s. 14—Identity of libels—Trial. *Perkins* v. *Fry*, *McDonald* v. *Record Printing Co.*, *Currie* v. *Record Printing Co.*, 10 O. W. R. 784, 954.

Several libels — *Damages—Separation.*]—A plaintiff who claims damages by reason of a series of libellous paragraphs and articles which he sets forth, cannot be ordered to declare what amount of damages he claims for each of such paragraphs and articles. *Prévost* v. *Nationalist Printing Co.*, 6 Que. P. R. 428.

Verdict for defendants—*Perverse verdict—New trial.*]—Two substantive allegations of wrong-doing on the part of plaintiff as a Minister of the Crown having been alleged, and there being no proof of the truth, and no justification for one of such allegations, the jury, after a charge in favour of the plaintiff, returned a verdict in favour of the defendants:—*Held*, on appeal (Irving, J., dissenting), that there should be a new trial. *Green* v. *World Printing & Publishing Co.*, 8 W. L. R. 210, 13 B. C. R. 467.

Verdict for $1—*Costs.*]—Action for libel in which the jury brought in a verdict in

favour of the plaintiffs for $1. The plaintiffs' counsel applied for full costs of suit, which was opposed. By Rule 926, where any action is tried by a jury, the costs shall follow the event, unless, upon application made at the trial, for good cause shewn, the Judge or the Court otherwise orders:—*Held*, that the verdict of $1 recovered should not carry costs, but no costs should be allowed to defendants. *Manitoba Farmers' Hedge & Wire Fence Co.* v. *Stovel Co.*, 22 C. L. T. 186, 14 Man. L. R. 55.

iii. *Pleadings.*

(a) Generally.

Accusation of malversation as a director of a company—*Answer to action—Bad administration as mayor—Putting in default inscription in law—C. P. 191, C. C. 1067.*]—A newspaper sued in damages for having published that the plaintiff as president of a company had purchased privately some real estate to re-sell it with profit to the company cannot plead, (1) that the plaintiff as mayor of the city has negotiated a loan to the great loss of the citizens of the city, (2) the plaintiff was bound to put the defendant in default, either by letter or otherwise, to publish an explanation or a retraction. These allegations will be struck on an inscription in law. *Garneau* v. *La Cie "La Vigil"* (1909), 10 Que. P. R. 370.

Declaration — *Several counts—Particulars of damages.*]—In an action for libel and slander based upon several different counts, the plaintiff may be ordered to give particulars of the amount claimed on each distinct count. *Hogg* v. *Ross*, 5 Que. P. R. 339.

Defamatory pleading — *Fire insurance — Implication — Fraud — Arson.*] — The denial in a plea that a fire occurred accidentally and from cause unknown, does not imply or insinuate that the assured criminally set the fire. Allegations in a plea by an insurance company, that the assured made false representations in his application for insurance, made false solemn declarations after the loss, as to the value of the stock, with fraudulent intent, and that in swearing to false exaggerated statements, the assured did not swear to the truth and rendered himself guilty of fraud and his policy null, when pertinent to the issue, and pleaded in good faith and with probable cause, are not libellous or defamatory. *Morrison* v. *Western Assce. Co.*, 24 Que. S. C. 111.

Defence — *Publication — Falsity.*] — Motion to strike out as false, frivolous, and vexatious, the following paragraphs of a defence in an action for libel: "The defendant does not admit that he is the publisher and editor of said newspaper." The fact of the defendant's being editor and publisher having been established by affidavit:—*Held*, that the paragraph could and should be struck out as false. *Lanos* v. *Landry*, 21 C. L. T. 312.

Disagreement of jury—*Amendment by adding innuendoes.*] — An action for libel. The cause was tried, and the jury disagreed. The plaintiff applied after trial to amend the statement of claim, by adding further innuendoes as to the libel complained of, the defendant opposing the motion, on the ground that a new case was set up, and also on account of the delay:—*Held*, that the plaintiff was entitled to the amendment sought, on payment of costs. *Grant* v. *Grant*, 24 C. L. T. 95.

Motion under C. R. 261 to strike out statement of claim—*No reasonable cause of action—Publication of obituary notice—Imputation that plaintiff was illegitimate—Inference not probable—Question for jury—Attack on defendant's legitimacy struck out of pleading under C. R. 298.*]—Plaintiff alleged that defendant published an obituary notice of his father, which she alleged imputed that she was illegitimate, and brought action to recover damages for libel. Defendant moved to strike out her statement of claim as disclosing no reasonable cause of action.—Middleton, J., *held*, that plaintiff had the right to go to trial as possibly, in the light of surrounding circumstances, she could shew enough to satisfy a jury that the words complained of were published with the intention that they should convey the meaning ascribed to them by plaintiff. Plaintiff's pleadings which attacked defendant's legitimacy struck out under C. R. 298. *Barnes* v. *Carter* (1910), 16 O. W. R. 911, 2 O. W. N. 8.

Particulars—*Amendment of pleadings.*] —The plaintiff sued the defendant for a libel published in his newspaper. Upon demand of particulars the defendant produced a certain number of issues of his newspaper. At the *enquête* the defendant made a motion to amend his pleading so as to make it conform to the facts, and at the same time asked leave to produce a number of additional issues of his newspaper to form part of his amended pleading:—*Held*, that such a motion will be dismissed because it would work an injustice upon the defendant, who would be taken by surprise, and because it would alter the pleadings. *Roy* v. *Mercier*, 2 Que. P. R. 495.

Practice — *Striking out defence—"Conciliatory plea" — Embarrassing matters.*]— In a libel action certain paragraphs were struck out as irregular and embarrassing. *Blight* v. *Warren*, 7 E. L. R. 305.

Statement of claim.]—In a libel action the defendants sought to strike out a paragraph in the statement of claim containing two sentences from the article complained of, because they were not included in the notice of complaint before action: — *Held*, that from the form of the notice in which he complained of the whole article the plaintiff could retain said paragraph or amend it as he desired. Allegations in aggravation of damages and proof of malice will not be struck out. *Pringle* v. *Financial*, 12 O. W. R. 929.

Statement of claim—Irrelevant allegations—Motion to strike out. *McAlpine* v. *Record Printing Co.*, 10 O. W. R. 981.

Statement of claim—*Setting out whole newspaper article — Parts not referring to plaintiff—Innuendo.*]—The very words com-

plained of in an action of defamation must be set out by the plaintiff, in order that the Court may judge whether they constitute a cause of action; it is not sufficient to give the substance or purport, with innuendoes; it is sufficient to set out the libellous passages, provided that nothing be omitted which qualifies or alters the sense; and, as the libel itself must be produced at the trial and the defendant is entitled to have the whole of it read, the plaintiff is entitled to set out in the statement of claim the whole article complained of.—*Held*, also, that certain words set out in another paragraph, which did not refer to the plaintiff, and tendered an issue not material, which might be embarrassing, should be struck out.—*Deyo* v. *Brondage*, 13 How. Pr. 221, referred to. *Hay* v. *Bingham*, 23 C. L. T. 112, 5 O. L. R. 224, 1 O. W. R. 822, 6 O. W. R. 447, 11 O. L. R. 148.

Statement of defence—Indictment of another person for the same defamatory writing — Pleading in bar — "Embarrassing" pleading — Rule 298 — Striking out. *Mills* v. *Spectator Printing Co.*, 13 O. W. R. 685.

Statement of defence — Irrelevancy—Embarrassment — Justification — Fair comment — Retractation — Apology — Mitigation of damages—Necessity for clear statement. *Currie* v. *Star Printing Co.*, 11 O. W. R. 168.

Statement of defence—Privilege—Invitation to libel — Relevancy — Sufficiency —Necessity for setting out facts—Justification — Particulars — Specific instances. *Laird* v. *Scott*, 9 W. L. R. 349.

What was said.]—Defendant in an action for libel cannot say, by way of defence, that "I did not say of you what you claim I did; but I did say of you something else and that is true." *Rassam* v. *Budge*, [1893] 1 Q. B. 571, followed. Pleadings, that a number of other statements were made by defendants and such statements are true, without specifically setting out the facts, are bad; as the plaintiff would be left to fish out facts which defendants desired to prove as detrimental to his reputation. *Kelly* v. *Ross* (1909), 14 O. W. R. 916, 1 O. W. N. 142.

(b) Justification.

Defence — *Fair comment — Absence of justification — Striking out defences.*]—In an action for alleged libel contained in an article in the defendants' newspaper, the defendants pleaded fair comment, but did not attempt in any way either to set up the facts upon which it was alleged the article was fair comment, or allege that the statements of fact in the article complained of were true: —*Held*, that the defence was bad, and should be struck out. It is clear upon the authorities that a man may not invent his facts and then comment on them, and succeed upon the ground that, the facts being assumed to be true, the comment is fair. *Crow's Nest Pass Coal Co.* v. *Bell*, 22 C. L. T. 407, 4 O. L. R. 660, 1 O. W. R. 679.

Defence—Fair comment — Untrue statements of fact. *Conmee* v. *Lake Superior Printing Co.*, 2 O. W. R. 509, 543, 743.

Defence — Justification—Fair comment —Particulars — Examination for discovery —Motion to strike out defence—Embarrassment. *Chambers* v. *Jaffray*, 6 O. W. R. 441.

Defence — *Justification — Particulars— Appeal — Res judicata.*]—A libel originally complained of in the statement of claim stated that the plaintiff had been cashiered from the army for cheating at cards, and also that divorce proceedings had been taken against him. The defendant pleaded justification to the whole, and added two clauses to the same paragraph of his statement of defence, one of which related to the first charge and the other to the second. The first of these clauses was as follows: "The plaintiff was obliged to leave the army on the ground that he had cheated at cards, and stories of the peculiar character of the plaintiff's card-playing and of his having been cashiered from the army for cheating at cards were in circulation in the city of Vancouver." The plaintiff applied for an order striking out both these added clauses, but the application was refused on the ground that the defendants were entitled to plead them as particulars of the defence of justification. There was no appeal from this order, but the plaintiff amended (by leave) by striking out so much of his complaint as related to the divorce proceedings, and the defendants then struck out of their defence the second clause, relating to the divorce proceedings. An application was then made to strike out the first clause, that relating to the plaintiff being cashiered from the army, and was refused by the Master and by a Judge in Chambers on appeal:—*Held*, *per* Falconbridge, C.J., that the plaintiff was not prejudiced by the clause; and, moreover, approving *Dodge* v. *Smith*, 1 O. L. R. 46, that a second appeal was not to be encouraged in a case of this kind. *Per* Street, J., that the matter of the second application was *res judicata* by the order made on the first application and not appealed against. *Bateman* v. *Mail Printing Co.*, 21 C. L. T. 559, 2 O. L. R. 416.

Justification — Qualified privilege—Answer to public statement—Judge's charge— Perverse verdict. *Preston* v. *Journal Printing Co.*, 2 O. W. R. 923.

Justification — *Pleading.*]—A defendant sued for having defamed the ward of the plaintiff in the course of the months of November and December, 1904, and April and September, 1905, cannot plead in justification facts which occurred and words which were spoken in February and March, 1904; such allegations are useless, cannot but be injurious, and will be struck out upon inscription in law. *Balthazard* v. *Either*, 7 Que. P. R. 337.

Letter reflecting on physician's professional skill—Justification—Damages— Costs. *Williams* v. *Morris* (B.C.), 4 W. L. R. 99.

Libel in newspaper — Justification pleaded—Particulars of statement of defence ordered—Practice—Costs to plaintiffs in any event. *Wilkinson* v. *Hamilton Spectator; Wilkinson* v. *Mail & Empire* (1910), 17 O. W. R. 935, 2 O. W. N. 471.

Moral and social duty—*Malice.*]—A niece wrote to her aunt, with whom she was on terms of great intimacy, and with whom she was in the habit of staying, a letter making, on the authority of a correspondent, statements derogatory to the character of a gentleman well known to niece and aunt, who was a frequent visitor at the aunt's house, and it was alleged on the one side and denied on the other that in the letter, which had been destroyed, the niece told the aunt "to spread this about town at once:" —*Held*, that such a moral and social duty existed as made the communication a privileged one; and that, though a direction to spread the statement about would be some evidence of malice, it should be left to the jury to say whether that direction had been in fact given. *Fenton* v. *Macdonald*, 21 C. L. T. 228, 1 O. L. R. 422.

Newspaper — *Misleading statement — Public interest—Damages—Costs.*]—The defendant published in a newspaper a statement that the plaintiff had in the Police Court pleaded not guilty to a charge of theft and had been remanded for *enquête*. As a matter of fact, the inquiry was held later in the same day, and the plaintiff was discharged. The item stating that she had been remanded, however, did not appear in the newspaper until the following day, and no mention was made of the fact that it had subsequently been discovered that the charge was unfounded. The defendant pleaded that the item was true and had been published without malice and in good faith and in the public interest; —*Held*, that, though the item was evidently published without malice and in good faith, yet, if it was in the public interest, it was equally so that the plaintiff's discharge should have been recorded. As there was no proof, however, of any pecuniary damage suffered by the plaintiff, judgment was given for $10 and costs as of a Circuit Court action of the lowest class. *Hearn* v. *Graham*, 23 C. L. T. 119.

Newspaper—*Repeating article from another newspaper — Defence—Justification — Payment into Court — Pleading.*] — It is not a defence to an action of libel nor a justification to say that the alleged libel was published by the defendant in his newspaper simply as a fact upon the authority of another newspaper.—The defendant, having offered and paid into Court with his defence a certain sum of money, cannot demand the complete dismissal of the action, but only dismissal of the claim so far as it exceeds the amount paid in. *Prévost* v. *Huard*, 7 Que. P. R. 406.

Pleading — *Defence—Denial—Justification — Public interest — Mitigation of damages.*]—In an action for damages for defamation, a defence based upon the truth of the words complained of (justification) and the allegation that they were used in the public interest, must be directed altogether to the facts alleged by the plaintiff, and all allegations of the defence relating to other facts will be struck out.—Where the defendant denies that he used the defamatory words complained of, he cannot set up the truth or the notoriety of the matters in respect of which he used the words, either as a ground of justification or in mitigation of damages. *Bouchard* v. *Chartier*, 31 Que. S. C. 535.

(c) Privilege.

Charge against civic employee by alderman — Justification—Public interest — Privileged communication — Damages. *Barthe* v. *Lapointe*, 4 E. L. R. 339.

Copied letter — *Confidential clerk — Publication — Privileged occasion — What witness understood words to mean—Evidence —Damages.*]—The defendant, a merchant, in a letter accused the plaintiff of theft and threatened to expose him. This letter was handed to a confidential clerk and copied, and the copy was signed by the defendant and sent by post to the plaintiff:—*Held*, *per* Barker, C.J., Landry and McLeod, JJ., Hanington, J., dissenting, that the writing of such defamatory statements did not fall within the ordinary business of a merchant, and the giving of it to his clerk to copy was a publication, and the occasion of such publication was not privileged.—As the defamatory words imputed a crime and were actionable in themselves, the clerk could not be asked what she understood by them, unless there were some circumstances proved which would or might give a meaning to them different from what they ordinarily have: *per* Barker, C.J., and McLeod, J.; Landry, J., doubting; and Hanington, J., dissenting.—*Per* Hanington, J., that the question was proper, because, while the answer could not be a justification, it might go in mitigation of damages. *Moran* v. *O'Regan*, 38 N. B. R. 399, 4 E. L. R. 573.

Evidence of malice or indirect motive—*Truth or falsity of defamatory words —Judge's charge—Damages.*] — Action for libel and slander by plaintiff, a church treasurer, against defendant, who had audited the plaintiff's church books. Plaintiff obtained a verdict at the trial. An appeal was dismissed:—*Held*, that there was no misdirection by the Judge. *Schaefer* v. *Schwab* (1909), 12 W. L. R. 338.

Express malice — *Interrogatories—Particulars—Practice.*]—As the particulars ordered were particulars of malice which could not be given, appeal allowed. Certain interrogatories struck out and order for particulars set aside. *Timmins* v. *National* (1909), 12 W. L. R. 492.

Fair comment.]—On an application to strike out a plea of fair comment which alleged that, "in so far as the said words consist of allegations of fact that are true in substance and in fact, and in so far as they consist of expressions of opinion they are fair comment made in good faith and without malice upon a matter of public interest," on the ground that the alleged libel was an assertion of facts only and was not a comment:—*Held*, that the plea was good, but that the defendants would require to prove the truth of the facts on which they based their comment, distinguishing the facts from the comment, and that they must give particulars. *Pike* v. *Lawton*, Royal Gazette, Nfld., 15 Feb., 1910.

Immunity—*Report of expert appointed to approve quality of materials.*]—The expert

appointed in pursuance of a contract for the construction of public works to approve of the materials employed and to report that they are according to the specifications agreed upon by the parties, is not liable in damages towards the contractors who supplied the materials if his report and his explanation of it is unfavourable to them, provided he has reported in good faith and without malice. *Audet & Ouimet* (1910), 19 Que. K. B. 541.

Innuendo — *Defamatory meaning ascribable to words not libellous in themselves — Privileged occasion—Notice to public of dissolution of partnership—Damages.*]—Action for libel. Plaintiff and defendant conducted a theatre in partnership. The defendant inserted a notice in a newspaper to the effect that the theatre was closed and that he would not be liable for any debts contracted on behalf of the theatre by the plaintiff:—*Held*, to be libellous and that the occasion was not privileged. *Fowler* v. *Nankin*, 11 W. L. R. 586.

Interest — *Evidence of actual malice—Charge to jury—Evidence.*]—On the trial of an action for damages for a libel alleged to be contained in a privileged communication, the Judge charged the jury as to the privilege, and added:—"If the defendant made the communication *bona fide*, believing it to be true, and the privilege existed that I have endeavoured to explain, then there would be no action against him:"—*Held*, that the plaintiff was entitled to a more explicit statement of the law on a point directly affecting the proof of an issue the burden of which was upon him. One portion of the communication containing the alleged libel might be read as importing a grave charge against the plaintiff or as an innocuous statement of fact:—*Held*, that, as, in order to prove malice, the writer's knowledge of the falsity of the fact was the material point, the sense in which he may have used the words was the governing consideration. The Judge's charge was not open to objection for want of an explicit reference to pre-existing unfriendliness between the parties as proof of malice, where the only evidence of unfriendliness consisted of hard things said of the defendant by the plaintiff. Judgment in 32 N. S. R. 129, affirmed. *Miller* v. *Green*, 21 C. L. T. 254, 31 S. C. R. 177.

Interest — *Evidence of actual malice—Nondirection—Misdirection — New trial.*] — The plaintiff, the local agent of an insurance company, voluntarily retired from his position, and another agent was appointed in his stead. Shortly afterwards the defendant, the general manager of the company, wrote to a policy holder, who was a client of the plaintiff, that the latter had been "removed from the agency . . . because it was clearly necessary . . . I now find that he has collected money which up to the present time we have been unable to get him to report." At the time this was written it was untrue, to the knowledge of the defendant, that the plaintiff had been dismissed and that he had collected money of the company for which they had been unable to get him to account:—*Held*, that the writing was libellous; but, if it was written *bona fide*, the occasion was privileged. 2. The trial Judge should have directed the jury that if it was proved that the defendant stated in his letter that which he knew to be false, it was evidence from which actual malice might be inferred, and, as he had not so directed that there should be a new trial. 3. That evidence of altercations between the plaintiff and defendant was proper to be submitted to the jury as evidence of malice. 4. That an inference of malice could be drawn from evidence that the defendant knew that the plaintiff had used abusive language with respect to him in connection with their business relations. 5. That the trial Judge erred in directing the jury that it was not open to the plaintiff to put another construction upon the word "report" than the sense in which it would be understood by the plaintiff and defendant themselves. 6. That the Judge erred in his definition of malice in connecting it with the idea of "reaking petty spite" upon the plaintiff, and in leaving the jury under the impression that the defendant's evidence as to the state of mind in which he wrote the letter was conclusive. *Miller* v. *Green*, 33 N. S. R. 517.

Interest — *Publication to clerk—Finding of jury.*]—One of the defendants, the secretary of a trade association, prepared a statement for circulation among the members of the association, and gave it to a person to copy. It contained an allegation that the plaintiff was unworthy of credit:—*Held*, that, as the publication to the members of the association was privileged, in the absence of malice, on the ground of interest, the publication to the copyist, though she was not a regular employé, was also privileged, being a reasonable means employed to make the communication to the others. *Lawless* v. *Anglo-Egyptian Cotton and Oil Co.*, 4 L. R. Q. B. 262, followed—*Held*, also, that the finding of the jury that "there was no ground of action" was in effect a finding that the words were not defamatory. *Harper* v. *Hamilton Retail Grocers' Assn.*, 21 C. L. T. 23, 32 O. R. 295.

Judicial proceedings — *Report of—Statement of advocate—Good faith — Damages.*]—The privilege which protects a report of judicial proceedings made in good faith does not extend to the publication of statements made by an advocate for one of the parties, outside of the Court, and in a private conversation, but these declarations, although they do not constitute a justification, may be pleaded to shew the good faith of the defendant and in mitigation of damages. *Desjardins* v. *Berthiaume*, 16 Que. S. C. 506.

Letter to newspaper—*Defence—Provocation by utterances of plaintiff reported in newspaper—Privilege—Mitigation of damages — Counterclaim — Malice.*] — Plaintiff was alderman of the city of Ottawa, and a member of the building committee of the public library, and defendant was the contractor for the stone and mason work of the library building. The libel complained of was in the letter written by defendant to the editor of the Ottawa "*Evening Journal*," published in that newspaper on 23rd October, 1903, in which, after calling attention to certain statements made by plaintiff at a meeting of the committee criticising the work upon the library building, defendant proceeds to charge in effect that plaintiff was actuated in his

criticism by spite and bigotry; that plaintiff was himself an incompetent mechanic; that certain buildings were put up by plaintiff, "of which he ought to be ashamed;" that plaintiff owed defendant an account which he had to force him to pay; that plaintiff was always in a quarrelling mood; and that "if the like of Alderman Hopewell was a fit man to inspect his work, it was time he quit building." *Laughton* v. *Bishop of Sodor and Man*, L. R. 4 P. C. 495, distinguished, *Murphy* v. *Halpin*, Ir. R. 8 C. L. 127, followed:—*Held*, that it was the duty of plaintiff as a member of the building committee to honestly criticise at meetings of the committee the workmanship on a building under its charge, and if such criticisms were not made in good faith and defendant felt aggrieved thereby, he could either resort to an action or communicate to the committee and such other persons as may have heard plaintiff's criticisms his defence thereto, accompanied with such retort upon plaintiff as may have been necessary as a part of his defence or fairly arising out of any charges made by plaintiff, and if in such retort defendant had reflected upon the conduct or character of plaintiff, it would be for a jury to say whether defendant acted in good faith and in self-defence, or was actuated by malice. But, he had no right to publish his defence and retort to the general public through the newspapers. In other words, the public as a whole, unlike the members of the committee and other persons who chanced to hear plaintiff, had no corresponding interest with defendant in the subject matter. . . . The facts set forth establish no defence on the ground of privilege, but many of them would be admissible in mitigation of damages, and limited to that purpose may be pleaded. . . . [Reference to *Stirton* v. *Gummer*, 31 O. R. 227.] Appeal allowed as regards counterclaim and dismissed as regards defence. *Hopewell* v. *Kennedy*, 4 O. W. R. 433, 25 C. L. T. 70, 9 O. L. R. 43.

Malice — *Privilege—Evidence—Meaning of words—New trial*]—The defendant, the general manager of a life insurance company, wrote a letter to F., a policy-holder in the company, in which he stated that the plaintiff had been "removed" from his office as local agent of the company, and assigned as the reason for such removal that they had tried for a considerable time past to get the plaintiff to attend properly to their business, and that it was only because it was clearly necessary that the change was made. He stated, further, that, to give the plaintiff the opportunity of getting the benefit of commissions on outstanding business, certain matters had been left in his hands, but that he, the defendant, now found that the plaintiff had collected money which, up to the present time, they "had been unable to get him to report." This letter was handed by F. to the plaintiff, who, in addition to acting as the local agent of the company, was a solicitor, and acted as F.'s legal adviser:—*Held*, in libel, that the trial Judge correctly directed the jury that if the statements made by the defendant in the letter in question, as to the reasons for dismissing the plaintiff, were made by him, knowing them to be false, there was malice, and his privilege was wholly gone.—*Held*, also, that the reception of evidence of F., as to the meaning which she attached to the words of the letter, was not, under O. 37, r. 6, "a substantial wrong or miscarriage in the trial," and was not therefore ground for a new trial. *Miller* v. *Green*, 35 N. S. R. 117.

Mercantile agency — *Privilege.*]—In a mortgage foreclosure action, the Lion Brewery Company as second mortgagees were joined as defendants, and a mercantile agency published a notice or circular, distributed amongst its subscribers, that a writ had been issued against the Lion Brewery Company claiming foreclosure of a mortgage, and indicating by means of the words "*et al*" that there were other defendants:—*Held*, in an action by the company against the mercantile agency, that the publication was libellous and not privileged. *Lion Brewery Co.* v. *Bradstreet Co.*, 9 B. C. R. 435.

Newspaper—Letter to—Defence—Provocation by utterances of plaintiff reported in newspaper—Privilege — Mitigation of damages—Counterclaim — Malice. *Hopewell* v. *Kennedy*, 4 O. W. R. 433.

Newspaper — *Privilege—Fair comment —Matters that may be considered in mitigation of damages — Comment distinguished from assertion of facts.*]—It is no defence to an action for libel, that the publication complained of purports to represent the assertions of a third party, or even the mere repetition by such third party of the assertions of another; such facts can be considered only in mitigation of damages. — While a newspaper may publish a report of the proceedings of a public body, and comment upon facts and statements then made that may be defamatory to individuals, it is not fair comment as against any such individuals, after a considerable interval of time, to republish such statements as facts or as alleged facts. Fair comment must never consist of the assertion of fact; it consists of opinions and inferences from facts assumed to be true.—A newspaper publishing and commenting upon proceedings in a judicial or semi-judicial investigation may comment upon the fact that further damaging evidence against a party might have been given if the tribunal had been disposed to receive it, but it is not fair comment to state such evidence, or the purport of it.—*Hibbins* v. *Lee*, 4 F. & F. 243, and *Helsham* v. *Blackwood*, 11 C. B. 111, approved and followed.—*Semble*, that the jury (or Judge sitting without a jury) may take into consideration the fact that the libellous statements were matters of public notoriety in the community previous to their publication by the defendant, in mitigation of damages. *Patterson* v. *Edmonton Bulletin Co.*, 1 Alta. L. R. 477, 8 W. L. R. 672.

Newspaper — *Privileged publications—Reports of judicial proceedings—Pleadings filed in civil actions.*]—The publication of the statements contained in a pleading filed in the course of a civil action, merely because such statements form part of such a pleading, is not a privileged publication within the rule which throws the protection of privilege about fair reports of judicial proceedings.—Judgment in *Shallow* v. *Gazette Printing Co.*, 4 E. L. R. 343, 17 Que. K. B. 309,

reversing the judgment in 31 Que. S. C. 338, 3 E. L. R. 25, affirmed; Girouard, J., dissenting. *Gazette Printing Co.* v. *Shallow*, 41 S. C. R. 339, 6 E. L. R. 348.

Newspaper—*Public interest—Privilege—Fair comment.*]—It is the English law, by virtue of which constitutional liberty of the press exists in Canada, which is applicable to actions for defamation in respect of writings in newspapers and to defences founded on privilege or fair comment. Under this law, three elements are necessary to enable the writer of a defamatory article to escape civil liability therefor; (1) the writing must be true; (2) it must relate to facts which are of interest to the public; and (3) it must have been published in the public interest and without malice. *Marcotte* v. *Bolduc*, 30 Que. S. C. 222.

Newspaper — *Recklessness—Absence of actual malice—Retractation — Damages.*] — Where a false report, implicating an entirely innocent person in the commission of a serious crime, has been published in a newspaper, not maliciously, but without any effort to verify the statements contained therein, the fact that the newspaper was about to go to press at the time the information was received is not a valid excuse for failure to investigate the truth of the charge; and the fact that subsequently a retractation and apology were published in the same journal, while it may be taken into consideration in the assessment of damages, is not a sufficient reparation for the wrong inflicted on an innocent peron by a false accusation. The Court in such case will award exemplary damages to an amount in proportion to the degree of negligence proved. *Auburn* v. *Berthiaume*, 23 Que. S. C. 476.

Newspaper — *Evidence — Comment on legal proceedings —Privilege — Public interest—Statutory declaration.*]—The publication of libellous matter in a newspaper cannot be justified on the ground that it was published "as a matter of public news" or "in the *bona fide* belief that it is in the public interest that the matters referred to should be made public."—Neither can the publication be justified on the ground that the matter complained of has been embodied in a statutory declaration made before a justice of the peace with the object of bringing the charges contained in the declaration before the Municipal Council having power to enquire into the charges made and to dismiss the official complained of.—Under the heading of "Scott Act inspector accused of bribery" the defendant company printed in their newspaper an item to the effect that M. had made a declaration before a justice of the peace accusing the plaintiff, the county Canada Temperance Act inspector, of attempted bribery, and stating that in the declaration referred to it was alleged that the plaintiff on two different occasions promised that he would not prosecute M. if the latter would give him a certain sum of money, which M. refused to do. At the trial the statutory declaration referred to was tendered in evidence, on behalf of the defendant, as evidence of *bona fides*, and was rejected by the trial Judge:—*Held*, that the evidence was rightly rejected, and that the defendant's appeal must be dismissed with costs.—2. That the making of the statutory declaration before the magistrate was not a necessary preliminary to an inquiry into the conduct of the plaintiff by the municipal council, and that the defendant could not claim privilege in respect to the publication. —*Semble, per* Graham, E.J., that a communication addressed to the warden of the council, and sent to him, might have been considered privileged. *McDonald* v. *Sydney Post Publishing Co.*, 39 N. S. R. 81, 1 E. L. R. 61.

Newspaper — *Fair comment—Truth of statement.*]—The defendants published on p. 1 of their newspaper an article stating that some women from Seattle had been canvassing some time ago in Victoria for subscriptions for a bogus foundling institution, and on being questioned by the police had left town; on p. 8 of the same issue there was an article stating that two ladies for the past few days had been selling tickets for a recital by one Greenleaf, and that the tickets were being sold "in a manner similar to those for a recital by a gentleman of the same name nearly two years ago, which was ostensibly for the benefit of the Orphanage, but which the promoters were obliged to abandon." The manner of selling tickets was as a fact the same in both cases:—*Held*, that the article on p. 1 did not necessarily refer to the plaintiff, and that the article on p. 8 was fair comment on a matter of public interest, and was true. *Wiles* v. *Victoria Times Printing & Publishing Co.*, 11 B. C. R. 143.

Newspaper interview — *Publication—Privilege—Innuendo — Meaning of words — Nonsuit.*]—A defeated candidate in an interview with a newspaper reporter the day after an election informed him that the plaintiff (who was a political opponent and an active party worker), had, as soon as it was known he was in the field, come to and asked him to indorse a note for $1,000, which he refused to do, and had also later, in a speech, accused him of disloyalty. This was published in the newspaper the following day, and was the libel complained of. The innuendo alleged was, that the plaintiff had offered his services and support as a bribe, and had corruptly offered to desert his party and abandon his principles and support the defendant at the election if he would indorse his note; that his opposition to the defendant's candidature was not due to principle of party loyalty, but to the defendant's refusal to indorse the note; and that because of such refusal the plaintiff not only opposed his candidature but attacked him personally and accused him of disloyalty. The interview was published, and the defendant next day called at the newspaper office, and the only thing he found fault with in the report was the omission of a few words in the introductory part. At the trial the Judge allowed the case to go to the jury, who found a verdict in favour of the plaintiff:—*Held*, that there was evidence that the defendant knew he was speaking for publication and that he authorized what he said to be published in a newspaper; and that the communication was not privileged. — *Held*, however, that the words were not capable of the meaning ascribed to them by the plaintiff, and that the motion for a nonsuit at the close of the case

should have been allowed. *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741, 744, referred to.—Judgment of MacMahon, J., at the trial reversed in part. *Hay* v. *Bingham*, 11 O. L. R. 148, 6 O. W. R. 447.

Newspaper libel—*Publication of pleadings—Judicial proceedings — Privilege.*] — *Held*, by the Supreme Court of Canada, in dismissing an appeal, that the publication by a newspaper of statements contained in a pleading filed in the course of a civil action is not a privileged publication. *Gazette* v. *Shallow*, 6 E. L. R. 348.

Occasion privileged — Master and servant. *Gildner* v. *Busse*, 3 O. L. R. 561, 1 O. W. R. 167.

Occasion privileged—Proof of malice—Social or moral duty—Functions of Judge and jury—Excessive damages. *Clunis* v. *Sloan*, 1 O. W. R. 27.

Petition to county council—Innuendo—Imputation of immoral character—Forced construction—Qualified privilege — No evidence of malice—Evidence for jury—Proper question. *Pherrill* v. *Sewell*, 12 O. W. R. 63.

Privilege—*Proof of malice—Understanding of letter—Admissibility of evidence—Misdirection—New trial.*]—The defendant, local manager of an insurance company of which the plaintiff had been an agent, wrote to Mrs. F., a policy holder, a letter in which he stated, among other things, that he had relieved the plaintiff of his agency; that the plaintiff had collected money which he had not reported, etc. In libel it was shewn that the plaintiff had not been dismissed from the agency, but wanted larger commissions in continuing, which were refused, and that he was not a defaulter, but was dilatory in making his returns:—*Held*, that evidence of Mrs. F. of her understanding of the letter as imputing to the plaintiff a wrongful retention of money, was improperly received, and there was a miscarriage of justice by its admission. The Judge at the trial charged the jury that "if the meaning of the first part of the letter is that he dismissed the plaintiff, and you decide that he did not dismiss the plaintiff, and it was not a correct statement, that is malice beyond all doubt. The protection which he gets from the privileged occasion is all gone. He loses it entirely. The same way with the second part. If it is not true, it is malicious, and his protection is taken away:—*Held*, that this was misdirection; that the question for the jury was not the truth or falsity of the statements, but whether or not, if false, the defendant honestly believed them to be true; and that it was misdirection on a vital point. The majority of the Court were of opinion, Girouard and Davies, JJ., *contra*, that, as the defendant had asked for a new trial only in the Court below, the Supreme Court could not order judgment to be entered for him; and a new trial was granted. Judgment in *Miller* v. *Green*, 35 N. S. R. 117, reversed. *Green* v. *Miller*, 23 C. L. T. 149, 33 S. C. R. 193.

Privilege — *Relevancy — Justification.*]—In a libel action defendant pleaded that a libel was published on the invitation or challenge of plaintiff:—*Held*, that this is a conclusion of fact, and that the facts and circumstances on which defendant claims privilege must be set out. In another paragraph defendant claims that the words in their natural and ordinary signification were true in substance and in fact.—*Held*, to be bad without particulars. *Laird* v. *Scott*, 9 W. L. R. 349.

Privileged occasion—Evidence of malice—Contradictory statements—Evidence for jury—Setting aside nonsuit — New trial. *Woods* v. *Plummer*, 10 O. W. R. 759.

Privileged occasion — *Publication to clerk—Dictated letter.*]—In an action for libel the declaration alleged that the defendant falsely and maliciously published a letter containing defamatory matter, and addressed and sent it to the plaintiff, and that this letter was dictated by the defendant to his stenographer, who extended the note and transcribed the same by typewriter, which transcribed copy was signed by the defendant and sent to the plaintiff. The defendant by his pleas denied malice, and alleged that the letter was drafted by him and given to his typewriter to be copied; that the typewriter was his confidential clerk, and as such was accustomed to deal with letters of a confidential nature, and that the typewriting of the letter in question was done in the performance of her duty as such confidential clerk; that no person except the defendant and the typewriter saw the letter, and its contents were not disclosed to any person other than the plaintiff:—*Held*, on demurrer (*per* Tuck, C.J., Landry, Barker, and McLeod, JJ., Hanington, J., dissenting), that the pleas admitted a publication and did not shew that the occasion was privileged, and, if proved, would not be an answer to the *prima facie* cause of action alleged in the declaration, and were bad on demurrer.—*Per* Hanington, J., that, as the publication was to a confidential clerk, whose duty it was in the usual course of the defendant's business to copy letters of a confidential character, the occasion was privileged, and there should be judgment for the defendant on the demurrer. *Moran* v. *O'Regan*, 3 E. L. R. 456, 36 N. B. R. 189.

Privileged occasion — Qualified privilege—Malice—Evidence of—Disagreement of jury—Nonsuit. *Latta* v. *Fargey*, 9 O. W. R. 231, 601.

Publication—*Privilege—Copied letter—Authority of manager of company—Damages—New trial.*]—The manager of the defendant company handed to his stenographer to be typewritten a draft letter written in the interest of the company, but unconnected with its ordinary business, which contained defamatory statements:—*Held*, that privilege was taken away by the publication to the stenographer, and the defendant company were liable for the act of the manager. *Pullman* v. *Hill*, [1891] 1 Q. B. 524, commented on, but followed. New trial ordered for excessive damages unless the plaintiff consented to a reduction. *Puterbaugh* v. *Gold Medal Furniture Mfg. Co.*, 23 C. L. T. 193, 24 C. L. T. 205, 5 O. L. R. 680, 7 O. L. R. 582, 1 O. W. R. 250, 2 O. W. R. 398, 3 O. W. R. 535.

Qualified privilege — *Garnishee — Declaration.*]—No action will lie for defamatory statements made in good faith by a garnishee in his declaration upon a seizure by garnishment. *Daoust* v. *Charbonneau*, 30 Que. S. C. 188.

iv. *Miscellaneous.*

Election contest—*Withdrawal of candidate—Allegation of improper motives—Trial of action—Verdict for defendant—New trial.*]—K. was a member of the House of Commons prior to the election in 1908 and in August of that year a letter was published in the *Sydney Post* which contained the following, which referred to him:—"The doctor had a great deal to say of the elections in 1904. Well, I have some recollections of that contest myself, and I ask the doctor: Why did you at that time withdraw your name from the Liberal convention? The majority of the delegates come there determined to see you nominated. Why did you not accede to their request? Doctor Kendall, what was your price? Did you get it? Take the good Liberals of this county into your confidence and tell them what happened in those two awful hours in a certain room in the Sydney Hotel that day?—The proceedings of the convention were held up for no reason that the delegates saw; but, for reasons which are very well known to you and three or four others whom I might mention. One speaker after another killed time at the Alexandria Hall while you were in dread conflict with the machine. Finally the consideration was fixed and you took off your coat and shouted for Johnson. What was that consideration?" On the trial of an action by K. against the proprietors of the *Post* the jury gave a verdict for the defendants:—*Held*, Davies and Duff, JJ., dissenting, that the publication could only be construed as charging K. with having withdrawn his name from the convention for personal profit, and was libellous. The verdict was therefore properly set aside by the Court below, and a new trial ordered. —Appeal dismissed with costs. *Sydney Post Pub. Co.* v. *Kendall* (1910), 30 C. L. T. 688, 43 S. C. R. 461.

Newspaper—*Publishing company—Joint liability of manager.*] — The president and manager of a company incorporated for the publication of a newspaper, who is also the signer of the declaration required by Arts. 2924 *et seq.*, R. S. Q., may be held responsible in damages for a libel published in the newspaper, jointly with the company. *Mignero* v. *La Patrie Publishing Co.*, 5 Que. P. R. 329.

Newspaper libel — *Justification—Evidence — Innuendo.*]—Action for libel. Defendants justified that part of the libel which referred to plaintiff as having been "found loitering in the bar-room" was true. This is a true statement of a fact. The assertion that plaintiff was in the "pay of a confessed gambler" is not supported by the evidence. It is no defence to say that an ordinary man might draw the same inference which the defendants did. Judgment for plaintiff for $25 and fixed costs. *Patterson* v. "*Plaindealer*," 10 W. L. R. 258, 2 Alta. L. R. 29.

Post card—*Threat of action.*]—A person who, without malice, sends his debtor a post card, upon which there is a notice that the sender will sue the sendee if he does not pay, is not liable in damages although third persons have seen the card. *L'Heureux* v. *Héroux*, 25 Que. S. C. 126.

Publication — *New trial.*]—The defendant took a copy of an alleged libellous resolution to the editor of a newspaper, who dictated it to his stenographer, and handed the defendant's copy back to her. Before the stenographer extended his notes, another copy of the resolution was found in the office, and from it the printer set up the type:—*Held*, reversing the decision of Irving, J., who dismissed the action on the ground that it was not shewn that the defendant was the cause of publication, that there should be a new trial. *Mackenzie* v. *Cunningham*, 21 C. L. T. 251, 8 B. C. R. 36.

Verbal accusations of theft repeated by letter—*Search warrant—Damages.*] — Plaintiff having been charged with stealing brass, a detective on investigation made an untrue representation to defendants, who had plaintiff's house searched, but nothing was found; they were not yet satisfied of plaintiff's innocence. This action was brought. Judgment given for plaintiff. *Massé* v. *Dominion*, 6 E. L. R. 209.

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2. SLANDER.

i. *Evidence.*

Conflicting evidence — *New trial.*]—In an action for damages for certain slanderous words alleged to have been spoken by the defendant, of and concerning the plaintiff, during the progress of a trial before a justice of the peace, six witnesses called by the plaintiff testified to the use of the words complained of, while four called on the other side, including the justice, testified that they had not heard the words used, and the defendant denied having uttered them. The County Court Judge treated the evidence for the defendant as a contradiction of that for plaintiff and gave judgment in the defendant's favour:—*Held*, that he erred in doing so, and that there must be a new trial. Weight should not be attached to the finding of the trial Judge on a question of fact where the reasons given disclose erroneous judgment in weighing the testimony. *Zwicker* v. *Zwicker*, 33 N. S. R. 284.

Malicious intent—*Presumption of malice —Evidence rebutting it—Qualified privilege.*]—Slander gives a right to an action only when it has been uttered with intent to do harm or through malice.—The presumption of malice created by damaging statements, is rebutted by evidence as to circumstances which have justified the party alleged to have uttered the slanders, or which establish his good faith.—He who is solicited at his own domicil by one seeking a favour is protected by a qualified privilege with respect to any answer he may give, and, from the moment he proves that, although damaging in itself, his reply was inspired by a sense of the duties of his position, or by a serious, weighty

and lawful interest, which dispelled from his mind every other thought, he is freed from all responsibility for the consequences thereof. *Belley* v. *Labrecque* (1910), 20 Que. K. B. 79.

Notice given by public crier—*Repair of road — Malice.*] — The defendant gave notice to the plaintiff at the door of the parish church, as the congregation were issuing from high mass, by the public crier, to repair and maintain his road and keep it open, in default of which the defendant would take the necessary proceedings to compel him to do so. The plaintiff having claimed $195 damages for defamation on account of this notice, which he alleged had been given maliciously, the defendant, in his defence, admitted that he had given the notice, but denied having done so maliciously. Neither of the parties offered oral evidence, leaving the Court to decide the cause upon the record:—*Held*, that there being nothing to justify the defendant in giving such a notice, which should have been given privately through the municipal officers, and not publicly at the church door, the defendant was guilty of a tortious act for which he was liable to the plaintiff. *Hamel* v. *Lauziere*, 22 Que. S. C. 194.

Onus—Words not defamatory *per se*—Innuendo. *Lossing* v. *Wrigglesworth*, 1 O. W. R. 160.

Proof of defamatory words—Foreign language — Interpretation — Innuendo — Amendment — Damages. *Reilander* v. *Bengert*, 7 W. L. R. 891.

Proof of defamatory words — *Pleading — Variance—Words spoken in respect of trade—Allegation substantially proved.*]—In an action for slander the statement of claim alleged that the defendant said of the plaintiff: "Don't buy any horses from that man; his horses are drugged, and when you have them awhile they go down;" and in proof of this a witness swore that the defendant said: "He (the plaintiff) drugged his horses, and when they were fed as an ordinary horse they would go down:"—*Held*, following *Reilander* v. *Bengert*, 1 Sask. L. R. 259, 7 W. L. R. 891, that while there was a variance between the words laid and those proved, yet the words proved did impute the offence charged, and were sufficient to support the allegation. *Rutledge* v. *Astell*, 1 Sask. L. R. 389, 8 W. L. R. 934.

Qualified privilege—Variance between pleading and proof—Nonsuit — Verdict of jury. *Tapp* v. *Brenot*, 3 O. W. R. 80.

Slander of real estate—*Haunted house —Cause of action—Malice—Proof of special damage—Statute of Westminster II.—Newspaper—Quantum of damages.*]—The publication in a newspaper of a statement that the plaintiff's house is haunted is, under the Statute of Westminster II., 13 Edw. I. c. 24 (Bac. Abr. vol. 1, 102), an actionable wrong, if special damage results, though there be no actual malice or any intention to injure the plaintiff or to depreciate the value of the property.—*Per* Richards, J.A.: — The members of the Court should, as educated men, assume that there are not such things as ghosts, and, therefore, that the statement published by the defendants was necessarily false. It should also be presumed that the reporter and the sub-editor who were responsible for the publication of the article, as educated men, knew that it was false, and, therefore, had no reasonable justification or excuse for publishing it. They thus rendered their employers, the defendants, liable in damages for the natural results of such publication, though such results were not foreseen by them.—The evidence shewed that the plaintiff lost a sale of the house in consequence of the publication, and that the house, being vacant, was damaged by crowds resorting to it on account of the report that it was haunted, and the plaintiff should be awarded $1,000 and costs. *Per* Phippen, J.A., concurring with Richards, J.A. — The case falls within the principle of *Riding* v. *Smith*, 1 Ex. D. 91, and *Bruce* v. *Smith*, 1 Fraser (Court of Session Cases, Scotland) 327, rather than within that other class of cases where, on the ground of public policy, or protection of property, or for other sufficient reason, the Courts have held honest statements to be lawful, although occasioning damage to the innocent.—*Per* Perdue, J.A., dissenting:—In such a case the plaintiff must prove that the statement is false, that it was published maliciously, and that special damage resulted. The statement can only be actionable if it was intended to be believed and was believed by some person who was influenced by it to the detriment of the plaintiff. But, if it was so repugnant to common sense and common knowledge that no proof of its untruth would be necessary, it is difficult to see how any one could have been deceived by it. The plaintiff failed to shew that the statement complained of was wrongful and was made with the knowledge that it would cause, or was likely to cause, injury to the plaintiff, or that the defendants, in publishing it, intended or contemplated any injury to the plaintiff or her property, and without such evidence the plaintiff should not recover. Intention to injure must be established, either directly or by reasonable inference, to support such an action. It is clear that the statement was only published as an item of news, with no intention to do any wrong to the plaintiff, and without any idea that the publication would cause any damage to the plaintiff's property. The plaintiff also failed to prove that she sustained special damage resulting directly from the publication complained of. The finding of the trial Judge on this point and as to those parts of the evidence which should be believed or disbelieved should not be interfered with. It must be shewn that an actual sale was prevented. Evidence of opinion to shew a general depreciation of value caused by the statement is not sufficient in such a case when no lasting injury was shewn to have been caused. *Nagy* v. *Manitoba Free Press Co.*, 5 W. L. R. 20, 453, 16 Man. L. R. 619:—*Held*, by the Supreme Court of Canada, affirming the above, that the reckless publication of a report as to premises being haunted by a ghost raises a presumption of malice sufficient to support an action for damages for depreciation in the value of the property, loss of rent, and expenses incurred in consequence of such publication. *Barrett* v. *Associated Newspapers*, 23 Times L. R. 666, distin-

guished. *Manitoba Free Press Co.* v. *Nagy*, 27 C. L. T. 783, 39 S. C. R. 340.

Trial by jury — *Improper rejection of evidence—Competency of witness—Obligation of oath—Misdirection — Provocation — Publication—New trial.*]—A witness who, to the question "Do you know the nature of an oath?" answers, "No," is not therefore incompetent, more particularly when, by other answers, he shews himself to be not "insensible to the religious obligation of an oath." The rejection of his evidence by the Judge, in a trial by jury, is improper and a sufficient ground for a new trial.—2. In an action for slander, the rendering of an account for professional services by the plaintiff to the defendant, however exaggerated circumstances may have made it appear to the latter, cannot be set up by him as a provocation, in mitigation of damages, still less as an excuse for the slander. A reference to it, in this sense by the Judge, in his charge to the jury, is a misdirection for which the plaintiff, on being nonsuited, is entitled to a new trial.—3. The utterance of a slander, in the presence of one person, is a sufficient publication to afford a legal ground of action, and it does not matter whether such a person was, or not, competent to become a witness in a Court of justice. To charge the jury that there was no publication of the slander in such circumstances, is misdirection which entitles the plaintiff, on nonsuit, to a new trial. *Cabana* v. *McManamy*, 35 Que. S. C. 3.

Understanding of by-standers of words spoken — *Question for jury—Non-direction—Excessive damages—New trial.*]—In an action for defamation, in which the jury awarded the plaintiff $500 damages, the evidence shewed that the plaintiff was a tenant of the defendant, paying rent for the property occupied by her and receiving a certain sum in return for the support of the defendant, who boarded with her. The words complained of were alleged to have been spoken on the termination of this arrangement, when the plaintiff removed her goods from the house, and were alleged to be "You stole my feather bed and silver spoons." The evidence of witnesses called by the plaintiff shewed that the words first used by the defendant were "You took my feather bed and silver spoons," but that when the plaintiff asked him the question, "Do you really blame me for stealing them?" the defendant replied, "Most undoubtedly I do." There was further evidence to the effect that the defendant was 85 years of age, very indistinct in his speech and hard of hearing and accustomed to make use of an ear trumpet, and that on the occasion of speaking the words complained of he did not use an ear trumpet. There was no evidence that the defendant correctly heard the question addressed to him by the plaintiff in the words used by her, or that he meant to accuse her of stealing, or that the words used by him might not have been used in a perfectly innocent sense: —*Held*, that this view of the question should have been placed before the jury by the presiding Judge, and they should have been asked to consider the question, in what sense the hearers understood the words used, and that there having been no such instructions there must be a new trial. Some of the remarks used by the presiding Judge were calculated to impress the jury with the idea that they had unlimited scope in relation to the question of damages, although this impression would be corrected to some extent by later instructions. The jury nevertheless awarded heavy damages in what the Court regarded as a mere petty squabble:—*Held*, that this was further reason for ordering a new trial. *McLean* v. *Campbell*, 37 N. S. R. 356.

Words charging criminal offence— Performance of duty as assessor — Special damage—Words spoken after plaintiffs ceased to hold office—Intrinsic evidence of malice—Privileged occasion — Excessive language — Question for jury—Burden of proof—Misdirection—Belief in truth of words spoken — Reasonable belief—Justification — Evidence of falsity of words—Evidence in reply. *Crate* v. *McCallum*, 6 O. W. R. 825, 11 O. L. R. 81.

Words spoken in foreign language —*Proof of—Meaning—Authority of counsel—Judgment.*]—*Held*, in an action for slander, that, when the alleged slanderous words being spoken in a foreign language, the person to whom the words are spoken repeats the words and states the meaning thereof in English, it will be assumed, in the absence of evidence to the contrary, that he understood such foreign language.—2. That when the slanderous words complained of charge an offence, it is sufficient to prove the gist of the offence.—3. That counsel have authority to consent on behalf of their clients to judgment being given by one Judge on evidence taken before another Judge. *Reilander* v. *Bengert*, 1 Sask. L. R. 259, 7 W. L. R. 891.

ii. *Practice.*

Damages—*Quantum—Verdict of jury for substantial sum—Appeal—Refusal of D. C. to interfere with finding of jury—Refusal to provide for set-off of another claim when established.*]—In an action for damages for slander plaintiff was allowed $150 by the jury, and Mulock, C.J.Ex.D. entered judgment accordingly. Defendant appealed and plaintiff cross-appealed. — Divisional Court *held*, that the Court should not interfere with the finding of the jury unless satisfied that the amount was so large that no twelve men could have reasonably given it, or unless it was satisfied that the jury must have taken into account matters which they ought not to have considered, or acted upon a wrong principle.—*Johnston* v. *Great Western Ry. Co.*, [1904] 2 K. B. 251, followed.—The Court refused to interfere and provide that the judgment should be set-off against a suggested money claim of defendant against plaintiff, when established. *Sill* v. *Alexander* (1910), 17 O. W. R. 775, 2 O. W. N. 401.

Election harangue — *Injuria absque damno.*]—Slanderous words spoken by a candidate to an opponent in an election harangue, even when they cause no real damage, are ground for an action. Cf. *Angers* v. *Pacaud*, 5 Que. Q. B. 17. *Verville* v. *Martin*, 17 Que. K. B. 365, 4 E. L. R. 549.

Failure of proof as to two charges— Success as to third—Damages—Costs. *Welch* v. *Smith* (N.W.T.), 4 W. L. R. 4.

Interrogatories on facts and articles—*Must be definite—Damages for slander must be proved—C. P. 365.*]—In an action in damages for slander, the interrogatories upon facts and articles must be well defined as to the words and expressions used.—The defendant's station in life and circumstances should be disclosed to the Court.—Substantive evidence should be made to determine the amount of damages. *Gravel* v. *Dumont* (1910), 11 Que. P. R. 264.

Joinder of several defendants.]—In an action for damages for slander against several defendants, these defendants must be impleaded separately, if combination or conspiracy between them is not charged in respect of said slanders, and if the occasions where these slanders were made are distinct, the language charged against each defendant differs, and the persons present were not the same. *Lecompte* v. *Rodrigue*, 11 Que. P. R. 26.

Mitigation of damages — *Provocation —Set-off.*]—An elector, who has made a complaint in respect of a voters' list, which a municipal council is revising, has the right to appeal from the decision of the council, but he has no right to say ostentatiously, while the council is sitting and with the object of intimidating it or ridiculing its decision, that he is going to appeal. If he does so, and the secretary-treasurer of the council, who has prepared the list and acted as clerk and adviser to the council, says to him that "it is easy for him to appeal because he is insolvent, he has not paid his taxes, and is already in debt to the municipality for costs," the manner in which this elector has acted will be taken into consideration by the Court in mitigation of damages in an action brought by the elector against the secretary-treasurer for slander on account of the words quoted.—2. A party against whom a debt cannot be set off because it is not liquidated, may, if he chooses, himself demand that it be set off. *Desmarais* v. *Geoffrion*, 22 Que. S. C. 229.

New slander since action—*Incidental demand.*]—Slanders uttered by the defendant after the commencement of an action for damages for previous slanders cannot be made the subject of an incidental demand in the same action, but must be the subject of a separate suit. *Lefebvre* v. *Godin*, 5 Que. P. R. 279.

Nominal damages — Costs—Cause for depriving plaintiff of—Misconduct. *Ellis* v. *Sherrin*, 3 O. W. R. 938.

Nominal damages—*Costs.*]—In slander, for words spoken imputing unchastity to the plaintiff and the commission of an indecent act by her in a public place under s. 177 of the Criminal Code, without claim for special damage, there was a verdict of $1 damages:—*Held*, that the defendant having denied the speaking of the words, and the only other defence being, that it was mere abuse spoken in the course of a quarrel between the parties, and the jury by their verdict having found both these questions in the plaintiff's favour, there was no reason for depriving her of the costs of the action in which she was successful. *Pickles* v. *Sinfield*, 24 C. L. T. 27.

Offence against morals — *Status of plaintiff as public officer—Proof of special damage—No necessity for — Case for jury.*] —In an action of slander for words used imputing an offence which, though non-criminal, and not being an indictable offence under the Criminal Code, yet affects a person's status as a public officer, the plaintiff is entitled to have the case go to the jury without making out a *prima facie* case of special damage suffered. *W.* v. *A.*, 13 B. C. R. 333.

Particulars.]—The plaintiff in an action to recover damages for defamatory words uttered in the presence of two persons specified and named, and also before a "a large number of other persons," will be ordered, upon motion, to give the names of these persons, the dates upon which the words were spoken, and the place at which they were spoken. *Lefebvre* v. *Lefebvre*, 4 Que. P. R. 366.

Parties—*Joinder of plaintiffs — Pleading —Striking out—Several rights of action arising out of same transaction.*]—The plaintiffs, a married man and an unmarried woman, brought the action for damages in respect of alleged statements by the defendant on three different occasions that the plaintiffs had been criminally intimate, one of the occasions complained of being by letter to the female plaintiff. A motion to require the plaintiffs to elect which would proceed with the action, and to strike out the claim in respect of the letter to the female plaintiff as shewing no cause of action or as embarrassing, was refused, leave to amend being given to both parties. The plaintiffs thereupon amended by claiming for both of them damages in respect of another allegation to the same effect, on another occasion, for the male plaintiff special damage, and for the female plaintiff the benefit of R. S. O. 1897 c. 68, s. 5:—*Held*, that the plaintiffs were entitled to sue in one action for damages in respect of the statements made on three occasions, there being publication as to both, and these three being a series with a common question of law and fact, but that the joinder of the claim in respect of the letter to the female plaintiff, which gave rise at most to a cause of action in the male plaintiff, was improper, and that this claim, unless amended so as to be simply one in aggravation of damages, should be struck out as embarrassing. Order of Britton, J., 3 O. W. R. 421, as to the joinder of parties, affirmed, and order of Anglin, J., as to the pleadings, varied. *Agar* v. *Escott*, 24 C. L. T. 312, 8 O. L. R. 177, 3 O. W. R. 719.

Privileged occasion — *Malice — Misdirection.*]—In an action for slander, where the occasion was privileged, the trial Judge, in defining malice, which it was essential for the plaintiff to prove, told the jury that it consisted of a reckless statement, of a statement not true, made without consideration of what the probable consequences might be to another person, and of a statement not made in good faith—not truly, but wantonly and recklessly, and without proper consideration:—*Held*, misdirection, for it should have been left to the jury to say whether the de-

fendant acted through a wrong feeling in his mind against the plaintiff—some unjustifiable intention to do him wilful injury; and a new trial was directed. *English* v. *Lamb*, 20 C. L. T. 377, 32 O. R. 73.

Proof of defamatory words—*Verdict—New trial—Aggravation of damages—Evidence—Pleading.*]—Motion for a new trial in an action of slander upon the ground that the verdict was perverse. The defamatory words were proved, but the jury nevertheless found a verdict for the defendant, instead of giving nominal damages to the plaintiff:—*Held*, that a new trial should not be granted in order that the damages which the jury ought to have assessed should be assessed to the plaintiff. Another ground of the motion was that the Judge had refused to admit evidence offered by the plaintiff and directed to aggravate the damages:—*Held*, that, inasmuch as there was no allegation in the plaintiff's pleading to entitle him to give evidence of the acts of the defendant on which he wanted to rely to aggravate the damages, a new trial should not be allowed on this ground. It would be a highly inconvenient practice to require a defendant to go to trial at the risk of being met with a number of circumstances which the other side was permitted to give evidence of, without having set them forth in his pleading, and which might, if unanswered, seriously affect the damages. *Milligan* v. *Jamieson*, 22 C. L. T. 409, 4 O. L. R. 650.

Special damage — *What constitutes.*]—The special damage required in an action of defamation must be such as would be the reasonable and natural result of the words used.—Where, therefore, the alleged defamatory words were that the plaintiff, who received an allowance for the maintenance of his wife's niece, from her father's estate, had put in an account of trifling matters, such as for candies, oranges, etc., the special damage alleged being that in consequence thereof the niece and wife had left him and refused to live with him:—*Held*, that such damage was not such as was recognisable at law, not being the natural and reasonable consequence of the words used. *Ludlow* v. *Batson*, 23 C. L. T. 151, 5 O. L. R. 309, 2 O. W. R. 41.

Understanding of bystander — *Jury—Misdirection—Damages.*]—In an action for slander, what a bystander says he understood the words to mean is not the guide the law provides for the jury. The true guide is what he would on the occasion of the speaking of the words have reasonably understood them to mean.—A jury should not be directed that they might draw an inference as to the sense in which words were understood, from the conduct of a bystander, particularly where such conduct was equivocal.—Although the amount of damages is, in a very large sense, in the hands of the jury, it is necessary always as a matter of law to direct their attention to the rule which the law prescribes for their guidance, and not to leave them under the belief that they need not make any inquiry as to the injury occasioned to the complainant by the slander, but were free to give whatever they thought proper. *Watt* v. *McQuaig*, 40 N. S. R. 553.

Words capable of defamatory meaning—*Question for jury—Crime.*]—In an action for slander, if the words used by the defendant are capable of being reasonably understood in a slanderous sense, it should be left to the jury to find whether or not they were so used, and the plaintiff should not be nonsuited on the ground that the words did not necessarily impute the commission of a crime. *Cameron* v. *Overend*, 15 Man. L. R. 408, 1 W. L. R. 545.

Words imputing unchastity — *Absence of averment and proof of special damage—Restriction to nominal damages—Interlocutory judgment — Assessment of damages at trial—Libel and Slander Act—Costs.*] — In an action, under s. 5 of the Libel and Slander Act, R. S. O. 1897 c. 68, for defamatory words spoken of a woman imputing unchastity to her, she "may recover nominal damages without averment or proof of special damage:"—*Held*, that, in the absence of such averment and proof, only nominal damages can be recovered.—In default of a defence in such an action, being one for pecuniary damages, under Rule 589, only interlocutory judgment can be entered to fix liability, and the damages, even though nominal, must be assessed by the jury at the trial, and the plaintiff is therefore entitled to the costs of such trial. *Whitling* v. *Fleming*, 16 O. L. R. 263, 11 O. W. R. 820.

iii. *Pleadings.*

(a) Generally.

Accusation against candidate at municipal election — *Good faith—Privilege.*]—An elector who, in the course of a municipal election, being consulted about the qualifications of a candidate, and questioned by the canvassers of the candidate as regards his hostile attitude, replies that he would not vote for a man against whom an accusation of corruption has been publicly brought, and who repeats these remarks in good faith, is not liable in damages for defamation. *Guimet* v. *Durand*, 28 Que. S. C. 465.

Action against newspaper — *Statement of claim—Motion to strike out certain paragraph—Security for costs — Defence — Bona fides—Public benefit.*]—Motion by defendant to strike out paragraph of statement of claim and for security for costs dismissed, as the paragraph was in itself a count for slander and could not be struck out, and although defendant might have a good defence based upon privilege it would not help him as far as costs are concerned.—Newspaper editors have no privileges and immunities beyond ordinary individuals in slander actions. *Greenhow* v. *Wesley* (1910), 16 O. W. R. 585, 1 O. W. N. 996, 1001.

Character of plaintiff.]—In an action for damages to the reputation, the defendant may plead the evil reputation of the plaintiff. *Coté* v. *Desrosiers*, 6 Que. P. R. 65.

Damages — *Plea alleging privilege, good faith and truth—The privilege of an alderman when discharging his duties of office—Notice of suit—Want of notice not pleaded—C. P. 88.*]—An alderman, when discharging the duties of his office, has the right to make

known at a meeting of the council the reasons why he votes against the appointment of a person to whom it is desired to give a municipal office, and amongst others, "that the person in question is a drunkard and makes immoderate use of intoxicants," providing the fact is true; it is even his duty to do so.—Such words, used under such circumstances and in the exercise of a right or of a duty, are privileged, and it is for the plaintiff, if he proposes to prove his case, to shew that the defendant acted with malice. —An alderman is a public officer, and as such, has the right, when he is sued in damages for an act committed by him in the exercise of his office, to the notice provided for by Art. 88 C. P., provided he acted in good faith. If it should happen that the defendant should not have raised such want of notice, it results from the text of the law that the Court itself should come to his assistance. *Lamy* v. *Page* (1910), 16 R. de J. 456.

Declaration—*Particulars.*]—If the occasion on which it is alleged that the defamatory statements were made is precisely set forth in the declaration, the defendant is not entitled to have the names of the witnesses who were present. *Lebel* v. *Tourgis*, 9 Que. P. R. 59.

Declaration—*Particulars—Names of persons present—Prejudice.*]—In an action for slander, where the declaration mentions a person in whose presence the words complained of were spoken, the plaintiff is not obliged to give the first name of such person, unless it appears that confusion may arise without it. 2. The plaintiff is not bound to give the names of the persons in whose presence the words were spoken, if the particulars given are precise enough to permit the opposite party to defend himself without knowing such names. 3. The words "similar statements" in such declaration, coming after the enumeration of defamatory remarks of the defendant, need not be particularised. *Kennedy* v. *Shurtleff*, 3 Que. P. R. 514.

Declaration—*Special damage—Particulars — Names of persons to whom words spoken.*]—In an action for damages for defamation, where the plaintiff complains of having suffered "in his sensibilities, his honour and the confidence which his friends and fellow-citizens had in him," he thereby alleges special damage, and is bound to give particulars in his declaration.—The plaintiff is not bound to give the names of all the persons in whose presence the defamatory words were spoken. *Ducharme* v. *Brulé*, 10 Que. P. R. 188.

Defence — *Denial — Justification — Innuendo—Hypothetical case.*]—In slander, the words complained of were to the effect that the plaintiff, a vendor of patent pills, had paid $50,000 for his title as a Senator of the Dominion, and was advertising that he was made Senator because of the benefits conferred by his discovery in pills. Innuendo, that he had corruptly bribed members of the Government, and had purchased the office, etc.:—*Held*, that a defence that if the defendant did speak the words, they, even with the innuendo, were not libellous, and denying the innuendo; and saying that without it the words were not libellous, was not open to objection, and not embarrassing. 2. That a defence justifying the slander and asserting, in addition, that the plaintiff did pay the Government $50,000 and did advertise as alleged, and that the particulars were well known to the plaintiff, but not to the defendant, was not embarrassing nor open to objection. 3. That the defendant was not at liberty to allege that the words actually spoken were different from those charged in the statement of claim, and to plead as to those other words something either by way of answer or in mitigation of damages; and a defence alleging that, if the defendant did speak the words, he did so not as stating a fact, but as stating a rumour generally believed, should be struck out. *Beaton* v. *Intelligencer Printing and Publishing Co.*, 22 A. R. 97, distinguished. *Rassam* v. *Budge*, [1893] 1 Q. B. 571, followed:—*Held*, also, that the remaining paragraphs of the defence, which were pleaded to a hypothetical case, which might never arise, and could arise only on an amended statement of claim, were objectionable and should be struck out. *Pulford* v. *Wallace*, 21 C. L. T. 238, 1 O. L. R. 278.

Defence—*Master and servant—Insurance company.*]—An insurance agent, sued for defamation by the insurance company which he formerly represented, may plead, besides the truth of certain facts, that he made other statements than those with which he is charged with making, and made them because the plaintiffs on their part made defamatory statements concerning the company which he now represents, thereby injuring the defendant. *Vallée* v. *Canada Life Assurance Co.*, 3 Que. P. R. 272.

Defence — *Mitigation of damages.*]—In an action for slander the defendant may allege facts and circumstances which occurred on the occasion in regard to which complaint is made, when such facts and circumstances are of such nature that, if proved, they will, if they do not altogether justify the conduct of the defendant, at least make the injury appear less grave and mitigate the damages. *Renault* v. *Lortie*, 3 Que. P. R. 495.

Defence — *Mitigation of damages.*]—In an action for damages for slander the defendant may allege certain facts which, if they are proved, will go, if not to justify the alleged defamation, at least to mitigate the damages. *Dion* v. *Fafard*, 4 Que. P. R. 351.

Defence — *Privilege—Mitigation of damages.*]—In an action for slander, the complaint was that the defendant had falsely and maliciously accused the plaintiff of stealing the defendant's newspaper. The defendant pleaded that "if he spoke the words complained of, which he does not however admit, but denies, they were so spoken in good faith and without any malice whatever towards the plaintiff, under the following circumstances" —setting out the circumstances which led the defendant to believe that the plaintiff had stolen his newspaper:—*Held*, that this was substantially a plea of privilege; and leave was given to add words claiming privilege. *Switzer* v. *Laidman*, 18 O. R. 420, distinguished:—*Held*, also, following *Beaton* v. *Intelligencer*

Printing and Publishing Co., 22 A. R. 97, that a subsequent paragraph of the defence setting up the same facts in mitigation of damages was properly pleaded. *Vansycle* v. *Parish*, 21 C. L. T. 125, 1 O. L. R. 13.

Defence—Striking out — Embarrassment —Privilege—Mitigation of damages. *Grant* v. *McRae*, 8 O. W. R. 304.

Defence — *Provocation — Set-off — Justification—Defence—Cross-action.*]—Rude and provoking words, but not reflecting upon the honour or credit of a person, do not justify or excuse defamatory accusations.—In an action to recover damages for slander, grounds of defence arising from provocation and set-off of injuries should be pleaded as defences to the principal action; and the defendant cannot support a cross-action for damages unless the injuries done by the plaintiff are more grave and damaging than those suffered by him. *Cleveland* v. *Sherman*, 19 Que. S. C. 270.

Defence—Privilege—Scandalous and irrelevant statements. *Caldwell* v. *Buchanan*, 10 W. R. 682, 2 O. W. R. 839.

Interest — *Malice — Judge's charge.*] — The plaintiff and defendant were members of the same cheese-making association. The plaintiff sued the defendant for slander for saying to the cheese-maker of the association that the plaintiff sent skimmed milk to the cheese factory. The defendant pleaded privilege. The Judge charged the jury that the occasion was privileged, and that the defendant was entitled to a verdict unless they came to the conclusion that he was actuated by malice; that they might take into consideration all the circumstances and all the evidence in coming to a conclusion as to whether the defendant acted from ill-will or not in reporting the matter to the cheese-maker:—*Held*, that this charge was entirely free from objection. *Preston* v. *Thompson*, 21 C. L. T. 464.

Irrelevant plea.] — In an action for damages by the advocate of a municipality against an elector in respect of words spoken by the latter charging the former with making out of his position an exorbitant revenue, it is not lawful for the defendant to plead that the plaintiff had publicly mentioned that he made from this source a certain sum; and such an allegation will be struck out of the pleas upon demurrer. *Monty* v. *Mercure*, 9 Que. P. R. 253.

Justifying words not charged — *Striking out — Demurrer.*] — To an action for damages for slander the defendant may not plead facts tending to justify other words than those mentioned in the declaration. The elimination of allegations in a plea not amounting to justification, should be sought by demurrer, and not by a motion to strike them out. *Phillips* v. *Laviolette*, 4 Que. P. R. 396.

Liability for tort — *Defamation—Witnesses in Courts of justice—Defamatory statements while under examination — Privilege absolute.*]—The privilege of a witness in a Court of justice, as to defamatory statements made by him while under examination, is maintainable in respect of them. *Cote* v. *Deneau* (1910), 19 Que. K. B. 272.

Malice—*Bad faith.*]—It is not legal to plead to an action for damages for defamation that the action is malicious and is the product of the hatred which the plaintiff bears to the defendant. *Melancon* v. *Archambeault*, 6 Que. P. R. 460.

Master and servant—*Malice.*]—A master is not necessarily liable in damages because, in the presence of fellow servants or even of casual bystanders, he accuses his servant of theft. Such an accusation is *prima facie* privileged, and to destroy the qualified privilege there must be some evidence of malice, such as want of belief in the accusation, intemperate language, seeking the opportunity to make the accusation publicly, or the like. *Gildner* v. *Busse*, 22 C. L. T. 137, 3 O. L. R. 561.

Plea of immunity — *Engineer charged, under a contract, with the duty of reporting upon work and materials—Execution of the contract—Obligation on the part of the contractor to furnish supplies of a certain standard.*]—When an engineer, charged with the duty of superintending the execution of a contract, is empowered to pass upon the work done and the materials supplied, he is free from all liability for damages if, whether rightly or wrongly, but in good faith, he condemns either the work or the materials.—If the kind of supplies to be employed in a work are specified with precision, the contractor has no right to use other materials, even though they are of as good a quality. *Audet* v. *Ouimet* (1909), 37 Que. S. C. 385.

(b) Privilege.

Privilege — Justification — Denial of innuendo — Motion to strike out defences. *Goodwin* v. *Graves*, 4 O. W. R. 449, 473.

Privilege—*Public interest — Provocation —Set-off.*]—A defendant has a right to plead to an action for slander that as a physician and a member of parliament he requires and is entitled to the esteem and confidence and consideration of his constituents and fellow citizens. 2. In an action for slander an allegation that everything which the defendant has said has been said in the public interest, in good faith, and without malice, and is a legitimate criticism on those who attacked his private character and attempted to tarnish it, if assisted in doing so, is not a valid defence and will be out upon petition *en droit*. 3. Where a plea of set-off of injuries may be set up as a defence to an action or as mitigation of the damages claimed, it must be alleged and proved that the provocation received was the immediate cause and was of sufficient violence to make the defendant lose the control of his will. *Bissonnette* v. *Sylvestre*, 6 Que. P. R. 255.

Privilege — *Discovery — Examination of plaintiff—Relevancy of questions—Mitigation of damages—Rule 488.*]—In an action for slander, the defence, besides a denial of the material allegations of the statement of claim, was that the words were spoken without malice, in the belief that they were true, and under such circumstances as to make them a privileged communication. There was no justification. The words were:

"He perjured himself and stole the money from the township:" and the innuendo was that the plaintiff had committed wilful and corrupt perjury for the purpose of procuring a reward of $5 from a municipal corporation, and had secured the reward by perjury:—*Held*, that certain questions put to the plaintiff upon his examination for discovery relating to the reward and directed to eliciting information as to the payment of it to the plaintiff; another question as to statements made by the plaintiff at meetings of the municipal council; another question as to the fact of the council having offered a reward to be paid to any one who killed a dog found worrying sheep; another question apparently intended to elicit information as to the particular times or occasions when the words were spoken; and other questions which might elicit information relevant to the defence of privilege — were all questions relevant to the issues raised on the pleadings, and should be answered by the plaintiff. Though a defendant may not be able to prove all that is necessary to be shewn to establish a defence of privilege, he is entitled to the benefit of what he does shew, in mitigation of damages, if it goes to that—subject, perhaps, to his having given the notice required by rule 488. *McKenzie* v. *McLaughlin*, 22 C. L. T. 92, 1 O. W. R. 58, 80.

Privilege — *Ecclesiastical immunity — Threat to refuse sacraments—Injury to plaintiff—Damages.*]—A priest who threatens to refuse the sacraments to commissioners of schools of his parish if they appoint as secretary-treasurer a particular person, renders himself liable to an action for damages on the part of the latter.—2. He cannot in such a case set up a privilege or an immunity except where there has been a refusal on the part of the commissioners to observe a grave moral obligation, for example, in appointing to such an office an incompetent person from the moral point of view and so declared by a competent authority. *St. Pierre* v. *Beaulieu*, 33 Que. S. C. 385.

Privileged occasion — *Excessive privilege—Malice — Proof of special damage — Judge's charge.*]—In 1892, by an error of a town assessor, the amount deducted by the Court of Revision from the defendant's assessment was entered on the roll as the assessment itself, so that he was assessed for some $40 less than he should have been. Subsequently the question of arrears of taxes came up in the council, of which the defendant was a member, and the cases of alleged arrears, including the undercharge of the defendant for 1892, were referred to a committee, of which the defendant was also a member. The committee by a majority reported that the defendant was liable for the amount, a minority report being presented by the defendant. On the report being considered, statements were made by those presenting it. The defendant in answer thereto, while contending that he was not liable, accused the plaintiff, who had been, but was not then, the assessor, of having violated his oath of office, and of having threatened to tax the defendant out of town, the defendant contending that he could have prosecuted him before a Judge, and was sorry he had not done so; and similar statements were made by him on other occasions:—*Held*, that the fact of the plaintiff not being the assessor did not prevent the action from being maintained without proof of special damage:—*Held*, also, that malice could be inferred from the language of the defamatory words themselves.—*McIntyre* v. *McBean*, 13 U. C. R. 534, dissented from.—*Laughton* v. *Bishop of Sodor and Man*, L. R. 4 P. C. 495, followed.—*Held*, also, that though the occasion was a privileged one, the words used, being foreign to the subject matter in hand, created an excess of the privilege, and the statements then made, as well as on the other occasions, were evidence of malice, which could not be withdrawn from the jury.—The Judge in charging the jury left it to them to say whether the defendant had established that he had acted *bona fide* and without malice; but on the jury being recalled he pointed out that the onus in this respect was on the plaintiff. An objection, therefore, on this ground of the charge was overruled.—A further objection taken to the charge was that the Judge—after first stating, in substance, that if as a matter of fact the defendant believed the charges to be true, the fact that he had no reasonable ground for such belief, need not enter into their consideration on the question of malice; that such belief was not sufficient, if he took advantage of a privileged occasion when this particular matter was not under discussion and was not relevant thereto, but to gratify some indirect motive of his own brought that in—proceeded: "The fact that it is true, that he believed it to be true, is immaterial. If he did not believe it to be true, that, in itself, was abundant evidence of malice; but if he believed it to be true that is not conclusive evidence of want of malice:"—*Held*, that the words "the fact that it is true, that he believed it to be true," which were objectionable words, were immediately corrected by the words which followed; and this was the way it was understood by the defendant's counsel at the trial as appeared by his objections to the charge; and therefore the charge in this respect was also unobjectionable. *Crate* v. *McCallum*, 11 O. L. R. 81, 6 O. W. R. 825.

Privileged occasion — *Misdirection—Absence of prejudice—Damages—Quantum.*]—In an action for slander the words complained of were: "You (meaning the plaintiff), stole my feather bed and silver spoons," and, at the same time, in answer to the question, "Do you really mean to blame me for stealing them," the further words, "Most undoubtedly I do" (meaning thereby that the plaintiff was guilty of stealing his feather bed and silver spoons).—The plaintiff was a tenant of a portion of the defendant's house, and, owing to some difference which had arisen, was engaged at the time the words in question were used in packing up the articles belonging to her with a view to their removal, and the defendant was objecting to having them removed until the following day, asserting that they had not been properly checked over. The words were uttered in the presence of third parties. The trial Judge instructed the jury that the occasion was privileged unless malice was shewn. The jury returned a verdict in the plaintiff's favour, and assessed the damages at $250:—*Held*, that the occasion on which the words complained of were uttered was

casions:—*Held*, not being the action from be- of special dam- e could be in- the defamatory v. *McBean*, 13 .—*Laughton* v. R. 4 P. C. 495, ough the occa- he words used, natter in hand, vilege, and the as on the other malice, which the jury.—The left it to them had established nd without ma- alled be pointed respect was on herefore, on this rruled.—A fur- harge was that ; in substance, the defendant e, the fact that for such belief, onsideration on such belief was ntage of a pri- rticular matter I was not rele- me indirect mo- in—proceeded: hat he believed If he did not lself, was abun- if he believed clusive evidence that the words t he believed it otionable words, by the words as the way it ndant's counsel is objections to charge in this able. *Crate* v. O. W. R. 825.

Misdirection— ces—Quantum.] he words com- ning the plain- silver spoons." answer to the n to blame me r words, "Most hereby that the ing his feather e plaintiff was the defendant's ifference which the time the in packing up r with a view endant was ob- oved until the they had not The words were rd parties. The jury that the ess malice was verdict in the d the damages asion on which re uttered was

not privileged, and that the directions given to the jury were erroneous on this point, but, as it was evident that the defendant was not prejudiced thereby, a new trial should not be allowed; also, that, while the damages were large under the circumstances, that was a matter peculiarly within the province of the jury, and they were not so excessive as to call for the interference of the Court. *McLean* v. *Campbell*, 38 N. S. R. 416.

Privileged occasion — *Theft—Judge's charge.*]—In an action brought by the plaintiff for damages for words spoken by the defendant of and concerning the plaintiff, imputing that the plaintiff was a thief, the defence set up was that, on the occasions when the words in question were used, the defendant, on behalf of the Reid Newfoundland Steamship Company, was conducting an inquiry into a shortage of accounts of one M., who was agent of the company at North Sydney, and that all the parties present were employees of the company, and were endeavouring to ascertain what had become of money which appeared by the accounts to have been taken from the office at the place where the enquiry was being held.—The trial Judge instructed the jury that the occasion upon which the words complained of were uttered was privileged, and that the words were not the subject of an action unless the jury found that the defendant, in uttering the words, was actuated by ill will or by some indirect motive other than a sense of duty, and that the burden of proving this was upon the plaintiff:—*Held*, that the instructions given were correct, and that, in the absence of evidence such as that indicated, the verdict of the jury in favour of the plaintiff was wrong; and the action was dismissed with costs. *Wilcox* v. *Stewart*, 38 N. S. R. 409.

Privileged occasion — *Contradictory statement — Malice — Evidence of.*] — The defendant, the yard master in a railway yard, forthwith reported to the train master, to whom it was his duty to report, that he had seen the plaintiff, a car examiner, break into a car and take therefrom a bundle of handles, whereupon the train master reported it to the company's detective, and, some four days afterwards, the plaintiff was called into the company's office, the train master, the detective, and a couple of other officials being present, and, on his denying any knowledge of the handles, the defendant was called in, and, on being questioned, made the charge already referred to. In an action for slander brought by the plaintiff against the defendant the plaintiff stated that shortly before being called into the office he had met the defendant, who informed him of the car having been broken open, but that he did not know who did it:—*Held*, that while the occasion on which the alleged defamatory statement was made was one of qualified privilege, the statement made by the defendant to the plaintiff was evidence of the defendant's disbelief in the truth of the charge, and therefore of malice to go to the jury to displace the protection afforded by the privileged occasion.—Judgment of a Divisional Court, reversing the judgment of Anglin, J., at the trial, affirmed. *Woods* v. *Plummer*, 15 O. L. R. 522, 11 O. W. R. 377.

Provocation.]—In an action for slander the defendant may, after admitting, denying, or declaring that he ignores, the allegations of the declaration, allege that he has been provoked by the plaintiff, and that the slander, if any, is compensated, and such allegations will not be dismissed on an exception to the form. *Molleur* v. *Marchand*, 2 Que. P. R. 405.

Public duty — *Municipal councillor — Truth.*]—A municipal councillor has a right to make known to the council all the facts which may be reasons for not awarding a contract of the municipality to a person who is tendering for it; it is even his duty to do so; but the statement must be true, and if he makes false statements, he is liable for defamation. *Campeau* v. *Monette*, 19 Que. S. C. 429.

Qualified privilege — *Quebec law — Functions of Judge and jury—Malice—Findings of jury—Exercise of right.*]—The rule of "qualified privilege" of the law of England in the matter of libel and slander corresponds to and is the same as that of the law of Quebec, in the same matter, that no action will lie for statements made by a person in the exercise of a right (*dans l'exercise d'un droit*), unless actual malice is proved.—As in England the question of privilege or no privilege is one of law for the Court, and not for the jury, to determine, so in Quebec it is for the Court and not for the jury to say whether the defendant in making a statement is in the exercise of a right.—Where in a trial by jury of an action for defamation, the jury finds that a statement caused the plaintiff damage to a fixed amount, but was made without actual malice, the Court, holding the defendant to have been in the exercise of his rights, or to employ the English equivalent, holding the occasion to have been privileged, will dismiss the action. *Kavanagh* v. *Norwich Union Fire Ins. Co.*, 28 Que. S. C. 506.

Qualified privilege — *Duty — Interest — Privileged occasion.*] — A qualified privilege exists, when it is the duty of the person charged with slander to make a communication with another person who has an interest in the subject of the communication, or some duty in connection with it; or, secondly, where the defendant has an interest in the subject of the communication, and the person to whom the communication is made has a corresponding interest, or some duty in connection with the matter. Consquently, a communication made by the chairman of the school commissioners or his colleagues, respecting the character of the secretary-treasurer, if the statement were made to them alone, would be privileged. But the privilege ceases when the communication is made at a public meeting of the parish, at which many others who were not interested were present. *Hébert* v. *Johin*, 26 Que. S. C. 193.

Slander uttered by married woman —*Action against husband—Pleading—Authorisation or ratification.*]—Where the plaintiff is suing a husband for a slander uttered by his wife, he must allege that the defendant has authorised or ratified the conduct of his wife, without which his action will be dis-

missed upon defence in law. *Lepage* v. *Montreuille*, 9 Que. P. R. 269.

Solicitor — *Innuendo — Amendment — Justification — Evidence — Privilege — Interest.*] — In an action for slander of the plaintiff as a solicitor, the evidence at the trial shewed that the defendant asked L. who his solicitor was, and upon L. mentioning the plaintiff, defendant said that if he had an honourable man like M. he might win his case. L. said that he would not change until he found some fault—that the plaintiff always did honourably with him, whereupon the defendant said that the plaintiff was "a dirty man." The words proved were different from those set out in the statement of claim, and the innuendo in the statement of claim was inapplicable. Leave was given to the plaintiff on the trial to amend, but no amendment was made: — *Held*, setting aside the verdict for the plaintiff, that, in the absence of evidence to shew how the words proved were spoken and understood, the Court could not frame an innuendo to conform to the evidence. On the trial the defendant called the plaintiff as a witness, and the plaintiff admitted that he had collected a sum of money for a client which he failed to pay over, and that he had given a note for the amount collected which he had also failed to pay and that a judgment had been obtained against him for the amount, which was unpaid at the time of the trial:— *Held*, that this evidence shewed conduct which was dishonourable to plaintiff as a solicitor and justified the language used by the defendant. If the words proved were spoken and understood in the sense that the plaintiff was not an honourable solicitor the defendant had substantiated a good defence: — *Held*, also, that the communication was a privileged one, L. being a person who had an interest in knowing of it. *Tobin* v. *Gannon*, 34 N. S. R. 9.

Statement of defence—*Justification — Particulars—Fair comments — Embarrassment — Specific charges.*]—After the order 13 O. W. R. 671, plaintiff amended his statement of claim confining it to two acts of wrongdoing to which the innuendo was pointed. The statement of defence was now ordered to be amended. *Foster* v. *Macdonald*, 13 O. W. R. 1012.

On appeal, order varied, 13 O. W. R. 1211.

Truth — *Justification.*] — A defendant will not be cast in damages for defamation of character where the words complained of truly describe the conduct or an act of the defendant. Thus a servant who has stolen wood from his master cannot have a verdict against the latter for saying, in a discussion relating to this theft of wood, "you are a thief." *Baron* v. *Laroche*, 3 Que. P. R. 450.

DEFAULT JUDGMENT.

See JUDGMENT.

DEFECTIVE SYSTEM.

See MASTER AND SERVANT—NEGLIGENCE.

DEFRAUDING CREDITORS.

See CRIMINAL LAW.

DEL CREDERE AGENT.

See CARRIERS—MECHANICS' LIENS.

DELAY.

See CONTRACT.

DEMURRAGE.

See SHIP—RAILWAY.

DEMURRER.

See ACTION—PLEADING.

DENTISTRY.

British Columbia Dentistry Act — *Construction of s. 66—"Using trade name for designation" — "Premises" — Unprofessional conduct.*] — Appellant had been found guilty of unprofessional conduct by the council of the College of Dental Surgeons of British Columbia for using the trade name "New York Dentists." Appeal dismissed. Using such a trade name is a breach of s. 66 above. It is "unprofessional conduct" to practice a profession otherwise than the law of the land requires. *College of Dental Surgeons* v. *Moody*, 10 W. L. R. 525.

British Columbia Dentistry Act, 1908, s. 39 — *Retroactive — Infamous or unprofessional misconduct.*]—An appeal from an order of the College of Dental Surgeons striking off appellant's name from register of practitioners dismissed, it being held that s. 39 of above Act is retroactive and case hopeless on the merits. *Re G. and College of British Columbia Dental Surgeons*, 9 W. L. R. 650.

Penalty—Practising dentistry without registration — Act respecting Dental Association of Alberta—Action brought in name of Crown — Pleading — Amendment allowed to raise objection to constitution of action—Informer. *Rex ex rel. Dental Association of Alberta* v. *Austin* (Alta.), 10 W. L. R. 387.

Unprofessional conduct — *Practising under trade name—"Toronto Dental Parlors"—Owned by non-licentiate—Aiding and abetting—Investigation of professional conduct by college — Injunction restraining — Validity of college by-laws—Ont. Dentistry Act, R. S. O. (1897), c. 178, ss. 15, 17, 26.*] —Plaintiffs, licentiates of the Royal College of Dental Surgeons, were employed at a salary to work for one Henry, who was not a licentiate. Henry advertised and conducted a dental business under the trade name of "Toronto Dental Parlors." The College, act-

ing under authority of their by-laws, instigated proceedings to enquire into plaintiffs' professional conduct, with a view to the suspension or cancellation of their licenses, for aiding and abetting Henry in carrying on the practice of dentistry, without having a license therefor, as required by s. 26 of the Ont. Dentistry Act, R. S. O. (1897), c. 178. Plaintiffs brought action for an injunction perpetually restraining the College from proceeding to try or determine above complaint against plaintiffs, and for a declaration that said by-laws were *ultra vires*. — Meredith, C.J.C.P., dismissed the action with costs — Court of Appeal dismissed plaintiffs' appeal with costs, Meredith, J.A., dissenting. *Gordon* v. *Royal College of Dental Surgeons* (1911), 18 O. W. R. 149, 2 O. W. N. 733.

See STATUTES.

DEPARTMENTAL STORE.

See ASSESSMENT AND TAXES.

DEPENDENT RELATIVE REVOCATION.

See WILL.

DEPORTATION.

See ALIENS.

DEPOSIT.

See VENDOR AND PURCHASER.

DEPOSIT RECEIPT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES—REVENUE.

DEPOSITIONS.

See CRIMINAL LAW — EVIDENCE — EXTRADITION—JUDGMENT DEBTOR.

DEPUTY JUDGE.

See LOCAL JUDGES AND MASTERS.

DEPUTY POLICE MAGISTRATE.

See POLICE MAGISTRATE.

DEPUTY RETURNING OFFICERS.

See ELECTIONS.

DESCENT.

See DISTRIBUTION OF ESTATES.

DESCRIPTION.

See BILLS OF SALE AND CHATTEL MORTGAGES —VENDORS AND PURCHASERS—WILLS.

DESERTED WIVES' MAINTENANCE ACT.

See JUSTICE OF THE PEACE.

DESERTION.

See DOWER—HUSBAND AND WIFE.

DESIGNS.

See TRADE MARKS.

DESISTMENT.

Order — *Prothonotary — Stay — Judgment—Inscription.*] — The prothonotary has no jurisdiction to act upon or pronounce any order whatever upon a desistment.—2. When a desistment is filed at the office of the Court, instead of at the hearing, it has the effect of staying the suit or preventing the continuation of the demand, but the defendant may apply to the Court for judgment in accordance with the desistment in order to obtain the right to an execution for costs. —3. An inscription for judgment upon a desistment is a regular way, if not the only way, of obtaining judgment thereon. *Majeau* v. *Mutual Fire Ins. Co.*, 6 Que. P. R. 21, 24 Que. S. C. 208.

Party represented by a solicitor — *Desistment by party himself.*]—A plaintiff who is represented by an attorney *ad litem*, cannot himself file a desistment from the suit. *O'Rourke* v. *O'Rourke*, 5 Que. P. R. 405.

See ACTION — ATTACHMENT OF DEBTS — COSTS — EXTRADITION — JUDGMENT—LANDLORD AND TENANT—PROHIBITION.

DESTRUCTION OF LIQUORS.

See INTOXICATING LIQUORS.

DETINUE.

See BILLS OF SALE AND CHATTEL MORTGAGES—TROVER AND DETINUE.

DEVISE.

See WILL.

DEVOLUTION OF ESTATES ACT.

See DISTRIBUTION OF ESTATES.

DIES NON JURIDICUS.

See ATTACHMENT OF DEBTS—DISMISSAL OF ACTION—INTOXICATING LIQUORS—PARTICULARS.

DIFFAMATION ET INJURE.

See DEFAMATION.

DIRECTORS.

See BANKS AND BANKING—COMPANY—INSURANCE.

DISAVOWAL.

See ACTION.

DISCHARGE.

See ARREST — ATTACHMENT OF DEBTS — JUDGMENT DEBTOR — PRINCIPAL AND SURETY.

DISCHARGE OF MORTGAGE.

See MORTGAGE.

DISCIPLINE.

See CHURCH—PROHIBITION.

DISCLAIMER.

See ELECTIONS.

DISCLOSURE.

See MANDAMUS.

DISCONTINUANCE OF ACTION.

See ACTION.

DISCOVERY.

1. EXAMINATION OF PARTIES AND OTHER PERSONS, 1483.
2. INSPECTION, 1506.
3. INTERROGATORIES, 1508.
4. PHYSICAL EXAMINATION, 1514.
5. PRODUCTION OF DOCUMENTS, 1515.
6. MISCELLANEOUS, 1525.

1. EXAMINATION OF PARTIES AND OTHER PERSONS.

Action against sheriff — *Examination of sheriff's deputy.*]—In an action against two sheriffs for neglect of duty as sheriffs, an order was made for the examination for discovery by the plaintiff of the deputy of one of the defendants, it appearing that that defendant had himself been examined and had deposed that certain acts, alleged to affect the matters in question, had been done by the deputy. Order 61 of the Supreme Court Rules should be read as supplemental to Order 31, and taken together they were authority for the order. *Hollingshead* v. *Armstrong*, 23 C. L. T. 73.

Action for account—*Denial of right—Production of books—Prejudice.*]—To an action by an incorporated association of cheesemakers against their president and salesman for an account of all moneys received by him for or on behalf of the plaintiffs for three years past, and the application thereof, and for delivery up of all books and documents in his possession belonging to the plaintiffs, and for an account of profits made by the defendant, one of the defences was that the defendant undertook the sale of the plaintiffs' cheese as a part of his own business, and that it was expressly agreed that he should not be called upon to divulge the names of the persons from whom he received orders, or give any other information touching his business or the account of sales or the bank account in connection with his business, and when examined for discovery he objected to produce his books and documents shewing sales and prices realised and persons to whom sales made, because, as he alleged, that would in effect give the plaintiffs what they sought in the action before they had established their right to it, which was expressly contested:—*Held*, that, as the fiduciary relationship existing between the parties was practically admitted, the position of the plaintiffs in seeking accounts and inquiries was not exactly like that of a plaintiff whose right depended on his establishing a case for them at the hearing. The defendant set up an extraordinary agreement, the probability of establishing which was not very great, and this was an element in determining the matter in the exercise of a sound discretion. The plaintiffs were, therefore, entitled to the discovery. *Sydney Cheese & Butter Factory Assoc.* v. *Brower*, 20 C. L. T. 208, 19 P. R. 152.

Action for damages for injuries by runaway team—"Legal professional privilege"—Information for use at trial — Obtained under solicitor's instructions. *Southwell* v. *Shedden Forwarding Co.* (1911), 18 O. W. R. 342; 2 O. W. N. 562.

Action for equitable execution of judgment — *Right to attack judgment — Absence of fraud and collusion.*]—In an action brought by a judgment creditor against the judgment debtors and one L. for the recovery, by way of equitable execution, of moneys claimed to belong to the judgment debtors, and to have been fraudulently transferred to L., an inquiry into the circumstances under which the judgment was recovered, cannot, in the absence of fraud and collusion in the recovery thereof, be insisted upon. A motion that a witness who, on examination for discovery, had refused to answer questions relating to such circumstances, should be compelled to attend and be examined at his own expense, was therefore refused. *Smith* v. *McDearmott*, 23 C. L. T. 204, 5 O. L. R. 515, 2 O. W. R. 316, 475.

Adjournment sine die to obtain information—*Notified to again attend—Given by solicitor—Default in attendance—Motion to strike out statement of defence.*]—Master in Chambers, *held*, that where an examination is adjourned *sine die*, there can be no default by party under examination, until there has been a new appointment given by the examiner and served in the regular way, or unless there has been a new day and time fixed and agreed to by his solicitor in writing. *McIntosh* v. *Robertson* (1911), 18 O. W. R. 636; 2 O. W. N. 869.

Appointment — *Service — Enlargement —Default of attendance.*] — The plaintiff obtained from the proper officer an appointment for the examination for discovery of the defendant. The defendant's solicitor was served with a copy of the appointment more than forty-eight hours before the time appointed for the examination, but the defendant himself was not served. At the appointed time and place the plaintiff's solicitor attended before the officer, but neither the defendant nor his solicitor attended, and the officer enlarged the appointment until the next day (the 7th), and on the 7th, the defendant still not having been served, and neither he nor his solicitor attending, the officer enlarged the appointment until the 8th. On the 7th the defendant was served with the appointment for the 8th, and with a subpœna, and was paid his conduct money, and his solicitor was on the 7th notified by letter of the enlargement till the 8th:—*Held*, that the defendant was in default for not attending for examination on the 8th. Rules 443 and 446 construed. *Reid* v. *Walters*, 21 C. L. T. 22, 19 P. R. 310.

Appointment for—*Attendance on oath —Refusal to answer—Subpœna.*]—Where a plaintiff, who had been served merely with an appointment for her examination for discovery, attended before a special examiner, voluntarily submitted herself for examination, and was sworn:—*Held*, that she was precluded from setting up, as a ground for her refusal to answer questions submitted to her, that she had not been served with a subpœna. *Regina* v. *Flavelle*, 14 Q. B. D. 264, followed. *Cooke* v. *Wilson*, 22 C. L. T. 168, 3 O. L. R. 299.

Attendance out of county — Further examination — Locus. *McKinnon* v. *Richardson*, 2 O. W. R. 244, 275.

Burden of proof—*Right to examine defendant before plaintiff.*]—In a case in which the burden of proof is upon the plaintiff, he may object to be examined for discovery by the defendant before he has himself examined the defendant. *De Martigny* v. *Bienvenu*, 21 Que. S. C. 317, 4 Que. P. R. 352.

Co-defendants—"*Party adverse in point of interest*" — *Rule 387.*]—A defendant is not a "party adverse in point of interest to another party on the same side of the record, within the meaning of Rule 387, unless there are some rights to be adjusted between them in the action. The mere fact that one defendant admits the allegations in the statement of claim and submits to the relief claimed, and another denies the plaintiff's right, does not make them parties "adverse in point of interest." — *Shaw* v. *Smith*, 18 Ch. D. 193, followed. Order of the Referee allowing one set of defendants to examine another set of defendants, in an action to set aside a settlement, reversed. *Fonseca* v. *Jones* (1910), 13 W. L. R. 206.

Commitment of judgment debtor for refusing to make satisfactory answers on examination for discovery. *Bateman* v. *Svenson* (1909), 42 S. C. R. 146, affirming 18 Man. L. R. 493.

Company — *Directors — Account of profits — Postponement of consequential discovery—Production of documents.*]—The statement of claim set forth a single cause of action, based upon the proposition that the defendant C. and his associates, as to the transactions detailed in it, in the circumstances under which those transactions took place, stood in a fiduciary relation to the defendant company, which prevented them from making any profit for themselves out of the purchase of certain businesses acquired by them and afterwards transferred for a large sum of money to the defendant company, and the relief claimed was an account and payment by the individual defendants of the difference between the aggregate of the price paid by them and what was paid by the company to them. It was admitted that the individual defendants received from the defendant company a sum in cash and stock far in excess of what they paid for the businesses, and the only matters really in controversy were the fiduciary relationship with the company and the liability of the defendants other than the defendant company, to account for the profit made by them on the transfer to the company of the properties, and, if liability were established, the amount for which they were answerable: —*Held*, that discovery as to the details of the expenditure made by the individual defendants in acquiring the businesses, should be postponed until their liability to account asserted by the plaintiff had been established. *Bedell* v. *Ryckman*, 23 C. L. T. 167, 5 O. L. R. 670, 2 O. W. R. 86, 148, 280.

Consulting engineer — *Examination of officer or servant of municipal corporation.*] —Plaintiff had a contract to build a dam for defendants under the direction of their consulting engineer:—*Held*, that this engineer could not be examined for discovery. *Winger* v. *Streetsville*, 12 O. W. R. 1172.

Corporation — *Miners' union—Pleading —Dual capacity—Subpœna—Conduct money —Objection.*]—A miners' union entered an appearance in an action, and by statement of defence raised the objection that it was not shewn that the defendant was a legal entity capable of being sued:—*Held*, that defendant by so pleading must be deemed, before a trial of the action, to be a corporation for the purposes of the litigation, and so compellable to make discovery. Where it is sought to examine for discovery in his dual capacity, one of the defendants in an action, who is also secretary of another defendant, two subpœnas are not necessary. On examination for discovery, if the witness has an objection, such as the payment of insufficient conduct money, he should take the objection before the examiner, and he will not be allowed to raise it on an application to compel his attendance to answer questions which he has refused to answer. *Centre Star Mining Co.* v. *Rossland Miners' Union*, 9 B. C. R. 190.

Creditor's action — Fraud — Pleading general relief—Transfer of assets of debtor —Amendment. *Traders Bank* v. *Sleeman*, 2 O. W. R. 127, 133.

Criminating answers — *Maintenance.*]—Maintenance is an indictable offence in the province of Ontario; and in an action to recover damages for maintenance, the plaintiff is not entitled to obtain from the defendants upon examination for discovery such answers as would tend to subject them to criminal proceedings. In such an action no discovery of the matters charged could be had which would not involve the defendants in matters leading up to the offence; and, therefore, the examination should not be allowed to take place at all. *Hopkins* v. *Smith*, 21 C. L. T. 377, 1 O. L. R. 659.

Cure of church—*Action against corporation of parish church.*]—In an action against a *curé* and wardens (the corporation) of the *fabrique* of a parish, the *curé* may be examined on interrogatories before the trial. *Coulombe* v. *Les Curé et Marguilliers de l'Oeuvre et Fabrique de la Paroisse de St. Joseph de Lanoraie*, 8 Que. P. R. 313.

Defamation — *Justification — Immorality—Disclosure of name of paramour.*]—The defendants having in their newspaper charged the plaintiff with immorality, the plaintiff sued them for libel, and the defendants pleaded that the charge was true. The plaintiff having required particulars, the defendants set forth that the plaintiff lived at a house of ill-fame; that he lived at a particular place in adultery; that a child was born to the woman with whom he lived; and that he brought to his house and kept with the members of his family a woman who had lived in a house of ill-fame. The plaintiff, being examined for discovery, admitted that he had lived in adultery with a woman who had previously lived in a house of ill-fame, and that she bore a child of which he was not the father, but denied the other allegations of the particulars:—*Held*, that the plaintiff was bound to disclose the name of the woman, although such disclosure might injure her. *Macdonald* v. *Sheppard Publishing Co.*, 20 C. L. T. 454, 19 P. R. 282.

Defendant—*Action for slander and penalty under Dominion statute—Relevancy — Pleading.*] — Action for slander and to recover $500 under s. 35, c. 26, 7 & 8 Edw. VII. (D.). Defendant ordered to answer certain questions which were put to him on examination for discovery. *Clements* v. *Oliver*, 13 O. W. R. 530.

Defendant — Action to establish partnership — Question as to profits—Stay of action—Agreement—Arbitration clause. *Vanderlip* v. *McKay* (Man.), 3 W. L. R. 232.

Defendant—Defamation — Privilege — Husband and wife. *Williamson* v. *Merrill*, 4 O. W. R. 528, 5 O. W. R. 64.

Defendant—*Libel — Answers tending to criminate — Witnesses and Evidence Act, s. 5—Con. Rule 439.*]—Upon the trial of an action for libel, s. 5 of the Ontario Witnesses and Evidence Act, as now enacted by 4 Edw. VII. c. 10, s. 21, would be applicable, and the defendant would not be excused from answering proper questions because the answers might tend to criminate him; and Con. Rule 439 (1250) puts a party on his examination for discovery in the same position as he would be in if he were being examined as a witness at the trial, and he is therefore not excused from answering any question that is properly put to him, upon the ground that the answer to it may tend to criminate him, and if he objects to answer on that ground, his answer is within the protection of s. 5.—*Regina* v. *Fox*, 18 P. R. 343, applied. Order of Mulock, C.J.Ex. D., affirmed. *Chambers* v. *Jaffray*, 12 O. L. R. 377, 7 O. W. R. 371, 8 O. W. R. 26.

Defendant — *Libel — Incriminating questions—Canada Evidence Act.*]—A defendant sued in damages for libel may on his examination for discovery refuse to answer questions on the ground that the answers may tend to incriminate him.—The Canada Evidence Act (R. S. C. 1906 c. 145), applies only where the proceeding is a criminal one. *Beique* v. *Fournier*, 10 Que. P. R. 302.

Defendant — Refusal to answer questions — Relevancy — Pleading — Statement of claim. *Canavan* v. *Harris*, 8 O. W. R. 325.

Defendant — Relevancy of questions — Pleadings — Company — Contract — Payment for shares — Conditions. *Horton* v. *Maclean*, 11 O. W. R. 961.

Defendant — Scope of — Discovery of mines—Dates and places. *Crawford* v. *Crawford*, 8 O. W. R. 833.

Defendant — *Scope of examination — Contract — Breach—Denial — Damages.*]—Motion by plaintiffs to compel defendant to answer certain questions put to him on his examination for discovery. The statement of claim alleged (1) an agreement by defendant to devote his whole time to the service of plaintiffs from 1889 to August, 1903; and (2) breach of said agreement "by carrying on business on his own behalf both alone and in partnership with others." Plaintiffs ask an account of such dealings, and resulting profits, and damages for breach of contract. The statement of defence denies any such agreement, and says that, if defendant was to devote his whole time to plaintiffs' business, he did so, and denies his having engaged in any other business on his own account. By these pleadings two issues are distinctly raised: — 1. Was there such an agreement between the parties as alleged in the statement of claim?—2. Was defendant guilty of a breach of the same? Plaintiffs must prove both to entitle them to a decree. The questions which defendant refused to answer were directed to the second point. The refusal was on the ground that plaintiffs were not entitled to an answer until they had proved the agreement. Plea held bad. See *Graham* v. *Temperance and General Life Assurance Co.*, 16 P. R. 536, at p. 539: — *Held*, defendant must attend at his own expense and answer the questions so far as necessary to prove the second point. But this would not extend to going into any such detail as will be proper enough on a reference as to profits and damages, nor would defendant necessarily be required to produce his books. *Sheppard Publishing Co.* v. *Harkins*, 4 O. W. R. 250, 277, 25 C. L. T. 45, 8 O. L. R. 632. See also 5 O. W. R. 482.

Defendant — *Service of appointment — Rule 391 A (1)—Service of original—Practice.*]—The plaintiff's solicitor, desiring to examine the defendant for discovery, served upon his solicitor a copy of the examiner's appointment, relying on sub-rule (1) of Rule 391 A., added to the King's Bench Act, R. S. M. 1902, c. 40, by 5 & 6 Edw. VII. c. 17, s. 2, and, upon the defendant failing to attend on the appointment, obtained an order from the deputy Referee directing the defendant to attend for examination at his own expense:—*Held*, on appeal from this order, that, as the sub-rule speaks of the service of an appointment upon the solicitor, service of a copy only of the appointment was not sufficient, without service also of a subpœna on the defendant personally under Rule 389, and that the order should be set aside with costs. *Meyers* v. *Kendrick*, 9 P. R. 363, followed. *Foley* v. *Buchanan*, 18 Man. L. R. 296, 9 W. L. R. 3.

Defendant a member of House of Commons—*Examination during session.*]—Defendant, a member of House of Commons, directed to attend for examination for discovery during the session, such examination to take place on a Saturday while house not sitting, thereby avoiding any possible deduction from sessional indemnity. *Lindsay* v. *Currie*, 13 O. W. R. 538.

Defendant resident out of Ontario—*Con. Rule 477.*]—The provision of R. S. O. 1897, c. 73, s. 16 (4), seems to contemplate only the attendance of witnesses at a trial, and is not applicable to the examination of a party for discovery merely.—A defendant resident in the province of Quebec cannot be compelled under Con. Rule 477 to attend for examination for discovery within the province of Ontario.—*Aliter*, where it is sought to examine a plaintiff.—*Meldrum* v. *Laidlaw*, D. C. 12th December, 1902 (not reported), followed.—*Smith* v. *Babcock*, 9 P. R. 97, not followed. *Lefurgey* v. *Great West Land Co.*, 11 O. L. R. 617, 7 O. W. R. 738.

Defendant whose defence has been struck out.]—A defendant not having attended for examination for discovery his statement of defence was struck out:—*Held*, that he can still be examined for discovery. *Lindsay* v. *Imperial Steel and Wire Co.* (1900), 14 O. W. R. 240.

On appeal defendant allowed to defend on terms, 279.

Defendant withdrawing after being sworn—*Order to appear again—Excuse.*]—A party to an action subpœnaed for examination for discovery before a special examiner and paid his conduct money for the day may be compelled to attend and testify in the same manner as a witness. One of four defendants, all of whom were subpœnaed for half past ten in the morning and attended and were sworn, after being excluded from the examiner's chambers, waited while the others were being separately examined until after three in the afternoon, and then, without communicating with the examiner, went away and did not attend for examination:—*Held*, that a local Judge's order requiring him to attend again for examination was right. *Campbell* v. *Scott*, 23 C. L. T. 113, 5 O. L. R. 233, 2 O. W. R. 144.

Disclosing names of witnesses — *Questions as to indemnity for costs.*]—On an examination of a plaintiff for discovery under Rule 379 of the King's Bench Act, he cannot be compelled to disclose the names of his witnesses, or to answer questions as to whether he has received from persons or corporations, not parties to the action, assistance or promise of assistance or indemnity as to the costs of the action, or as to whether he consulted before action with such other persons as to bringing the suit. *Gibbins* v. *Metcalfe*, 23 C. L. T. 98, 14 Man. L. R. 364.

Election by widow—Evidence—Notice of election—Presumption of election in favour of will—Jurisdiction of the Court in an action not brought by widow. *Hurry & Stewart* v. *Hurry* (P. E. I. 1910), 9 E. L. R. 123.

Examination — *Officer of corporation—British Columbia Rule 370.*] — Under the above rule in the case of a corporation any officer or servant of it may, without any special order . . . be orally examined:—*Held*, to mean that the examination may take place without an order being specially made for that purpose. *Robinson* v. *McKenzie Brothers, Marshall* v. *Vancouver* (B.C.), 10 W. L. R. 375.

Examination of agent of party—*Ontario Rule 903—Ex parte order—Necessity for notice.*]—Under above rule the examination of an agent or employee of a party can only be obtained on notice to the opposite party. *Smith* v. *Clergue*, 13 O. W. R. 761.

Husband of a married woman defendant — *Séparation de biens.*]—Even where the defendant, a married woman separate as to property, declares, in response to interrogatories put to her, that she knows nothing of the facts alleged in her plea, the Court would not be justified in allowing the examination for discovery of her husband, who, according to the plaintiff, would be able to give all the necessary information. *Gladu* v. *Hurtubise*, 10 Que. P. R. 177.

Infant plaintiff—*Examination of tutor.*]—In an action brought by a father, as tutor of his infant child, to recover damages for injuries caused to the child by an accident, the defendant may examine the father for discovery before the trial. *Vinchery* v. *Montreal St. Ry. Co.*, 10 Que. P. R. 241.

Interrogatories — *Oral examination of parties — Double examination.*]—Action for libel in charging plaintiff with not accounting for moneys received as agent for defendants. Defendants pleaded privilege. Plaintiff was ordered to attend for examination. See 18 Man. L. R. 465, 10 W. L. R. 81. Defendants delivered interrogatories which were not answered.—*Held*, that plaintiff must answer. *Timmons* v. *National Life*, 11 W. L. R. 337.

Libel action — *Plaintiff not mentioned by name—Questions as to who was intended — Examination of defendant — Refusal to answer on advice of counsel—Malice—Privilege.*]—In an action for libel, defendant on advice of counsel, refused to answer certain questions on examination for discovery. The

Court ordered him to attend at his own expense before a special examiner, and answer the questions or have his statement of defence struck out.—*Wilton* v. *Brignall* (1875), W. N. 239, followed. — *Jones* v. *Hulton*, [1909] 2 K. B. 444, [1910] A. C. 20, and *Heaton* v. *Goldney*, [1910] 1 K. B. 754, distinguished. *Morley* v. *Patrick* (1910), 16 O. W. R. 172, 21 O. L. R. 240.

Liquidator of company — *Action against company — Production of books.*]— The official liquidator of a company sued for an act attacked as a fraud may be examined for discovery, and compelled, upon subpœna to that effect, to produce the books of the company in his possession. *Ward* v. *Montreal Cold Storage Co.*, 4 Que. P. R. 47.

Manager of a company being wound up who has been appointed liquidator —*Default to make him a party to the suit*— *C. P. 286; 8 Edw. VII. c. 69, s. 228.*]—The manager of a company which is being wound up and who has been appointed liquidator to the company cannot be examined on discovery if he has not been joined as a party to the suit. *Comet Motor Co.* v. *Dom. Mutual Fire Ins. Co.* (1910), 11 Que. P. R. 308.

Master in Chambers ordered defendant to attend for examination in Toronto—*Con. Rule 453—Change of pendente lite—Practice — Riddell, J., reversed Master's order — Costs throughout to defendant in any event.*]—*Dryden* v. *Smith*, 17 P. R. 500, specially referred to. *Jenne* v. *Mersman* (1910), 17 O. W. R. 886; 2 O. W. N. 418.

Member of waterworks and electric light commission of town—*Con. Rule 439 (a)—R. S. O. (1897), c. 234—R. S. O. (1897), c. 235.*]—Latchford, J., *held*, that a member of the waterworks and electric light commission of a town, constituted by by-law passed under Mun. Light and Heat Act, R. S. O. (1897), c. 234, and Municipal Waterworks Act, R. S. O. (1897), c. 235, is a servant of the municipality, and as such was liable to examination under Con. Rule 439a. *Young* v. *Gravenhurst* (1910), 17 O. W. R. 96, 2 O. W. N. 118.

Affirmed by D. C. 17 O. W. R. 211, 2 O. W. N. 167.

Motorman — On plaintiff's suggestion— Did not see accident—Motion to examine conductor—Rule 439 (a2),—Order granted on terms of paying costs. *Caswell* v. *Toronto Ry. Co.* (1910), 18 O. W. R. 473; 1 O. W. N. 856.

Next friend of plaintiff—*Con. Rules 439, 440.*]—The next friend of an infant plaintiff is not examinable for discovery.— The distinction between Con. Rules 439, 440, and English O. xxxi., R. 29, pointed out. *Vano* v. *Can. Coloured Cotton Mills Co.*, 9 O. W. R. 10, 13 O. L. R. 421.

Officer of bank—Production of documents — Relevancy — Pleadings — Contradicting affidavit on production. *Bank of Hamilton* v. *May*, 12 O. W. R. 850.

Officer of benefit society — *Clerk of subordinate "camp."*] — Motion by defendants to set aside an appointment issued by plaintiffs for the examination of one Harley Field as an officer of defendants. The action was brought to recover from defendants the amount of a policy upon the life of plaintiffs' son, payable to plaintiffs:—*Held*, by the constitution of defendants the governing body is the "Head Camp," which alone has power to form subordinate camps and issue charters to them. The "Head Comp" consists of one delegate from each subordinate camp and eleven officers who are elected every two years by the members from among their own number. This has absolute jurisdiction over all members. Every subordinate camp has similar officers, who are elected annually by the members. These officers are paid by the subordinate camps such compensation as they see fit. The dues of the members are payable monthly to the clerk of the subordinate camp and handed to the banker. But no clerk or banker can be installed until he has given security to the satisfaction of the Head Camp's three head managers. The clerk and banker of the subordinate camps are the persons by whom the dues of the members are collected and remitted to the Head Camp. In the present case, Field is the clerk of the Woodstock camp, of which deceased was a member; but he was not the clerk during the lifetime of insured. It is not easy to see what information he can give; but, if he is the proper officer to examine, he must prepare himself accordingly. After reading through the by-laws of the Order, and the material filed, I think plaintiffs' view is right, and that the clerk and banker of the subordinate camp are officers of this Order, and liable to examination. Motion dismissed with costs. *Readhead* v. *Can. Order of Woodmen*, 5 O. W. R. 55, 9 O. L. R. 321. Appealed twice, but both dismissed. See 5 O. W. R. 90 and 169.

Officer of company—*Agent of unincorporated association.*] — The plaintiffs sued "The Tanners' Association," a syndicate, not incorporated, made up of a number of trading partnerships and incorporated companies. One of the companies appeared and defended in their own name "sued as the Tanners' Association:"—*Held*, that the agent of the association or syndicate could not be examined by the plaintiffs for discovery as an officer of the association or of the company defending. *Ahrens* v. *Tanners' Assocn.*, 23 C. L. T. 261, 6 O. L. R. 63, 2 O. W. R. 464, 479, 513.

Officer of company — *Attorney under Extra-provincial Corporations Act — Con. Rule 439a.*]—An attorney appointed to represent a foreign company in Ontario, in compliance with the Act respecting the licensing of extra-provincial corporations, 63 V. c. 24 (O.), is an officer of the company within the meaning of Con. Rule 439a, and may be examined under that Rule. *McNeil* v. *Lewis Bros.*, 12 O. W. R. 284, 16 O. L. R. 652.

Officer of company—Motion for leave to examine servant as well—Examination of officer not completed—Rule 439a (2). *Hees Co.* v. *Ontario Wind Engine Co.*, 12 O. W. R. 774.

Officer of defendant bank — *Local agent — Previous examination of principal*

officer.]—Action by the liquidator of the Palmerston Pork Packing Co. to set aside a chattel mortgage given by the company to defendants. The general manager of defendants was examined for discovery. He knew nothing of the facts. Subsequently on 5th November, 1904, the inspector was examined with no better results. Plaintiff now moved for an order for the examination under Rule 439 (2) of Mr. Campbell, the agent of defendants who was in charge of the Palmerston branch, and was present at the giving of the mortgage in question:—*Held*, where a corporation or other company is a party to an action, it would seem reasonable and convenient that the company should suggest for examination the officer or servant best qualified to give all information to which the opposite party is entitled. Such officer should prepare himself by obtaining full knowledge of all relevant facts, so that the examining party may be in as good a position as if contending with an individual. Order granted for examination of Campbell. *Clarkson* v. *Bank of Hamilton*, 4 O. W. R. 422, 9 O. L. R. 317.

Officer of defendant company — *Charter—Forfeiture—Production of membership roll—Privilege.*]—In an action against an incorporated club, for a declaration that they were using their premises as a common betting house contrary to the provisions of the Criminal Code, 1892, and for a revocation of their charter:—*Held*, that the Evidence Act of Ontario, R. S. O. 1897, c. 73, s. 5, applied, and that the president of the club was not bound to produce upon his examination for discovery the membership roll of the club, he having stated under oath that its production might lead to a criminal prosecution against him. *D'Ivry* v. *World Newspaper Company of Toronto*, 17 P. R. 387, and *Hopkins* v. *Smith*, 1 O. L. R. 659, followed. Forfeiture of the charter being claimed, on that ground also a refusal to produce the roll was justifiable. *Attorney-General for Ontario* v. *Toronto Junction Recreation Club*, 24 C. L. T. 172, 7 O. L. R. 248, 3 O. W. R. 287, 4 O. W. R. 72.

Officer of defendant company — *Defamation — Evidence — Circular—Names of recipients—Source of information.*]—In an action for damages alleged to have been sustained by reason of the sending out by the defendants of a circular stating that they had been "advised that the plaintiffs had decided to discontinue their separator business," the manager was ordered to give on his examination for discovery the names of the persons to whom the circular had been sent and the name of the person who had "advised" the defendants of the fact alleged:—*Held*, affirming the decision of Mabee, J., 11 O. L. R. 227, 7 O. W. R. 59, that the order was proper, both items of information being relevant to the defence set up of qualified privilege, and the latter being also important on the question of damages. *Massey-Harris Co.* v. *DeLaval Separator Co.*, 11 O. L. R. 91, 7 O. W. R. 682.

Officer of defendant company — *Examination of president — Attempt to examine secretary-treasurer — Practice—Man. Rule 387.*]—The president of defendant company has been examined for discovery, and it was now sought to examine its secretary-treasurer:—*Held*, that he can only be examined if it is shewn that the desired information could not have been had from the first officer, and it was not his duty to procure it. *Brown* v. *London*, 11 W. L. R. 411.

Officer of defendant company — Information not in personal knowledge of officer—Memorandum prepared by others—Refusal to vouch for accuracy — Duty of officer to investigate for himself. *Fraser* v. *Can. Pac. Ry. Co.* (Man.), 4 W. L. R. 525, 5 W. L. R. 42.

Officer of defendant company — Re-examination. *Small* v. *Shea's Yonge Street Theatre Co.*, 3 O. W. R. 420.

Officer of defendant company — *—Refusal to answer—Remedy—Master in Chambers.*]—The Master in Chambers has no power to strike out the defence of a company defendant for refusal of an officer to answer questions upon his examination for discovery, nor to order him to attend again to make answer; the plaintiff's remedy, if he wishes to have the questions answered, is by motion to commit the officer. *—Badgerow* v. *Grand Trunk Ry. Co.*, 13 P. R. 132, and *Central Press Association* v. *American Press Association*, *ib.* 353, applied and followed. *McWilliams* v. *Dickson Co.*, 10 O. L. R. 639, 6 O. W. R. 424, 702, 706.

Officer of defendant company — Senior assistant engineer—Chief engineer a defendant—Officer put forward by company. *Barry* v. *Toronto & Niagara Power Co.*, 7 O. W. R. 700, 770.

Officer of defendant companies — *Relevancy of questions.*]—Plaintiffs supplied gas to their customers in Hamilton. Defendants were three companies, also operating in Hamilton, and plaintiffs alleged, supplying or using electricity. Plaintiffs complained that defendants, by allowing electricity to escape, had set up electrolytic action and damaged plaintiff's gas pipes, etc., and claimed damages and an injunction. Plaintiff examined for discovery one Hawkins, as an officer of all three defendant companies, and upon the examination Hawkins refused to answer several questions, and plaintiffs moved for an order compelling him to answer.—Riddell, J., *held*, that Hawkins should disclose who his employers were and the terms of his employment; give information as to kind, conductivity, etc., of defendant's wires, number of cars run, their average mileage, and generally all information that would enable an expert to compute or determine the amount, tension, etc., of electrical current; and the means adopted to prevent the escape of electricity; that plaintiffs were entitled to all the information defendants had, and the officer examined must inform himself. — *Harris* v. *Toronto Electric Light Co.*, 18 P. R. 285; *Clarkson* v. *Bank of Hamilton*, 9 O. L. R. 317, followed.—That, if he did not know, he should say who did, that that person might be examined; he should tell what instructions he gave to his subordinates, and who they were; that information should also be given as to whether a measurement had been made of the current, as to the sectional area and conductivity of the wires of defendant street railway, as to tracks and bonding, etc.; and

information should be given as to what were necessary and proper precautions taken by the defendants to confine the electric current to their own wires and apparatus. *Ont. Pipe Line Co.* v. *Dom. P. & T. Co.* (1909), 16 O. W. R. 294.

Officer of defendant foreign company.]—An order cannot be made for the examination for discovery of an officer of a foreign corporation residing in a foreign country, even when the foreign corporation has attorned to the jurisdiction of the Courts of this province. Order of Master in Chambers, 4 O. W. R. 233, reversed. *Perrins* v. *Algoma Tube Works*, 24 C. L. T. 373, 8 O. L. R. 634, 4 O. W. R. 233, 289.

Officer of defendant manufacturing company — Action for tolls—Timber Slide Companies Act—Penalty or damages. *Pickerel River Improv. Co.* v. *C. Beck Mfg. Co.*, 5 O. W. R. 181, 183.

Officer of defendant municipal corporation—*Member of municipal council.*]—A member of a municipal council, other than the head, is not examinable for discovery as an "officer" of the corporation under Con. Rule 439 (*a*). *Davies* v. *Sovereign Bank*, 12 O. L. R. 557, 8 O. W. R. 443.

Officer of defendant railway company—*Conductor.*]—The plaintiff's claim being that, while employed as a brakesman on one of the defendants' trains, he went under one of the cars, by order of the conductor in charge, for the purpose of adjusting some chains, and that, while so engaged, the train was started without warning to him and caused him injury:—*Held*, that the conductor, in the circumstances, was an officer of the railway company within the meaning of Rule 387 of the King's Bench Act, and must attend and submit to be examined as to his knowledge of the matters in question. *Gordanier* v. *Can. North. Rw. Co.*, 24 C. L. T. 379, 15 Man. L. R. 1.

Officer of defendant railway company — "*Right of way agent*"—*Authority to bind company—Examination out of the jurisdiction — Alberta Rule 201.*]—Defendants' "right of way agent" can be examined under above Rule as an officer of defendants, but not outside the jurisdiction. *Powell* v. *Edmonton*, 11 W. L. R. 613.

Officer of defendant railway company—*Station agent — Section foreman—Clerk.*]—A station agent is an officer of a railway company within the meaning of Rule 21 of the Judicature Ordinance, N. W. T., and liable to be examined for discovery. A section foreman is not such an officer, nor is the chief clerk in the office of a general superintendent. *Eggleston* v. *Can. Pac. Rw. Co.*, 5 T. L. R. 503.

Officer of defendant street railway company—Motorman — Foreman of repair shop—Inspection of car—Affidavit on production — Particulars. *King* v. *Toronto Rw. Co.*, 7 O. W. R. 37.

Officer of municipal corporation—*Park commissioner—British Columbia Order 31a.*]—The word "officer" in above rule refers to an individual under the control and direction of defendants. The park commissioner is a legislative officer, and therefore is not examinable as such an "officer." *Anderson* v. *Vancouver*, 10 W. L. R. 646.

Officer of municipal corporation—*Rule 387—Water meter inspector.*]—A water meter inspector employed by a city corporation, after inspecting the plaintiff's meter, left a trap-door open, in consequence of which the plaintiff was injured:—*Held*, in an action against the city corporation to recover damages for his injuries, that the inspector was examinable for discovery as an officer of the corporation under Rule 387 of the King's Bench Act. *Shaw* v. *Winnipeg* (1910), 13 W. L. R. 706.

Officer of plaintiff bank—*Pleadings*—Relevancy of questions—Foreign commission. *Sovereign Bank* v. *Frost* (1910), 1 O. W. N. 938.

Officer of plaintiff company — *Relevancy of question—Conspiracy—Damages—Settlement with some defendants.*]—Action for damages for conspiracy and breach of contracts. Settlements had been made with some defendants. An officer of plaintiffs ordered to answer a question as to amount paid in such settlements. *McLean* v. *White*, 13 O. W. R. 713. Appeal dismissed, 855.

Officer of plaintiff company — Relevancy of questions — Scope of examination —Contracts — Financial standing of company. *Northern Iron & Steel Co.* v. *Solway & Cohen*, 9 O. W. R. 597, 709.

Officer of railway company—*Engine-driver—Rules 439, 461 (2).*]—*Held*, reversing the decision of a Divisional Court, 4 O. L. R. 43, 22 C. L. T. 162, that inasmuch as the engine-driver never was in charge of the train, never assumed the duties of conductor, and never acted for the defendants in relation to the control, conduct, and management of the train in such a way as to make him responsible to the defendants except for the management of his engine, he was not an officer of the company examinable for discovery under Rule 439: Maclennan, J.A., *dubitante*. Speaking generally, the officer of the corporation who, if there was no action, would be looked upon as the proper officer to act and speak on behalf of and to bind the corporation in the kind of transaction or occurrence out of which the action arises, would *primâ facie* be the proper officer to be examined in the first instance under Rule 439. *Morrison* v. *Grand Trunk Rw. Co.*, 23 C. L. T. 9, 5 O. L. R. 38, 1 O. W. R. 180, 263, 329, 758.

Officer or servant of municipal corporation — Consulting engineer — Rule 439 (*a*). *Winger* v. *Village of Streetsville*, 12 O. W. R. 1172.

Officer or servant of railway company—"*Manager*" — *Art. 286, C. P.*]—The word "manager" in Art. 286, C. P., may be interpreted as meaning the manager of the works, and in an action for damages for personal injuries the man who was in charge of the works when the injury occurred may be examined on discovery on behalf of the plaintiff. *Piti* v. *Atlantic Que. and Western Rw. Co.*, 10 Que. P. R. 162.

Officer of unincorporated society—*Production of minutes—Interest of persons not parties.*]—In an action against some of the members of an unincorporated musical society for infringement of the copyright of a musical composition, the secretary-treasurer, one of the members sued, stated in his examination that he had taken minutes of meetings of the members of the society, at which proceedings took place relating to the performance of the composition in question, and that he had handed these and other documents referring to the same matters to the advocate for all the defendants:—*Held*, against the objection that this defendant was not bound to produce these documents because they concerned persons other than the defendants, viz., the members of the society, not sued,—that this defendant was bound to produce them. It is not a ground for resisting production that a person, not before the Court, has an interest in the document. *Carte* v. *Dennis*, 4 Terr. L. R. 357.

Officers of bank—Local manager — Teller. *Bartlett* v. *Canadian Bank of Commerce*, 1 O. W. R. 68, 162.

Parties — Amendment — Relevancy of questions—Defamation — Privilege — Mitigation of damages. *McKenzie* v. *McLaughlin*, 1 O. W. R. 58, 80.

Parties — *Change in rules — Cross-examination.*]—The omission to include in the Supreme Court Rules, 1906, the amendment of June, 1900, to the old Rule 703, has not changed the examination for discovery from a proceeding having the nature of a cross-examination. *McInnes* v. *B. C. Electric Ry. Co.*, 8 W. L. R. 277, 13 B. C. R. 465.

Parties — Default of attendance—Motion to dismiss action—Proof of default—Affidavit of solicitor — Cross-examination — *Ex parte* certificate of examiner. *Johnston* v. *Ryckman*, 1 O. W. R. 720, 2 O. W. R. 1080, 1113, 3 O. W. R. 198.

Parties—Failure to acquaint themselves with facts—Motion for re-examination — Substitution of agent for examination — Costs. *Boisseau* v. *R. G. Dun & Co.*, 10 O. W. R. 751.

Parties—Re-examination — Special circumstances. *Smith* v. *Lake Erie & Detroit River Ry. Co.*, 2 O. W. R. 217.

Parties—Relevancy of questions—Pleadings — Perjury — Incriminating answers. *McLeod* v. *Crawford*, 11 O. W. R. 101, 133.

Parties — *Undertaking of solicitor — Breach—Counterclaim — Separate examinations of same parties in action and counterclaim.*]—Motion by defendants to set aside appointment for examination of defendants for discovery and similar appointments as counterclaiming plaintiff. Appointments set aside, plaintiff's former solicitor having given an undertaking "to take no steps until plaintiff had been examined for discovery." Even, if no undertaking, doubtful if a counterclaiming defendant can be treated as a plaintiff in a separate action for purpose of having a separate procedure. *Stowe* v. *Currie*, 13 O. W. R. 787.

Parties for whose immediate benefit *action prosecuted—Rules 440, 446.*]—Motion by defendants for examination of and production by O. and K. as being parties for whose immediate benefit this action is prosecuted. O. and K. have a tenta interest in any judgment or settlement herein. Motion dismissed. *Stowe* v. *Currie* (1909), 14 O. W. R. 61, affirmed, 223. See S. C. 248.

Party — Conduct money — Insufficient payment—Acceptance without objection — Failure to attend — Costs. *Cyr* v. *O'Flynn* (N.W.T.), 6 W. L. R. 353.

Party — *Danger to life from examination.*] — Order made for examination of plaintiff for discovery, same to be held in presence of her physician, who may stop same whenever her condition renders it advisable. *Lindsay* v. *Imperial Steel & Wire Co.*, 13 O. W. R. 872.

Party—Disclosing names of witnesses—Modified rule—Relevant fact. *Williamson* v. *Merrill*, 4 O. W. R. 528, 5 O. W. R. 64.

Party—*Inscription in law.*]—When allegations in a pleading are attacked by means of an inscription in law, one of the parties cannot be examined for discovery by virtue of Art. 286, C. P., by his opponent, on the facts which are the subject of such allegations; and if such examination has been commenced upon other facts, it will be adjourned until judgment has been rendered on the inscription in law. *United Shoe Machinery Co.* v. *Grunet*, 7 Que. P. R. 268, 284.

Party—*Notice to solicitor of party to be examined.*]—The party who serves his opponent with notice of preliminary examination, must give notice of the service to the solicitor of the party served. *Beique* v. *Fournier*, 10 Que. P. R. 275.

Party—Order for examination—*Ex parte* order—Irregularity as to place of examination and person of examiner—Setting aside order—Practice. *Crowcworth* v. *Gummerson*, 8 O. W. R. 799.

Party—Production of documents — Relevancy—Contract—Construction. *Westmoreland Coal Co.* v. *Hamilton Gas Light Co.*, 6 O. W. R. 817.

Party—Relevancy of question—Counterclaim. *Hamilton Provident & Loan Society* v. *White*, 3 O. W. R. 687.

Party—Relevancy of questions—Trespass—Placarding hotel with notice of contagious disease. *Wedin* v. *Robertson* (Alta.), 7 W. L. R. 72.

Party — Scope of examination—Production of books—Relevancy — Damages. *Blumenstiel* v. *Edwards*, 3 O. W. R. 772, 5 O. W. R. 341, 796.

Party—Scope of examination—Relevancy of questions—Duty of party to inform himself. *Randolph* v. *James*, 12 O. W. R. 1008.

Party — Service of appointment — Rule 391 A (1) — Necessity for service of original — Practice. *Foley* v. *Buchanan*, 9 W. L. R. 3.

Party—*Time for examining—Inscription for trial.*]—The trial of a suit begins with the inscription mentioned in Art. 293, C. C. P., and after the latter is filed, an application to examine the opposite party for discovery comes too late. *Hétu* v. *French*, 28 Que. S. C. 397.

Party—*Time for—Inscription—Trial.*]—The preliminary examination of the opposite party under Art. 286, C. P., cannot take place after the filing of an inscription for final examination and hearing on the merits; inscription being a proceeding which forms part of the trial of a cause. *Jobin* v. *Potvin*, 6 Que. P. R. 117.

Past officer of company—*Order compelling attendance—Order of foreign Court.*]—R. S. C. c. 140 extends to parties as well as witnesses; and the person who was manager of the defendant company at the time when the transactions in dispute in the action took place, as such officer, is a *quasi* party and stands for the person to be examined for discovery for the defendant company. And an order to compel him to attend and be examined in pursuance of an order of a Manitoba Court, which he had refused to do, was made as on an *ex parte* application. *In re Kirchoffer* v. *Imperial Loan & Investment Co.*, 24 C. L. T. 230, 7 O. L. R. 295, 3 O. W. R. 390.

Past officer of company — *Rule 439 (a)—Rule 485.*]—There is no power now under Rule 439 (*a*), as substituted by Rule 1250 for the Rule 439 (1), to make an order for the examination for discovery of a former officer or servant of a corporation party, nor is there power to make such an order under Rule 485. *Cantin* v. *News Publishing Co., of Toronto*, 24 C. L. T. 398, 8 O. L. R. 531, 4 O. W. R. 162, 217.

Patent of invention—*Agents—Production of documents.*]—In an action for damages for the infringement of a patent of invention the defendants pleaded among other defences that the invention was in public use prior to the application for letters patent; that the patent was void for want of novelty; that the patent was not at the commencement of the action a valid and subsisting patent; that the plaintiff had not since the expiration of two years from the date of his patent commenced and after such commencement continuously carried on in Canada the manufacture of the patented invention; that the plaintiff had after the expiration of one year from the granting of the patent imported or caused to be imported into Canada articles made in accordance with the patent:—*Held*, that the defendants were entitled to the fullest discovery from the plaintiff, and that he was bound to give information as to agreements and transactions made and carried on between him and certain agents employed by him for the manufacture and sale of the patented invention, especially as to the time at which and the terms upon which the patented invention was manufactured in Canada under the patent; and the plaintiff having refused upon his examination for discovery to answer questions relating to these matters, was ordered to attend for re-examination at his own expense. The plaintiff was also ordered to make and file another affidavit on production, and to produce for inspection statements received by him from such agents. *Parramore* v. *Boston Mfg. Co.*, 22 C. L. T. 415, 4 O. L. R. 627, 1 O. W. R. 643, 716.

Person actually interested—*Nominal paintiff.*]—When the plaintiff in an action is only a *prête-nom* and does not know the facts of the case, an examination before trial of the person actually interested will be allowed. *Barbeau* v. *Viau*, 7 Que. P. R. 151.

Person for whose benefit action defended—Rule 440 — Manager of assignor company. *Carter* v. *Lee*, 8 O. W. R. 499.

Person for whose benefit action defended — *Rule 440.*]—Rule 440, providing that a person for whose immediate benefit an action is prosecuted or defended shall be regarded as a party for the purpose of examination, is difficult of application where the plaintiff seeks to examine a person for whose benefit it is said that the action is defended. Where the action was for infringement of a patent of invention for a certain heater, and the statement of defence denied the infringement and set up that the right to manufacture the heater was acquired by the defendants from C. & Co., and it did not appear that anything had been done by C. & Co. in reference to the action before or after it was brought:—*Held*, that the members of the firm of C. & Co. were not persons for whose immediate benefit the action was defended; at the most, a successful defence might relieve them from a possible liability to the defendants. *Moffat* v. *Leonard*, 24 C. L. T. 401, 8 O. L. R. 519, 2 O. W. R. 787, 3 O. W. R. 633, 4 O. W. R. 201, 5 O. W. R. 259.

Person for whose immediate benefit action defended—*Action against assignee for creditors—Examination of assignor—Reference for trial—Power of referee to order examination.*]—Appeal by defendant from order dismissing appeal from certificate of Neil McLean, official referee, of his ruling in the course of a reference that plaintiff was entitled to examine for discovery one David E. Starr, against whose assignee for the benefit of creditors this action was brought, to establish the right of plaintiff to rank upon the insolvent estate:—*Held*, Rule 440 and Rule 466 are in *pari materia* and provide that a person for whose immediate benefit an action is prosecuted or defended is to be regarded as a party for the purpose of examination and for the purpose of discovery. Under the Rules examination for discovery may be "before the trial" (Rule 439), and production may be ordered "at any time pending the action or proceeding" (Rule 463). Rule 440 has been construed to apply to a debtor who has assigned his estate for the benefit of creditors, even though the estate may be insolvent. In *Macdonald* v. *Norwich Union Ins. Co.*, 10 P. R. 462 (1884), Mr. Justice Rose *held*, that such an assignor might be treated as one to be immediately benefited by the litigation. This decision was followed in 1897 by McColl, J. (afterwards Chief Justice of British Columbia), in *Tollemache* v. *Hobson*, 5 B. C. R. 214; see *Johnston* v. *Ryckman*, 7 O. L. R. at p. 523, 3 O. W. R. 198. There would be no difficulty in supporting this order to examine the debtor Starr for discovery, and have him make production of papers if the action had not been referred. This cause being at issue, all the matters

were referred by order of 6th April, 1904, to be tried before a referee, pursuant to s. 29 of R. S. O. 1897 c. 62. The whole cause and all its issues were thus before the referee to be tried, and, having regard to the original scope of the Rules in question, it is competent for an order to issue for the purpose of examining the assignor with a view to the proper trial of the cause. The referee has plenary power to deal with the cause under the statute, and, in addition, under Rules 648, 665, 666, 667, and 669. The reference being before trial and for the purpose of trial, the referee can properly direct one to be examined for discovery who is a party or who is to be treated as a party to the litigation.—Appeal dismissed.—Meredith, J., dissented on both grounds. *Garland* v. *Clarkson*, 5 O. W. R. 62, 9 O. L. R. 281.

Personal services—*Action for motion for further examination—Better affidavit on production—Value of services.*]—Cartwright, Master, granted order requiring further examination of plaintiff and for better affidavit on production in an action to recover for personal services, the value of which was not ascertained. Costs to defendant in cause. *Morton* v. *Forst* (1910), 17 O. W. R. 761, 2 O. W. N. 427.

Place for —Residence of parties — Endorsement on writ—Appointment for examination of plaintiff—Did not attend—Motion to dismiss action for default dismissed—Plaintiff has right to move from place he commenced action—Examination should be where he now resides—Where there are joint plaintiffs action should not be dismissed for default of one—Costs to plaintiffs. *Jeune* v. *Mersman*, 17 O. W. R. 886, 2 O. W. N. 418, followed. *Ferris* v. *McMurrich* (1911), 18 O. W. R. 396, 2 O. W. N. 770.

Plaintiff—Absence from province—Place of residence—Offer to submit to examination abroad—Stay of action—Concurrent proceedings under Railway Act. *McLean* v. *James Bay Rw. Co.*, 5 O. W. R. 440, 495.

Plaintiff — *Disclosure — Particulars — Pleading.*]—After the close of the pleadings particulars are only required for the purpose of limiting the issues at the trial, and will not be ordered until after discovery, and not then if the discovery results in full disclosure.—The particulars disclosed at an examination for discovery are as binding on the party discovering as they would be if delivered in the form of a pleading. *Kelly* v. *Kelly*, 18 Man. L. R. 331, 9 W. L. R. 517.

Plaintiff — Issue of appointment before service of statement of defence—Service of statement of defence on same day—Fraction of day—Rules of Court. *Stone* v. *Davies*, 9 O. W. R. 187, 258.

Plaintiff — *Libel—Absence of justification — Qualified privilege — Honest belief—Relevancy of questions.*]—In an action for libel, in which the defendant has pleaded qualified privilege, to which the plaintiff has replied malice, the defendant, although he has not pleaded justification, is not precluded, on examination of the plaintiff for discovery, from asking questions which are relevant to the issue of the defendant's honest belief, as tending to shew the absence of malice, although they may incidentally prove the truth of the libel. *McKeraow* v. *Comstock*, 11 O. L. R. 637, 7 O. W. R. 197, 275, 449, 558.

Plaintiff—Scope of enquiry—Relevancy of questions. *Torrance* v. *Hamilton, Grimsby, & Beamsville Rw. Co.*, 7 O. W. R. 46.

Plaintiff claimed the defendant was seller, not agent, for the sale of certain apples injured in transit; on examination for discovery it was held that defendant must inform himself as to instructions given to and communications with shipper, and whether or not these were in writing. *Randolph* v. *Jones*, 12 O. W. R. 1008.

Plaintiff resident abroad—*Demand—Description in writ—Travelling Expenses.*]—Where the plaintiff is described in the writ as being "of No. 8 rue Alfred de Vigny, in the city of Paris, in the republic of France," it is not incumbent on his attorney to "declare where such party then is" under Art. 361, C. P., but it is for the opposite party to have him examined under a commission. Where a party is absent and under Art. 361, C. P., service of summons upon articulated facts may be made upon his attorney; such attorney may demand the necessary funds to pay his client's travelling expenses under Art. 370, C. P. *Menier* v. *Whiting*, 18 Que. S. C. 113.

Plaintiff resident abroad—*Place of Examination — Order — Discretion.*]—The plaintiff resided at Cleveland, in the State of Ohio, and the defendant and the solicitors for both parties in the county of Oxford, Ontario, where also the cause of action arose:—*Held*, that the local Judge for that county has jurisdiction under Rule 477 to make an order, upon the application of the defendant, requiring the plaintiff to attend for examination for discovery at Windsor, Ontario; that it was unnecessary for the defendant to shew special circumstances to obtain such an order; that it was a proper exercise of discretion to name Windsor, as a place "just and convenient" for the purpose; and that the local Judge properly took judicial notice of the geographical situation of Windsor. *Lick* v. *Rivers*, 21 C. L. T. 166, 1 O. L. R. 57.

Plaintiffs—*Particulars.*]—Application to compel plaintiffs to answer questions which they had refused to answer on their examination for discovery and any other questions, or to deliver particulars. No order made:—*Held*, that where discovery results in such disclosures that particulars are not ordered, the particulars disclosed in the examination will be binding. Plaintiffs therefore will be entitled to prove misconduct on defendant's part in any transaction referred to in his examination. If any other transactions are brought out they will be disposed of by the trial Judge. *Kelly* v. *Kelly*, 9 W. L. R. 517.

Postponement by company *till enforceable contract established.*] — Motion to postpone discovery by defendant until plaintiff has established an enforceable contract between plaintiff and defendants C. and O., dismissed. A preliminary trial to ascertain if there be such a contract would be unsatisfactory and at any rate must be or-

dered by a Judge, not Master in Chambers. *Stowe* v. *Currie* (1909), 14 O. W. R. 62, affirmed, 154.. See S. C., 248.

Preliminary hearing.] — A plaintiff whose title is denied by an *exception à la forme* cannot refuse to be examined for discovery as to this defect of title before the hearing of the exception. *Moreau* v. *Lamarche*, 3 Que. P. R. 73.

President of club.] — Motion by defendants to commit plaintiffs' president for refusing to answer certain questions and to produce certain letters upon his examination for discovery dismissed, the questions being irrelevant and the letters purely personal or relating to plaintiff's domestic affairs. *Toronto Club* v. *Imperial Bank* (1909), 14 O. W. R. 92.

Questions on examination — *Assignment of chose in action — Interest of assignor—Nominal plaintiff.*]—In an action to recover a money demand assigned to the plaintiff, the defence alleged that the plaintiff was only a nominal plaintiff and that no consideration had been given for the assignment, and the plaintiff on his examination for discovery objected to answer questions relating to the consideration and to the interest of the assignors:—*Held*, that the question should be answered. *Boggs* v. *Bennett Lake & Klondike Navigation Co.*, 8 B. C. R. 353.

Relevancy of questions — *Defamation —Wrongful dismissal.*] — The plaintiff had, as a member of the medical board of the defendants, recommended a certain woman as a nurse, and she was employed by the defendants. Subsequently, the defendants, having been informed that the plaintiff had introduced the woman under an assumed name, and had previously been living in adultery with her, dismissed the plaintiff from their medical board, and withdrew permission to him to deliver lectures to the nurses, by a resolution of their board of directors, in which the grounds of their action were stated to be that the plaintiff had "recommended as a nurse a woman who was not a fit and proper person for the position, and had in doing so done injury to the hospital, and for other reasons" not specified in the resolution. The plaintiff sued for wrongful dismissal and for libel. In their defence the defendants set up that the alleged libel was privileged and that they had received information to the effect that the plaintiff had been living in adultery with the woman in question some time previous to his appointment. Upon his examination for discovery the plaintiff was asked several questions as to his former relationship with the woman. These he refused to answer. Upon an application to compel him to answer:—*Held*, that the plaintiff was bound to answer all questions the answers to which would tend to shew whether or not the woman in question was or was not a fit and proper person to be employed as a nurse, even though the fact sought to be proved had occurred previously to the plaintiff's appointment, and that evidence tending to shew that the woman had been living in adultery or leading an immoral life was evidence bearing on that issue, especially as the adultery was alleged to have been committed with the plaintiff himself, and he would therefore be aware of it and of the fact that the woman was not a fit or proper person when he recommended her appointment. *Ings* v. *Calgary General Hospital Trustees*, 4 Terr. L. R. 58.

Scope of examination—*Cross-examination—Rule 703 — Retroactivity.*]—Upon the examination for discovery of the defendants certain questions were objected to, on the ground that they were in the nature of cross-examination. On the 30th May, 1900, an order was made requiring the defendants to answer the questions objected to, from which the defendants appealed. Owing to some doubt as to the construction to be placed on the Rules providing for examinations for discovery, on the 15th June, 1900, Rule 703 was amended so as expressly to sanction cross-examination:—*Held*, dismissing the appeal, that the examination for discovery under Rule 703 (even before the amendment) was in the nature of a cross-examination, but limited to the issues raised in the pleadings. *Carroll* v. *Golden Cache Mines Co.*, 6 B. C. R. 354, overruled. The amendment of 15th June, 1900, is retroactive. *Bank of British Columbia* v. *Trapp*, 20 C. L. T. 464, 7 B. C. R. 354.

Scope of examination.]—In the examination of a party or his representative for discovery under Arts 286 *et seq.*, C. C. P., the witness can be asked as to every fact relating to the claim or to the defence; and in this case the question asked was relevant to the claim. *Can. Pac. Rw. Co.* v. *Richelieu & Ontario Navigation Co.*, 9 Que. Q. B. 283.

Scope of examination — *Rule 703.*]—The action was to set aside the will of Alexander Dunsmuir, on the grounds of insanity and undue influence exercised by the defendant, who was the beneficiary under the will. On the examination for discovery of the defendant, he refused to answer questions in reference to the nature and extent of the subject matter of the will, the business and personal relations that existed between him and his deceased brother, the history of their dealings with the property, the mode in which the deceased brother managed his affairs, and the circumstances leading up to and surrounding the execution of the will:—*Held*, that the questions must be answered or the defence would be struck out. The examination for discovery under Rule 703 is a cross-examination both in form and in substance, and a party being examined must answer any question the answer to which may be relevant to the issues. *Hopper* v. *Dunsmuir*, 23 C. L. T. 275, 10 B. C. R. 23.

Scope of examination — *Specific performance — Denial of contract — Tender — Financial means.*]—In an action for the specific performance of an alleged contract for the sale and purchase of a vessel for $5,000, one-half of which was to be paid in cash at the execution of the bill of sale and delivery of the vessel, and credit given for the remainder of the purchase money without any security upon the vessel or otherwise, the plaintiffs alleged a tender to the defendants of $2,500 in payment of the down instalment. Defences in denial of contract and of fraud

were, among others, set up:—*Held*, that, as the defendants absolutely refused to carry out the contract, and denied their obligation to do so, the question whether there had been a tender in fact was immaterial, in an equity action such as this; and, therefore, the plaintiffs were not obliged upon examination for discovery to answer questions as to the source from which they had obtained the money alleged to have been tendered. The defendants also sought to examine the plaintiffs as to their means, to shew that they were persons of no means, which, it was contended, would be a circumstance to induce the Court to refuse to adjudge specific performance, even if the contract were proved:—*Held*, that the defendants were not entitled to such discovery, no such issue being raised upon the record, and it not being alleged that the contract was entered into upon the belief or representation that the plaintiffs were persons of means. *Bentley* v. *Murphy*, 21 C. L. T. 590, 2 O. L. R. 665.

Second trial — *Rule 439.*]—A party to an action may be orally examined before the trial touching the matters in question: Rule 439:—*Held*, that a trial which has proved abortive by the disagreement of the jury or by the granting of a new trial is not a trial within the meaning of the Rule. *Leitch* v. *Grand Trunk Rw. Co.*, 12 P. R. 541, 671, 13 P. R. 369, considered. Where the defendant had not been examined before the first trial, and the judgment thereupon had been set aside and a new trial ordered, the plaintiff was allowed to examine the defendant before the second trial:—*Semble*, that if there had been an examination of the defendant before the first trial, a second examination might be an abuse of the process of the Court. *Clarke* v. *Rutherford*, 21 C. L. T. 189, 1 O. L. R. 275.

Servant of defendant — Con. Rules 439 *(a)*, 440, 441. *Van Koughnet* v. *Toronto Towel Supply Co.*, 8 O. W. R. 683.

Servant of defendant company — Examination of conductor — Application for leave to examine motorman—Special grounds — Admissions — Evidence. *Tinsley* v. *Toronto Rw. Co.*, 10 O. W. R. 40.

Stage of cause.]—The preliminary examination of a party to an action may take place after the inscription of the cause. *Bourassa* v. *Lambert*, 5 Que. P. R. 375.

Time for—*Day before trial.*]—The preliminary examination of a party may take place the day before that fixed for examination and hearing. *Ward* v. *Jasmin*, 5 Que. P. R. 130.

Wife of defendant—*Separate property —Agency for husband—Art. 591, C. P.*]—Where, after judgment, the plaintiff moves for the examination of the defendant's wife under Art. 591, C. P., he must allege in his motion that the defendant and his wife are separate as to property, or that the defendant's wife has acted as his agent for the administration of property belonging to the defendant. *Nadeau* v. *Boulay*, 10 Que. P. R. 217.

Withdrawal of one defendant after being sworn — Order to appear again. *Campbell* v. *Scott*, 5 O. L. R. 233, 2 O. W. R. 144.

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2. INSPECTION.

Action for negligence—*Defect in elevator—Witness.*]—In an action for damages for injuries alleged to have been caused by the defects of an elevator situated on the property of the defendants, the Court cannot allow the plaintiffs the privilege of having the elevator inspected by a person whom they intend to call as a witness. Such an inspection is not an expertise under Art. 392, C. P. C.; and it cannot be allowed under Art. 288. *Gareau* v. *Montreal Street Rw. Co.*, 8 Que. Q. B. 409, followed. *Dubois* v. *Horsfall*, 18 Que. S. C. 138.

Action for negligence — *Motion for further affidavit on production—Documents in possession — Examination of witness — Relevancy—Costs.*]—Plaintiff brought action to recover damages for injuries sustained by alleged negligence of defendants in the condition and operation of an elevator in defendant's hotel while plaintiff was a guest therein. Plaintiff moved for an order requiring defendants to file a further affidavit on production and produce certain documents admitted to be in defendant's possession and for examination of witness.—Sutherland, J., *held*, that the sole object of the motion appeared to be to ascertain names of defendant's witnesses and that none of the discovery sought was relevant to the issue. Motion dismissed. Costs in the cause. *Pryor* v. *Clifton Hotel Co.* (1910), 16 O. W. R. 1018, 2 O. W. N. 75.

Action for work and labour—*Experts.*]—In an action for the value of work done for the defendant to his house, where he complains of bad workmanship and alleges that he will be obliged to spend a certain sum to put the work done in good condition, the plaintiff cannot have an order to enter the defendant's house with experts to examine the work done. *Adams* v. *Préjent*, 3 Que. P. R. 516.

Inspection of defendants' premises —Survey and plan—Rule 571. *Helliwell* v. *City Dairy Co.*, 6 O. W. R. 480.

Inspection of motor car — Allegations of uselessness. *Young* v. *Hyslop*, 7 O. W. R. 581.

Machine in dispute — *Order for production—Deposit to cover expense.*]—When an action is brought to revendicate a machine which the defendant says is in his factory, but which the bailiff charged with the writ has been unable to find or seize, the Court is without power to order the defendant to exhibit the machine in his premises, because Art. 289, C. P., does not authorise a compulsory entry on the premises of a party. *Gareau* v. *Montreal Street Rw. Co.*, 1 Que. P. R. 566, followed. The Court will not, in such a case, order the defendant to bring the machine to Court, because such a course

would subject him to expense which he is not bound to bear. Nevertheless, an order for inspection will be granted in such a case, ordering the defendant to bring the machine to Court, when the plaintiff has deposited an amount sufficient to cover the expense of removal. *United Shoe Machinery Co.* v. *Caron*, 6 Que. P. R. 100.

Motion for further affidavit on production.]—Incorporated company—Examination for discovery—If resisted, order to issue as asked. *Kline* v. *Dominion Fire Ins. Co.* (1910), 17 O. W. R. 246, 2 O. W. N. 184.

Pleading — *Damages.*] — Action to recover the price of a hat destroyed by an icicle which fell from the roof of the defendant's house. The plaintiff went to the defendant's house to claim the value of the hat; she asked to see it and said she would pay after seeing it. Later the plaintiff wrote to her that he would not go to her house. Then the defendant sent an expert to see the hat, but the plaintiff refused to let him see it. The defendant asked that she might not be obliged to plead until she had seen the hat and ascertained the damages. An order was made to that effect. *Dorney* v. *Marceau*, 16 Que. S. C. 226.

Premises—*Photographs.*] — By virtue of Art. 289, C. P., a Judge may permit one of the parties to go upon the premises of the other for the purpose of photographing the place where the accident in question in the action happened. *Primeau* v. *Merchants Cotton Co.*, 3 Que. P. R. 175.

Premises — *View.*] — Except in cases where a view of the *locus* is prescribed under the terms of Art. 392, C. C. P., a Judge cannot order a plaintiff claiming damages for injury to his property to submit to have his residence and property examined with the defendant with a view of ascertaining whether he can be held liable for the damages claimed. *Garceau* v. *Montreal St. Rw. Co.*, 8 Que. Q. B. 409.

Production of letter—*Motion for under Con. Rule 452 — Relevancy.*] — Plaintiff moved under Con. Rule 452 for production of a letter admitted by defendant Parker in his possession:—*Held*, that in view of the alleged ground of action, which was a breach of contract made by defendant Parker on behalf of his co-defendant and himself with plaintiff, it was very material to plaintiff's case to ascertain what were the relations between the defendants and what authority Parker had to bind his co-defendant, and plaintiff should be allowed to judge for himself as to its relevancy, and was entitled to production. Costs of motion and order to plaintiff. *Smith* v. *Fox* (1910), 15 O. W. R. 793.

Right to inspect premises in question in action.]—In an action for damages, the Court will not allow one of the parties to enter upon the premises of his adversary, in company with one or more persons of his own choice, to make an examination of the machine alleged to have caused the injury. *Belair* v. *Dominion Textile Co.*, 10 Que. P. R. 257.

Subpoena duces tecum.] — Excepting the case of a public officer, no one can be forced by an action at law to give communication or a copy of a writing under private signature, of which he is the legal depository. This demand can only be exercised during the pendency of a suit by serving the depository with a *subpœna duces tecum*. *Massee* v. *Trudel* (1909), 36 Que. S. C. 501.

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3. INTERROGATORIES.

Absence of defendant — *Delay—Foreign commission.*]—In case of absence of the defendant, the attorney upon whom service of interrogatories *sur faits et articles* has been made may demand a delay in order that his client may appear and reply, or ask that the plaintiff shall interrogate the defendant upon a commission rogatory, in default of which the *faits et articles* will be taken *pro confessis*. *Hall* v. *Fenton*, 4 Que. P. R. 344.

Administered to officer of defendant municipal corporation — *Examination of another officer—Refusal to furnish information by servant of corporation—Relevancy—Opinions of servants.*]—Plaintiffs sold to defendants an incinerator for consuming city refuse and sued for price thereof. Defendants claimed the machine would not do the work contracted for. Plaintiffs served interrogatories to ascertain quantity of different classes of refuse. The answers being unsatisfactory further details were asked, but a Referee dismissed the application. On appeal to Judge in Chambers this finding was sustained. The Court of Appeal being evenly divided the appeal was dismissed. *Decarie* v. *Winnipeg*, 11 W. L. R. 102.

Affidavit — Claim of privilege — Reports obtained from solicitor in contemplation of possible litigation. *Orr* v. *Toronto Ry. Co.*, 9 O. W. R. 30.

Affidavit — Contradicting — Pleading—Interrogatories — Relevancy of documents. *Bank of Montreal* v. *McDonald*, 40 N. S. R. 595.

Answers — Exceptions. *Boynton* v. *Givan*, 1 E. L. R. 482.

Answers — Exceptions — Setting down —Practice—Relevancy of answers—Lunatic —Action against committee for specific performance of contract. *Golden* v. *McGivery*, 5 E. L. R. 89.

Answer — *Reference to answer of co-defendant—Exceptions.*] — To an interrogatory to sue out particulars of a claim of debt by the defendant C. against the defendant company, the defendant C. answered that he believed that schedules (which contained the information sought) attached to the answer of the defendant company were true:—*Held*, allowing an exception for insufficiency, that, the interrogatory relating to a matter within the defendant's knowledge, he should have made positive oath of the correctness of the schedules, or that they were correct to the best of his knowledge, information, and belief, accounting for his inability to swear

positively to their correctness. *Lodge* v. *Calhoun*, 25 C. L. T. 89, N. B. Eq. 100.

Answers — *Exceptions — Costs—Will.*]—The bill alleged that the testator by his will bequeathed a fourth part of his estate to be divided equally among the four children of his son who were living at the date of the will; that the plaintiff was one of the children, and a beneficiary under the will. The defendants, trustees under the will, to interrogatories whether the plaintiff was not one of the four children of the son mentioned in the will, and living at the date thereof, and beneficially entitled thereunder to some and what interest in the estate, after admitting the will, answered that they did not know that the plaintiff was one of the children of the son, that she was living at the date of the will, and that she was beneficially entitled to an interest in the estate, although they were so informed and believed:—*Held*, sufficient. Specific information should be given in answers upon facts within the knowledge of the party answering, and the matter should not be left to inference. Where some exceptions were allowed, and others overruled, costs were allowed to each party. *Crosby* v. *Taylor*, 24 C. L. T. 241, 2 N. B. Eq. 511.

Application for order—*When granted —Stage of action.*]—On an application for the production of documents, the usual test is whether, having regard to the circumstances disclosed by the pleadings, it can fairly be said that the discovery sought is not necessary or may not prove helpful upon the trial. The granting of the order is practically a matter of course, unless it is sought at an improper stage of the action. *Wood* v. *Dom. Lumber Co.*, 40 N. S. R. 510.

Business books of defendant — *Materiality—Personal injuries.*]—In an action for injuries to the plaintiff and his carriage, alleged to have been caused by the defendant's servants driving "recklessly and negligently," on an examination of the defendant for discovery he gave the names of his men who were with his waggon at the time of the accident, but he could not give the weight of the load without his books, which he declined to produce. After the examination was adjourned for the purpose of a motion to compel their production, his solicitors wrote a letter stating that the defendant's team was coming from a house on a certain street, and that the weight of the load and waggon together was not less than three tons. This the plaintiff declined to accept as sufficient:—*Held*, that, as the plaintiff's case rested on "recklessly and negligently driving horses and a conveyance," which the defendant contended was impossible on account of the weight of the load; and as it might assist the plaintiff to find out what house the team was coming from and the weight of the load, the books must be produced. *Boyd* v. *Marchment*, 9 O. W. R. 275, 13 O. L. R. 404.

Business books of defendant — *Postponement — Profit of business — Master and Servant Act, ss. 3, 4—Application to contract alleged—Statement of profits—Right to impeach.*]—In an action to recover a share of the profits of a business under an alleged agreement to share profits, the plaintiffs sought discovery of the books of the defendant:—*Held*, that the consideration of the matter should be postponed until it had been properly determined in the action, as a matter of law and not upon an interlocutory motion, first, whether the agreement alleged by the plaintiffs was within ss. 3 and 4 of the Master and Servant Act, R. S. O. 1897, c. 157, and second, whether (if it was) the statement of profits declared by the defendant could be impeached for fraud, error, mistake, or other like cause. *Cutten* v. *Mitchell*, 10 O. L. R. 734, discussed. *Engeland* v. *Mitchell*, 9 O. W. R. 31, 13 O. L. R. 184.

Business books of plaintiffs — Postponement of discovery till counterclaim established. *Parry Sound Lumber Co.* v. *Flanner*, 9 O. W. R. 708.

Chattel mortgage — *Bona fides — Solicitor and client—Privilege.*]—On an interpleader issue between an execution creditor and a chattel mortgagee, where the chattel mortgage has been taken to an advocate to secure his client's indebtedness to him for professional services, the books and papers of the advocate are not privileged from production so far as they are required to shew the propriety and amount of the charges made. *Smith* v. *Mackay*, 3 T. L. R. 102.

Company — *Officer.*] — Interrogatories must be addressed to a corporation which is a party to the action, and not to one of its officers. *Lambe* v. *Electric Fire Proofing Co. of Canada*, 6 Que. P. R. 397.

County Courts — *Practice — Affidavit of documents—Documents not disclosed in—Application for further affidavit—Sufficiency of affidavit—Rule 237—Power and discretion of Judge.*]—In an action on a guaranty, the plaintiffs applied for an affidavit of documents. The defendant Rebecca Levy (who carried on business as L. Levy & Co., with her husband, L. Levy, as manager) admitted that she had certain letters relating to the present action written subsequently to the 16th February, 1904 (the date on which the defendants notified the plaintiffs that they, defendants, would no longer be responsible under their guaranty). The plaintiffs, having had previous dealings with the defendants on the strength of other guaranties given by them, obtained an order for further and better discovery generally. In her affidavit filed pursuant to this order, the defendant Rebecca swore that she had no entry in her books of cheques received on account of the previous transactions to that in question in this action; that if the cheques had been endorsed with the name L. Levy & Co., it was done wholly without authority, and she denied having any documents relating to the guaranties. The plaintiffs then obtained an order "that the defendants do within one week from the date hereof make full discovery on oath of all books of account, ledgers, journals, blotters, cash books, bank pass books, promissory notes, cheques, memoranda, and other books of account, statements, or writings, which now are or were in use in the business of the defendants in the years 1902, 1903, 1904, 1905, 1906, with liberty to the plaintiffs to apply again as to the other matters mentioned in the notice of application filed and served herein on the 25th day

of July, 1906."—An appeal from this order was dismissed.—*Per* Irving, J.:—The authorities conferred by the County Court Rules as to ordering discovery is subject to the same limitations as are imposed by the Rules of the Supreme Court. *Empire Mfg. Co.* v. *Levy & Co.*, 5 W. L. R. 183, 12 B. C. R. 387.

Default — *Pleading.*]—A defendant in default for a reply to interrogatories *sur faits et articles* cannot obtain permission to plead until he has been relieved from his default. *Hall* v. *Fenton*, 4 Que. P. R. 356.

Deposit in Court—Delivery out. *Appleyard* v. *Mulligan*, 9 O. W. R. 240.

Evidence to contradict affidavit on production — *Privileged documents — Reports of officials of company respecting accidents — Cross-examination on affidavit.*]—1. In an action for damages resulting from a railway accident, when negligence is charged, reports of officials of the company as to the accident, made before the defendants had any notice of litigation, and in accordance with the rules of the company, are not privileged from production, although one of the purposes for which they were prepared was for the information of the company's solicitor in view of possible litigation. *Woolley* v. *North London Rwc. Co.*, L. R. 4 C. P. 602, followed.—2. The fact that the reports sought to be withheld were written on forms all headed, "For the information of the solicitor of the company and his advice thereon," is not sufficient of itself to protect them from production. *Hunter* v. *Grand Trunk Rwc. Co.*, 16 P. R. 385, distinguished.—3. When the officer of the defendants who made the affidavit on production was cross-examined upon it, and as a result made a second affidavit producing a number of documents for which he had claimed privilege in the first, the examination on the first affidavit may be used to contradict statements in the second, although there was no further examination.—4. An affidavit on production cannot be contradicted by a controversial affidavit; but if, from any source, an admission of its incorrectness can be gathered, the affidavit cannot stand. *Jones* v. *Monte Video Gas Co.*, 5 Que. B. D. 556; *Berwicke* v. *Graham*, 7 Que. B. D. 400, and *Roberts* v. *Oppenheim*, 26 Ch. D. 743, followed. *Savage* v. *Can. Pac. Rwc. Co.*, 3 W. L. R. 124, 16 Man. L. R. 381.

Ex parte order.]—Summons by the defendants to set aside an *ex parte* order giving the plaintiffs leave to deliver interrogatories to be answered by the defendants' manager:—*Held*, discharging the summons, that an order for leave to deliver interrogatories under Order XIII., Rule 6, may be made *ex parte*. *Daily Co.* v. *B. C. Market Co.*, 21 C. L. T. 321, 8 B. C. R. 1.

Exception to the form—*Preliminary plea—Proof ordered.*] — Where the parties have been ordered to proceed to proof upon a preliminary plea (in this case an exception to the form), the plaintiff may interrogate the defendant upon *faits et articles*. *Cullen* v. *Daly*, 9 Que. P. R. 268.

Faits et articles—*Second examination—Leave of Court—New matter.*]—A party can only once be examined upon interrogatories on articulated facts, except it be with the permission of the Judge or Court, upon cause shewn, and then only on new matter which was not referred to in the first interrogatories. *Holmes* v. *Woodworth*, 9 Que. P. R. 311.

Foot-note — *Practice — Exceptions to answer — Irrelevancy.*] — The plaintiffs omitted to add any foot-note to their interrogatories, as provided by s. 44 of the Supreme Court in Equity Act, C. S. 1903, c. 112.—On a motion to set aside an order setting exceptions to the answer down for hearing:—*Held*, that, by a proper construction of the section, such an omission was equivalent to a requirement that all the defendants should answer all the interrogatories.—Where defendants, in answering interrogatories filed as part of the bill, neglect to state their belief, or, when required to set out a document at length, neglect to do so without assigning a sufficient reason, the answer is insufficient, and exceptions on that ground will be allowed. If, however, the interrogatories relate to matters which are altogether irrelevant, the exceptions will be overruled. *Golden* v. *McGivery*, 4 N. B. Eq. 42, 5 E. L. R. 89.

Foreign defendants — *Administration of interrogatories to resident clerk—Power of Court.*]—The Court is without power to order that the clerk in charge of the head office in America of a commercial firm described as of New York City, but whose head office is, after the issuance of a commission to New York, declared to be in France, be examined on articulated facts in lieu of the personal defendants. *Timossi* v. *Moos*, 9 Que. P. R. 250.

Judgment on, for default of answer —*Discretion.*]—The Court has a discretion as to admitting interrogatories upon default to appear and answer them, and is not imperatively obliged to admit them upon such default. *Caron* v. *Gaudet*, 6 Que. P. R. 105.

Knowledge, information, and belief —*Documents.*]—An answer to an interrogatory must be in plain and positive language, and clear in meaning, so that it may be safely put in evidence.—It is not sufficient for the plaintiff, in answer to an interrogatory, to deny having any knowledge, without stating his information and belief.—Where a plaintiff was properly interrogated as to the existence of a document in a public office, it was held that he was not bound to seek knowledge as to the fact, but that, if he had such knowledge or information or belief upon the subject, he should answer fully as to his knowledge, information, and belief. *Scott* v. *Sproul*, 2 N. B. Eq. 81.

Letters in possession of defendant's agents — Refusal of agents to give up. *Outerbridge* v. *Oliphant*, 9 O. W. R. 596, 731.

Motion for better affidavit — Contentious affidavit — Exhibits — Practice. *Doyle* v. *Williams*, 9 O. W. R. 286.

Order — *Diligence — Stay of proceedings.*]—Where a party has obtained from the Court an order to force the opposite party to produce certain documents, he must pro-

ceed with diligence to have the order obeyed. A subsequent order which stays all proceedings until the order for production has been obeyed, is irregular and will be set aside. *Toronto Type Foundry Co.* v. *Mergenthaler Linotype Co.*, 8 Que. P. R. 279.

Order for — *Amendment.*]—An order for interrogatories "*sur faits et articles*," signed by the prothonotary, may be amended by him only. *Tongas* v. *Quinn*, 7 Que. P. R. 34.

Order for further particulars — *Officers of municipality.*]—The plaintiffs' claim was for the price of an incinerating machine bought by the defendants, who refused payment on the ground that the machine would not do the work contracted for.—In preparing for trial the plaintiffs, believing it to be necessary to procure information as to the quantities of the different classes of refuse to be consumed by the machine, delivered interrogatories, the answers to which did not satisfy the plaintiffs. — On appeal from the order of Mathers, J., sustaining an order of the Referee dismissing the plaintiffs' application for further details of information to be given by defendants—in answer to the interrogatories: — *Held, per* Howell, C.J.A., and Richards, J.A., that the plaintiffs were not entitled on the appeal to an order requiring the defendants to furnish estimates or opinions of their officers as to the quantity of manure produced throughout the city, although such officers had means of forming such opinions. — *Per* Perdue and Cameron, JJ.A., that such information should be furnished.—The Court being equally divided, the appeal was dismissed without costs. *Decarie Mfg. Co.* v. *Winnipeg*, 18 Man. L. R. 663.

Particulars—*Discovery — Which should be had first?*]—On appeal order made allowing plaintiff to have discovery before delivery of particulars, latter to be furnished within one week after discovery. *Townshend* v. *Northern*, 14 O. W. R. 727, 1 O. W. N. 69.

Penal action.]—The defendant in an action *qui tam* for a penalty under Art. 5639, R. S. Q., is not bound to respond to interrogatories *sur faits et articles;* and in this case a motion to take the interrogatories *pro confessis* was dismissed, but without costs. *Rossignol* v. *Morel*, 3 Que. P. R. 407.

Practice — *Insufficiency to answer — Exceptions.*]—A defendant who has acted entirely through his solicitor in any matter, and has himself no personal knowledge, must state in his answer, when required to do so, the knowledge that he has of the matters he is interrogated upon, basing his answers upon the information given him by his solicitor.—Where there are a number of different and distinct questions included in one section of the interrogatories, and the answer to that section is sufficient as to one or more of these questions, an exception to that whole answer must be overruled. The exception is too wide.—*Burpee* v. *American Bobbin Co.*, N. B. Eq. Cas. 484, followed. *Fenety* v. *Johnston*, 4 N. B. Eq. 101, 6 E. L. R. 213.

Secretary of corporation — *Authority to answer.*]—The answers of the secretary of a corporation to interrogatories *sur faits et articles* will be struck out of the record if he has not been authorised by the corporation to answer; a delay should be granted to allow the secretary to renew his answers after having procured the necessary authorisation. *Dumont* v. *College of Physicians & Surgeons of Que.*, 4 Que. P. R. 81.

Service abroad — *Statute—Repeal — Answers—Capias.*]—The provision contained in s.-s. 6 of s. 63 of c. 83 of the Revised Statutes of Lower Canada is abrogated.—2. A party who is served in Ontario with interrogatories, and at the same time accepts conduct money, thereby consents to go to the place where he is summoned to answer the interrogatories, and cannot oppose a motion to have the interrogatories taken *pro confessis* if he does not so answer.—3. Interrogatories may be served, in an action in which a *capias* is issued, immediately after the filing of a petition to quash the *capias*. *Carbonneau* v. *Bernard*, 6 Que. P. R. 309.

Service with writ ex juris—*Ex parte order—Incorporation of English practice.*]—The Judicature Ordinance, R. O. 1888, c. 58, s. 479, enacts: "Where no other provision is made by this Ordinance, the procedure and practice existing before the Judicature Ordinance, R. O. 1888, shall (adapted to the circumstances of the Territories), be held to be incorporated as part of this Ordinance."—English Order 31 is intituled "Discovery and Inspection." Rules 1-11 of that Order deal with discovery by interrogatories, and do not appear in the Judicature Ordinance. The remaining Rules 12-13, with some slight modifications, do appear therein under the same title: ss. 144 *et seq.*—*Held*, that the practice and procedure laid down in England, Order 31, Rules 1-11, were incorporated in the Judicature Ordinance by s. 479. Section 185 of the Judicature Ordinance, R. O. 1888, c. 58, is intended only for the purpose of perpetuating testimony or obtaining evidence to be used at the trial, and not for the purposes of discovery. *Contra per* Richardson, J.—Concurrently with an order for service *ex juris*, an order was made *ex parte* giving the plaintiffs leave to deliver interrogatories with the writ of summons.—*Held*, that, as the material in support of the order did not profess to shew grounds as provided by Jud. Ord. s. 402, to satisfy the Judge that "delay caused by proceeding in the ordinary way" (i.e., on notice) "would or might entail irreparable or serious mischief," the order ought not to have been made *ex parte*. *Young* v. *Brassey*, 1 Ch. D. 277, discussed. *Lougheed* v. *Praed*, 1 Terr. L. R. 253.

Viva voce answers—*Reading answers from paper.*]—A party to an action required to give *viva voce* answers to interrogatories must do so and must not read them from a paper prepared in advance. *Molsom* v. *Consumers Cordage Co.*, 10 Que. P. R. 190.

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4. Physical Examination.

Bodily injuries — *Accident.*]—In an action to recover damages for bodily injuries resulting from an accident, the Court has no power to order the plaintiff to submit him

self to a physical examination by a surgeon, if he refuses to do so. *Mousseau* v. *City of Montreal*, 4 Que. P. R. 38.

Bodily injuries—*Assault.*]—In an action to recover damages for bodily injuries caused in an assault the Court will order the plaintiff to submit himself to surgical examination. *Baxter* v. *Davis*, 4 Que. P. R. 153.

Report.]—It is usual in an order requiring plaintiff to submit to physical examination by a surgeon to insert a direction that the report be in writing and a copy given to the plaintiff's solicitor. It is doubtful if this can be insisted on as a term of the order. *Leslie* v. *McKeown*, 13 O. W. R. 342.

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5. Production of Documents.

Action against railway contractor—*Copies of contracts, rules, and regulations.*]—In an action for damages against a railway contractor, the plaintiff may ask for the filing of: (a) a copy of the contract between the defendant and the railway company; (b) a copy of the contract between the plaintiff and defendant; (c) a copy of the regulations issued by the defendant's engineer concerning blasting operations; and (d) the pay list containing the name and number of the plaintiff. *Piti* v. *New Canadian Co.*, 10 Que. P. R. 173.

Action against unincorporated association—*Documents in possession of central body—Striking out defence for non-production.*]—A defendant should not have his defence struck out for non-production of documents which are not in any way in his custody or control, but are in the custody of the officials of an incorporated body, having its head office in a foreign country and not being a party to the action. — *Kearsley* v. *Philips*, 10 Que. B. D. 36, and *Fraser* v. *Burrows*, 2 Que. B. D. 624, followed. *Vulcan Iron Works* v. *Winnipeg Lodge, No. 122 Ironmoulders' Union of North America*, 18 Man. L. R. 137, 9 W. L. R. 208.

Action against unincorporated association — Individual defendants ordered to represent association—Documents in possession of central body out of jurisdiction of Court—Attempt to compel production. *Vulcan Iron Works* v. *Winnipeg Lodge No. 122, Ironmoulders' Union of North America*, 9 W. L. R. 208.

Action for penalties.]—It is improper in an action to recover penalties under the Extra-Provincial Corporations Act, 63 V. c. 24 (O.), to issue the usual *præcipe* order for production of documents by the defendants. Such an order having been issued, it was held that the defendants were not bound to file an affidavit and claim privilege, but were entitled to have the order set aside. *Johnston* v. *London & Paris Exchange*, 23 C. L. T. 245, 6 O. L. R. 49, 2 O. W. R. 468, 492, 501.

Action for value of professional services — Dockets and blotters of solicitor — "Entries of events"—Affidavit on production —Parts of books sealed up. *Arnoldi* v. *Cockman*, 11 O. W. R. 102.

Action on life insurance—*Application of Quebec law—Agreement between defendants and general agent and sub-agent—Materiality — Relevancy.*] — In an action to recover amount of two life insurance policies there were two questions for consideration, if deceased suicided, and if Quebec laws applied. Deceased resided in Montreal, and defendants' head office was in Toronto:—*Held*, that the agreements between the general agent and defendants and the general agent and Montreal sub-agent must be produced. *Gray* v. *Crown Life*, 13 O. W. R. 644.

Affidavit — *Copy of document.*]—Under 53 V. c. 4, s. 60, and form 10, an affidavit of discovery should negative possession of a copy of a document. *Burden* v. *Howard*, (No. 2), 23 C. L. T. 266.

Affidavit — Defunct company—Accountant. *Waterall* v. *Union Petroleum Co.*, 6 O. W. R. 740.

Affidavit — Identification and description —Schedules—Mortgages. *Farmers' L. and S. Co.* v. *Scott*, 2 O. W. R. 23.

Affidavit — *Letters—Solicitor and client—Privilege.*]—In an action on a policy on the life of the plaintiff's husband, the defendants filed an affidavit on production, but objected to produce certain letters between a local and the head office, on the ground "that they are privileged, being of a confidential nature and disclosing certain legal points in connection with the defence of this action." On a motion to compel production, the defendants' manager in an affidavit stated that "it is my custom, in the course of business, frequently to write to the head office on matters involving points of law; the head office confer with their general solicitors, receive legal advice from them, and then communicate with me. The letters (in question) are of the same nature as those between solicitor and client, and are, as I am advised and believe, privileged for that reason." — *Held*, not sufficient, and that the affidavit should state that the letters "came into existence for the purpose of being communicated to the solicitor, with the object of obtaining his advice or enabling him to defend an action." *Southwark and Vauxhall Water Co.* v. *Quick*, 3 Q. B. D. 315, followed. *Thomson* v. *Maryland Casualty Co.*, 11 O. L. R. 44, 7 O. W. R. 15.

Affidavit — *Materiality — Examination of parties—Scope of—Contents of document—Costs of examination.*]—The plaintiff alleged a contract of partnership with the defendant J. for the promotion of a company to buy plant and carry on a manufacturing business, and that the defendants R. and C. had maliciously caused a breach of the partnership contract; he claimed an account and damages. The defendant R., on examination for discovery, said that he had obtained agreements to sell from various companies, which were afterwards assigned to a newly incorporated company, not a party to this action. The plaintiff alleged that these agreements were, in fraud of him, substituted with variations, for agreements previously entered into between the same companies and J.; also that R. and C. paid $20,000 to J. to induce him to act with them; and it appeared from R.'s

examination that he and C. drew a cheque upon their bank account in favour of J., which was paid:—*Held*, that the agreements and the cheque and a memorandum prepared by R. were material to the plaintiff's case, and should be produced or accounted for in the defendants' affidavits of documents.—2. That R. and C. ought not, as a matter of discretion, to be ordered to disclose facts which would become material only when the plaintiff should have established his right to damages.—3. That the plaintiff was entitled to know from R. and C. whether they paid money to J.; whether it was their own money, or, if not, whose it was; and for what it was paid.—4. That the plaintiff was entitled to know the amount paid by R. and C. to the M. company for their business, it being alleged by the plaintiff that he and J. had obtained a prior option upon it.—5. That the plaintiff was entitled to know from C. the nature of the agreements made for the purchase of the properties; if they were in writing, and he had access to them in his capacity of director of the company which was formed, he should inform himself of their contents so as to be able to answer as to them, or should produce copies; but, if he had no right of access, he was not bound to state his mere recollection of them:—*Semble*, that where an examination is unnecessarily long, the costs of it should be entirely disallowed. Decision of Meredith, C.J., 22 C. L. T. 117, varied. *Evans* v. *Jaffrey*, 22 C. L. T. 133, 3 O. L. R. 327, 1 O. W. R. 29, 158, 2 O. W. R. 678, 3 O. W. R. 877, 6 O. W. R. 733.

Affidavit — *Necessity for* — *Agent's commission.*]—In an action for compensation for services rendered in finding a purchaser for property, where one of the defendants is a corporation, and must have under its control all records, proceedings, and correspondence, if any exist, relating to communications with the other defendant, it is impossible to say, under all the circumstances, that discovery was not necessary or might not be helpful in the trial, and an affidavit of documents will therefore be ordered. *Wood* v. *Dominion Lumber Co.*, 37 N. S. R. 250.

Affidavit — *Order.*]—Where inspection is sought of documents supposed to be in the possession of the opposite party, an order should be obtained under s. 59 of 53 V. c. 4, for discovery by affidavit as to what documents are in the opposite party's possession, when an order may be made under c. 61 for their production. *Cushing Suphite Co.* v. *Cushing*, 23 C. L. T. 158, 2 N. B. Eq. 458.

Affidavit — *Partnership* — *Master and servant—Agreement to share profits—Statement furnished by master—Fraud.*]—*Held*, by Anglin, J., in Chambers, that, notwithstanding the language of s. 3 of R. S. O. 1897, c. 157, a statement of profits furnished by a master to his servants, where there is an agreement to share profits, is impeachable for fraud; and fraud being alleged by the plaintiffs (servants) in an action (*inter alia*) for an account of profits, the plaintiffs were entitled to discovery of a document in the possession of the defendant (master) shewing the basis of the statement of net profits furnished by the defendant:—*Held*, by a Divisional Court, upon appeal, not passing upon the questions with regard to the statute, that production of the document was properly ordered, having regard to the general rules relating to discovery and the other claims made in the action. *Cutten* v. *Mitchell*, 10 O. L. R. 734, 6 O. W. R. 497, 552, 629.

Affidavit — Partnership — Account — Special agreement — Master and servant—Profit sharing—Statement furnished by master—Impeaching for fraud. *Cutten* v. *Mitchell*, 6 O. W. R. 497, 552, 10 O. L. R. 734.

Affidavit—*Privilege* — *Confidential communications* — *Solicitor and client.*]—There has been a progressive development of the particularity required in the description of correspondence between a solicitor and his client in order that it may be protected from discovery by reason of privilege. As the affidavit on production cannot be contradicted, the grounds upon which the privilege is claimed must be set forth explicitly and fully, so that the Court may judge as to whether the documents so described are properly withheld from production. The affidavit must not only state that the correspondence is confidential and of a professional character, but the nature of it must be set forth, without any ambiguity whatever, in order that there may be no doubt as to its being privileged. Where the solicitors were acting as agents for the sale of defendant's land in question in this action, shortly before the first of the letters for which the defendant claimed privilege was written:—*Held*, that the defendant, in order to protect the correspondence, should give some more definite description of it than that it was written "in reference to the matters which are now in question in this action." *Gardner* v. *Irwin* 4 Ex. D. 49; *O'Shea* v. *Wood*, [1891] P. 286, and *Ainsworth* v. *Wilding*, [1900] 2 Ch. 315, followed. *Clergue* v. *McKay*, 22 C. L. T. 64, 148, 162, 3 O. L. R. 63, 478, 1 O. W. R. 178, 241, 2 O. W. R. 647, 3 O. W. R. 860.

Affidavits — Privilege—Confidential communications — Solicitor and client. *Hall* v. *Laplante*, 2 O. W. R. 490.

Affidavit of documents—*Sufficiency of description* — *Privilege.*] — An affidavit of documents which described certain bank books as bill registers, current accounts, and ledgers for stated periods:—*Held*, sufficient.—Privilege was claimed for the first time in respect of such books in a supplementary affidavit filed subsequently to the issue of a summons for a further and better affidavit. — *Held*, that this affidavit defeated the summons, and that the claim of privilege must be allowed. *Bank of British Columbia* v. *Oppenheimer*, 20 C. L. T. 142, 7 B. C. L. R. 104.

Affidavit of documents made by officer of defendant company — Cross-examination on—Claim of privilege — Documents procured in contemplation of litigation—Right of plaintiff to full information—Duty of officer to inform himself—Disclosing names of witnesses. *Savage* v. *Can. Pac. Ry. Co.* (Man.), 3 W. L. R. 124.

Affidavit on production — *Documents relating to plaintiff's title—Protection.*]—The plaintiff's manager made an affidavit on

production of documents in which he objected to produce certain agreements (referred to in the statement of claim) between the plaintiffs and their assignors whereby the property in question in the action was assigned to the plaintiffs; on the ground that such document "relates exclusively to the title of the plaintiffs and to the case of the plaintiffs in this action and not to the case of the defendants, nor does the said document tend to support the defendants' case, nor does it, to the best of my knowledge, information, and belief, contain anything impeaching the case of the plaintiffs:"—*Held*, not sufficient to protect the document from production. *Combe* v. *Corporation of London*, 1 Y. & C. C. C. 631, followed. *Quilter* v. *Heatly*, 23 Ch. D. 42, specially referred to. *Diamond Match Co.* v. *Hawkesbury Lumber Co.*, 21 C. L. T. 342, 1 O. L. R. 577.

Appeal — *Discretion.*]—An appeal from the decision of Weatherbe, J., refusing the plaintiff's application for discovery of documents. The defendants contended that there was nothing to indicate the existence of any documents to be discovered, and also that there was no appeal, the order being discretionary with the Judge below:—*Held*, that an appeal can be asserted in such cases; and that the Judge below erred in refusing discovery. *Wood* v. *Dom. Lumber Co.*, 24 C. L. T. 238.

Better affidavit.]—*Murphy* v. *Lake Erie & Detroit River Rw. Co.*, 1 O. W. R. 827, 2 O. W. R. 444.

Books of company — Affidavit on production — Privilege — Relevancy. *McPhee* v. *McPhee Automatic Co.*, 7 O. W. R. 609, 771.

Breach of contract—Correspondence relating to similar contracts. *Denison* v. *Taylor*, 2 O. W. R. 386, 469.

Breach of contract—Damages—Loss of profits in business — Books and documents pertaining to business—Postponement of trial. *Playfair* v. *Turner*, 7 O. W. R. 332, 379.

Confidential report to company's solicitor — *Privilege.*]—A company sued in damages on account of an accident cannot be compelled to produce at the trial a report made by an officer of the company to their solicitor, this report being a privileged communication between attorney and client. *Zaste* v. *Grand Trunk Rw. Co.*, 10 Que. P. R. 270.

Correspondence after action begun—Information for defence — Privilege — Examination for discovery—Undertaking to produce. *Slater Shoe Co.* v. *Wilkinson*, 1 O. W. R. 591.

Defendant's affidavit of documents—*Document relating solely to defendant's case —Refusal to produce.*]—In defendant's affidavit on production, he admitted having a lease which he refused to produce. Inspection of it refused, as plaintiff cannot in any way support his case by it. *Von Feber* v. *Enright*, 11 W. L. R. 648.

Documents out of jurisdiction.]—Certain documents had been sent under the by-laws of the defendant union to the parent union in Columbus, Ohio, the latter being lawfully in possession of them, but not a party to this action:—*Held*, that the defendant could not be compelled to produce these documents on discovery. *Vulcan* v. *Winnipeg*, 9 W. L. R. 208.

Enforcement of order—*Stay of proceedings.*]—The party in whose favour an order is made for the production of documents is not entitled to have the proceedings in the case stayed until it is complied with, but should use the means provided by law to have it enforced. *Toronto Type Foundry Co.* v. *Mergenthaler Lithographic Co.*, 16 Que. K. B. 345.

English practice—Payment of costs of discovery—Incorporated company—Selection of officer to make affidavit on production. *Can. Bank of Commerce* v. *Carbonneau* (Y. T.), 1 W. L. R. 262, 399.

Examination of officer of plaintiff of company—*Relevancy.*] — Order made for further production, but motion dismissed so far as re-examination of an officer of plaintiff company is concerned as to place of deposit of the mineral alleged to be the origin of "Vitae Ore," and the process of manufacture of the artificial article. *Theo. Noel* v. *Vitae Ore*, 10 W. L. R. 88.

Identification—*Description in affidavit.*]—Where discovery of documents is made, it is not enough to make them up in sealed bundles marked A. and B., but the documents must be identified by a mark or number and so described in the affidavit. *Cushing Sulphite Co.* v. *Cushing*, 23 C. L. T. 231, 2 N. B. Eq. 466.

Inspection — Privilege — Mortgage — Books of bank — Bank Act — Fraud —Preliminary issue—Appointment of accountant as agent to inspect books—Grounds for. *Can. Bank of Commerce* v. *Wilson* (Y.T.), 8 W. L. R. 266.

Letters — Privilege—Contracts similar to that in question — Trade combination—Security for costs—Increase in amount—Discretion. *Cascin Co.* v. *Hunsley*, 3 O. W. R. 59, 178, 255, 412.

Letters between solicitor and client —*Privilege.*]—Letters passing between a solicitor and his client, who was the common grantor of the plaintiff and defendant, in respect to the property in dispute, which had passed into the possession of the defendant from the executor of the writer, after his decease, are not privileged from production. *Platt* v. *Buck*, 22 C. L. T. 374, 4 O. L. R. 421.

Mechanics' lien action — *Order and appointment issued after trial begun.*]—In a mechanics' lien action plaintiff, without leave of Referee, obtained an order for production, and an appointment to examine one of the defendants for discovery, pending an adjournment, and after the trial had commenced. The order and appointment were set aside, but without prejudice to an application being made therefor to the Referee. *Wade* v. *Tellier*, 13 O. W. R. 1132.

Mortgage — Estoppel — Fraud — Discovery limited as to date by affidavit on production — Account — Preliminary issue — Better affidavit. *Can. Bank of Commerce* v. *McDonald* (Y.T.), 1 W. L. R. 271, 506.

Motion — *Necessity for.*]—A defendant cannot demand, by motion, the production of the documents invoked by the plaintiff in support of his claim, the plaintiff not being in a position to proceed with his action until such documents have been produced. *Lemay* v. *Labelle*, 4 Que. P. R. 189.

Motion for — *Vagueness — Action en bornage—Specifications of documents sought.*]—In an action *en bornage*, a motion by the plaintiff that the defendant be ordered to produce and give communication of all documents and titles which he has in his control, and which relate to the contestation, is too vague and indefinite, because it does not call for any particular document. *Bruneau* v. *Talbot*, 9 Que. P. R. 424.

Motion for further affidavit — Practice — Examination — Costs. *Barwick* v. *Radford*, 7 O. W. R. 237.

Motion to compel—*Documents relied on by plaintiff—Pleading.*]—A defendant not being bound to plead to the action whilst documents invoked by the plaintiff are not produced, a motion to compel production of such documents is idle (*inutile*). *Montreal Watch Case Co.* v. *Imperial Button Works, Limited*, 7 Que. P. R. 279.

Non-materiality of documents — *Foreign commission—Inspection.*]—Where discovery, as distinguished from production for the purpose of inspection, of documents, is sought, an affidavit of such documents must be given, though their production when applied for could be successfully opposed on the ground of immateriality. Documents within the jurisdiction of the Court will not be ordered to be produced before a commissioner for taking evidence abroad except in very special circumstances. Where inspection of documents had been given by consent, an application to the Court for further inspection was granted, and the Court declined to give effect, as too technical, to an objection that a demand in writing for inspection had not been made prior to the application to the Court. *Cushing Sulphite Co.* v. *Cushing*, 23 C. L. T. 231, 2 N. B. Eq. 469, 472.

Order for — *Default—Proof of—Contempt of Court—Attachment.*]—Before an attachment can be issued for contempt in not producing documents for inspection on an examination for discovery, an order for production for inspection has to be made. An order for production of books for inspection must state the time, or time after service thereof, within which the books are to be produced, and the copy thereof served must be indorsed with notice of the consequence of neglect or refusal to obey the same. *Smith* v. *McKay*, 4 T. L. R. 202.

Order for production—*Motion to dismiss action—Indorsement of notice.*]—In order that a party taking out an order for discovery may invoke the provisions of s. 184, J. O. 1893, though only with the object of having a plaintiff's action dismissed or a defendant's defence struck out, the order must be indorsed in accordance with s. 311. *Doidge* v. *Town of Regina (No. 2)*, 2 Terr. L. R. 337.

Ownership of land — *Filing of documents of title.*]—A party who alleges that he is the owner of certain land, without alleging title or proofs in support of his allegation, will not be ordered, upon motion to that effect, to file his document of title to the property, and proceedings will not be suspended in order to compel him to file such documents. *Molson* v. *Montreal*, 5 Que. P. R. 339.

Penalty.]—*Johnston* v. *London and Paris Exchange*, 6 O. L. R. 49, 2 O. W. R. 468, 492, 501.

Place of production.]—Where an order has been made for the production of document, the document should be produced in the city or town in which the writ was issued, but a Judge has a discretionary power to order production somewhere else to prevent inconvenience and prejudice to a party's business operations. *Davies-Sayward Mill and Land Co.* v. *Buchanan*, 24 C. L. T. 107, 10 B. C. R. 175.

Pleading — *Documents mentioned in — affidavit.*]—Application to enforce production of documents to which reference had been made in the defendants' pleading: Order XXX., Rules 15, 17, 18.—The defendants had referred to a certain deed which contained a reservation, both in the grant and *habendum*, as follows: "Subject, however, to the terms of a written agreement entered into between the said parties this day." The defendant objected to produce this agreement, upon the ground that it was not a document referred to in the pleadings. The plaintiff's affidavit did not allege that the document was in the possession or power of the defendants. For the plaintiff it was contended that, if the document was to be regarded as one referred to in the pleadings, no affidavit was necessary: Order XXX., Rule 18:—*Held*, that the agreement was not a document referred to in the pleadings; that the affidavit was defective; and the motion should be refused with costs. *Robert* v. *Miller* (No. 2), 20 C. L. T. 410.

Practice — *Application to dismiss action —Failure to indorse notice on order.*]—Rule 330 applies to orders for discovery of documents, not only where the remedy sought for non-compliance is attachment, but also where the remedy sought is dismissal of the action or striking out of the defence. Where therefore a copy of such an order served was not indorsed as provided, an application to dismiss the action for non-compliance with the order was refused. *Leadley* v. *Gaetz*, 5 Terr. L. R. 484.

Privilege — Contemplated litigation — Affidavit on production. *James Co.* v. *Dom. Ex. Co.*, 4 O. W. R. 418.

Privilege — Information and documents obtained before action. *London Life Ins. Co.* v. *Molsons Bank*, 1 O. W. R. 457, 2 O. W. R. 34, 3 O. W. R. 858.

Privilege — *Photographs.*]—Photographs sworn to be part of the materials of the defendants' evidence in the action are privileged from production.—Documents sworn to be called into existence in the *bona fide* belief that litigation might ensue are not for this reason only privileged from production. *Feigenbaum* v. *Jackson*, 7 B. C. R. 171.

Privilege — Reports of officers of company—Contradictory affidavit on production —Examination of officer of company—Affidavit made by a different officer. *Bain* v. *Can. Pac. Rw. Co.* (Man.), 2 W. L. R. 235.

Privilege — *Reports of officers of company—Examination of officer — Duty to obtain information.*]—1. When an affidavit on production of documents is made by an officer of a company, any other examinable officer of the company may be examined upon it, and his answers may be used to impeach the affidavit on an application to compel the filing of a further and better affidavit.—2. If such last-mentioned officer on his examination states that he does not know whether or not certain documents exist which, by the rules of the company, should be in existence, he will be ordered to inquire and obtain the information necessary to enable him to answer fully and explicitly.—3. Reports of the various officials and servants of a railway company upon the occurrence of a fire alleged to have been caused by sparks from a locomotive, and as to the condition of the locomotive, if made in the regular course of duty under the rules of the company, are not privileged from production. — 4. The fire having occurred on the 20th day of the month, the officer was ordered to produce all reports on the condition of the locomotive from the first to the last day of the month. *Bain* v. *Can. Pac. Rw. Co.*, 15 Man. L. R. 544, 2 W. L. R. 235.

Privilege—Sale of patent rights—Letters before sale. *Outerbridge* v. *Oliphant*, 8 O. W. R. 494.

Privilege—*Solicitor and client—Fraud.*]—There is no valid claim of privilege in regard to the production of documents passing between solicitor and client, when the transaction impeached is charged to be based upon fraud. *Williams* v. *Quebrada Railway, Land, and Copper Co.*, [1895] 2 Ch. 751, followed. And where the action was by a mortgagor to set aside as fraudulent a sale under the power in the mortgage and for redemption:—*Held*, that an admission made by one of the defendants, though sufficient to entitle the plaintiff to redeem, not being of efficacy against some of the other defendants, did not remove the issue of fraud from the record so as to enable the defendant making the admission to escape discovery. *Smith* v. *Hunt*, 21 C. L. T. 237, 1 O. L. R. 334.

Production of documents—*Privilege—Evidence produced in contemplation of litigation.*]—Appeal by plaintiffs from order of local Judge at Perth requiring plaintiffs to file a further and better affidavit on production. Defendants were owners of land through which a roadway runs, and the question to be determined in the action was whether such roadway was a public highway or not:—*Held*, that defendants were not entitled to such production and inspection. While the information was not obtained for the purpose of supporting an action expressly contemplated at the time the instructions were given to the solicitors, it must have been contemplated at the time the instructions were given to the solicitors, that if the report of the solicitors was that a highway existed, an action would be brought against the defendants for obstructing it, if they persisted in disputing that it was a highway, in which event the information obtained by the solicitors would be necessary to assist them in prosecuting such action. The immediate purpose of the information was to aid the solicitors in forming an opinion to the legal rights of plaintiffs in reference as to the road, and such information obtained by the solicitors for that purpose was privileged from production in an action brought as the result of the opinion formed by the solicitors. *Southwark* v. *Quick*, 3 Q. B. D. 315; *Leroyd* v. *Halifax*, [1895] 1 Ch. 686. The appeal allowed, with costs to the successful party in the action. *Elmsley* v. *Miller*, 5 O. W. R. 651, 717, 10 O. L. R. 343.

Railway — *Affidavit on production made by officer—Cross-examination on — Claim of privilege—Reports of officials respecting accident—Duty of officer to inform himself—Disclosing names of witnesses.*]—Reports made by the employees of a railway company to their superior officers in accordance with its rules concerning an accident resulting in death, and immediately thereafter, are not privileged from production in an action against the company for damages arising out of the accident, if they were made in the discharge of the regular duties of such employees and for the purpose of furnishing to their superiors information as to the accident itself, and were not furnished merely as materials from which the solicitor of the company might make up a brief, and an officer of the company who has made an affidavit on production of documents, must, on his cross-examination on such affidavit, furnish such information concerning them that the Court may be in a position to decide on a further motion whether they are privileged or not. If any of the information sought on such examination, and to which the plaintiff is entitled, is not within the knowledge of the deponent, he must ascertain the facts and give the information. That the names of some of the defendants' witnesses would be disclosed if the questions were answered, is not a sufficient reason for refusing to answer. Questions as to whether reports had been sent in as to the condition of the locomotive before the accident, and as to repairs thereto, must also be answered. *Savage* v. *Can. Pac. Rw. Co.*, 15 Man. L. R. 401, 1 W. L. R. 441.

Railway company—*Accident — Reports of servants—Privilege.*]—A company sued in damages on account of an accident may be compelled to produce at the trial all reports of the accident made by its employees in the ordinary course of their business, or of their duty, but not its reports made at the request or instance of its solicitor, in answer to inquiries made by the latter, with a view to and in contemplation of anticipated litigation. *Stocker* v. *Can. Pac. Rw. Co.*, 5 Que. P. R. 117.

Relevancy — *Denial—Sufficiency of affidavit.*]—When a party to an action has made

and filed an affidavit on production of documents, in the ordinary form, in obedience to an order to produce served upon him, the opposite party must be satisfied with such affidavit unless he can shew, from admissions or former statements on oath of the affiant, that there is a reasonable suspicion that he has in his possession or power other documents relating to the matters in question.—The party seeking discovery cannot get an order for a better affidavit merely by shewing that there are in the possession or power of the opposite party letters or other documents not mentioned in the affidavit which might contain relevant matter, in the face of the statement in the affidavit that there are none such. *Muir* v. *Alexander*, 24 C. L. T. 410, 15 Man. L. R. 103.

Security for costs of production — English rules—Special provisions of Yukon rules—Practice. *Can. Bank of Commerce* v. *Carbonneau* (Y.T.), 1 W. L. R. 262, 399.

Time for — *Particulars.*]—If a plaintiff, at the time of the return of his action, does not file the documents invoked in support of his demand, the defendant may make a motion for their production and for particulars. *Thibault* v. *Poulin*, 21 Que. S. C. 126.

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6. MISCELLANEOUS.

Action to revoke probate of will in favour of earlier document—Leave to defendant to photograph document produced by plaintiff—Terms—Costs. *Foulds* v. *Bowler*, 7 W. L. R. 517.

Inspection and analysis of medical preparations—*Passing off goods on public —Injunction.*]—In an action for an injunction restraining the defendants from passing off upon the public certain medicinal preparations manufactured and sold by them, so as to deceive the public into the belief that they were the preparations of the plaintiffs, the defendants are not entitled to an order for the analysis of the samples of the preparations of the plaintiffs, though produced by them for all purposes, and although they contended that such analysis was necessary to test the claims made by the plaintiffs that their preparations were cures for cancer and other diseases.—The defendants' object could be as well attained by an analysis of what might be freely purchased in the open market without the destruction of any of the plaintiffs' property. *Theo Noel Co.* v. *Vitæ Ore Co.*, 8 W. L. R. 643, 18 Man. L. R. 46.

Inspection of document referred to in pleading — Practice. *Shaw* v. *Brown* (No. 1), 4 E. L. R. 312.

Inspection of property—*Trespass — Mining land—Risk of losing evidence—Con. Rules 1096, 1098.*]—In an action for damages and for an account of ore or minerals removed by the defendants from the property of the plaintiffs, in which a trespass on part of the plaintiffs' property was admitted by the defendants, an order was made, before the delivery of the statement of claim, allowing the plaintiffs to inspect the defendants' property, so that the plaintiffs might state their case according to the facts, and because the evidence necessary to ascertain how much ore had been removed might be lost by delay. *Right of Way Mining Co.* v. *La Rose Mining Co.*, 9 O. W. R. 678, 14 O. L. R. 80.

Interrogatories — Delivery before defence. *White* v. *McCabe*, 40 N. S. R. 628.

Interrogatories—*Unsatisfactory answers —Defence struck out.*]—Where the answers of the defendant to certain interrogatories were disingenuous and evasive, and certain information peculiarly within his knowledge or under his control was not disclosed by him, an application was made under O. 30, R. 20, to strike out his defence. The Judge ordered that, unless the defendant made a sufficient answer to the interrogatories within a stated period, his defence should be struck out and judgment entered against him. On appeal this order was affirmed. *Rand* v. *White*, 40 N. S. R. 145.

Surgical examination of plaintiff—*Action for personal injuries—Rule 462 — Delivery of defence.*]—An examination of the person by a surgeon under Con. Rules 462, in an action for personal injuries, is an examination for discovery; and that Rule must be applied in the same way as Con. Rule 442; therefore an order for such an examination, in an action where the liability is disputed, will not, if opposed, be made before the delivery of the statement of defence. *Burns* v. *Toronto Ry. Co.*, 9 O. W. R. 277, 13 O. L. R. 404.

DISCOVERY OF FRESH EVIDENCE

See EVIDENCE.

DISCOVERY OF MINERALS.

See MINES AND MINERALS.

DISMISSAL OF ACTION.

See ACTION.

DISMISSAL OF SERVANT.

See MASTER AND SERVANT.

DISORDERLY HOUSE.

See CRIMINAL LAW.

DISQUALIFICATION.

See ELECTIONS.

DISSOLUTION OF MARRIAGE.

See DIVORCE—HUSBAND AND WIFE.

DISSUADING WITNESS.

See CRIMINAL LAW.

DISTRACTION OF COSTS.

See COSTS—SOLICITOR—WILL.

DISTRIBUTION.

See EXECUTORS AND ADMINISTRATORS—LIMITATION OF ACTIONS.

DISTRESS.

Arrears of taxes—*Notice of sale—Time—Illegal sale—Trespass ab initio — Damages—Lien.*]—The provision in s. 88 of the Assessment Act directing that the collector of taxes shall give at least ten days' public notice of the time and place of sale of goods for delinquent taxes, means "ten clear days," and the party making a distress on less notice becomes a trespasser *ab initio*.—Section 87 does not create the relationship of landlord and tenant between the parties; nor does it give a lien upon goods such as the preferential charge upon lands under s. 80.—The notice of sale being bad, the defendants in an action for illegal distress were trespassers *ab initio*, and the measure of damages was the value of the goods, with additional moderate damages for the bare trespass. *Can. Canning Co.* v. *Fagan*, 12 B. C. R. 23, 3 W. L. R. 38.

Payment by tenant after distress to mortgagee of landlord—*Distress lawfully begun—Continuation after payment—Validity of payment—Bailiff—Counterclaim—Costs of distress—Costs of action for illegal distress.*]—Action by tenant against landlord and bailiff for an injunction restraining defendants proceeding with a distress for rent, and for damages. Defendant Ireland, being the owner of a farm of 90 acres in the township of Brighton, conveyed it by way of mortgage to C. R. W. Biggar and others, trustees. Later defendant Ireland demised the same premises, by lease under seal, to plaintiff for 5 years, at an annual rent of $150. Rent became in arrear and landlord distrained. Landlord's mortgagee notified tenant to pay rent to him, as his mortgage was overdue, and threatened tenant with proceedings if he did not so pay him the rent. Under this compulsion tenant paid landlord's mortgagee the rent due:—*Held*, the position was the same as if plaintiff, after defendant had distrained his goods, had paid the rent to the landlord himself. The distress was originally lawful, and the landlord was entitled to retain it until, not only the rent, but the costs of the distress, should be paid. Until payment of these plaintiff was not entitled to any relief. Upon the question whether plaintiff was entitled to pay his rent to the mortgagees or not, the defendant Ireland failed. On the other hand defendants were entitled to be paid their costs of distress before a replevin or injunction could properly be granted, because the seizure and proceedings down to the time plaintiff paid his rent to the mortgagees were proper and regular; and they were entitled to retain a sufficient quantity of the goods until the costs of distress were paid. In these circumstances, there was no cause of action against the bailiff, and the action should be dismissed as against him. *Puffer* v. *Ireland*, 5 O. W. R. 447, 10 O. L. R. 87.

Sale of land—*Instalments of purchase money—Rent — Default — Construction of deed.*]—A deed by which the owner of land lets it for five years, the grantee to pay taxes, assessments, and assurances, in which it is stipulated that on default of payment within sixty days after the falling due of each yearly sale, the grantee will lose all advantage, is, in spite of its being called a "*promesse de vente et bail*," nothing but a sale of the land, voidable under certain conditions, and a distress in eviction by the grantor, claiming rent and an indemnity, will be dismissed upon exception to the form, such action not being between landlord and tenant. *Irving* v. *Monchamps*, 3 Que. P. R. 430.

Taxes — Controversy as to amount due — Excessive distress — Special damage — Costs. *Bradley* v. *Township of Gainsboro*, 9 O. W. R. 397, 819.

Water rates—*Sale after payment—Damages.*]—The defendants having caused the plaintiff's goods to be seized for water rates, he on the day of the seizure, paid the amount of the account. Nevertheless, by reason of an error in the entry of payment in the books of the defendants, the bailiff, finding no record of the payment, gave notice of sale and went on with the sale on the day fixed. The plaintiff did not leave his receipt at his house for the bailiff to see; but the latter discovered the error and offered to have the goods sold returned to the plaintiff; the plaintiff, however, refused to make any arrangement, saying that the defendants would have to take the consequences of the error:—*Held*, that, in these circumstances, the plaintiff had no right to damages against the defendants, but could recover only the value of the goods sold. *Clermont* v. *City of Montreal*, 16 Que. S. C. 331.

See ASSESSMENT AND TAXES.

DISTRIBUTION OF COSTS.

See COSTS.

DISTRIBUTION OF ESTATES.

Ab-intestate succession—*Inventory — Notary.*]—The choice of a notary to proceed to the inventory of an *ab-intestate* succession belongs to the most diligent party especially if another party who has had the control of the estate for some time, has failed to complete the inventory; however, the latter being the choice of the majority of the interested parties, will be appointed to assist the other notary in his inventory. *Mallette* v. *Mallette*, 5 Que. P. R. 422.

Acceptance of succession — *Renunciation.*]—An heir, who has accepted a succession under benefit of inventory, cannot afterwards renounce it. *Re Mathieu & Montreal Loan & Mortgage Co.*, 6 Que. P. R. 69.

Acceptance of succession — *Rights of heirs and legatees—Stay of proceedings—Inventory—Action — Parties — Dilatory exception.*]—Where the heirs or universal legatees of a decedent have accepted and converted to their own use their respective shares of the property of the decedent, they have accepted the succession, and cannot afterwards demand a stay of proceedings to deliberate and make an inventory.—The defendant cannot set up by way of exception that one of the universal legatees has not been made a party to the cause, if he does not allege and support some right in respect of which he should be brought in. *Roy* v. *Roy*, 8 Que. P. R. 331.

Acceptance — *Acts of heirs — Liability for mourning outfit for widow—Period.*] — Heirs who appoint an attorney "to make and sign all the deeds required for the management of the succession," and, through his agency, receive the money deposited in a bank by the deceased, cause to be delivered to them bills and notes due to the succession and collect the amounts thereof, revendicate by action, as owners, the movable goods of the succession, perform the actions of heirs and thereby take irrevocably a status as such.—2. The mourning outfit of a widow is due to her by the heirs of her husband, according to his fortune, and the price of it is estimated for a period of one year. *Mailloux* v. *Paquette*, 35 Que. S. C. 166.

Account — *Succession — Partition — Conversion of estate into money.*] — Although, in general, the respective rights of the persons interested in a succession are to be determined by an action *en partage*, yet when such succession consists entirely of money, which has been administered by one of the heirs, the action to account lies without action *en partage*. 2. If it is alleged that the succession originally consisted in part of movables other than money, but that the same were converted into money, *preuve avant faire droit* will be ordered. *Brien* v. *Lanctot*, 2 Que. P. R. 560.

Act of heirship — *Sale of effects — Payment of expenses—Beneficiary.*]—The fact that an heir-beneficiary has received before assuming that position certain moneys due to the deceased and has sold certain of his effects by private sale with the object of providing for the expenses of his funeral and final illness, as well as of inventory and advertising, especially when the moneys received were insufficient to defray such expenses, does not constitute an acceptance of the succession pure and simple which deprives the heir-beneficiary of that position. *Walker* v. *Goyette*, 17 Que. S. C. 288.

Ascertainment of next of kin of intestate — *Questions as to legitimacy of uterine brother—Marriage laws of State of New York—Bigamous marriage of wife of absentee—Statutes — Presumptions.*] — Action for a declaration of plaintiffs' status rights as next of kin of one George W. Todd, who died intestate at Hamilton, leaving a considerable fortune. Plaintiffs and defendants other than the company (administrators) were grandchildren of one Philinda Ellison, whose matrimonial experiences give rise to the question raised by defendants as to the legitimacy of plaintiffs' father, Parley Hunt the younger. Philinda Ellison first married one Gideon Todd in 1820. By him she had issue Mary Ann Todd, the mother of defendants, and George W. Todd, the intestate. In 1824 Gideon Todd deserted his wife and caused a story to be published that he had been drowned. Believing him dead, Philinda Todd in 1826 entered into marriage relations with Parley Hunt the elder, which continued until her death in 1833. Of this marriage Parley Hunt the younger was born in November, 1829, more than 5 years after Gideon Todd had deserted his wife, who always remained unaware that he was not in fact dead. He returned many years afterwards to his former home, in the State of New York, where all the parties were domiciled. The estate of George W. Todd consisted entirely of personalty. Parley Hunt the younger was born in November, 1829, and died in 1896. On 3rd May, 1895, the legislature of the State of New York passed the following statute, chaptered 531 of the laws of that year:—"1. All illegitimate children whose parents have heretofore intermarried, or shall hereafter intermarry, shall thereby become legitimatized and shall be considered legitimate for all purposes. Such children shall enjoy all the rights and privileges of legitimate children. Provided, however, that vested interests in estates shall not be divested or affected by this Act. 2. All Acts and parts of Acts inconsistent with this Act are hereby repealed. 3. This Act shall take effect immediately." There could be in 1895 no vested interests in the estate of George W. Todd, who did not die until 1903. *Nemo est hæres viventis.* The proviso in s. 1, therefore, does not, for the purposes of this case, exclude Parley Hunt the younger from the beneficent operation of the statute. Although illegitimate when born, the subsequent intermarriage of his parents in 1830 legitimatized him for all purposes. His issue can, therefore, claim through him as a half brother of the intestate George W. Todd. Judgment entered declaring plaintiffs to be of the next of kin of George W. Todd, deceased, and for payment to them of their costs of this action by defendants other than the Trusts and Guarantee Co., who will have their costs as between solicitor and client out of the estate of the intestate. Judgment of Anglin, J., 10 O. L. R. 147, 5 O. W. R. 405, affirmed by the Court of Appeal. *Hunt* v. *Trusts and Guarantee Co.*, 18 O. L. R. 351, 6 O. L. R. 1024.

Caution—*Order allowing registration of by administratrix — No power to vacate — Appeal to Divisional Court—9 Edw. VII, c. 46, s. 4—Receiver—Portion—Interest in land assigned—Administration—Con. Rule 954.*]—Latchford, J., *held* (17 O. W. R. 846, 2 O. W. N. 407), that a Judge of the High Court has no power to vacate his order allowing a caution to be registered, even if the circumstances warranted such a course.—That in event of special leave being obtained to ap-

peal from an order allowing a caution to be registered, the appeal must be to Divisional Court under 9 Edw. VII. c. 46, s. 4.—That a receiver should not be appointed where all the assets were vested in applicant as administratrix, who also was protected by a judgment against the claims of the other party interested.—That an order for partition of lands should be refused where it appeared that applicant was entitled to an undivided three-sixteenths interest, but before making the motion had assigned all his interest in said lands to his solicitor as collateral security for costs.—Divisional Court *held*, that where land is vested in an administrator, and the real complaint is that the administrator is not acting properly in respect of the estate, the proper course is to apply for administration, and upon due cause being shewn such an order may be made.—That if at any time in the future it should be made to appear that the interests of all parties required administration of the estate by the Court, such an order might be applied notwithstanding the dismissal of these appeals, and the dismissal of these appeals would not prejudice the appellant in any application he might be advised to make in the future. Subject to above provisions appeals were dismissed with costs. *Re McCully, McCully* v. *McCully* (1911), 18 O. W. R. 236, 2 O. W. N. 662, O. L. R.

Claims against intestates' property in hands of administrator — *Application for directions—Disputed account—Irregular proof of—Notice—Effect of—Summary application.*]—A claim was filed with the administrator of the estates of two deceased persons, verified by an affidavit which was technically very irregular, and which did not set out with any degree of clearness the nature of the claim, nor did it state whether any security was held for payment. On an application for directions:—*Held*, that, notwithstanding the irregularity and insufficiency of the affidavit in question, it constituted notice to the administrator, and, having regard to the provisions of Rule 596 of the Judicature Ordinance, he could not disregard the claim, but should proceed by giving notice under s. 45 of the Trustee Ordinance, c. 11 of 1903 (2nd session).—2. That paragraph 3 of Rule 481 of the Judicature Ordinance does not permit a Judge to dispose of the claim of a creditor on summary application, where there are facts in dispute. *Re Musgetter Estate*, 1 Sask. L. R. 369, 8 W. L. R. 704.

Claims on — *Alimentary allowance for widow.*]—A widow, as such, has no right to an alimentary allowance from the succession of her deceased husband. *Peloquin* v. *Brazeau*, 5 Que. P. R. 128.

Claims on — *Widow's mourning.*] — A widow who sues to obtain from her husband's succession a provision for the expense of her mourning, has a right herself to choose what she regards as proper to buy, and the person who is obliged to pay for the mourning must pay such a sum as is fitting, having regard to the estate and fortune of the deceased; a detailed account of the cost of the mourning cannot be claimed. *Peloquin* v. *Brazeau*, 5 Que. P. R. 129.

Contestation of collocation—*Leave to file after time—Affidavit.*]—Where a motion for leave to file, after the time has expired, a contestation of collocation, has been dismissed because the contestation is not accompanied by an affidavit, it is not sufficient for the contesting party to file such affidavit, but he must apply to the Court for leave to file a contestation supported by an affidavit. *Labelle* v. *Ouimet*, 5 Que. P. R. 232.

Creditor in possession of property of estate—*Duty preliminary to exercising his rights—He must dispossess himself and render an account.*] — The creditor of an estate cannot take any action against it if he is in possession of some of the assets thereof and if he is under the obligation to account. Hence, the widow who remains in possession of the estate after her husband's death, and disposes of part of the property, and retains control over the remainder, will not be permitted, as long as she has not dispossessed herself of the residue and rendered an account, to enforce her rights as a creditor of the estate. *Vandry* v. *Belanger* (1910), 39 Que. S. C. 55.

Curator — *Action—Dilatory exception — Inventory.*]—The curator to a vacant succession has no right to stay the prosecution of an action against him, upon the ground that he is obliged to make an inventory. *Dupuy* v. *Robson*, 8 Que. P. R. 352.

Descent — *Partition of real estate — Next of kin—Statute of Distributions, C. S. N. B. 1903 c. 161.*]—L. died intestate, leaving him surviving heirs, consisting of an uncle and the representatives of two deceased uncles and three deceased aunts on his father's side, and the representatives of a deceased uncle and aunt on his mother's side:—*Held*, that the heirs on the maternal side rank equally with the heirs on the paternal side, when they stand in the same degree of relationship, and that the partition of the real estate must be made on this basis. — *Doe dem. Wood* v. *DeForrest*, 23 N. B. R. 209, followed as to distribution of real estate. *Carter* v. *Lowerison*, 4 N. B. Eq. 10, 4 E. L. R. 391.

Devolution of Estates Act—*Collateral relations—Per capita distribution—Half-blood—Double-blood.*]—An intestate was possessed of both real and personal property, and left no wife, child, father, mother, uncle, or aunt. His next of kin were cousins, some of whom were the children of his father's half brother, and one of whom was the niece both of his father and mother:—*Held*, that the estate should be distributed equally among the cousins. Under the Devolution of Estates Act the whole estate is to be distributed as personal property is now distributable. Collateral relatives in the same degree of kinship take equally in their own rights, not by way of representation; those of the half blood take equally with those of the whole blood, and those of the double blood take no more. *Re Adams*, 24 C. L. T. 59, 6 O. L. R. 697, 2 O. W. R. 1156.

Devolution of Estates Act—*Relatives of the half blood.*]—In the distribution under the Devolution of Estates Act of the real and personal estate of an intestate, brothers and sisters of the half blood share equally with

those of the whole blood. *Re Wagner*, 24 C. L. T. 19, 6 O. L. R. 680, 2 O. W. R. 1084.

Heritier beneficiaire — *Seisin—Liability for debts—Account.*]—An *héritier bénéficiaire* is, like an *héritier pur et simple*, seised of the succession as soon as it is opened, with this difference, that he is not personally liable for the debts of the succession. He may be sued for such debts, and the creditors, before bringing action, are not obliged to demand and await an account. *Picard* v. *L'Hopital Général de Quebec*, 26 Que. S. C. 159.

Infant heirs—*Distribution "en justice"—Authorisation by Judge — Family council—Execution by notary.*]—By Art. 693, C. C., it is provided that if there are infants among the heirs of a decedent the distribution of the succession must be made "*en justice*:"—*Held*, that this does not mean that it must be adjudged by the Court in an action *en partage*, but that it must be made under judicial authority; and it is so made if it is authorised, for the infants, upon the advice of a family council, by a Judge of the Superior Court who refers the carrying out to a notary. *Belleau* v. *Bank of Montreal*, 31 Que. S. C. 525.

Intestacy — Division of real estate — Widow of distributee—Share of interest — Dower in other shares—R. S. N. S. 1900 c. 140—Merger. *Re Archibald*, 5 E. L. R. 510.

Intestacy — Next of kin — Action for administration — Issue as to legitimacy—Administratrix—Costs. *Wall* v. *Wall*, 5 O. W. R. 503.

Intestacy — *Next of kin—Ascertainment—First cousins once removed.*]—Application by the administrator of the estate of Isabella McEachren, deceased, for an order for the administration and distribution of her said estate, consisting of about $3,000 personalty and $300 realty, which came to her on the part of neither parent. Isabella McEachren died inestate and unmarried. There were 2 daughters of a deceased sister of the intestate's father and 16 or more grandchildren of the deceased brothers and sisters of the intestate's mother. The intestate's father and mother were dead. No brothers or sisters, or children of such, survived her. The question was whether the 16 grandchildren of the brothers and sisters of the intestate's mother, were entitled to participate, by representation of their deceased parents, with the 2 daughters of the deceased sister of the intestate's father, in the distribution of the estate. Falconbridge, C.J.:—*Held*, that there was no representation of collaterals of this class, and that the 2 daughters of the deceased sister of the intestate's father took to the exclusion of the 16 grandchildren of the deceased brothers and sisters of the intestate's mother. The Statute of Charles, being in force here, was applicable to the present case. The word "prospectively" in s. 37 of the Devolution of Estates Act does not exclude the operation of the Statute of Charles by making applicable ss. 38 to 55 of the Devolution of Estates Act to descents subsequent to 1886, the word having reference to the period prospectively from 1852 to 1886. *Re McEachren*, 6 O. W. R. 393, 10 O. L. R. 499.

Intestacy — Real property—Statute of Distributions—Next of kin in equal degree—No collaterals after brothers and sisters' children. *Phillips* v. *Gillis* (P.E.I.), 6 E. L. R. 575.

Intestacy — Statute of distributions — Personal property—Next of kin of intestate "and their representatives." *Re Dodd* (P.E. I.), 6 E. L. R. 578.

Intestacy in part — *Widow's benefit.*]—Where under a will there was an intestacy in part, viz., an intestacy as to the residuary estate: — *Held*, following *In re Twigg* (1892), 1 Ch. 579, that the Devolution of Estates Act did not apply, and the widow was not entitled to $1,000 under s. 12. *In re Harrison*, 21 C. L. T. 478, 2 O. L. R. 217.

Intestate's estate — *Rights of widow—Second husband and child — Devolution of Estates Ordinance — Married Women's Property Ordinance—Land Titles Act—Imperial Intestates' Estates Act.*]—The Devolution of Estates Ordinance, c. 13 of 1901 (assented to 12th July, 1901), provides: — "1. The property of any man hereafter dying intestate and leaving a widow, but no issue, shall belong to such widow, absolutely and exclusively, provided that prior to his death such widow had not left him and lived in adultery after leaving him.—2. This section shall apply to the property of any person who died before the date of the coming into force of this Ordinance, in case no portion of the estate of such person has been distributed:" —*Held*, that s.s. 2 does not apply to a case where the widow died previously to the passing of the Ordinance, although no portion of the estate of the deceased husband had been distributed at the time of its passing. The Ordinance respecting the personal property of married women, C. O. 1898, c. 47, provides that "a married woman shall in respect of personal property be under no disabilities whatsoever heretofore existing by reason of her coverture or otherwise, but shall in respect of the same have all the rights and be subject to all the liabilities of a *feme sole*:"—*Held*, that notwithstanding this provision a husband is entitled to the whole of his deceased intestate wife's undisposed of personal property upon taking out letters of administration. Section 3 of the Land Titles Act, 1894, 57 & 58 V. c. 28 (D.), which provides that "land in the Territories shall go to the personal representatives of the deceased owner thereof in the same manner as personal estate now goes, and be dealt with and distributed as personal estate," does not convert realty into personalty, but refers only to the manner of distribution. The Imperial Intestates' Estates Act, 53 & 54 V. c. 29, is not in force in the Territories. Where, therefore, S. died on the 24th December, 1899, intestate and without issue, leaving as his next of kin his father, and also his widow, who having married B., died on the 22nd April, 1901, leaving a child by B., the property of S. was directed to be distributed as follows: — One-half of the personal property to the deceased's father and the other half to B. for his own benefit, on his taking out administration to his deceased wife; one-half of the real property to the deceased's father and the other half to

the administrator of the widow's estate to be distributed, one-third to B. and two-thirds to her child. *Re Steidel*, 5 Terr. L. R. 303.

Irregular succession — *Demand of possession — Hereditary rights — Publication of notice to heirs.*]—Possession of an irregular succession cannot be demanded if it is not alleged that the plaintiff has the hereditary rights which he assumes to exercise, and if the formalities prescribed by Art. 1424, C. P., that is to say, the publication of a notice to the possible heirs of the deceased, have not been complied with. *Gouin* v. *Bédard*, 7 Que. P. R. 366.

Judgment — *Contestation — Motion to set aside — Preliminary exception—Deposit —Creditor.*]—A motion to set aside a contestation of a judgment of distribution is a preliminary exception, and must be accompanied by the deposit mentioned in Art. 165, C. P.—2. A party making such a motion will be permitted to make a deposit upon giving notice of it to the opposite party.—3. The contestation of a judgment of distribution by a creditor, who has not filed his claim, will be set aside if it is not accompanied by the deposit required by Art. 674, C. P. *Labelle* v. *Guimet*, 5 Que. P. R. 150.

Lands held in trust by deceased intestate — Conveyance by administrator to beneficiary—Approval of official guardian—Rule 972. *Re Davis*, 12 O. W. R. 653.

Legacies charged with payment of debts—*Liability of legatees — Proportionate shares.*]—When there are several heirs or universal legatees charged with the debts of a testator, they are not jointly and severally obligated for the payment of such debts, but each one only in proportion to his share in the estate. *Roy* v. *Roy*, 8 Que. P. R. 165.

Legacy — *Saisie-Conservatoire.*]—A legatee is not entitled to issue a *saisie-conservatoire* which he alleges simply that he has good grounds for claiming the amount of his legacy and for bringing into the custody of the Court all movables and money belonging to the estate of the deceased. *Rochon* v. *David*, 6 Que. P. R. 290.

Legatee not heard of for 7 years—*Presumption of death—Burden of proof.*]—A testator, dying in 1895, gave his estate (subject to his wife's life interest) to his brothers and sisters share and share alike. One brother was living in 1885, but had not been heard of for more than 7 years before the death of the testator. There was no evidence that he was in fact dead, nor that he survived the testator. Letters of administration to his estate were granted in 1903, upon the presumption that he was dead:—*Held*, that the onus of proof that he survived the testator lay upon those who claimed under him; and, there being no evidence that he survived, the administrator of his estate failed to establish any right to share in the testator's estate; and distribution among the other legatees or their representatives was ordered, subject to their undertaking to refund should it be established at some future time that the absentee or his representative was entitled. *Re McNeil*, 12 O. L. R. 208, 7 O. W. R. 563.

Legitimation of bastard — *Heirship of parent.*]—A father is one of the heirs of his natural child legitimated by a subsequent marriage with the child's mother. *Lamoureux* v. *Aymard*, 24 Que. S. C. 24, 5 Que. P. R. 432.

Moneys at joint credit of deceased and another—*Trust—Survivorship — Will — Construction — Executor and trustee — Gift—Sale by executor—Undervalue—Jurisdiction of Probate Court.*] — D. deposited money in a bank in the joint names of himself and a daughter, with power in either to draw against it. The daughter never exercised this power, and when D. died she and her co-executor of his will, in applying for probate, included the money in their statement of the testator's property:—*Held*, that the money in the bank remained the property of D., and did not pass to the daughter on his death.—An executor sold property of the estate for $800, his wife being the purchaser. On the passing of the accounts the Judge of Probate found as a fact that the property was worth $1,800, and ordered that the executor account for the difference:—*Held*, that the executor, having really sold the property to himself secretly, for an inadequate price, was properly held liable to account for its true value.—*Held*, also, that, though the Probate Court could not set aside the sale, it had jurisdiction to make such order.—Where by will money was bequeathed to the testator's daughter "to hold and be enjoyed by her while she remains unmarried," with a bequest over in case of her decease or marriage:—*Held*, that the daughter was only entitled to the income from the money and not to the possession and disposition thereof. —Remarks on the absence from the record of the decree of the Court of original jurisdiction.—Judgment of the Court below. *Re Daly*, 1 E. L. R. 487, affirmed. *Daly* v. *Brown, Re Daly*, 27 C. L. T. 662, 39 S. C. R. 122.

Opposition — *Collocation of married woman—Personal service — Judgment.*] — An opposition in distribution against the placing on the list of a woman who lives apart from her husband, must be served upon her and not upon her husband only.—2. A collocation which has been confirmed constitutes a judgment which cannot be attacked by an opposition in distribution. *Décary* v. *Pominville*, 5 Que. P. R. 203.

Partition — Real estate of intestate — Collateral relatives—Paternal and maternal stocks—Heirs and next of kin—Costs. *Carter* v. *Lowerison*, 4 E. L. R. 391.

Partition of property contained in a succession is declaratory of the ownership of the share of each co-partitioner, and is retroactive in its result to the date of the opening of the succession. Hence, a mortgage given, before the partition, by an heir upon his undivided share of an immovable property belonging to the succession, is subject to the implied condition that it will not cover any more that the share which will fall to the mortgagor by the partition. *Owens* v. *Chopin* (1910), 39 Que. S. C. 213.

Payment of debts—*Real and personal property.*]—The Devolution of Estates Act, R. S. O. c. 127, vests the real as well as

the personal estate of a deceased person in his personal representatives for the purpose of paying his debts; but, except in the case of a residuary devise of real and personal estate, which is especially provided for by s. 7, the order in which the different classes of property were applicable to the payment of debts before the passing of the Act, has not been disturbed by its provisions. *Re Hopkins*, 20 C. L. T. 446, 32 O. R. 315.

Personalty — *Next of kin — Married Woman's Property Act.*]—Where a child dies intestate and unmarried entitled to personal estate, leaving a father, mother, brother, and sister, the father is entitled as the next of kin in the first degree to the whole of the personal estate exclusive of all others. This rule of construction, as to the distribution of personal property, has not been in any way altered by any provision of the Married Women's Property Act, 1895. *Lewin* v. *Lewin*, 36 N. B. R. 365.

Real representative — *Caution—Sale of land—Lapse of year—Injunction.*]—Letters of administration to real estate of an intestate who died 18th October, 1900, were issued to the defendant on the 14th October, 1901. Prior to such issue the defendant advertised the lands of the deceased to be sold on the 22nd October, 1901, more than a year after the death of the intestate. No caution had been filed within the year under the Devolution of Estates Act; and it appeared that there were no debts:—*Held*, that the plaintiff was entitled to an injunction restraining the defendant from selling the plaintiff's interest in the lands, under the above circumstances. Clearly the defendant had no right to sell the lands at the time he proposed doing so, as, by the operation of the Devolution of Estates Act, the property had become vested in the heirs of the deceased. *Byer* v. *Grove*, 22 C. L. T. 28, 2 O. L. R. 754.

Redemption of hereditary share—In addition to reimbursing the price paid for it, the redemption of an hereditary share, under 710 C. C., is subject to three conditions, namely: (1) It must have been acquired from a person entitled to inherit; (2) The property to be redeemed must form part of the inheritance; (3) The party redeeming must himself be an heir. *Taillefer* v. *Langevin* (1910), 39 Que. S. C. 274.

Registration of caution after expiry of three years—*Approval of official guardian — Vested interest of infant in land devolving—Construction of ss. 14, 15, 16—Revesting in personal representative —Sale with approval of guardian.*] — Sections 14 and 15 of the Devolution of Estates Act, R. S. O. 1897 c. 127, as amended by 2 Edw. VII. c. 17, apply where the interests of infants as well as those of adults are to be affected; and where, upon an intestacy, land has vested in an adult and an infant (the heirs of the intestate), after three years from the death of the intestate, the land not having been disposed of or conveyed by the administrator, and no caution having been registered, within that period, a caution may be registered, under s. 14, after the expiry of that period, upon the certificate of the official guardian approving of and authorising the caution to be registered being given and registered with the caution; and the effect, under s. 15, is to re-vest the land in the administrator, just as it would have been or remained vested if the caution had been registered within the three years; and the administrator, with the consent of the official guardian, acting on behalf of the infants, may then sell and convey as provided in s. 16. *Re Bowerman and Hunter*, 18 O. L. R. 122, 13 O. W. R. 891.

Renunciation of — *Mandate of attorney — Execution — Registration.*]—In the absence of proof of express mandate, an allegation of renunciation of a succession made by an attorney *ad litem*, in an action claiming rights under a substitution, is absolutely void and ineffective as a renunciation, the same not being made by a notarial deed or by a judicial declaration which has been recorded, as required by Art. 651, C. C., and an attorney *ad litem* having no presumed mandate to renounce a succession.—2. A document purporting to be a renunciation of a succession in this province, executed in a foreign country before witnesses and a justice of the peace, and recorded on the same day by the town clerk of the place, is also void and ineffective as a renunciation, the forms prescribed by Art. 651 C. C., not having been thereby complied with, and the document, moreover, not having been registered, as required by Art. 2126, C. C. *Legrand* v. *Legrand*, 20 Que. S. C. 521.

Renunciation of succession — *Registration—Residuary legatee.*]—It is only in regard to third persons that the lack of registration renders a renunciation to a succession invalid, and in an action against a residuary legatee who renounces to the succession after the expiry of the delays to make inventory and deliberate, and subsequently pleads a renunciation to the succession, the plaintiff cannot have such renunciation set aside on the ground of non-registration. *Turner* v. *Renouf*, 6 Que. P. R. 175. See, also, *Renouf* v. *Turner*, 24 Que. S. C. 194.

Report — *Dispensing with — Powers of prothonotary.*]—The power to pay the money without report of distribution is given to the prothonotary alone, and not to the Judge or Court. *Gravel* v. *Melancon*, 5 Que. P. R. 388.

Report on — *Collocation — Contestation —Evidence—Proceedings in action.*]—Upon a contestation of a collocation of a report on distribution, the Court will consider all the proceedings in the action subsequent to the writ of summons. *Pelletier* v. *Michaud*, 20 Que. S. C. 413.

Rival claims to succession—*Dilapidation of property — Remedy against—Sealing up—Curator.*]—When the property of a succession is dilapidated or in danger of becoming so, the only remedy which creditors or heirs have is to cause the property to be sealed up; they cannot, so long as the time for making an inventory and deliberating has not expired, where several persons are claiming the succession, obtain the appointment of a curator. *Lamoureux* v. *Aymard*, 24 Que. S. C. 24, 5 Que. P. R. 432.

Sale of land — *Caution—Administrator —Consent of adults—Infants—Official guardian.*]—An intestate owning real estate left

her surviving her husband and two infant children. Letters of administration were granted to the husband, who registered a caution under s.s. 5 of s. 14 of the Devolution of Estates Act, R. S. O. 1897 c. 127, and, with the consent of the official guardian, sold the real estate. On an application under Con. Rule 972:—*Held*, that, although administrator, he, being the only adult interested in the real estate, was not deprived of his right to consent, and that his application to register the caution was sufficient evidence of such consent. *Re Hart Estate*, 9 O. W. R. 285. 13 O. L. R. 379.

Sale of lands by administrator — Convenience of heirs — Duty of official guardian—Title — Vendor and purchaser. *Re Joyce*, 3 O. W. R. 816.

Sale of lands by administrator — *Non-concurring adult heirs — Official guardian.*]—Application for a direction to the official guardian to approve of a sale of certain lands, made by the applicant as administrator of his deceased brother's estate, there being heirs who were *sui juris*, but had not concurred in the sale. The application was made under s. 16 of the Devolution of Estates Act, R. S. O. 1897 c. 127, as amended by 63 V. c. 17, s. 17, which gives the official guardian power to approve the sale in such case, as in the case of infants. There appeared to be no express objection to the sale by any of the heirs, but their concurrence had not been sought, because of the delay and expense which that would involve:—*Held*, that under the facts of this case, the proper course was for the official guardian to make the usual inquiries, and if no good reasons were advanced or discovered for withholding his approval it should be given. *Re Bradleu*, 23 C. L. T. 298, 6 O. L. R. 397, 2 O. W. R. 711.

Sale of land by administrators — Consent of official guardian—Sale free from dower—Widow a lunatic — Necessity for order—Terms—Payment into Court for benefit of widow—Costs. *Re Redman*, 10 O. W. R. 16.

Sale of land by administrators — Non-concurring heir — Consent of official guardian—Payment of amount of share — Debt of heir to estate—Statute of Limitations — Right to retainer — Payment into Court. *Re Booth*, 6 O. W. R. 503.

Settlement — *Trust deed—Construction — Equitable estate in fee of settlor — Rule in Shelley's Case—Devolution of Estates Act —Distribution of estate.*] — Motion under Rule 938 by trustees under a certain trust deed, executed by William Bower, since deceased, for an order determining two questions arising upon the construction of the trust deed, viz.: (1) Who are to share in the trust estate as to the right heirs of William Bower according to the laws of descent in Ontario? (2) Whether under the trust deed the property vests in the administratrix of the estate of William Bower, under the Devolution of Estates Act, for the purpose of distribution. The trust deed conveyed to the applicants (and another trustee, since deceased) a farm of 80 acres, "to have and to hold the same, with the appurtenances unto the said parties of the second part (trustees), their heirs and assigns forever, to the use and upon the following trusts, namely, first, to lease and demise the said land and to pay the said rents and profits over to the said party of the first part (settlor) for his maintenance and support annually, during the remainder of his natural life, and after the death of the said party of the first part, then in trust to convey and assign the said lands to such person or persons as the said party of the first part shall, by his last will and testament in writing executed by him so as to pass real estate in the Province of Ontario limit and appoint, and in the event of his dying without making such will, then to hold the same in trust for the right heirs of the said party of the first part, according to the laws of descent in Ontario, in fee simple." William Bower died on 21st February, 1903, without having made a will, leaving as his next of kin a brother and two sisters, and the children of two deceased sisters:—*Held*, it was quite clear that the settlor was possessed of an equitable estate in fee simple in the lands described in the trust deed, which estate under the Devolution of Estates Act, vested in the administratrix. There being no disposition of the estate provided for under the deed upon the testator's death, the duty is cast upon the administratrix to proceed to realize upon and distribute the estate under the provisions of that Act. *Re Bower Trust*, 5 O. W. R. 383, 9 O. L. R. 199.

Substitution — *Restraint on alienation until opening—Right of appelé to alienate eventual interest—Absent heir—Opening of succession—Effect.*]—The sale of rights of succession in property devised subject to substitution with restraint on alienation before the opening of the substitution, where such sale is made by an *appelé*, is valid, but does not take effect, until the opening. The restraint upon alienation does not, in such a case, imply a prohibition against alienating the rights which the *appelé* may eventually have therein. The *appelé* has not, therefore, the right to demand a declaration that the sale made by him is void, and revendication of the property sold.—Where one of several heirs is absent at the time of the opening of a succession and does not concur therein, it devolves exclusively on his co-heirs present. *Marcoux* v. *Maillé*, 31 Que S. C. 101.

Will—Construction — Disappearance of devisee—Declaration of death—Administration order. *Re Stubbins*, 12 O. W. R. 1104.

DISTRICT COURT.

See COSTS—COURTS.

DISTRICT COURT JUDGE.

See WATER AND WATERCOURSES.

DISTRICT COURTS, ONTARIO.

See COURTS.

DISTRICT MAGISTRATE.

See PROHIBITION.

DISTURBING PUBLIC MEETING.

See CRIMINAL LAW.

DISTURBING RELIGIOUS MEETING.

See CRIMINAL LAW.

DITCHES.

See DRAINS.

DIVIDENDS.

See COMPANY—FRAUD AND MISREPRESENTATION.

DIVISION COURTS.

See APPEAL COURTS—COURTS.

DIVISIONAL COURTS.

See APPEAL COURTS—COURTS.

DIVORCE.

See APPEAL—HUSBAND AND WIFE.

DIVORCE COURT.

See COURTS.

DOCK.

See MUNICIPAL CORPORATIONS.

DOCUMENTS.

See DISCOVERY—EVIDENCE—JUDGMENT.

DOG.

See ANIMALS.

DOMESTIC FORUM.

See CHURCH—INSURANCE.

DOMICIL.

Change — *Service of process—Nullity — Prejudice.*]—Where a young man of full age who used to live with his father, but left to pursue his studies in a foreign city for a number of years, taking with him all his effects with the exception of a few books used by him when a student; and proposes on the completion of his studies to settle in one of several countries, and has no intention of returning to his father's domicil, he is held to have his domicil in such foreign city, and service at his father's domicil is irregular and null, and such nullity amounts to prejudice. *Robert* v. *Dufresne*, 7 Que. P. R. 226.

Change of — *Jurisdiction—Pleading.*] — Want of jurisdiction *ratione personæ* cannot be set up unless it has been pleaded by *exception declinatoire*.—2. One who is proved to have had his domicil in the province is regarded as having continued it there, even when he has gone to reside elsewhere, if it has not been proved that he has acquired a domicil at his new place of abode. *Pilnik* v. *Numizinski*, 16 Que. S. C. 231.

Change pending action.]—Where plaintiff leaves the province while his action is pending he must furnish a power of attorney even when the cause has been inscribed for hearing. *Ricciordo* v. *Can. Pac. Ry. Co.*, 11 Que. P. R. 112.

Election of by plaintiff in action—*Statement in writ of summons—Curator ad hoc.*]—A plaintiff is at liberty to choose his own domicil, and even if he describes himself wrongly in the writ of summons, the defendant can suffer no prejudice thereby, especially if he is represented by a curator *ad hoc*, whose domicil is well established and not contested. *Cantlie* v. *Cantlie*, 7 Que. P. R. 346.

Origin — *Change — Intention—Proof of —Residence—Permanency of.*]—The domicil of origin adheres until a new domicil is acquired, and the onus of proving a change of domicil is on the party who alleges it; the change must be *animo et facto*, and the animus to abandon must be clearly and unequivocally proved; although residence may be decisive as to the factum, it is equivocal as regards the animus; the question is one of fact, to be determined by the particular circumstances of each case. Where a deceased person (in respect of whose estate a question of his domicil at the time of his death arose in an action by his widow to obtain a share of it) had his domicil of origin in Ontario, but went to live in the province of Quebec upon a farm owned by his father:—*Held*, upon the evidence, that he had not so adopted the farm as his home as to effect a change of domicil. *Coyne* v. *Ryan*, 21 C. L. T. 498. (Affirmed by C. A., 22 C. L. T. 12.)

Origin — *Choice—Abandonment — Husband and wife—Alimony—Writ of summons — Rule 162 (c).*]—In an action for alimony the defendant was served with the writ of summons in November, 1900, in the State of California, where he had gone to reside in September, 1899. He was born in the State of Pennsylvania, and was married to the plaintiff in the State of New York in 1889. For seven or eight years before the marriage he had lived in Canada, most of the time in Ottawa.

After the marriage the plaintiff and defendant went to Europe for several months, and afterwards resided for short periods at two places in different States in America. In 1891 they came to Canada, and bought property at a village in Ontario, which was their home from that time on, although during several winters thereafter they went to different places in the United States, where each did something to earn money, but always came back to the Ontario home in the spring. The plaintiff still continued to reside there, and said she never at any time had any intention of changing permanently her residence or place of abode. The defendant swore that in September, 1899, he sold all the property he had in Canada, and went to the United States to reside, where he had ever since resided, was now residing, and intended to reside, and that he had no property of any kind in Ontario. The defendant had since going to California instituted proceedings there against the plaintiff for a divorce:—*Held*, that the defendant's domicil of origin was in the United States; that he acquired a domicil of choice in Ontario; that, upon the evidence, he had not abandoned that domicil; and therefore he was still domiciled within Ontario, within the meaning of Rule 162 (c), and service of the writ upon him out of Ontario was permissible. *Bonbright* v. *Bonbright*, 21 C. L. T. 339, 497, 1 O. L. R. 629, 2 O. L. R. 249.

See ASSESSMENT AND TAXES — ATTACHMENT OF DEBTS—BANKRUPTCY AND INSOLVENCY—BILLS OF EXCHANGE AND PROMISSORY NOTES — CONTRACTS—COURTS—CRIMINAL LAW—EXECUTORS AND ADMINISTRATORS —FISHERIES—HUSBAND AND WIFE—INFANT —INTERDICTION — JUDGMENT — MARRIAGE — PARLIAMENTARY ELECTIONS — PEREMPTION—SHIPS — STATUTES — WRIT OF SUMMONS.

DOMINION CONTROVERTED ELECTIONS ACT.

See ELECTIONS.

DOMINION JURISDICTION.

See CONSTITUTIONAL LAW.

DOMINION LANDS.

See ASSESSMENT AND TAXES — CONSTITUTIONAL LAW—CROWN.

DOMINION LANDS ACT.

See CONSTITUTIONAL LAW — CROWN—DEED —LAND TITLES ACT.

DOMINION MINING REGULATIONS.

See MINES AND MINERALS.

DOMINION RAILWAY ACT.

See RAILWAY.

DOMMAGE.

See DAMAGES—NEGLIGENCE.

DONATIO INTER VIVOS.

See GIFT.

DON MANUEL.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

DONATIO MORTIS CAUSA.

See GIFT—HUSBAND AND WIFE—REVENUE —WILL.

DONAIRE.

See HUSBAND AND WIFE.

DOWER.

Action for recovery of possession of land — Defence that defendant in possession as dowress—Proof of marriage—9 Edw. VII. c. 39, s. 9 (O.)—Forfeiture of dower by adultery—Leaving husband by reason of his cruelty—Waiver of right by non-assertion—Resulting trust. *Bowman* v. *Thurman*, 14 O. W. R. 254.

Admeasurement of — *Sum in lieu of—Commissioners' report — Motion to confirm —Affidavits.*]— Under 53 V. c. 4, s. 237, *et seq.*, a widow will not be compelled to take money in lieu of land because such a course will be more satisfactory or profitable to the owner of the land subject to dower. Affidavits upon questions of fact inquired of or relevant to an enquiry by commissioners to admeasure dower cannot be read on a motion to confirm their report. *Re Kearney*, 21 C. L. T. 415, 2 N. B. Eq. R. 264.

Adultery — *Statute of Westminster — Repeal by provincial legislature.*]—A claim made by the plaintiff to dower out of the estate of her deceased husband was resisted on the ground of adultery, the circumstances being that her husband, who was a seafaring man, being away from home for a number of years, and being reported to have been drowned, the plaintiff, believing this to be true, went through the form of marriage with another man and lived with him.—The provisions of the Statute of Westminster, 13 Edw. I., were substantially embodied in the Married Woman's Property Act of 1884, which provided that a woman guilty of adultery . . . should not be entitled to dower,

etc., but in the revision by c. 22 of the Acts of 1898, this section was omitted, and by s. 23 of the Married Woman's Property Act of 1884 was repealed:—*Held*, that the effect of this course of legislation was to repeal the Statute of Westminster, if it ever was in force in this province, irrespective of whether it would be applicable to such a case as the present, as to which no opinion was expressed. *Nolan* v. *McAdam*, 39 N. S. R. 380.

Assignment of — *Possession by widow, adverse to heir—Right of entry—Statute of Limitations.*]—An assignment of dower by oral agreement is valid, and under such assignment the widow may take any part or even the whole of the descendent lands.—Where the heir-at-law permits the widow of the owner of the fee to occupy the whole of the estate during her life under an oral arrangement with the heir understood to be in lieu of dower, but with no definite agreement or understanding to that effect, the widow's possession is not adverse to the heir-at-law, and the Statute of Limitations will not run against the right of entry. *Lloyd* v. *Gillis*, 37 N. B. R. 190.

Bar — *Adultery—13 Edw. I. c. 34.*]—A wife voluntarily separated from her husband after having lived with him for three years. Nine years later she married again, knowing that her first husband had married, and believing that he had obtained a divorce from her and that she was at liberty to marry. Subsequently she learned that his second marriage was illegal, and she immediately left her second husband:—*Held*, that under the statute 13 Edw. I., c. 34, the dower right of the wife in the estate of her first husband was not barred by her subsequent cohabitation with another, as she acted *bona fide*, believing, on reasonable grounds, that she was legally entitled to marry again. *Phillips* v. *Phillips*, 4 N. B. Eq. 115, 6 E. L. R. 478.

Bar — *Infant wife—Purchaser for value—Consideration—Married Woman's Real Estate Act.*]—A purchaser for value is one who obtains a property for a valuable, as distinguished from a merely good, consideration; and where there is no question of *bona fides* involved, the question of the adequacy of the consideration cannot be enquired into. Where a son, who had left his father's farm, returned upon his father's request and promise of remuneration and helped the father to work the farm, and remained with him working in that way upon a further request and promise of a conveyance, and the father afterwards married a girl under 15, and then conveyed a part of the farm to the son, the wife, who was still under 15, joining to bar her dower:—*Held*, that the consideration, having become executed by the son having done his part, was a substantial and valuable consideration sufficient to make the son a purchaser for value, within the meaning of s. 5 of the Married Woman's Real Estate Act, R. S. O. 1897, c. 165; and therefore, the wife having been found to have known what she was doing when she executed the release of dower, was not entitled to dower out of the land conveyed to the son. Judgment in 6 O. L. R. 259, 23 C. L. T. 285, 2 O. W. R. 699, affirmed. *Crossett* v. *Haycock*, 24 C. L. T. 310, 7 O. L. R. 655, 3 O. W. R. 616.

Bar in mortgage — *Release of equity of redemption — Release after action.*] — The plaintiff joined with her husband in executing a mortgage of land, and released her dower in due form. The defendant took an assignment of the mortgage, and, subsequently, received from the plaintiff's husband a release of his equity of redemption, in which the plaintiff did not join:—*Held*, that the plaintiff could not assert a claim for dower against the defendant as long as the mortgage remained on foot, her only remedy being to redeem. As to a release executed by the defendant after the commencement of the action, the plaintiff's right must be determined by the condition of things existing at the time of action brought. *Thompson* v. *Thompson*, 37 N. S. R. 242.

Bar of dower in mortgage — Surplus after mortgage sale—Dower claimed in whole amount realised—Judgment against mortgagor before passing of Dower Act—Priorities. *Re McIntyre*, 2 E. L. R. 305.

Conveyance of land free from — *Dispensing with concurrence of wife—Circumstances disentitling to alimony—Adultery—Right to value of dower.*] — An order was made under s. 12 of R. S. O. 1897, c. 164, dispensing with the concurrence of the wife for the purpose of barring her dower in a conveyance, where she had not been heard of for several years, having left her husband again and again for the purpose of living and having lived the life of a prostitute.—In such a case, in order to deprive a wife of an award of dower, it is unnecessary to shew a continuous living with one man in adultery. *Re Smithers*, 9 O. W. R. 819, 14 O. L. R. 536.

Customary dower—*Authorisation by interdicted husband — Registry laws—Sheriff's sale — Vendor and purchaser — Warranty — Succession — Renunciation — Donation by interdict.*] — The registration of a notice to charge lands with customary dower must, on pain of nullity, be accompanied by a certificate of the marriage in respect of which the dower is claimed, and must also contain a description sufficient to identify the lands sought to be affected. A sale by the sheriff, under execution against a debtor in possession of an immovable under apparent title, discharges the property from customary dower which has not been effectively preserved by registration validly made under the provisions of Art. 2116, C. C. *Per* Taschereau, C.J.:—Neither the vendor nor his heirs, who have not renounced the succession, nor his universal donees, who have accepted the donation, can, on any ground whatever, attack a title for which such vendor has given warranty:—*Semble*, that voluntary interdiction, even prior to the promulgation of the Civil Code of Lower Canada, was an absolute nullity, and that the authorisation to a married woman to bar her dower is not invalidated by the fact that her husband had been so interdicted at the time of such authorisation. *Rousseau* v. *Burland*, 23 C. L. T. 38, 32 S. C. R. 541.

Customary dower — *Declaration — Registration—Marks woman—Payment of debts—Partition — Interest—Heirs—Purchaser.*] —1. The registration of a declaration signed

by mark in the presence of a single witness is sufficient to preserve the right to customary dower.—2. The dowress has the right to obtain possession of the part of the land devoted to her customary dower, even if there are debts which may be the basis of a claim when partition is made later.—3. The dowress, taking the part of the lands appropriated to her customary dower, will be obliged to pay interest to the heirs upon such portion of her debts as may be attributed to her part of the lands; but such an arrangement should be made with the heirs, and such payment is due to them, and not to a purchaser, who has only a remedy *en garantie* against his grantor. The Quebec Act, 47 V. c. 15, which declares that after the 1st January, 1884, rights of customary dower shall be avoided and extinguished as against purchasers, if the declaration required by law has not been registered, should be interpreted as limited to cases, where a purchaser subsequent to the 30th June, 1881, has registered his title before the registration of the declaration of the dowress. *Toupin* v. *Vézina*, 9 Que. Q. B. 406.

Desertion by wife — *Registration.*] — The defendant had sued the plaintiff, her husband, *en séparation re corps*, and her action had been dismissed. Instead of returning to live with him, she abandoned the original home, and, several years afterwards, registered a claim for dower against the lands of her husband. In an action to cancel the registration:—*Held*, that it was illegal, because the advantages which she was entitled to by reason of her marriage with the plaintiff were dependent upon the condition of fulfilment of the obligations incumbent upon her as his wife. And the Court adjudged the defendant to return to the conjugal domicil within thirty days, and in default of her doing so, the Court declared that the defendant should be deprived of her matrimonial rights and advantages, and that the registration of the claim to dower should be cancelled by the plaintiff registering the judgment now pronounced. *Gibson* v. *Patrick*, Que. S. C. 504.

Election — *Gross sum — Proceeds of sale of testator's land.*]—The owner of land died intestate leaving a widow and an infant child. The widow administered, and, with the consent of the official guardian, sold and conveyed the land in March, 1899, barring her dower in the deed of grant, and the whole of the purchase money was paid into the Court to the joint credit of herself and of the official guardian, she reserving her right to elect between receiving the value of her dower or a distributive share of the estate, one of which it was clearly understood she would be entitled to be paid out of the fund in Court. In September, 1900, the widow executed a document wherein she elected to take the value of her dower in lieu of "any other interest she might have in her husband's undisposed of real estate." She died in April, 1901:—*Held*, that the administrator of the widow's estate was entitled to receive out of the moneys in Court the value of the widow's dower, computed according to the annuity tables. *Re Pettit*, 22 C. L. T. 300, 4 O. L. R. 506, 1 O. W. R. 464.

Equitable charge — *Legacies—Mortgage.*]—A testator devised a farm to his son, subject to the payment by him of certain legacies. The son mortgaged the farm, his wife joining to bar her dower, and paid the legacies out of the proceeds. The son died seised of the farm, and the mortgage was then in force:—*Held*, that the son took under the will the legal seisin in the farm, and not a mere equitable estate, and that his widow was entitled to dower out of the full value of the land. *Re Zimmerman*, 24 C. L. T. 234, 7 O. L. R. 489, 3 O. W. R. 509.

Equitable estate — *Voluntary conveyance by husband.*]—It is only when the husband dies beneficially entitled thereto that the wife acquires any right to dower in an equitable estate, and the husband can therefore deal as he pleases with such an estate; a voluntary conveyance thereof, even though made with the object of preventing the wife acquiring any right to dower, being unimpeachable by her. *Fitzgerald* v. *Fitzgerald*, 23 C. L. T. 85, 5 O. L. R. 279, 1 O. W. R. 17, 2 O. W. R. 68.

Equity of redemption—*Conveyance by husband alone—Discharge of mortgage.*] — On the 8th February, 1881, the owner of land subject to a mortgage, dated 29th January, 1879, in which his wife had joined to bar dower, made a second mortgage in which his wife did not join. A portion of the moneys advanced upon the second mortgage were applied in payment of the first mortgage, and the first mortgagees executed a disbharge, which was registered on the 5th March, 1881. On the 30th September, 1881, the owner executed a conveyance of the land to the plaintiff, the grantor's wife joining therein to bar her dower. Neither the plaintiff nor his grantor paid the principal money due under the subsisting mortgage, and the mortgagees in the exercise of the power of sale on the 27th February, 1892, contracted to sell the land to the defendant, who had ever since been in possession as purchaser. The plaintiff's grantor died on the 19th September, 1901, leaving his wife surviving him, and the plaintiff, claiming as assignee of the wife's right to dower by virtue of the conveyance of 30th September, 1881, brought this action for dower on the 11th September, 1902:—*Held*, that, as the law stood on the 29th January, 1879, the wife, having joined in the mortgage of that date and thereby barred her dower, could become entitled to dower out of the equity of redemption only in the event of her husband dying beneficially entitled; and, as long as the mortgage subsisted, her husband could by a subsequent conveyance defeat her dower in the equity, which he effectively did by the second mortgage; and this was not affected by 42 V. c. 22 (O.), which became law on the 11th March, 1879. 2. The second mortgage having been executed and delivered for some weeks before the execution of the discharge of the first, the effect of the registration thereof was not to revert the premises in the mortgagor, but in the second mortgage. *Anderson* v. *Elgie*, 23 C. L. T. 278, 6 O. L. R. 147, 1 O. W. R. 550, 638, 2 O. W. R. 584.

Estate in fee — *Undivided share — Commencement of right—Costs.*]—The plaintiff brought suit for dower, arrears of dower for six years before action, and costs of suit.—The defendant denied the right, as-

serting that.—1. The deceased had only an estate for life, and not in fee.—2. If the plaintiff was dowable, she was only entitled to dower in an undivided one-half of the premises.—3. She was only entitled to dower from the commencement of the suit, as the deceased did not die seised.—4. She was not entitled to costs of suit.—The first ground was decided in the plaintiff's favour: 1 N. B. Eq., Reps. 53:—*Held*, that the defendant was entitled to succeed on the second and third grounds; and no costs were allowed. *Ahern* v. *Ahern*, 20 C. L. T. 19.

Gift of land by father to son — Mother joining in deed to bar dower—Absence of consideration — Improvidence—Action by mother against son for dower after death of father. *Fretts* v. *Fretts*, 10 O. W. R. 613.

Interest in lands — *Locatee of Crown lands—Bond to convey — Unpatented lands — Unregistered assignment — Public Lands Act—Evidence — Corroboration.*]—A locatee of Crown lands executed a bond in favour of his son, in consideration of services rendered, that the land should, at his death, be conveyed to the latter, on condition that he paid the Crown dues, which he did. The father afterwards married, and after his marriage obtained the patent:—*Held*, that his widow was not entitled to dower inasmuch as he had no more than the right of enjoyment for life with the fee held as trustee for his son. A locatee of land transferred all his interests therein to his son by assignment, which assignment was deposited, but not registered in the Crown lands office.—*Held*, that, notwithstanding R. S. O. 1897, c. 26, s. 19, the omission to register did not invalidate the transfer as against the assignor; and it operated so as to prevent the father from dying beneficially entitled, and so defeated any claim of the widow under the Dower Act. The facts rested mainly upon the evidence of the son, and his evidence did not require corroboration under R. S. O. c. 73, s. 10. *Brown* v. *Brown*, 24 C. L. T. 289, 8 O. L. R. 332, 3 O. W. R. 795.

Interest in lieu of—Devolution of Estates Act—Election — Exercise by assignee of dowress. *Re Boismier*, 3 O. W. R. 355.

Land contracted to be sold by testator — *State of nature—Right to dower——Executors—Payment to widow for release.*]—The testator was the owner in fee at the time of his death of a timbered lot containing 100 acres, from 15 or 20 acres of which he had taken the timber; a part of the cleared land had been prepared for cultivation, and the seeds planted, but, owing to the nature of the soil, with little or no result. The testator had contracted to sell the whole lot for $2,000, and after his death the purchaser called on the executors to receive the balance of the purchase money and to make title. The widow claimed her dower, and her claim was compromised by the executors at $390, which they paid her, and she released her dower; they then conveyed to the purchaser under c. 24 of the Trustees and Executors Act, R. S. O. 1897 c. 129:—*Held*, that the lot was not in a state of nature at the time of the death, and the widow's dower attached upon the whole of it; she was entitled to have one-third of such part as was not woodland assigned to her, with the right to take from the woodland fire wood for her own use and timber for fencing the other part; the executors had the right, under s. 33 of R. S. O. c. 129, to apply the money of the estate in the purchase of the release of the widow's dower; and were entitled to charge the estate with the $390. *Re McIntyre, McIntyre* v. *London & Western Trusts Co.*, 24 C. L. T. 268, 7 O. L. R. 548, 1 O. W. R. 56, 3 O. W. R. 258.

Lands subject to charge for maintenance—Exchange for other lands—Conveyance to chargee — Recital—Evidence to contradict—Right to dower subject to charge and to lien for improvements—Costs. *Smith* v. *Smith*, 8 O. W. R. 654.

Lease made by deceased husband — *Priorities—Assignment of dower—Rights of executor and devisee—Devolution of Estates Act.*]—A dowress whose dower has not been assigned has no estate in the land out of which she is entitled to dower, but, as soon as her dower is properly assigned, she is entitled to claim possession of the land assigned to her in priority to persons claiming under leases created by her husband, without her assent, during the coverture. *Stoughton* v. *Leigh*, 1 Taunt. 402, followed. Where a testator, dying in August, 1901, devised land to his son, and probate of the will was granted to the executor named therein, and the son in April, 1902, executed a conveyance of a part of the land to the testator's widow for her life, as and for her dower, the executor not assenting thereto:—*Held*, that the conveyance was of no avail, for the only person who could assign dower was the executor, in whom, under s. 4 of the Devolution of Estates Act R. S. O. 1897, c. 127, the whole inheritance of the testator vested. *Allan* v. *Rever*, 22 C. L. T. 294, 4 O. L. R. 309, 1 O. W. R. 459.

Limitation of actions — *Absence from the province.*]—F. died intestate in 1884. A.'s son C. died in 1885, leaving a widow and two children. Soon after the son's death his widow removed to the United States, remarried and has been absent from Ontario for twenty years:—*Held*, that she cannot now maintain any action for dower. *Re Foster and Knapton*, 13 O. W. R. 176.

On appeal the order was varied by directing that appellant's interest or right should not be affected by order made as between vendor and purchaser. *Ibid.*, 507.

Mortgaged land — *Sale — Purchase money.*] — The testator in his lifetime purchased property subject to a $10,000 mortgage, which he assumed, but subsequently made a new mortgage, in which his wife joined to bar dower, and paid this mortgage off. He afterwards made a further mortgage for $1,650.58, in which his wife also joined to bar dower. He subsequently entered into an agreement for the sale of the property for $16,000, receiving $500 on account. The agreement was carried out by his executrix, the purchase money being applied in paying off the two mortgages, taxes, etc., leaving a balance of $2,150.52:—*Held*, that the wife was entitled to dower only out of the residue of the estate after satisfying the charges;

and that such balance must not be treated as merely personal estate so as to prevent the widow from claiming her dower therein. *Re Williams*, 24 C. L. T. 91, 7 O. L. R. 156, 1 O. W. R. 534, 2 O. W. R. 47, 3 O. W. R. 251.

Partnership lands—Evidence — Partition. *Dunn* v. *Dunn*, 4 E. L. R. 15.

Petition for admeasurement of—*Intituling.*]—A petition for admeasurement of dower should not be intituled as though it were a suit between the dowress and the devisees. *Re Woodman*, 21 C. L. T. 509.

Possession as dowress—*9 Edw. VII. c. 39, s. 9 (O.)—Action to recover possession — Forfeiture of dower by adultery.*]—Ejectment action, defendant claiming to be rightfully in possession as dowress. Defendant's husband having cruelly used her and forced her from her home, she went to Michigan, where she lived in adultery. Her husband having gone through two or three marriage ceremonies during their separation finally sold his farm, one of his supposed wives joining to bar dower:—*Held*, that defendant was not entitled to dower and there is no resulting trust in her favour, although she had helped with her money to buy the farm. She had slept on her rights. *Bowman* v. *Thurman* (1909), 14 O. W. R. 254.

Reference — Report — Judgment—Costs —Sale of land. *Lachance* v. *Lachance*, 1 O. W. R. 518, 778.

Separation deed—*Jointure — Election.*]—On the 24th July, 1868, the plaintiff and her husband and trustees on her behalf executed a deed which, after reciting that disputes had arisen between the husband and wife and that an action for alimony was pending, provided for the separation of the husband and wife and the conveyance of certain property by the husband to trustees for the benefit of the wife, and contained a number of covenants, one of which was a covenant by the trustees that the wife would, whenever called upon, release her dower in any lands of which the husband might thereafter acquire a title. The husband died in January, 1898, having acquired and dying seised of other lands. In August, 1898, the wife brought this action claiming dower in these lands, having up to that time continued to have the beneficial use and possession of the lands mentioned in the deed of 1868:—*Held*, that that deed provided a jointure for the wife, within s. 7 of 27 Hen. VIII. c. 10; that the acceptance of the deed and the benefits thereby conferred was an election by her within that Act to accept the jointure; and, therefore, she was not entitled to dower in the after-acquired lands.—Judgment in 19 C. L. T. 244, 30 O. R. 689, affirmed. *Eves* v. *Booth*, 20 C. L. T. 346, 27 A. R. 420.

See Distribution of Estates—Fraudulent Conveyance—Husband and Wife—Mortgage — Vendor and Purchaser — Will.

DRAINS.

Action against municipality — *Compensation for damage by water overflowing on lands—Defence — Agreement with previous owner — Validity of agreement — Statutory drain—Municipal Drainage Act—By-law.*] — Plaintiff brought action to recover $1,000 compensation for damages alleged to have been caused to his lands by a drain constructed by defendant township. Defendants pleaded in answer that they had entered into an agreement with a former owner of plaintiff's land whereby he was to be relieved of any assessment for the drain on the terms that he would take the burden of the waters which might come to his lands and supply a sufficient outlet. Plaintiff contended that this agreement was unauthorised and illegal. Court of Appeal, *held*, that an agreement might be one which no Court would enforce, but still be a complete defence of leave and license: That when the agreement was made the parties knew they were dealing with a statutory drain, subject to repair and improvement from time to time: That plaintiff stood in the shoes of his vendor from whom he purchased with notice and could not now be heard to complain: That he had suffered no damage, as he could extend the drain on his own property to a proper outlet. Action and appeal dismissed with costs. *McLaughlan* v. *Plympton* (1911), 18 O. W. R. 417, 2 O. W. N. 845.

Action against municipality.] — Plaintiffs, innkeepers, sued defendant municipality for damages caused by repairing a drain in winter:—*Held*, that plaintiffs were entitled to $100 each. Injunction refused. No certificate given to help plaintiffs in matter of costs, and defendants were allowed to exercise any set-off of costs. *Miernicki* v. *Sandwich East* (1909), 14 O. W. R. 455.

Action against municipality to recover damages—Water backed on plaintiff's land—Neglect of township to keep drains clean and clear of weeds—Evidence that there was no township drain — Action dismissed without costs. *Carney* v. *Colborne* (1910), 17 O. W. R. 879, 2 O. W. N. 432.

Action to restrain defendant from obstructing drainage of dwelling-house—*Easement—No reservation in deed—Effect of on plaintiff's rights.*]—Appeal from the judgment of Meagher, J., refusing an interim order to restrain defendant from cutting off and obstructing the drain from plaintiff's house. *Oland* v. *Mackintosh* (N. S. 1910), 9 E. L. R. 230.

Alteration of report and plans.]—Before the report, plans, and assessment of the engineer for a drainage scheme have been adopted by the council, it can refer them back to him for further consideration or for amendment, but after they have been adopted it cannot of its own motion change or amend them; and if the drainage scheme is carried out with a material change the municipality are not protected, and are liable to make good any damages resulting from the work. *Priest* v. *Flos*, 21 C. L. T. 113, 1 O. L. R. 78.

Artificial drain — *Repairs — Outlet.*]—Section 75 of the Drainage Act, R. S. O. 1897, c. 226, applies only to drains artificially constructed, and does not apply to the repair or improvement of a natural watercourse. Sutherland-Innes Co. v. Romney, 30 S. C. R.

495, considered and followed. Where part of a drainage work to which the provisions of s. 75 apply is out of repair, it is not necessary before initiating proceedings for the improvement of the drain under that section for the initiating township to repair the portion of the existing drain which it is bound to repair. Both classes of work may be provided for in the same by-law, the engineer in that case estimating and assessing separately the cost of each class. *Re Mersea, & Gosfield* v. *North Rochester*, 21 C. L. T. 558, 2 O. L. R. 435.

Artificial obstruction — *Failure of Scheme—Report of engineer.*] — In 1884 a petition was presented to the plaintiffs' council asking for the removal of a dam and other obstructions to Mud Creek, into which the drainage of the township and of Augusta, adjoining, emptied. The council had the creek examined by an engineer, who presented a report with plans and estimates of the work to be done and an estimate of the cost and proportion of benefit to the respective lots in each township. The council then passed a by-law authorizing the work to be done, which was afterwards set aside on the ground that the removal of an artificial obstruction was not contemplated by the law then in force, s. 570 of the Municipal Act, 1883. In 1886 the Act was amended, and a fresh petition was presented to the council, which again instructed the engineer to examine the creek and report. The engineer did not again examine it (its condition had not changed in the interval), but presented to the council his former report, plans, specifications, and assessment, and another by-law was passed, under which the work was done. In an action to recover from Augusta its proportion of the assessment:—*Held*, affirming the judgment of the Court of Appeal, 2 O. L. R. 4, 21 C. L. T. 375, Strong, C.J., dissenting, that the amendment in 1886 to s. 570 of the Municipal Act, 1883, authorized the plaintiffs' council to cause the work to be done, and claim from Augusta its proportion of the cost.—*Held*, further, reversing the judgment, that the report of the engineer was sufficient without a fresh examination of the creek and preparation of new plans and a new assessment. *Elizabethtown* v. *Augusta*, 22 C. L. T. 191, 32 S. C. R. 295.

Assessment for construction of dyke and aboiteaux.—Objection to assessment —Not made according to benefit received by lands effected — Cumberland Sewers Act (1893), c. 80—The Marsh Act—Prescription —Lost grant—Declaration granted on basis of the assessment. *Corbett* v. *Pipes* (N. S. 1910), 9 E. L. R. 127.

Assessment for outlet—*Engineer's report under Municipal Drainage Act—Drainage area—Benefit—Portion of cost assessed to other townships—Liability of subservient townships to pay interest—At expiration of four months — Date from which interest should be calculated — Municipal Drainage Act, s. 66—Costs.*] — After delivery of the judgment of Court of Appeal (14 O. W. R. 1033, 1 O. W. N. 190), the question arose as to the liability of the subservient townships to pay interest on the amounts payable by them by way of contribution to the expenses of the drainage scheme.—Henderson, Referee, *held*, that, under s. 66 of the Ont. Municipal Drainage Act, no sum was payable by the subservient townships until the expiration of four months from date of judgment of Court of appeal, and interest should be computed from that date.—*Elizabethtown* v. *Augusta*, 2 O. L. R. 4; 2 Cl. & Sc. Dr. Cas. 370, 378; 32 S. C. R 295, distinguished.—*Toronto Ry. Co.* v. *Toronto*, [1906] A. C. 117; 75 L. J. P. C. 36 approved.—In view of the fact that the question was practically without precedent, costs allowed on County Court scale without any set off. *March* v. *Huntley*, *March* v. *Goulbourn* (1910), 17 O. W. R. 731.

Assessment of lands in adjoining township—Outlet or injuring liability. *Re Elma & Wallace*, 2 O. W. R. 198.

Award—*Reconsideration—Construction of ditch—Charge for engineer's services—Letting work—Breach of contract—Re-letting.*] —By virtue of s. 36 of the Ditches and Watercourses Act, the township engineer, on the reconsideration of an award, may make any award which might have been made in the first instance. In accordance with the provisions of s.-s. 2 of s. 4 of the same Act, the council by by-law fixed the charges to be made by the engineer for his services at the rate of $5 a day, and under s. 29 the engineer certified to the clerk that he was entitled to $45 for fees and charges for his services:—*Held*, that his certificate established *prima facie* the validity of his claim for $45, and the onus was on the plaintiff, objecting to the award, to shew its incorrectness, which she had not done.—*Held*, also, that under s.-s. 4 of s. 28 work under an award not performed as contracted for, may be re-let. Judgment of County Court of Ontario reversed. *Cuddahee* v. *Mara*, 12 O. L. R. 522, 8 O. W. R. 423.

By-law — Assessment of owners to pay damages and costs before benefit by-law passed — Drainage Act, s. 95. *Re McClure & Brooke*, 6 O. W. R. 1021, 11 O. L. R. 115.

By-law — Construction of drain as part of drainage scheme — Petition — Sufficient number of signatures — Drainage area — Proportion to size and extent of drainage scheme — Minority imposing on majority. *Re Duane and Township of Finch*, 12 O. W. R. 144.

By-law — *Petitions for—Qualification — Damages.*]—The assessment roll last revised previous to the passing of a drainage by-law is the one to be looked at for the purpose of ascertaining whether the petition for the work was sufficiently signed to authorise the passing of the by-law. The words "exclusive of farmers' sons not actual owners," in s.-s. 1 of s. 3, R. S. O. c. 226, do not refer to farmers' sons who are not actual owners in fact, but to farmers' sons so shewn by the last revised assessment roll. A farmer and his sons arranged that he should convey his farm to them, taking back a life lease:—*Held*, that this was sufficient to give them an interest in the land, of a freehold nature, entitling them to be assessed as joint owners, and so assessed they are not "farmers' sons not actual owners."—*Held*, also, following *Connor* v. *Middagh*, 16 A. R. 356, and *McCulloch* v. *Township of Caledonia*, 25 A. R. 417, that, the by-

law not having been quashed, the plaintiff was not entitled to damages for work done under it, although it was invalid. *Challoner* v. *Lobo*, 32 O. R. 247, 21 C. L. T. 29.

Construction of ditch without by-law—*Trespass — Negligence — Costs.*] — Section 470 of the Municipal Act, R. S. O. 1897 c. 223, applies only to actions brought to recover damages "for alleged negligence on the part of the municipality." In an action against a municipality for damages for diverting water upon the plaintiff's land by the construction of a ditch without any proper by-law authorizing the work:—*Held*, that s. 470 did not apply, as the plaintiff's claim was for trespass, and not for negligence; and that the trial Judge had power over the costs; and the Court would not interfere with his discretion in awarding costs up to the trial to the plaintiff, while directing a reference as to damages. Judgment of Ferguson, J., 1 O. W. R. 559, affirmed. *Lawrence* v. *Owen Sound*, 23 C. L. T. 138, 5 O. L. R. 369, 1 O. W. R. 559, 2 O. W. R. 189.

Construction of new drain — *Notice—Land owners—Liability for old drain—Appeal to County Council.*]—A public notice given by a special superintendent of his appointment and of his proposed visit to places where it is proposed to establish a watercourse, is sufficient when it is addressed to the persons directly or indirectly interested in the proposed works, and the owners of a concession through which the watercourse must necessarily pass are sufficiently notified by such a notice. 2. Arts. 881 and 882 of the Municipal Code, passed in the interests of agriculture, override art. 501, C. C., and subject the owners of higher lands to submit to the establishment of a watercourse through their lands for the benefit of lower marshy lands. 3. Owners who assert that they are already under obligation in respect of works for a watercourse established by a proces-verbal, in order to escape liability for the work of making a new watercourse, must prove the homologation of this proces-verbal, and they may, besides, be made liable for the new watercourse in respect of the land which such new watercourse drains. 4. An appeal to the county council does not deprive a party of his right to move before the Superior Court to quash a proces-verbal on the ground of illegality or nullity. *Ste. Julie* v. *Massue*, 13 Que. K. B. 228.

Construction of road—Flooding neighbouring land — Damages—Injunction—Scale of costs—Municipal corporation. *Taylor* v. *Collingwood*, 3 O. W. R. 368, 553.

Contractor claiming for work performed.]—Section 93 of Mun. Drainage Act, as enacted by 1 Edw. VII. c. 30, s. 4, deals only with cases of damages occasioned to others by reason of construction of drainage works in the way provided for by municipality, and does not refer to the claim of a contractor or workman to be paid for work performed; and therefore an action brought in the High Court which appears by statement of claim to be one to enforce payment of such a claim should not be summarily dismissed on ground that Drainage Referee alone has jurisdiction; but the question of jurisdiction should be left for determination at trial when the facts are investigated. Judgment of Falconbridge, C.J.K.B., 11 O. W. R. 320, and Divisional Court, 11 O. W. R. 1106, reversed *Bank of Ottawa* v. *Roxborough* (1909), 18 O. L. R. 511; 13 O. W. R. 1175.

Cost of construction—*Charge on land —"Owner"—Award.*] — Moneys paid by a municipality under the provisions of the Ditches and Watercourses Act, R. S. O. 1897 c. 285, for the construction of a ditch under that Act, when placed upon the collector's roll, become, by virtue of s. 30, a charge upon the lands traversed by the ditch in the hands of the respective owners for the time being, though different from the owners at the time of the initiation of the proceedings under the Act. *Wicke* v. *Ellice*, 11 O. L. R. 422, 7 O. W. R. 425.

Cost of repairs—*Varying apportionment —Powers of Referee.*]—Upon certain repairs to a drainage work becoming necessary, one of the townships interested directed their engineer to make a report, and he assessed the cost against the different townships in the proportions in which the original cost had been assessed, no proceedings having been taken under s. 69 or s. 72 of the Drainage Act to vary the assessment:—*Held*, that this was the proper mode of apportionment, and that, notwithstanding the wide wording of s. 71 of the Act, the Drainage Referee had no power to vary an apportionment made under such circumstances. *Re Chatham & Dover*, 24 C. L. T. 307, 8 O. L. R. 132, 3 O. W. R. 882.

Cost of work—*Procès-verbal — Ratepayers not interested—Mis-en-cause—Costs.*]—At common law as well as by virtue of the Municipal Code, a procès-verbal cannot bind, nor effectively call upon to contribute to the costs of works ordered by the procès-verbal in regard to a watercourse, any ratepayer except those interested: arts. 811, 870, 871, 881, 882, C. M. 2. Therefore a procès-verbal which imposes upon certain ratepayers the duty of contributing to the cost of works in which they are not interested, is illegal and unjust, and should be quashed. 3. Costs cannot be given against a mis-en-cause unless he has joined issue with the plaintiff and asked for the dismissal of the whole or part of the plaintiff's claim. *Paquet* v. *St. Nicolas*, 13 Que. K. B. 1.

County road—*Watercourse—Special superintendent—Procès-verbal.*] — Article 772 of the Municipal Code applies only to cases where it is necessary to dig a watercourse through lands fronting on a road duly established, and where such a watercourse is necessary not only for draining the water from the road, but also for draining the abutting lands.—2. In this case a watercourse serving the purpose of draining several lots in the vicinity of a road was not in question, but only a prolongation or continuation of road ditches into natural watercourses to facilitate the flow of water from the road; and consequently the special superintendent had a right to provide in his procès-verbal for the digging and maintenance of these outlets by virtue of arts. 799 and 803 of the Municipal Code. *Nicolet* v. *Tousignant*, 12 Que. K. B. 105.

Culvert in highway—Existing drain — Reconstruction — Costs of. *Re Camden & Dresden*, 2 O. W. R. 209.

Damages—*Injury to building.*]—An action for damages caused to plaintiff's property by alleged negligent construction of certain highways and drains, thereby increasing the surface flow of water reaching his premises, the building erected thereon finally collapsing after a heavy thunder storm on the 20th July, 1907. The trial Judge held that plaintiff had a right to recover some damages prior to that date and gave a reference. A Divisional Court extended the period to the date of the inquiry, which the Court of Appeal confirmed and fixed damages at $100 in order to prevent a reference, which seemingly would be very expensive and difficult. *Rudd* v. *Arnprior*, 13 O. W. R. 172.

Debentures — *Maintenance — Embanking work—Registration of by-laws.*]—Section 83 of the Drainage Act, R. S. O. c. 226, directing that the time for payment of debentures issued for the cost of maintenance of a drainage work shall not exceed seven years, does not apply to debentures issued for the cost of extending, improving, or altering a drainage work, and the municipality has the same power to issue debentures as in the case of an original drainage work. Because in the course of the construction of a railway work, banks are formed with the spoil cast from the dredge, the work is not one within s.-s. 2 of s. 3 of the Drainage Act, R. S. O. c. 226; that subsection relates to the reclamation of wet or submerged lands. *Semble*, that the provisions of the Municipal Act as to the registration of by-laws for contracting debts apply to by-laws for the issue of debentures for drainage works, and when such by-laws have been registered in accordance with the provisions of the Act, they cannot be set aside, even if originally *ultra vires*. Judgment of Ferguson, J., 18 C. L. T. 342, affirmed. *Sutherland-Innes Co.* v. *Romney*, 19 C. L. T. 381, 26 A. R. 495

Defective system — *Recovery of damages and costs — Subsequent assessment — Drainage Act, s. 95.*]—The assessment for damages and costs recovered by a person complaining of a defective system of drainage must be made only against the lands included in the drainage scheme complained of. Lands included in an amended scheme undertaken after the right to damages has accrued and claim has been made are not liable.—Judgment of the Drainage Referee affirmed. *Re McClure & Brooke*, 11 O. L. R. 115, 6 O. W. R. 1021.

Deposit of earth on plaintiff's land—*Claim for compensation—Remedy—Action—Forum — Drainage Referee.*]—In an action brought against a township corporation and their contractor for damages caused by the variation of the specifications by the contractor for constructing a drain under the Municipal Drainage Act, R. S. O. 1897 c. 226, in placing earth excavated in digging the drain upon the land of the plaintiff without permission:—*Held*, that, whether the plaintiff was entitled to be compensated or not, her claim fell under s. 93 of the above Act as amended, and her remedy was by notice proceedings before the Drainage Referee as provided for by that section, and not by writ and proceedings in an action. *Burke* v. *Tilbury North*, 8 O. W. R. 457, 862, 13 O. L. R. 225.

Destruction of water privilege — Easement — Compensation — Declaratory order—Injunction. *Re Farrand & Morris & Grey*, 6 O. W. R. 686.

Discharge of hot water and steam into — *Liability.*] — The defendants connected a drain leading from their premises with a private drain constructed by the plaintiff. Hot water and steam, originating on the defendants' premises and passing into their drain, flowed back through the plaintiff's drain, and overflowed his cellar, and filled his house with steam: — *Held*, following *Fuller* v. *Pearson*, 23 N. S. Reps. 263, 21 S. C. R. 337, that the defendants were responsible in damages. *Andrews* v. *Cape Breton Electric Co.*, 37 N. S. R. 105.

Disputes between adjoining owners —*Forum for decision.*]—A dispute between neighbours with regard to a drain, must be decided by the municipal authority constituted for that purpose, and not by an action in the Superior Court. *Dansereau* v. *Dansereau*, 16 Que. K. B. 426.

Disputes between adjoining owners —*Municipal Code—Action négatoire.*]—Difficulties arising between owners of neighbouring rural parcels of land, as to the right to flow of water, are of administrative competence, and must be settled according to the provisions of the Municipal Code. They do not afford ground for the remedy by action *négatoire* in favour of one who asserts that his neighbour, by his drainage works, has caused an excessive discharge of water upon his land. *Muldoon* v. *Casey*, 33 Que. S. C. 45.

Dispute between neighbours — *Forum —Municipal officers—Superior Court.*]—The special remedy provided in a statute which imposes obligations such as those of vicinity, drainage, and sewerage of the Municipal Code, excludes the remedies of the common law. Therefore, a difference between neighbours in a rural municipality in regard to a ditch or drain must be referred to the municipal officers appointed for that purpose, and an action in the Superior Court based on such difference will be dismissed. *Dansereau* v. *Dansereau*, 29 Que. S. C. 411.

Ditches—*Injury to lands — Non-compliance with law.*]—Rural municipalities which, in the construction and maintenance of roads, do not observe the requirements of the law touching drainage (in this case making lateral ditches), are responsible for the damages which resulted to the lands bordering on the roads. *Thérien* v. *Windsor*, 30 Que. S. C. 24.

Ditches and watercourses — *Construction of road ditches by corporations—Liability for flooding lands in neighbourhood—Ditches and Watercourses Act—Award of township engineer—Construction of ditches in pursuance of—Neglect to keep ditches in repair—Damages — Injunction — Mandamus — Costs.*]—Plaintiff brought action to have it declared that certain awards made under the Ditches and Watercourses Act were null and

void, and for wrongfully causing water to be discharged upon plaintiff's premises; for an injunction to restrain defendants from continuing to flood plaintiff's land, and for a mandamus directing defendants to construct a ditch to carry the said water in its natural course to a proper outlet. At trial Britton, J. (14 O. W. R. 45), gave plaintiff judgment for $40 damages for flooding in 1904, and costs. Plaintiff appealed to the Divisional Court:—*Held*, that the appeal should be dismissed with costs. *Mandley* v. *Monck* (1909), 14 O. W. R. 1222, 1 O. W. N. 271.

Ditches on each side of a municipal road—*Remedy by mandamus to force municipality to maintain.*]—A ratepayer has a remedy in a writ of mandamus to oblige a municipal corporation to have ditches dug on each side of a road maintained by the corporation. *Beaudet* v. *Leclercville*, 37 Que. S. C. 276.

Ditch overflowing lands — Municipal corporation—Injunction — Damages. *Woolard* v. *Corporation of Burnaby*, (B.C.), 2 W. L. R. 402.

Execution of work by persons benefited — *Default — Officers of corporation — Mandamus—Code of Procedure—Change in.*] —Municipal corporations have the direction and control of works necessary for the execution of *procès-verbaux* regulating the opening or maintenance of watercourses. 2. If persons liable to do work, neglect to do it, the municipal corporation should have it done by their officers. 3. Municipal officers are subject to the orders of the municipal corporation, but not to the orders of private persons interested in the works, and they are responsible for their acts only to the corporation. 4. The Superior Court has the right to compel municipal corporations by mandamus to execute what they have ordered by their own *procès-verbaux*, and their right exists whenever there is no other remedy equally appropriate, advantageous, and efficacious. 5. The new Code of Procedure, so far from restricting the cases where mandamus may be obtained against corporations, renders the use of the writ applicable to a larger number of cases than the old Code of Procedure. See Art. 1022 of the old Code, and Art. 992, No. 1, of the new. *Gauvin* v. *St. Patrice*, 23 Que. S. C. 318.

Flooding lands — Cause of action — Injunction—Damages — Drainage Referee—Appeal while reference still pending—Negligence—Insufficiency of excavation—Improper deposit of material excavated — Breach of trust—Allowing contractor to escape from obligation as to place of deposit—Engineer—Directions of—Depth and width of excavation. *McOuat* v. *Stormont, Dundas & Glengarry*, 8 O. W. R. 40.

Flooding lands of private owner — Injury to land — Negligence—Action—Non-repair of drain—Pleading—Defence—Denial —Other causes of flooding. *Teitelbaum* v. *Morris* (Man.), 5 W. L. R. 449.

Flooding private lands — Culvert—Increase in rapidity of flow of water—Cause of action. *Swayzie* v. *Montague*, 1 O. W. R. 742.

Injunction *restraining Drainage Referee from proceeding in an action before him under the Municipal Drainage Act, R. S. O. (1897), c. 226.*]—Plaintiff, a civil engineer, instituted proceedings before the Drainage Referee, under s. 93 of the Municipal Drainage Act to recover $1,239.33 balance alleged to be due him for preparing plans, specifications and estimates for draining certain lands. The defendants admitted employing plaintiff, but asserted that they had paid him all that was due him, *i.e.*, $1,950, and contested the right of the plaintiff to have the matter in issue tried by the Drainage Referee:—*Held*, that the claim of the plaintiff did not arise in the "construction, improvement or maintenance of the drainage work," but in matters wholly preliminary to such construction. Prohibition granted restraining the Drainage Referee from proceeding further in the action. *Moore* v. *March* (1909), 14 O. W. R. 1066, 1 O. W. N. 38, 206. See S. C., 13 O. W. R. 692, 14 O. W. R. 1194, 20 O. W. R. 67.

Injunction requiring townships to open up and maintain culvert.]—At trial, plaintiff was awarded $240 damages, and a mandatory injunction against both defendants, requiring them to open up and maintain a culvert, opposite plaintiff's land, in such a manner and to such an extent as to receive and carry away waters that may from time to time flow along the east side of the road-allowance, so that said waters may not back up on plaintiff's land. On appeal to the Divisional Court it was held that the judgment appealed from should be varied as to the terms of the injunction awarded by making it one restraining the defendants from continuing to bring the foreign water down to the injury of the plaintiff and operation of the judgment should be suspended for one year to enable defendants to do this. With this variation judgment affirmed, and appeal from it dismissed, with costs. *Vanderberg* v. *Markham & Vaughan* (1910), 15 O. W. R. 321.

Injuring liability — *Natural watercourse.*]—Under s.-s. 3 of s. 3 of R. S. O. c. 226, lands in one municipality from which water has been caused to flow upon and injure lands in another municipality, either immediately, or by means of another drain, or by means of a natural watercourse, may be assessed and charged for the construction and maintenance of a drainage work required to relieve the injured lands from such water. *In re Townships of Orford and Howard*, 18 A. R. 496, *In re Townships of Harwich and Raleigh*, 21 A. R. 677, and *Broughton* v. *Township of Grey*, 27 S. C. R. 495, distinguished. *Re Orford & Howard*, 20 C. L. T. 206, 27 A. R. 223.

Injury to land—*Trespass — Officer of Corporation—Limitations of Actions — Continuing Trespass.*]—Action for trespass by the municipal corporation constructing and maintaining a drain through the plaintiff's land. The jury found that the drain had been constructed in 1886 "by virtue of the street commissioner's power of office." The plaintiff, although aware of the existence of the drain at the time, made no objection till 1896, when the land caved in. The judgment in 33 N. S. Reps. 401, holding that the de-

fendants having constructed the drain by their agent, the trespass, being a continuing one, was not barred by the Towns Incorporation Act, 1895, was affirmed. *Truro* v. *Archibald*, 31 S. C. R. 380.

Inter-municipal works — *Contract — Damages—Guaranty — Continuing liability.*]—The city of Montreal having a sewer sufficient for all its purposes within its limits through lands lying on a lower level than those of three adjoining municipalities, entered into an agreement in writing with one of them, St. C., by which it was permitted to connect its sewers with the Montreal sewer in question for drainage purposes, and, by the same agreement, Montreal consented that the two other municipalities should make connections with St. C.'s sewers, so connected, in such manner that waters coming from such three higher municipalities should be drained through the Montreal sewer, on condition that the connection should be made by St. C. at its own cost and to the satisfaction of the Montreal engineers; and that Montreal should be guaranteed against damages:—*Held*, that the guaranty bound the several higher municipalities not only for all damages resulting from the act of making the actual connection of the sewers, but also for damages that might be subsequently occasioned from user.—*Held*, also, that, as Montreal had not obliged itself to construct additional or new works within any fixed time in case of insufficiency, the adjoining municipalities were not relieved from any of their liabilities on account of postponement of construction of such works by Montreal.—*Held*, further, that the judgment awarding damages against Montreal being a matter between third parties and not *res judicata* against the other municipal corporations interested, Montreal was only entitled to recover from St. C. such damages as might be shewn to have resulted from the connection and user of the sewers under the agreement; that Montreal, when sued, was not obliged to summon its warrantor in the action for damages, but could, after condemnation, recover such damages by separate action under the contract; that it was not a condition precedent to action by Montreal, by the terms of the contract, that it should first submit to a judicial condemnation in liquidation of such damages; and that, as between St. C. and the *arrière garants*, their contracts bound them to pay damages in proportion to the areas drained by them into the Montreal sewers. *Montreal* v. *Ste. Cunegonde*, 22 C. L. T. 251, 32 S. C. R. 135.

Lands subject to works *without outlet, and which has no benefit from the watercourse—Recourse of the owner.*]—The recourse in an action in the Superior Court to set aside the decision (of a Court of Revision), is open to an owner whose land is assessed for the cost of opening and maintaining a watercourse to drain the water from a road, without draining the assessed land, and not being any benefit to him, in a district where the work on the municipal roads is only done at the cost of the municipality under Art. 1080 C. M. *Coté* v. *Windsor*, 1909, 36 Que. S. C. 363.

Maintenance — *Improvement of natural watercourses—"Benefit" assessment—"Outlet" liability.*]—Lands from which no water is caused to flow by artificial means into a drain having its outlet in a municipality other than that in which it was initiated, cannot be assessed for "outlet liability" under 57 V. c. 56 (O.). 2. Where a drainage work initiated in a higher municipality, the assessment for "outlet liability" therein is limited to the costs of the work at such outlet. 3. Every assessment, whether for "injuring liability" or for "outlet liability," must be made upon consideration of the special circumstances of the case, and restricted to the mode prescribed by the Act. There must be apparent water which is caused to flow by an artificial channel from the lands to be assessed into the drainage work or upon other lands, to their injury, which water is to be carried off by the proposed drainage work. 4. Assessment for "benefit" under the Act must have reference to the additional facilities afforded by the proposed work for the drainage of all lands within the area of the proposed work, and may vary according to circumstances. 5. Section 75 of the Act only authorises an assessment for repair and maintenance of an artificially constructed drain. The cost of widening and deepening a natural watercourse is not assessable upon particular lands under s. 75, but is a charge upon the general funds of the municipality. 6. Works for the reclamation of drowned lands in a township on a lower level than that of the initiating municipality are not drainage works, within the meaning of s. 75, for which assessment can be levied thereunder, nor are they works by which the lands in the higher township can be said to have been benefited. Decision in 26 A. R. 495, 19 C. L. T. 381, reversed. *Sutherland-Innes Co.* v. *Township of Romney*, 21 C. L. T. 1, 30 S. C. R. 495.

Maintenance of ditch — *Action against ratepayer—Prescription—Forum — Justices of the Peace — Residence—Summons—Conviction.*]—The prescription of six months provided by Art. 2558, R. S. Q., does not apply to an action begun by a municipal corporation against a ratepayer, for the recovery of his share of the cost of maintenance of a line ditch. 2. Such a suit may be begun by the corporation after having paid the account of the rural inspector, but not before a justice of the peace, the right of recourse to that tribunal being a right personal to the rural inspector, which he cannot assign. 3. In this case, the summons calling upon the appellant to appear before two justices of the peace of the district of Montreal, without indicating their residence, and the conviction having been made by such justices without stating their residences, the summons and convictions were held void, the competence of justices of the peace under Art. 1042, M. C., depending upon their place of residence, which, therefore, must be mentioned. *Tourville* v. *Francois de Salles*, 23 Que. S. C. 67.

Maintenance of watercourse — *Procès-verbal—Charge on riparian owners and persons benefited.*]—Article 871 of the Municipal Code, under which drainage works, in default of agreement or of *procès-verbal*, is done by the riparian proprietors, and Art. 887 of the same Code, which makes the owners of lands drained liable for such work,

may be combined and read together. Therefore, a *procès-verbal* which makes works of maintenance of a watercourse chargeable to the contributories in their double capacity of riparian owners and owners of the lands drained, is not annulable on this ground. *Plante* v. *Richelieu*, 32 Que. S. C. 284.

Mandamus — *Notice — Damages—Drain insufficient to carry off water.*]—To entitle a person who or whose property is injuriously affected by the condition of a drain to a mandamus for the performance of such work as may be necessary to put the drain in proper condition, the notice required by s. 73 of the Drainage Act, R. S. O. c. 226, while not necessarily in technical form, must be so clear and precise that the municipality can decide whether the complaint is well founded or frivolous, and must be one which the municipality would be justified in acting upon under s.-s. (*a*) of that section. A letter referring to defects in the drain, and suggesting steps to be taken, but not calling upon the municipality to do specific work, is not sufficient. The notice by which proceedings are initiated in Court cannot be regarded as a notice under s. 73. A person who or whose property is injuriously affected by the condition of a drain is entitled to recover from the municipality charged with the duty of maintaining it such damages as he sustains by reason of its non-repair, whether caused by the flooding of his land by the waters of the drain, or by its failure to carry off the water which came upon the land in the course of nature. *Crawford* v. *Ellice*, 19 C. L. T. 385, 26 A. R. 484.

Mandamus — *Notice—View—Damages.*]—A letter written by the complainant's solicitor to the council of the municipality, stating that the land in question had been flooded by water from a drain constructed by the municipality, but not saying anything as to the drain's condition, and asking them to construct and maintain such drainage work as is required to relieve the land, is not a sufficient notice under s. 73 of the Drainage Act to justify the issue of a mandamus. It is the claimant's duty to shew that proper notice has been given if a mandamus is asked for, and objection to the sufficiency of the notice may be taken by the defendants at any stage of the action without pleading want of notice. The Drainage Referee in trying an action may proceed partly on view, but in so doing must follow strictly the directions of the Act, and not make the view without appointment or notice to the parties. If he does so proceed, however, his finding, though based partly on the view, may be upheld if the evidence supports it. A complainant is entitled to recover for any injury to the use and enjoyment of his land or for its depreciation in value, if caused by failure to keep a drain in repair, but not for depreciation in value based upon the alleged insufficiency in size of the drain as originally made, and the Court holding, on the construction of the Referee's judgment, that this element had been allowed to enter into the computation of the damages, reduced them from $250 to $50. *McKim* v. *Township of East Luther*, 21 C. L. T. 113, 1 O. L. R. 89.

Municipal Drainage Act, s. 75—*Three townships interested — Dom. Rw. Act, ss. 250, 251—Necessity for by-law.*]—A large number of residents of the township of Chatham petitioned their council that certain areas be drained by deepening and otherwise improving certain drains already made, which were not satisfactory. The council had plans and specifications, estimates, assessments, etc., made by a civil engineer which were finally adopted by the council. Duplicate copies of the final report were served upon the townships of Camden and Dover, through which townships the drain would pass. The township of Dover appealed to the Drainage Referee, taking a number of objections, all of which the Referee overruled and confirmed the report except that he altered the provision for maintenance so as to include the lands in Dover assessed for benefit as well as those assessed for outlet. The Court of Appeal held, that the findings of the Referee had been reached after careful surveys, examinations and investigations, and he being familiar with the drainage areas in question, as well as with all the surrounding areas and the drainage systems and works thereon, therefore it would be necessary for the appellants to shew a very strong case to overcome such findings. This not having been done, the appeal was dismissed. *Dover* v. *Chatham* (1909), 15 O. W. R. 156.

Neglect to maintain and repair drain —Damages—Mandamus. *O'Hara* v. *Richmond*, 4 O. W. R. 178.

Neighbour on higher land.]—In an action contesting a servitude to drain surface water, the defendant who blames his neighbour on higher land for the excess of water has no recourse in real warranty against him. He cannot, under this pretext, delay the principal demand by a dilatory exception. Cf. *Gauthier* v. *Darche*, 1 L. C. J. 296, and *Gosselin* v. *Martel*, 27 Que. S. C. 364. *Roumilhac* v. *Dennis*, 36 Que. S. C. 516.

Non-repair — Injury to private property —Damages—Finding of Referee — Appeal— Notice of non-repair. *Rayfield* v. *Amaranth*, 2 O. W. R. 69.

North-west Irrigation Act—Construction of ditch by land owner—Filling up by municipality — Highway — Dedication — Sale of lots by plan—Land Titles Act—Certificates of title—Authority to construct ditch — Conditions — Repudiation — Resolution of council — Right of way — Forfeiture— Waiver—Minister of Interior — Territorial Department of Public Works — Orders in council — Evidence — Presumption — Rebuttal — Appeal — Amendment — Costs. *Robertson* v. *High River* (N.W.T.), 6 W. L. R. 281, 767.

Overflow—*Flooding premises abutting on street—Situation with regard to street level — Unprecedented rain-fall — Vis major — Evidence—Sufficiency of drains to carry off water in ordinary circumstances.*] — The plaintiff complained of damage to goods in his shop on the 27th November, 1909, by the overflow of water from drains constructed by the defendants. On the day of the overflow there was an unprecedented rain-fall; 4.35 inches of rain having fallen in 24 hours. The floor of the plaintiff's shop was 2 feet

below the street level:—*Held*, on the evidence, that the water which damaged the plaintiff's goods came from the overflow of the 10th street drain; and that drain had been proved, by actual experience of 20 years, to be sufficient to carry off properly all the rain-fall for that period, even on a previous occasion when there was a rain-fall of 4.10 inches in 24 hours.—The plaintiff said that the condition of affairs had been altered by the macadamising of the streets and the filling in of the portion of a swamp upon which the plaintiff's shop was situate with sand or silt from the river:—*Held*, that the plaintiff, having consented to this, could not complain:—*Held*, also, that the rain-fall of the 27th November was so great that it could not reasonably have been anticipated—it amounted to *vis major*. *Sum Kum Wo* v. *New Westminster* (1910), 15 W. L. R. 512, B. C. R.

Overflow of drains—Injury to land — Liability of corporation — Evidence. *Lamport* v. *Toronto*, 11 O. W. R. 537.

Overflow of lands—Negligence — Damages — Natural watercourses — Construction of ditches—Action by officer of municipality —Effect of his negligence. *Baskerville* v. *Franklin* (Man.), 3 W. L. R. 547.

Overflow of water—Injury to building —Liability of municipality — Evidence — Findings of fact — Appeal — Damages — Mode of estimating — Reference — Fixing by Court on appeal. *Rudd* v. *Arnprior*, 11 O. W. R. 886, 13 O. W. R. 172.

Persons interested — *Benefit — Art. 470, M. C. — Contributory — Procès-verbal — Action to annul — Time-limitation — Homologation — County council — Costs.*] — The expression "persons interested" in Art. 470, M. C., applies to those who are benefited by the work there mentioned. Hence, the owner of lands on a higher level from which water is carried by its natural flow to those on a lower level, cannot be made a contributory to the work or expense provided in a *procès-verbal* for the opening and maintenance of the municipal watercourse through the low level lands into which such water is discharged.—*Comtois* v. *Dumontier*, 8 Que. Q. B. 293, approved and followed.—An action will lie in the Superior Court by a party unlawfully made a contributory to work in a *procès-verbal*, to have it annulled in so far as he is concerned, and such action is not subject to the limitation of 30 days prescribed in Art. 708, M. C.—*Grenier* v. *Lacourse*, 2 Que. Q. B. 445, approved and followed.—When the consideration and homologation of a *procès-verbal* is referred by a local council to the county council under Art. 136 M. C., and the latter takes the matter up and homologates the *procès-verbal*, any action to annul it is properly brought against the corporation of the county which is liable for costs in case of contestation. *Beauce* v. *Breakey*, 15 Que. K. B. 520.

Petition — Alteration of route — Engineer — By-law — Quashing — Costs. *Re Macdonald & Alexandria*, 2 O. W. R. 637.

Petition for—*Report of civil engineer under Municipal Drainage Act—Assessment for outlet—Appeal to Drainage Referee — Sufficiency of outlet—Evidence on question as to—Report of engineer confirmed by Court of Appeal.*]—In 1909 Kalbfleish and other interested landowners presented a petition to the council of the township of South Easthope, asking that action be taken in connection with a drain which was out of repair and considered insufficient. The council appointed John Roger, C.E., under the Municipal Drainage Act, to examine and prepare a scheme and assessment, which was done.—Roger, C.E., reported that these lots in South Easthope, and certain lands in the township of Downie and in the city of Stratford, would be benefited by the proposed drain, and that all three municipalities should be assessed accordingly. His report stated that there would be a sufficient outlet.—Official Drainage Referee, on appeal by Stratford, found the proposed outlet insufficient, and that the assessment in the city was unwarranted.—Court of Appeal, on appeal by South Easthope, *held*, that it was a question of evidence, that the expert testimony was directly in conflict, but that the great weight of evidence was in favour of the report of the engineer. Appeal allowed and the report of the engineer confirmed with costs throughout. *Stratford* v. *South Easthope and Downie* (1910), 17 O. W. R. 830, 2 O. W. N. 388.

Petition for drainage scheme — *Engineer's report—Delay in filing—Extension of time — Alteration and enlargement of scheme — Municipal Drainage Act.*] — The power of extending the time for filing the report of an engineer upon a municipal drainage scheme by s. 9, s.-s. 8, of the Municipal Drainage Act as amended by 62 V. (2), c. 28, s. 6 (O.), can only be exercised under the condition mentioned in that sub-section. It is a limited power to extend for good cause, and is dependent upon inability of the engineer to make a report within the time fixed owing to the nature of the work, and not upon dilatoriness or supineness on his part. —An engineer was appointed to make examination and report in 1900, but did nothing within the first 6 months after his appointment. Various extensions were granted, several after the extended time had expired. No report was made till February, 1905, and such report was, after amendment, adopted by the council in June, 1905, and a by-law founded upon it, the engineer advancing no excuse for delay except press of work and lack of assistance:—*Held*, that when the report was made the petition was not on foot, and therefore there was no warrant to the council for adopting the report or founding a by-law upon it. *Re McKenna & Osgoode*, 8 O. W. R. 713, 13 O. L. R. 471.

Petition for work—Majority of owners to be benefited—Assessment for outlet—Assumption of award drain—Enlargement and extension into new territory—Exit—Pipe under railway embankment — Enlargement — Effect. *Fairbairn* v. *Sandwich South*, 8 O. W. R. 925.

Procès-verbal—*Construction of drain—Private interest.*] — A municipal corporation has no power to order, by a *procès-verbal*, the construction of a watercourse begun in the interest of a private person and not in the interest of the public. *Fontaine* v. *Sherrington*, 23 Que. S. C. 532.

Procès-verbal — *Municipal Code, Arts. 771, 772, 870 et seq. — Contributories — Resolution.*]—A *procès-verbal* for the opening and maintenance of a watercourse is presumed to be made under the general provisions of Arts. 870 *et seq.* of the Municipal Code, and persons interested only can be made thereby contributories to the work. A *procès-verbal* for a watercourse cannot be held to have been made under Arts. 771 and 772, M. C., unless it is so expressly declared in the resolution ordering it to be made and appointing a special superintendent for that purpose. *Cf. County of Beauce* v. *Breakey*, 15 Que. K. B. 520. *Gagné* v. *Windsor*, 34 Que. S. C. 119.

Pumping machinery — *Drainage — Injury to land and crops—Overflow of water—Inefficient operation of pumping plant—Appointment of engineer and commissioner of works — Construction of works—Negligent operation—Want of repair — Provisions of Drainage Act — Damages—Costs—Source of payment—Drainage area—General funds of municipality.*] — A municipality negligently operated their pumping machinery used for drainage purposes so as to cause damage to the lands of certain persons. Corporation held liable under Drainage Act R. S. O. 1897, c. 226, s. 73 and 1 Edw. VII. c. 3, s. 4 (O.) One-half of the damages awarded were imposed on the general funds of the municipality, and one-half on the area benefited by the drainage machinery causing the damage. *Bradley* v. *Raleigh*, 6 O. W. R. 267, 10 O. L. R. 201.

Qualification of petitioners — "*Last revised assessment roll.*"] — The "last revised assessment roll" which governs the status of petitioners in proceedings under the Drainage Act is the roll in force at the time the petition is adopted by the council and referred to the engineer for enquiry and report, and not the roll in force at the time the by-law is finally passed. Judgment of Meredith, C.J., 32 O. R. 247, 21 C. L. T. 29, reversed. *Challoner* v. *Township of Lobo*, 21 C. L. T. 108, 1 O. L. R. 156, 292; and this judgment was affirmed. Appeal dismissed with costs to respondents the township of Lobo, but without costs to the respondent Oliver. *Challoner* v. *Lobo*, 23 C. L. T. 35, 32 S. C. R. 505.

Repair of highway — Watercourse — Injury to land — Remedy — Action — Injunction—Damages. *Smith* v. *Eldon*, 9 O. W. R. 963.

Report of engineer — *Amendment — Failure to take oath—Appeal.*]—Taking the oath prescribed in s. 5 of the Municipal Drainage Act, R. S. O. c. 226, is an essential prerequisite to the exercise of jurisdiction by the engineer under s. 75 of that Act. While an appeal to the Drainage Referee against a report is pending, the initiating municipality cannot refer back the report to the engineer for amendment. *Re Colchester North & Gosfield North*, 20 C. L. T. 207, 27 A. R. 281.

Report of engineer — *Amendment — Jurisdiction of Referee — Appeal — Court of Appeal.*]—The Drainage Referee cannot under s. 89 of the Drainage Act, R. S. O. c. 226, upon the admission of the initiating township that the report appealed from is defective, refer it back, against the wishes of the appealing townships, to the engineer for amendment. That course can be adopted, if at all, only with the engineer's consent and upon evidence given. An order assuming to refer back a report is not an interlocutory order within the meaning of s. 90 of the Drainage Act, R. S. O. c. 226, and an appeal lies to the Court of Appeal against it. *Adelaide & Warwick* v. *Metcalfe*, 20 C. L. T. 63, 27 A. R. 92.

Report of engineer—Appeal to drainage referee—Appeal to Court of Appeal—Status of appellant—Land owner—Township corporation—Right of appeal—Amount of assessment—Scope of report—Petition—Area—Enlargement—Multiplication of drains—Injury to land—Absence of benefit — Unjust assessment—Outlet. *Re Aldborough & Dunwich*, 4 O. W. R. 159.

Road ditch — Negligence — Flooding adjoining lands—Findings of jury—Depriving land-owner of access to highway—Remedy—Compensation—Rights of purchaser of land affected—Injunction—Statute of Limitations—Undertaking. *Donaldson* v. *Dercham*, 10 O. W. R. 220.

Road drainage — *Injury to lower lands — Aggravation of servitude — Remedy — Action négatoire.*]—A municipal corporation will not be permitted to facilitate, by its system of road drainage, the flow of water or sewage from higher lands to lower lands abutting on the road. The remedy by action *négatoire* is open to the owners of the latter to stop the aggravation of servitude so caused to them. *Desbiens* v. *Jonquières*, 30 Que. S. C. 376.

Service of engineer — *Remuneration — Audit by County Judge—Municipal Drainage Act s. 5 (a)—Absence of written request by council — Condition precedent — Clerical work done by assistants—Value of assistants' services.*]—Action by engineer for remuneration for reporting on a drainage scheme. Under s. 5 (*a*) above the County Court Judge has no jurisdiction to audit plaintiff's account unless there has been filed a written request by the council or a person assessed. The engineer has the right to delegate to qualified assistants matters of detail such as taking levels, preparation of plans, but not any requiring the exercise of judicial discretion. The amount to be paid the assistants is a matter of *quantum meruit*, *Moore* v. *March*, 13 O. W. R. 692. See 14 O. W. R. 1066, 1194, 1 O. W. N. 38, 206, 20 O. L. R. 67.

Servitude — *Procès-verbal — Description of property — Nullity — Payment for benefit.*]—The absence of the proper designation and description of property affected by servitude created by *procès-verbal* regulating cost of construction and maintenance of an artificial watercourse is a radical nullity, and not an informality.—2. Such nullity may be legally pleaded in answer to a suit for recovery of cost of proportion of work created by such *procès-verbal*, which by-law is still in existence.—3. Promise to pay made by defendant is null for want of legal consideration. *St. Edwidge de Clifton* v. *Foy*, 16 Que. S. C. 418.

Status of petitioners — *Finality of assessment roll — Farmer's son.*] — In proceedings under the Drainage Act the assessment roll is conclusive as to the status of the persons mentioned in it, and evidence is not admissible to shew that a person entered on the roll as owner is in fact a farmer's son and has been entered on the roll as owner by the assessor's error. Judgment below on this point reversed: Armour, C.J.O., dissenting; but affirmed *per curiam* on other grounds. *Township of Warwick* v. *Brooke*, 21 C. L. T. 231, 1 O. L. R. 433.

Township drain — *Division of township —Damages before division—Action for.*] — A township, in which extensive drainage works had been constructed, was divided into two townships by a statute which provided that the assets and debts of the original municipality should be divided between the new municipalities, each remaining liable as surety for the portion of the debts it was primarily liable to pay, and the provisions of the Municipal Act as to the separation of a junior from a senior township to be applied as far as possible:—*Held*, that an action for damages caused by the drainage works, incurred before the division, and asking to have the drains kept in repair, must be brought against both townships and not against that one only in which the plaintiff's land was situate. *Wigle* v. *Gosfield South*, 21 C. L. T. 231, 1 O. L. R. 519.

Township lots — *Engineer's report under Drainage Act—Portion of cost assessed to other townships—Appeal to Drainage Referee — Engineer's report varied — Appeal to Court of Appeal.*]—Township of March initiated proceedings for the purpose of draining certain lots. The engineer made a report under the Drainage Act assessing the townships of Huntley and Goulbourne for a portion of the cost. Both townships appealed to the Drainage Referee on a large number of grounds. The Referee allowed the appeal of Goulbourne to the extent of $77.79, but dismissed the appeal of Huntley. Huntley appealed direct to the Court of Appeal:—*Held*, that the finding of the Drainage Referee should be confirmed and the appeal dismissed. *Huntley* v. *March* (1909), 14 O. W. R. 1033, 1 O. W. N. 190.

Turning water on plaintiff's farm] —Plaintiff brought action claiming that defendants had while engaged in repairing a highway wrongfully constructed certain grades and ditches along certain culverts through the highway so as to divert water from the highway and from an adjoining highway over which they had not assumed control, and from other lands into and upon plaintiff's farm, for which he claimed damages and an injunction.—At trial Teetzel, J., *held*, that the evidence as to damages was conflicting, but there was no doubt that the excess of water discharged on plaintiff's land caused him some loss and inconvenience, and would have a depreciating effect upon the value of his farm. In lieu of an injunction judgment was given plaintiff for $450, for damages past and future, with costs.—Divisional Court dismissed appeal with costs.—Judgment of Teetzel, J., 15 O. W. R. 294, affirmed. *McMulkin* v. *Oxford* (1910), 16 O. W. R. 3.

Watercourse traversing two counties — *Naming of special superintendent — Request—Quashing—Costs — Res Judicata.*] —The defendants had presented a petition to the county council of Hochelaga for the authorisation of the opening and maintenance of a watercourse crossing the counties of Hochelaga and Jacques Cartier. The council granted the request and named a special superintendent, who, after having visited the locus and heard the parties, drew up a report in favour of the proposal. This report was submitted for homologation to the board of delegates of the two counties, who, after consideration, quashed it with costs of the report against the defendants, the petitioners. These costs were forthwith taxed and paid by the plaintiffs, who now claimed payment of them from the defendants:—*Held*, that the decision of the board of delegates had the force of *res judicata* against the defendants, and could not be incidentally reformed in a suit for the costs.—2. That the council of Hochelaga had, in this case, the power to name a special superintendent, and even supposing such nomination to be illegal, the corporation would not be responsible for errors in procedure induced and accepted by interested parties. *County of Hochelaga* v. *Laplaine*, 20 Que. S. C. 165.

See APPEAL — ASSESSMENT AND TAXES — CONTRACT — COSTS — LOCAL JUDGES AND MASTERS — NUISANCE — PARTIES — RAILWAYS — WATER AND WATERCOURSES.

DROIT CRIMINEL.

See CRIMINAL LAW.

DROIT MUNICIPAL.

See MUNICIPAL CORPORATIONS.

DROIT SCOLAIRE.

See SCHOOLS.

DRUGGIST.

See NEGLIGENCE.

DRUNKARD.

See INTOXICATING LIQUORS.

DUCKS.

See ANIMALS.

DURESS.

Payment under threat of criminal prosecution — *Error — Ratification.*]— About the time a dissolution of partnership was imminent, one of the partners was accused of embezzling funds, and, supposing that he was liable for an alleged shortage, and under threat of criminal prosecution, he signed a consent that the amount should be deducted from his share as a member of the firm. He was denied access to the books and vouchers, and some weeks afterwards, upon statement of the affairs of the partnership, the amount so charged to him was paid over to the other partners. It was subsequently shewn that this partner had made his returns correctly, and had not appropriated any part of the missing funds:—*Held*, that he was entitled to recover back the amount so paid in an action *condictio indebiti*, as both the consent and the payment had been made under duress and in error; and, further, that there had been no ratification of the consent to the deduction of the amount by the subsequent payment, because the denial of access to the books and vouchers caused him to continue in the same error which vitiated his consent in the first place; and further, that, even if the consent could be regarded as amounting to an agreement, it would be avoidable for error as to fact. *Migner* v. *Goulet*, 21 C. L. T. 137, 31 S. C. R. 26.

See BILLS OF EXCHANGE AND PROMISSORY NOTES — MORTGAGE — VENDOR AND PURCHASER.

DUTIES.

See CONSTITUTIONAL LAW—REVENUE.

DYING DECLARATION.

See CRIMINAL LAW—EVIDENCE.

EARLY CLOSING.

See CONSTITUTIONAL LAW.

EASEMENT.

Agreement — *Right of way — "Droit de tour d'échelle"—Notice—Repairs—Building—Injury to adjoining premises from rain-water — Remedy.*]—An agreement between neighbours in these words, "*les parties auront toutes deux droit de passer sur le terrain situé entre les dites maisons pour réparer chacune la sienne*," does not establish a servitude of right of way; it simply confers the right known to the old French law as "*le droit et tour d'échelle*." It gives the owner of the dominant tenement the right to go upon the servient one and to use upon it such implements as ladders, scaffolding, etc., as may be necessary to repair his buildings, wherever they are in need of repair, and then only. Notice to the owner of the servient tenement is, therefore, implied, as a condition precedent to the exercise of the right. Further, it cannot be used, if no repairs are necessary, nor if such repairs cannot be effected at the season when the exercise of the right is claimed.—2. An action lies to compel the owner of a building to perform the necessary works to prevent rain-water from spattering from his roof or outworks into his neighbour's windows. *Thibault* v. *Gourde*, 33 Que. S. C. 536.

Ancient lights — *Prescription—Unity of possession—Evidence — Onus—Presumption —Commencement of statute.*]—A right to the access and use of light to a house cannot be acquired under the Prescription Act by the lapse of time during which the owner of the house or his occupying tenant is also occupier of the land over which the right would extend. In an action to establish a right to ancient lights, the burden of proof in the first place is on the plaintiff to shew uninterrupted use for twenty years, and then the burden is shifted to the defendant to shew such facts as negative the presumption of ancient lights. Remarks as to the time from which the twenty years' prescription began to run. *Feigenbaum* v. *Jackson*, 8 B. C. R. 417.

Conveyance of lots according to registered plan — *Park reserve and entrance marked on plan—Registry laws—Statute of Limitations.*]—*Held*, affirming the judgment of a Divisional Court (19 O. L. R. 471, 14 O. W. R. 710, 1 O. W. N. 62) in the circumstances there stated, that what the plaintiff claimed and was entitled to was an easement, and that the defendant's possession was insufficient to bar the plaintiff. — *Mykel* v. *Doyle* (1880), 45 U. C. R. 65, approved and followed.—*Per* Garrow, J.A., that even if the conveyance to the defendant had actually been of the land which she claimed to have purchased, she must have taken subject to the rights of prior and subsequent purchasers of lots laid out on the plan, such rights resting upon and being protected by prior registration of the plan, of which every one subsequently dealing with the land was bound to take notice; and such rights were in the nature of easements.—*Per* Meredith, J.A., that the whole difficulty had arisen through a mistake of fact as to the actual position on the ground of the reservations, a mistake made when the defendant first acquired an interest in the land, and not attributable to the plaintiff; what the parties were bargaining about was land abutting on these reservations, with common rights over them, for access, etc.; position on the ground of the reservations—created, at least, when the defendant took her lease — being easements, against which the Statute of Limitations relied upon by the defendant does not run, no title by length of possession had been acquired. *Ihde* v. *Starr* (1910), 21 O. L. R. 407, 16 O. W. R. 473, 1 O. W. N. 909.

Deed — *Registration — Renewal—Road—Discontinuous, but apparent servitude—Ingravation.*]—Default to renew the registration of the instrument creating a servitude, does not effect the extinction of such servitude, unless a real, discontinuous, and non-apparent servitude is in question.—2. In the present case the servitude, while discontinuous, was apparent; it was indicated by a road, and the Act 44 & 45 V. c. 6, ss. 5, 6, 7, does not apply to servitudes discontinuous but apparent, and consequently it was not necessary to renew the registration of the instrument

which constituted it.—3. It cannot be said that there is aggravation of the servitude by the fact that the place where it is sought to be maintained changes little by little by reason of the fact that the water of a river breaks the land and makes more distant, little by little, the place where the gravel is found which is to be taken out according to the terms of the instrument creating such servitude. *Perry* v. *Simard*, 21 Que. S. C. 522.

License to build a house on land — *Exclusive enjoyment — Profit à prendre — License to use land as fishing station—Transfer.*]—The right to build a house on another man's land is not an incorporeal hereditament. Such a right is a mark of title and of exclusive enjoyment and is not an easement or *profit à prendre*.—The right to put boats, nets, etc., on shore and to use the property as a fishing station is not an easement, and, if a *profit prendre*, is personal only, and not transferable. *Pitman* v. *Nickerson*, 40 N. S. R. 20.

Light — Air — Ventilation — Private way — Prescription — Proof — Injunction —Damages—Costs. *Davids* v. *Newell*, 8 O. W. R. 297.

Light — *Injunction — Lost grant — Evidence — Inference — Ancient lights.*]—An application of the plaintiff for an injunction restraining the defendant from erecting a building which would deprive the plaintiff of light through certain windows, was refused, where the evidence did not warrant the Judge in inferring a lost grant, and where serious injury would be inflicted on the defendant if the erection of the building were delayed.—An inference that might be drawn from the continuous enjoyment of such an easement for 20 years may be rebutted and disproved. Cases under the common law relating to ancient lights referred to. *Crowe* v. *Cabot* 40 N. S. R. 177; *O'Mara* v. *Eden*, *ib.* 180*n*.

Light — *Obstruction to access of light to windows—Claim under grant—Distinction between grant and ancient lights—Injunction — Waiver — Damages — Mortgage.*]—The rules settled by the Courts in case of the interference with ancient lights are not applicable to a case where, as here, the plaintiff's rights are dependent upon a prior conveyance from the common owner of his lot and the adjoining one, now owned by the defendants, the plaintiff being entitled to receive such access of light through his windows as the windows afforded at the time of the severance of his lot from that owned by the defendants.—*Held*, however, Mabee, J., dissenting, that the plaintiff had, by his inertness in insisting on his rights while the defendants' building complained of was in course of construction, disentitled himself to a mandatory injunction for its removal, his remedy being limited to an award of damages. —*Held*, also, that the existence at the time of the grant to the plaintiff's predecessor in title of an outstanding mortgage, which was subsequently discharged, was not material. *Simpson* v. *T. Eaton Co.*, 10 O. W. R. 215, 569, 15 O. L. R. 161.

Light — *Servitude — Contract — Interference with enjoyment of.*]—A notarial deed made between the parties and intituled "*Convention et Accord*," contained among other provisions the following: "The parties, their heirs and those claiming under them, shall respectively have the right to maintain forever the windows (*ouvertures*) which actually exist in their said dwelling houses built on said lots Nos. 120 and 119, and will have the right to change the places of the same according to their respective need, but they will not have the right to construct more of them than they now actually respectively have:"—*Held*, that the deed above mentioned created an easement for light in favour of the covenantees. — 2. It follows that nothing may be done which would limit the enjoyment of this easement or make it inconvenient; the condition of the place cannot afterwards be changed so as to render the right illusory.—3. Thus the construction of a new roof on the house at such a height that it takes away almost all the light and air obtained from a window of which the existence and enjoyment were assured by such deed, constitute an obstacle to the enjoyment of such easement.—4. As a consequence he having a right to this easement can demand that this new construction be removed and the removal should be to such an extent that, after it has been done, the person having a right to the easement will enjoy it to the same extent as before.—5. The easement of light covenanted for by the plaintiff places on the defendant, the owner of the servient tenement, the implicit obligation not to build in such a manner as to destroy the enjoyment of the easement by the plaintiff. *Thibault* v. *Gourde*, 26 Que. S. C. 185.

Light — *Servitude — Right of view — Deed — Reservation — Way — Rights in common.*]—A conveyance of lands fronting on public highways with the right of passage merely over a private lane, does not create a servitude that can entitle the grantee to make windows and openings in walls which are built upon the line of the lane.—A reservation in a deed of partition to the effect that lanes through subdivided lands should be held in common by the proprietors *par indivis*, or their representatives, must be construed as reserving the rights in common only to the co-proprietors, and their heirs or the persons to whom such rights in the lanes might be conveyed.—Judgment in *Goné* v. *Lespérance*, 14 Que. K. B. 168, affirmed. *Lespérance* v. *Goné*, 25 C. L. T. 138, 36 S. C. R. 618.

Light — *Servitude — View — Indirect view.*]—A view over a contiguous tenement from a platform or gallery, of which the front parallel to the division line is closed, obtained by leaning over the side rails that are at right angles to the division line, is not a direct view, within the meaning of Art. 536 C. C. *De Bellefeuille* v. *Auger*, 28 Que. S. C. 532.

Non-apparent continuous servitudes —*Building restrictions — Necessity for renewal of registration—Party wall—Deed—"Fastened."*] — Clauses in a deed of sale, prohibiting building in certain materials, or for certain purposes, do not create servitudes. 2. The words "établissements qui pourraient être de nature à incommoder les voisins et

devenir un sujet de plainte," imply some substantial inconvenience exceeding ordinary grievances such as neighbours living together are obliged to endure. 3. A proprietor has a right, under Art. 520, C. C., to occupy nine inches of his neighbour's land for a foundation wall eighteen inches in thickness. He has also the right to erect upon his line a building which cannot serve as a mitoyen wall, such as a wooden brick-encased wall, but subject to the obligation of demolishing such wall at his own cost, in the event of his neighbour constructing a mitoyen wall between their respective properties; and even where the previously existing wall was quite sufficient for his purposes, he will still be obliged to contribute one-half of the cost of the mitoyen wall if he use it. 4. The word "fastened" (scellé) in Art. 534, C. C., is sufficiently complied with by a window fixed to the wall with nails or screws, and these covered by a moulding of plaster which is, itself, fastened in such a way as not to be removable without being broken. 5. The deed creating a servitude must sufficiently indicate the dominant property without extrinsic aid. Judgment in Que. S. C. 292 affirmed. *Sicotte* v. *Martin*, 20 Que. S. C. 36.

Pleading — *Interest of claimant.*]—In an action to establish a right of servitude, allegations in the defence that the plaintiff has no interest in the servitude which she claims —in this case a right of way—and that her action is brought only for the purpose of forcing the defendant to purchase her land, will be struck out on demurrer. *Content* v. *Demers*, 2 Que. P. R. 500.

Prescription — Ditch — Statutory authority—Crown — Statutory easement—Maintenance of ditch—Pleading—Amendment — Vendor and purchaser. *Gray* v. *Daniels* (B. C.), 8 W. L. R. 246.

Private way — Unity of ownership — Subsequent severance—Revival of easement —Reservation. *McClellan* v. *Powassan Lumber Co.*, 42 S. C. R. 249.

Projecting eaves — *Descending water and snow—Common owner—Conveyance by —Grant and reservation of rights.*] — The plaintiff's predecessor in title, owning a lot of land, built two houses thereon, with a passageway between them, and the eavestrough and part of the eaves of the defendant's house projecting over the passageway. He then conveyed to the defendant's predecessor in title the westerly house, "with the privilege and use of the projection of the roof . . . as at present constructed," and covenanted for the quiet and undisturbed enjoyment of the projection, and that, on any sale or conveyance of the house to the east, he would "save and reserve the right . . . to such projection." Subsequently he conveyed the easterly house, with the land between the two houses, to the plaintiff, "subject to the right . . . to the use of the projection . . . as at present constructed:—*Held*, that the defendant was not bound to prevent the snow and water discharged from the clouds upon his roof from falling from it upon the plaintiff's land, and that the easement of shedding snow and water, as had been done ever since the defendant's house was built, was necessary to the reasonable enjoyment of the property granted; that the grantor could not insist upon the grantee altering the construction of the roof so as to prevent the snow and water coming down, and the plaintiff stood in no higher position than the grantor; that the projection of the roof over the plaintiff's land carried with it the necessary consequence that water and snow falling upon the roof must to a large extent descend upon the land below; and the action was dismissed with costs. *Hall* v. *Alexander*, 22 C. L. T. 178, 3 O. L. R. 482, 1 O. W. R. 204.

Right of aqueduct — *Lease — Grant—Title — Deed—Covenant—Trespass.*]—The grant in a lease by the owner of an inheritance of the right to empty water upon the premises and to conduct pipes through and make cisterns and other works in connection with an aqueduct and repairs thereof, together with the declaration of the lessor that he does not intend to bind his heirs and assigns, is a sufficient title to the lessee, and affords ground for resisting an action for trespass for exercising such right, brought by the son of the owner, who has become the purchaser of the inheritance by virtue of a deed in which he engages to observe the provisions of the lease and the servitudes established by it. *Roy* v. *Cliche*, 16 Que K. B. 101.

Right of aqueduct — *Prescription — Adverse enjoyment—Lost grant—User—Injunction.*]—The plaintiffs and their predecessors in title had for many years, under a lease from B., a supply of water by pipes passing through the land of the defendant. B. did not in fact own the land, and had no right to make the lease. There was no evidence that the lease was made with the knowledge and consent of H. (the predecessor in title of the defendant), the owner of the servient tenement:—*Held*, that the plaintiffs' right to the easement could not be supported on the presumption of a lost grant and a continuous uninterrupted user for over 20 years referable to that title.—*Held*, *per* Hannington, J., that assuming that the plaintiffs were entitled to the easement as claimed, the erection by the defendant of the building on his land as proposed was no infringement of the plaintiffs' right for which an injunction ought to be granted. *Loggie* v. *Montgomery*, 3 E. L. R. 336, 38 N. B. R. 112.

Right of drawing water — *Right of way—Action négatoire—Title—Revendication —Bornage—Description of land — Seigneurie Measurements—English or French feet — Contractual derogation from rule of law.*]—An action *négatoire* between neighbours concerning the right of drawing water from a well and the right of way, to which the defendant sets up as an answer his right of property in the land upon which the well and the way are, may be tried and decided as an action for revendication of the land, without its being necessary to resort to a *bornage*.—The extent or quantity of land expressed in square feet means French feet where the land originally formed part of a *seigneurie*, and English feet in all other cases. Nevertheless, one may depart from this rule by agreement, and when land formerly belonging to a *seigneurie* is granted by a *seigneur*

with an express description as containing so many feet English measure, subsequent alienations of portions of the land measured by feet must be considered as made according to the same measure, where this is recognised by the parties in their deeds by the references which they make to the original grant, and in their conduct during their possession. *Béchard* v. *Boucher*, 31 Que. S. C. 92.

Right of way — *Agreement—Evidence—User.*]—The plaintiff claimed a right of way over a private road 700 feet in length, in part on land of defendant adjoining plaintiff's land, and leading from a public highway to lots comprised in part by defendant's land, sold by defendant's predecessor in title, B., under a conveyance reserving to the grantees the use in common of the road. The evidence of plaintiff's predecessor in title, K., was that, shortly after the sale of these lots, he moved back on his land his farm house and fence, to widen the entrance of the private road at its junction with the highway, under an agreement with B., concurred in, as he believed, by the owners of the lots, that he, K., should have for so doing a right of way with them over the road. B. denied that an agreement was concluded, or that the matter ever proceeded beyond negotiation, and his evidence was corroborated by H., a former owner of the lots, and by drafts of an agreement containing alterations indicating that the parties were merely in treaty, and providing for the maintenance of the road by K. in common with the owners of the lots, an obligation disclaimed by plaintiff, and for a conveyance by K. of the part of his land to be used for widening the entrance. This conveyance was never made, and the land was included in the conveyance from K. to the plaintiff. The road had been used, from the time of the alleged agreement, by K. and plaintiff in connection with the farm house, until it was torn down, situate about 200 feet from the public highway, and the plaintiff had used, but not without interruption, the road for about 13 years, for a considerable part of its length. Shortly after the date of the alleged agreement, fences with gates, crossing the road at separate points, were erected by H. without objection by K.: —*Held*, that the plaintiff's bill for an injunction to restrain the defendant from obstructing plaintiff in the use of the road, should be dismissed. *Fairweather* v. *Robertson*, 24 C. L. T. 232, 2 N. B. Eq. 412.

Right of way—*Extinguishment by tax sale—Onus.*]—Plaintiff was declared entitled to an easement over a strip of land. The defendant alleged the extinguishment of the easement by a tax sale, but he did not meet the onus of shewing a valid tax sale, the production of the tax deed not being enough. *Essery* v. *Bell*, 13 O. W. R. 395.

Right of way—*Limited grant—Colourable user.*]—A right of way granted as an easement incidental to a specified property cannot be used by the grantee for the same purposes in respect to any other property. Judgment of the Court of Appeal, 26 A. R. 95, *ante* 77, affirmed *Robinson* v. *Purdom*, 19 C. L. T. 374, 30 S. C. R. 64.

Right of way—Reconveyance—Indemnity—Party wall—Prescription—Chimney. *Lane* v. *George*, 4 O. W. R. 539.

Right of way—Repairs—Dominant and servient tenements—Water—Right to flow of—Injunction. *Burrell* v. *Lott*, 1 O. W. R. 181, 3 O. W. R. 115.

Right of way — *User—Prescription — Railways—Crossing.*]—A railway line passed over the northern half of lots 32, 33, and 34, respectively, of the 8th concession of North Dumfries, having a trestle bridge over a ravine on lot 34, near the boundary of 33. G., the owner of lot 33 (except the part owned by the railway company), for a number of years used the passage under the trestle bridge to reach a lane on the south half of lot 34, over which he could pass to a village on the west side, his predecessor in title, who owned all these lots, having also used the same route for the purpose. The company having filled up the ravine, G. brought this action for a mandatory injunction to compel the defendants to reopen it:—*Held*, reversing the judgment of the Court of Appeal, 27 A. R. 64, 20 C. L. T. 56, that such user could never ripen into a title by prescription of the right of way, nor entitle G. to a farm crossing on lot 34. *Guthrie* v. *Can. Pac. Rw. Co.*, 21 C. L. T. 222, 31 S. C. R. 155.

Rights appurtenant to dominant tenement — *Construction of ice-house — Flooding of servient tenement—Aggravation of servitude—Abatement of nuisance.*]—The construction upon a dominant tenement of an ice-house in such a manner as to cause the water from melting ice stored therein to flow down upon the adjoining lands on a lower level, and cause injuries to the property, is an aggravation of the natural servitude, for which the owner of the servient tenement is entitled to recover damages for the injury resulting therefrom, and to have a decree for the abatement of the nuisance; Girouard, J., dissenting. *Audette* v. *O'Cain*, 27 C. L. T. 658, 39 S. C. R. 103.

Sale of land—*Severance—User.*]—*Held*, affirming the judgment in 32 N. S. R. 340, that where two properties of one owner are sold at the same time, and each of the purchasers has notice of the sale to the other, the right to any continuous easement passes with the sale as an absolute legal right; but the same must have been enjoyed by the vendor at the time of the sale. Therefore, one purchaser could not claim the right to use a dam on his land in such a way as to cause the water to flow back on the other property, where such right, if it had ever been enjoyed by the former owner, had been abandoned years before the sale. *Hart* v. *McMullen*, 20 C. L. T. 197, 30 S. C. R. 245

Servitude — *Change of level—Injury to lower land—Remedy.*]—The owner of the lower parcel of land is not liable for damage suffered by the owner of the higher parcel by reason of the lessee of the lower parcel having changed the level, the latter not being the agent or representative of the owner of the parcel. 2. The owner of the higher parcel cannot even require the owner of the lower to pull down at his expense the obstructions created by his tenant; he can only demand the power to destroy them himself at his own charges, reserving his recourse in damages against the lessee who did the mischief. Judgment in 11 Que. K. B. 173

varied. *Kieffer* v. *Ecclésiastiques du Séminaire des Missions Etrangères*, 13 Que. K. B. 89. [1903] A. C. 85.

Servitude — *Covenant — Vagueness — Building on adjoining "lot"—Construction —"House"— Alignment and height of buildings.*]—Effect will be given to a covenant of servitude, though expressed in vague or indefinite language, if the intention of the parties clearly appears from the circumstances in which it was made.—Thus, where in the sale of part of a lot, the purchaser agreed not to build except on a line with and no higher than the houses to be erected by the vendor on the adjoining lot, and the only adjoining lot owned by the vendor, at the time, was the remainder left him after the sale, the servitude thus stipulated is not void for vagueness, but exists in favour of that remainder, as the dominant tenement.—2. The word "lot," in a grant of an easement or servitude, may mean "part of a lot," when the context or the circumstances make it so appear.—3. The word "house," in a covenant intended to fix the alignment and height of buildings, includes shops or stores, as well as dwelling-houses. *McCallum* v. *Morgan*, 32 Que. S. C. 67.

Servitude — *Enclave—Right of way — Necessity.*]—A proprietor whose land is enclosed on all sides by that of others, and who has no communication with the public road, cannot claim a way over the land of a neighbour which does not offer the shortest crossing, unless it be established in evidence that the shortest crossing would be too inconvenient for the use of the enclosed proprietor. Judgment in 17 Que. S. C. 522 affirmed. *Boyer* v. *Perras*, 10 Que. K. B. 313.

Servitude — *Right to discharge water on adjoining land—Action négatoire—Claim for damages—Action for tort—Third party— Stay of proceedings to add.*]—A plaintiff who, by an action *négatoire de servitude*, contests the defendant's right of exercising a servitude over the plaintiff's land by discharging water upon it from his (the defendant's) land, and who grafts upon this action a claim for damages, is in fact bringing an action for a tort, especially where he alleges no act on the part of the defendant tending to shew that the latter intends to exercise a servitude. In such a case the defendant, alleging that he is subjected to the same treatment by a third person, cannot, by dilatory exception, demand a stay of proceedings for the purpose of bringing this third person into the action and making him take *son fait et cause*. *Roumilhac* v. *Deniss*, 10 Que. P. R. 63.

Servitude — *Tacit extinction—Building on adjoining lot—Height of building.*]—Servitudes may be extinguished by tacit (as well as express) abandonment or renunciation. Extinction may result, in the case of a servitude *non altius tollendi*, from the fact that the owner of the dominant tenement, having alienated the part contiguous to the servient tenement, has permitted the purchaser, a joint stock company in which he is a shareholder, to erect upon it a building of a height exceeding that permitted by the servitude. Judgment in *McCallum* v. *Morgan*, 32 Que. S. C. 67, reversed. *Morgan* v. *Guy*, 18 Que. K. B. 56.

Servitudes — *Building restrictions — Necessity for renewal of registration—Party Wall—Deed—"Fastened."*]—1. Clauses in a deed of sale, prohibiting building in certain materials, or for certain purposes, do not create servitudes; and, even assuming that they do, such servitudes, being continuous non-apparent servitudes, are extinguished, as regards subsequent purchasers of the immovable sold, by want of renewal of registration. 2. The words "établissements qui pourraient être de nature à incommoder les voisins et devenir un sujet de plainte," imply some substantial inconvenience exceeding ordinary grievances obliged to endure. 3. A proprietor has a right, under Art. 520, C. C., to occupy nine inches of his neighbour's land for a foundation wall eighteen inches in thickness. He has also the right to erect upon his line a building which can not serve as a mitoyen wall, such as a wooden brick-encased wall, but subject to the obligation of demolishing such wall at his own cost, in the event of his neighbour constructing a mitoyen wall between them; and even where the previously existing wall is quite sufficient for his purposes, he will still be obliged to contribute one-half of the cost of the mitoyen wall if he use it. 4. The word "fastened" (scellé) in Art. 534, C. C., is sufficiently complied with by a moulding of plaster which is, itself, fastened in such a way as not to be removable without being broken. 5. The deed creating a servitude must sufficiently indicate the dominant property without extrinsic aid. *Sicotte* v. *Martin*, 19 Que. S. C. 292.

Severance of tenement — *Right of drainage—Implied grant—Continuous easement but not apparent or necessary.*]—The plaintiff owned the eastern half of a double house, and the defendant owned the other half, which was situate higher up the hill than the plaintiff's. From the sink in the defendant's house a drain was used, which came through the partition wall, under the floor in the basement of the plaintiff's house and connected with the sewer in the street. The plaintiff's sink connected with the same drain. There was no other connection between the sewer and the two houses. Both parties derived their title from G., who had devised one house to each of two nieces. The defendant claimed a right of drainage over the plaintiff's property, as an implied grant when the severance of ownership took place: —*Held*, that, although it was a continuous easement, it was not an "apparent" and necessary easement to the enjoyment of the defendant's house. *Tanner* v. *Hiscler*, 40 N. S. R. 250.

Street — *Private way — Right of access —Payment—Reservation—Indemnity — Covenant—Future payments.*]—*Held*, that College street, in the city of Toronto, was, up to the year 1889, a private road, to which adjoining owners acquired no right of access; that the reservation upon its dedication in that year by the University of Toronto to the city corporation of the right of the University to compel adjoining owners to pay for the right of access was valid; that a covenant by a vendor of land adjoining the street in favour of the purchaser thereof to indemnify him "against the payment of any money, and against all loss, costs, or damages he

may be obliged to pay to secure access," was therefore enforcible; and that the covenantee could recover not only the amount of payments actually made, but also the amount of payments to be made by him in the future, under an agreement by which he agreed to pay a sum in instalments for the right of access. Judgment of MacMahon, J., 1 O. L. R. 382, 21 C. L. T. 290, affirmed. *Palmer* v. *Jones*, 21 C. L. T. 556, 2 O. L. R. 632.

Water privilege — *Original in grant—Prescriptive title—Evidence—Referee's deed—Proof of decree.*]—In 1854 R. B., owner of lot 8, conveyed the northern part thereof to M., together with the privilege of taking water thereto through a pipe, which M. was empowered to build, from a spring on the southern part of the lot. By *mesne* assignment M.'s lot, with the water privilege, became vested in T. B. In 1871, he executed to S. for 21 years with covenant for renewal, a lease of the spring, with a right to lay a pipe therefrom through the southern part of lot 8 to lot 9. The ownership of the southern part of lot 8 was then in H., and in 1905 became vested in the defendant. In 1872 S. built a pipe from the spring across H.'s land to lot 9 and it has been in uninterrupted use ever since, a period exceeding 20 years. In 1904 lot 9 with the lease was assigned to the plaintiffs. The plaintiffs' predecessors in title always rested their right to the easement; this could not be set up.—A deed of a referee in equity, though purporting to have been made under a decree of the Court, is not admissible in evidence without proof of the decree. *Logie* v. *Montgomery*, 26 C. L. T. 465, 3 N. B. Eq. 238.

Water supply — *Servitude — Contract—Rescission.*]—In the year 1880 R., who was building an aqueduct, found it necessary to pass over D.'s land, and bound himself, in consideration of being permitted to do so, to supply D. with as much water for the use of his house as he had a right to expect from the proper working of the aqueduct, on payment of $4 per annum. In 1902 R. forcibly broke the connection between the main pipe and D.'s house and cut off his supply of water, because, although D.'s family had increased in numbers, he refused to pay $9 per annum for the water:—*Held*, that R. had no right to refuse the supply of water so long as he retained the servitude of D.'s property.—2. If a party to a contract dissolves it by reason of infractions, by the other party, of some of its stipulated conditions, he must dissolve it *in toto*. *Doyon* v. *Roy*, 24 Que. S. C. 191.

Water supply—*Servitude — Enforcement—Interlocutory injunction.*]—If a right to a supply of water is granted in exchange for other advantages, it should be considered rather as a right of servitude attaching to the realty than as a personal right; and an interlocutory injunction will be granted to compel its enforcement, especially when the respondent cannot terminate it without trespassing on the land of the applicant. *Christin* v. *Pelouquin*, 7 Que. P. R. 13.

See Architect, Assessment and Taxes, Assignment of Chose in Action, Building, Chose in Action, Contract, Costs, Crown, Deed, Injunction, Landlord and Tenant, License, Limitation of Actions, Mines and Minerals, Nuisance, Railway, Timber, Vendor and Purchaser, Water Deed, Watercourses, Ways.

EATING HOUSES.

See Municipal Corporations.

ECCLESIASTICAL LAW.

See Church—Marriage.

EDUCATION.

See Schools.

EJECTMENT.

Action brought under order of Equity Court—*Proof of title—Presumption of possession—Nonsuit.*]—R. filed a bill in equity praying that M. might be restrained from asserting title to a lot of land, and that R. might be declared to be entitled to the lot in fee simple. The Judge in Equity directed that R. bring an action of ejectment against M. to try the title. Both parties failed to prove a documentary title, and relied upon, and gave evidence of, title by possession. On questions submitted the jury found that R. and his predecessors in title had been in possession of the lot since 1876. On this finding the trial Judge ordered a verdict to be entered for R.:—*Held*, that the direction was right, and the Court was not obliged to treat the action under the order of the Equity Court as an ordinary action of ejectment, and assume the defendant to be in possession, and nonsuit the plaintiff on failure to prove title. *Robertson* v. *Miller*, 35 N. B. R. 686. The decree in equity founded upon the verdict in this case was reversed by the Supreme Court of Canada. *Miller* v. *Robertson* (1904), 35 S. C. R. 80.

Action for possession — *Damages for detention—Mesne profits—Reference—Costs.*]—Plaintiff brought action to recover possession of certain unpatented lands and for damages for their detention by defendant.—Magee, J., gave plaintiff judgment for possession for payment by defendant of *mesne* profits with reference to Master at Cayuga to fix amount and costs.—Divisional Court dismissed defendant's appeal with costs. *White* v. *Thompson* (1911), 18 O. W. R. 478, 2 O. W. N. 607.

Application to be put in possession after adverse judgment at trial—Refusal — Practice. *Girroir* v. *McFarland* (1910), 9 E. L. R. 109.

Change of ownership—*Notice to tenant.*]—The plaintiff in an action of ejectment must prove the change of ownership of the land, and notice thereof given to the tenant. *Valiquette* v. *Kennedy*, 7 Que. P. R. 409.

Documentary title — Root of title not shewn—Possessory title. *Gaudet* v. *Hayes*, 3 E. L. R. 152.

Condition of re-entry for want of property to distrain — *Tenant denying to bailiff that there was property to distrain, not estopped from shewing the truth at the trial—His credibility a question for the jury.*]—Ejectment on a condition of a re-entry for want of property to distrain. The bailiff had been sent to search the premises, and had also a demand in ejectment to serve if no property should be found on which to levy. He found nothing, but on passing a hovel he asked defendant if there was any property there, and defendant said there was not, and the bailiff did not search it, and served the demand in ejectment. On the trial the defendant did not dispute his former denial that there was property, but proved that there was sufficient to satisfy half a year's rent. Plaintiff contended that defendant was estopped from denying the truth of his statement to the bailiff. At the trial the Judge held defendant was not estopped and plaintiff submitted to a non-suit. A rule *nisi* to set the non-suit aside and for a new trial was granted on the ground that defendant was estopped: — *Held*, Peters, J., that defendant was not estopped, but that the rule should be made absolute on the ground that plaintiff had a right to have the credibility of defendant's testimony in contradicting his former statement submitted to a jury. *Stewart* v. *McPhee* (1863), 1 P. E. I. R. 236.

Equitable defence — *Verdict for defendant—Legal title—Costs.*]—In an action of ejectment, where the defendant pleads that he is entitled to possession on equitable grounds, and the Judge trying the case without a jury finds that the plea is proved, it is proper under s. 134 of C. S. N. B. 1903, c. 111, to order a verdict for the defendant, although the legal title and right to possession is in the plaintiff, and the effect of the verdict is to deprive the plaintiff of the costs of the ejectment. *Souci* v. *Guillette*, 37 N. B. R. 393, 1 E. L. R. 356.

Improvements — *Tender — Condition—Description of land.*]—In a petitory suit by the owner of land against a possessor, the plaintiff is not obliged to tender with his action an amount for the improvements; he is not in default to pay the amount until it has been fixed by the Court. A tender expressed to be made without a prejudice, and pour acheter sa paix, and under the condition that the party to whom it is made can take it only as a complete settlement of his claim in principal, interest, and costs, is not illegal and will not be struck from the record on demurrer; it is not equivalent to a payment of the amount, but is a mere proposal. A tender is not necessarily illegal by reason only that there is a condition attached to it. Where land claimed by a petitory suit was situated in a locality of which there was no cadastral plan, and no fences or other boundaries, the judgment was held to be executable and the land to be sufficiently described as the lot of land situate at Fox Bay, Anticosti, on which the defendant had built a dwelling house which he occupied. *Menier* v. *Whiting*, 18 Que. S. C. 113.

Issue as to position of house—Abandonment of, by defendant at trial—Judgment for possession — *Mesne* profits—New trial— Costs. *Little* v. *Pellctier* (N. W. T.), 3 W. L. R. 67.

Mesne profits — Improvements — Evidence—Damages—Costs — Set-off. *Easten* v. *Anderson* (Alta.), 7 W. L. R. 282.

Pleading — *Defence—Deed given as security — Amendment—Parties.*]—To an action by the plaintiffs, as executors and heirs of W., to recover possession of land which it was alleged the defendant had entered into possession of and was withholding, the defendant pleaded that the land in question was conveyed to W. by M. by a deed which, though absolute in form, was given by way of mortgage to secure a sum of money; that W. executed a bond to reconvey the land upon payment of the amount secured with lawful interest; that M. died intestate and since his death the land in question had been in possession of H., one of the heirs-at-law of M., and had never been in possession of the defendant; and that before action brought the full amount of principal and interest was tendered to the plaintiffs. This paragraph of the defence having been struck out as disclosing no reasonable answer to the action, or, in the alternative, as tending to prejudice, etc., the fair trial of the action:—*Held*, that the paragraph should be restored and amended in such a way as to shew that the heir of M., in whose possession the land was alleged to be, was the defendant's wife, and that the plaintiffs, if they wished, should have leave to add H. as a defendant. *Whitman* v. *Hiltz*, 38 N. S. R. 174.

Proof of title — *Heir-at-law — Unrecorded deed—Sale by administratrix — Presumption—Paper title—Adverse possession—Acts of possession—Limitation of actions.*]—An unrecorded deed from the heir-at-law of the owner of the fee to his widow in occupation at the time of his death, which occupation was continued by the widow and her successors in title to the time the deed was given, and for more than twenty years after, is not a deed by one disseised (the possession not being adverse), but operates as a conveyance of the heir's title, or, at all events, is good as a release against the heir or one claiming through him under a recorded deed. After a lapse of thirty years a deed by an administratrix, under a license from the Probate Court to sell, will be presumed to be good, though there is no affidavit of the administratrix indorsed thereon, as required by the Probate Act of 1840, and no proof that the provisions of the Act as to notice of sale, etc., were complied with. Adverse possession to cut down a documentary title of a defined lot must be made out clearly and satisfactorily, and must be open and exclusive, of some definite part or of the whole; and evidence of acts of cutting hay and planting crops on parts of the lot, the location of which are not so defined as to make it possible to adjudge their position or boundaries, amount only to acts of trespass. *Cairns* v. *Horsman*, 35 N. B. R. 436.

Proof of title — Heirship — Marriage—Reputation—Improvements under mistake of

title—Lien—Option of taking land. *Derrickson* v. *Ellis*, 3 O. W. R. 828.

Right of action—*Lease—Reversioner.*]—An owner of land may bring an action to recover possession, although he has previously given a lease of it to a third party. *Penner* v. *Winkler*, 15 Man. L. R. 428, 1 W. L. R. 403.

Theatre—*Plaintiffs in wrong seat — Refused to move—Assault upon house constable —Forcible ejectment—Action for damages.*]—Teetzel, J., *held*, that when a patron goes to a theatre and is by mistake of the usher, given a seat to which his ticket does not entitle him to remain, he is only a licensee, and has no right to hold the seat after his attention has been called to the error, and that if he refuses to leave the seat, the theatre authorities are justified in using such force as may be necessary to remove him. *Hyde & Lashman* v. *Toronto Theatre Co.* (1910), 17 O. W. R. 380.

Title — *Adverse possession—Evidence — New trial.*]—On the trial of an action of ejectment, where the defendant claimed title by adverse possession, the Judge, in charging the jury, told them that if what the plaintiff stated was true, it would be difficult for them to find the defendant's holding to be open and adverse to the plaintiff. The jury, however, found that the defendant had title by adverse possession:—*Held*, that the verdict was not perverse, but there should be a new trial, as it was against evidence. *Porter* v. *Brown*, 36 N. B. R. 585.

Title — *Certificate under Land Registry Act—Tax sale — Regularity—Onus.*]—In an action for the recovery of land, a plaintiff who relies on a certificate of title based on a tax deed, is not called upon to prove the regularity of the tax sale proceedings until the defendant shews some title to the land in question. *Carroll* v. *Vancouver*, 10 B. C. R. 179.

Title of plaintiff—*Possession of defendant—Mortgage—Foreclosure — Decree pro confesso—Nonsuit.*]—P., by his will made in 1879 and registered in 1883, devised the land in dispute to the defendant M. D. for her life, she being then in possession, on condition that she pay a certain sum of money to a person named at a time specified, and on her death or in default of payment to W. H. P. in fee. There was no evidence whether M. D. paid the money or not, but she remained in possession of the property, and there were other circumstances from which it was assumed that she had. W. H. P. mortgaged the property to B. in 1895. Upon this mortgage a suit for foreclosure was brought in equity, in which suit M. D. was joined as a defendant. The bill was taken *pro confesso* for want of an appearance, and a decree for sale made. At the sale under this decree W. H. P. became the purchaser, and in 1897 he mortgaged to the Globe Savings and Loan Company. The Globe Company, through liquidators, assigned the mortgage to the plaintiffs, and they sold under the power of sale and acquired any title that could be derived from that source. No proof was given of the liquidation proceedings or the appointment of liquidators. In an action of ejectment by the plaintiff against M. D. and her husband, the trial Judge held that, assuming the interest of M. D. in the property to have been foreclosed by the equity suit, the plaintiff, by failing to prove the liquidation proceedings or the appointment of liquidators, made out no title which entitled them to eject the defendants in possession; and ordered a nonsuit:—*Held*, on an application to set aside the nonsuit and enter a verdict for the plaintiffs, that the nonsuit was right. *Colonial Investment and Loan Co.* v. *Demerchant*, 38 N. B. R. 431, 4 E. L. R. 546.

Trust — Statute of Frauds—Title by possession—Costs. *Sinclair* v. *McNeil*, 2 O. W. R. 915.

Verdict for defendant—*New trial.*]—In an action of ejectment, where the verdict is for the defendant, the Court will not ordinarily grant a new trial, unless special circumstances exist which prevent the plaintiff from bringing another action. *Tobique Salmon Club* v. *McDonald*, 36 N. B. R. 589.

See Husband and Wife — Judgment — Landlord and Tenant — Limitation of Actions — Pleading — Vendor and Purchaser — Water and Watercourses.

ELECTION.

See Bankruptcy and Insolvency — Courts — Criminal Law — Domicile — Dower — Elections — Insurance — Judgment — Landlord and Tenant — Limitation of Actions—Mistake—Opposition—Partnership — Parties — Penalty — Pleading — Railway — Schools — Substitution — Venue — Vendor and Purchaser—Will.

ELECTIONS.

1. Parliamentary Elections, 1586.
i. *Agency*, 1586.
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1. Parliamentary Elections.

i. *Agency.*

Delegates to convention.]—The respondent was nominated as a candidate for election as a member of the Legislative Assembly for Ontario by a party convention,

and, in acknowledging and accepting the nomination, he said: "There are three things essential to success; first, a good cause; second, proper organisation; third, hard work. The first we have; the second and third will largely depend on you:"—*Held*, that the respondent by these words constituted every delegate who was present his agent, and became responsible for all that was afterwards done by them in organisation and work for the purpose of the election. *Re East Middlesex Provincial Election, Rose* v. *Rutledge*, 23 C. L. T. 183, 5 O. L. R. 644, 2 O. W. R. 233.

Evidence of — *Canvassers—Speakers—Relatives—Scrutineers.*]—The following were held to be agents:—One who accompanied the respondent on a canvassing trip during which he spent a day canvassing for the respondent and spoke on his behalf at an election meeting at which the respondent was also present and spoke. One who accompanied the respondent on a canvassing trip, acting as interpreter (the respondent being under the impression that he was one of his supporters), and actually worked and canvassed for him with his authority. The son of the respondent, who took an active interest in the election on behalf of the respondent with his knowledge, acted as scrutineer, and was furnished with a sum of money by the respondent when leaving for the polling place at which he was to act. *Leblanc* v. *Maloney*, 5 T. L. R. 402.

Proof of.]—The respondent was the candidate of the Protestant Protective Association and of the Patrons of Industry. D. was president of the local Conservative Association for a town in the riding. After R., who was a candidate in the Liberal interest—though an opponent of B., the nominee of the Liberal party—had withdrawn, D. canvassed two or three votes in the interest of the respondent, to whom he transferred his support, probably in order to defeat B. There was one interview between D. and the respondent during the campaign, but it was not shewn clearly that the latter, or any accredited agent of his, knew that D. was working for him. The respondent was not called as a witness on this point, but there was no doubt that he relied on having the votes of the Conservatives. There was no Conservative committee, and D. did not attend the respondent's committee meetings. The evidence of one witness, if accepted in its entirety, would have brought agency home very closely, but it was contradicted by D. It also appeared that D. knew where to send a person to obtain a scrutineer's authority:—*Held*, that there was much to raise a case of suspicion, but in a question of imputed agency the facts ought to lead to a not doubtful inference; and in this case they stopped short of that, and therefore D. was not an agent for whose acts the candidate was responsible. *Re South Perth Provincial Election—Malcolm* v. *McNeill*, 2 Elec. Cas. 30.

Proof of.]—As to the agency of L., who had bribed two voters, it appeared that the respondent was brought into the field as the candidate of his party, having been nominated at a convention of the party association for the electoral district; L. was not a delegate to, nor was he present at, the convention; and he was not upon the evidence connected with the association or its officers; he was not brought into touch with the candidate, or any proved agents of his, either as regards knowledge of the fact that he was working or purported to work on behalf of the candidate, or as regards any actual authority conferred upon him to do so. But he was present at three meetings of electors when the voters' list was gone over; he acted as chairman of a public meeting called in the respondent's interest; he canvassed some voters; and from his antecedents, the respondent hoped or believed or expected that he would be an active supporter:—*Held*, by the Court of Appeal, Boyd, C., dissenting, affirming the decisions of the trial Judges, that L. was not an agent of the respondent, Haldimand Case, 1 Elec. Cas. 572, distinguished. *In re East Elgin Provincial Election—Easton* v. *Browcer*, 21 C. L. T. 10, 2 Elec Cas. 100.

Proof of.]—As to the agency of T., who had been found guilty of a corrupt practice, it appeared that he was one of the local vice-presidents of the party association above referred to; he had been present at two meetings of local party men calling themselves a "Conservative Club," who were interesting themselves in the election, and had contributed towards the cost of hiring the club room; at these meetings, he had gone over the voters' list with others, which was the only work done; at a meeting held by the respondent in the place where T. lived, he had presided, having been elected chairman by the audience, and had made a speech introducing and commending the respondent; before the meeting he had met the respondent in the street, had shaken hands with him, and asked him how things were going. The respondent did not know that T. was local vice-president, and had never heard of the "Conservative Club." T. was not a delegate to the nominating convention nor present thereat. The association, as such, was not charged with any definite duty in connection with the election except the selection of a candidate:—*Held*, reversing the decision of the trial Judges, Burton, C.J.O., and Maclennan, J.A., dissenting, that T. was an agent of the respondent. *In re East Elgin Provincial Election—Easton* v. *Browcer*, 21 C. L. T. 10, 2 Elec. Cas. 100.

What constitutes—*Authority—Recognition — Delegates to convention—Canvassing —Accompanying candidate in canvass.*] — See *In re Lisgar Dominion Election*, 22 C. L. T. 433, 14 Man. L. R. 310.

What constitutes agency.] — As to the nature of agency in the abstract, in election law there does not now seem to be any room for doubt. In election cases, as in other cases, there must be authority in some mode or other from the supposed principal. It may be by express appointment or direction, or employment, or request, or it may be by recognition and adoption of the services of one assuming to act without prior authority or request. It may be directly shewn or it may be inferred from circumstances. It may proceed directly from the supposed principal, or it may be created indirectly through one or more authorised agents. The fact that a person is a delegate to or member of the convention or body which selects a candidate

does not of itself make such a person an agent of the chosen candidate. Canvassing or other work in the promotion of an election does not *per se* establish agency, although, according to degree and circumstances, it may afford cogent evidence of agency. The respondent was nominated at a meeting of delegates from different portions of the constituency. The respondent did not appear to have definitely requested the assistance of these delegates in the contest, but at a general public meeting, after the close of the convention, he expressed hope "that all his friends would go to work with a good will;" the respondent further stated that he wished it understood that he expected the delegates to assist at the election:—*Held*, that these and other general remarks did not seem sufficient to constitute all supporters of the Government or all Liberals, or even all such in the constituency, agents of the candidate. Accompanying a candidate in his canvass is not sufficient in itself to constitute agency. *Re Lisgar Dominion Election*, 22 C. L. T. 433.

ii. *Ballot Papers.*

Divisions of—*Error in printing—Uncertainty.*]—Where a surname of a candidate had been printed so high up in the ballot paper as to appear in the division containing the name of another candidate and to lead to uncertainty as to which of the two candidates' divisions it was in:—*Held*, that the votes marked opposite to such surname were ambiguous, and could not be counted for either candidate: and a new election was ordered. *Re South Perth Provincial Election —Schoultz* v. *Moscrip*, 2 Elec. Cas. 52.

Initialling by deputy returning officer—*Numbers — Marking by voters.*]—A ballot paper properly marked by a voter, but not initialled by the deputy returning officer, having instead the initials C. S., which appeared to be and were assumed to be, those of the poll clerk, held good.—2. A ballot from which the official number was torn off, no explanation being given as to how it happened, held bad.—3. Ballots marked with a single horizontal or slanting line, instead of a cross, or with an imperfect cross, held good, following *Jenkins* v. *Brecken*, 7 S. C. R. 247. —4. Ballots marked for a candidate, but having: (1) the word "vote" written after his name; (2) having the word "Jos," being an abbreviation of the candidate's Christian name, written before his name; (3) having the candidate's surname written on the back of the ballot—held, bad. *Re West Huron Provincial Election—Garrow* v. *Beck*, 18 C. L. T. 247, 2 Elec. Cas. 58.

Marking of — *Division of—Portion removed.*]—If a ballot paper is so marked that no one looking at it can have any doubt for which candidate the vote was intended, and if there has been a compliance with the provisions of the Act, according to any fair and reasonable construction of it, the vote should be allowed.—2. The dividing lines on the ballot between the names of the candidates, and not the lines between the numbers and the names, indicate the divisions within which the voter's cross should be placed, and the space containing the number is part of the division of the ballot containing the candidate's name, so that a vote marked by a cross to the left of the line between the number and the name is good.—3. A ballot from which a portion of the blank part on the right hand side has been removed, leaving all the printed matter except a portion of the lines separating the names, but properly marked by the voter, is good.—4. Ballots marked for both candidates, and a ballot marked on the back, although over a candidate's name, are bad.—5. Ballots with other marks on them besides a cross, held good or bad under the circumstances of each case set out in the report.—6. A ballot having the name of a candidate marked on its face in pencil, in addition to being properly marked for that candidate, held good.—7. A ballot with two initials on the back as well as those of the returning officer, held good.—8. A ballot with the name of a voter on the back, held bad.—9. Ballots with certain peculiar crosses marked thereon, held good. *Re West Elgin Provincial Election*, 18 C. L. T. 249, 2 Elec. Cas. 38.

Numbering by deputy returning officer — *Numbers leading to identification of voters — Rejection of ballots — Voiding election costs.*] — The deputy returning officer placed numbers on the ballot papers by which the voters could be identified:—*Held*, the prohibition contained in the Dominion Election Act, 63 & 64 V. c. 12, s. 80, s.-s. 2 (D.) applied, and such ballots must be rejected. *Woodward* v. *Sarsons*, L. R. 10 C. P. 733, applied, and a new trial was ordered, there being a sufficient number of ballots rejected to have altered the result of the election. *Re Wentworth Dominion Election — Sealey* v. *Smith*, 5 O. W. R. 282, 9 O. L. R. 201.

Numbering by deputy returning officers—*Marking by voters—Divisions of ballot paper—Error in printing—Uncertainty.*] —The fact that a number has been placed on the back of each ballot paper in a voting subdivision, in pencil, by the deputy returning officer, will not invalidate them. — 2. The fact that the cross is marked in the division on the left hand side of the ballot paper containing the candidate's number, and not in the division containing his name, will not invalidate it. *In re West Elgin Provincial Election*, 2 Elec. Cas. 38, followed.—3. Where the surname of a candidate was printed too high up and in the division of the ballot paper occupied by the name of another candidate: —*Held*, that the ballots marked with a cross above the dividing line, but opposite the surname so placed, could not be counted for such candidate, but were either marked for the other candidate, or were void for uncertainty. *Re South Perth Provincial Election*, 18 C. L. T. 255, 2 Elec. Cas. 47.

Secrecy — *Act of deputy returning officer — Numbering ballots.*] — Under the Dominion Election Act a ballot cast at an election is avoided if there are any marks thereon by which the voter may be identified, whether made by him or not. Hence, where a deputy returning officer at a polling place placed on each ballot the number corresponding to that opposite the elector's name on the voters' list the ballots were properly rejected. Judgment of Meredith, C.J., and Teetzel, J., 9 O. L. R. 201, 5 O. W. R. 282, affirmed. Sedgewick and Idington, J.J., dis-

senting. *Re Wentworth Dominion Election—Sealey* v. *Smith*, 25 C. L. T. 133, 36 S. C. R. 497.

iii. *Claim against Candidate.*

Quebec Election Act — *Time for presentation — Approval of Judge.*]—A person who has a claim against a candidate at an election for the Legislative Assembly of the province, in relation to the election, and has not sent it in to the agent of the candidate within one month after the day of the declaration of the election, but who afterwards obtains an approval of the same by a competent Judge, under s. 231 of the Quebec Election Act, 1903, has an action against the candidate to recover the amount. The true report of s. 231, notwithstanding its permissive form, is to take the claim out of the operation of the preceding s. 230, by which it would be barred, and to restore the right to enforce it at common law. *Pigeon* v. *Chaurest*, 28 Que. S. C. 469.

iv. *Corrupt Practices—Penalty.*

Admissions — *Revocation — Candidate disbursing money through persons other than lawful agents — Presumption — Onus — Illegal expenditure — Agent or mandatory — Wilful ignorance — Voiding election — Disqualification of candidate.*] — An admission made and filed by a respondent to a controverted election petition that illegal acts have been done by electors and agents of such a nature as to cause the avoidance of the election, cannot be revoked. A demand for revocation not supported by any reason, not even that of error, will be rejected.—A candidate at a Dominion election may disburse money for election expenses only through the medium of an agent or agents appointed in conformity with s. 143 of 62 & 63 V. c. 12 (D.), and a contravention of this provision of the statute is an indictable offence; it creates besides, a presumption of fraud which the person contravening must rebut.—A candidate, having an agent as required by the section cited, who remits to another person a sum of money for the so-called legal purposes of the election, without controlling the use of it or asking for an account of it, and who destroys the documents furnished by his depositary shewing the use made of it, will be held to have approved or permitted the illegal use of it by the latter.—One who to the knowledge of the candidate, approaches the electors on his behalf and takes charge of an important part of the election, whether in the way of intrigue or otherwise, becomes the mandatory and agent of the candidate, so that the latter is responsible for and suffers the consequences of his acts. The candidate cannot pretend ignorance of them; and his neglect to control them, his care to shut his eyes and keep himself in ignorance, are equivalent to an express authorisation to commit them.—This implied mandate or agency is deduced from the circumstances, which may vary infinitely, and the appreciation of which is for the Court.—In the course of the trial in this case it was proved that the agents and mandatories of the respondent were guilty of corruption, personation, and fraudulent practices, for which the respondent was responsible, and which had the effect of disqualifying him and voiding his election. *Bergeron* v. *Brunet*, 27 Que. S. C. 389.

Agency—*Scrutineer—Burden of proof — Common law of Parliament—Irregularities—Saving clause — Scrutiny — Disqualification of voter—Crown land agent—Persons voting on transfer certificates—Agent—Names not on voters' list in poll book—Certificates issued in blank—Telegraphed certificates—Demand for tendered ballot.*]—A. was found guilty of corrupt acts at H., a polling place, on polling day. Before that day his sole connection with the respondent was that, being a livery stable keeper, he had driven the respondent, a day before the nomination, from one place in the electoral division to another. The respondent on that occasion canvassed A. for his vote, but A. made no promise, and the respondent did not ask him to vote for him. On the day before the polling, A. and one G. drove to H., arriving there in the evening. The trip was undertaken at the instance of G., who was held not shewn to be an agent of the respondent. In order to persuade A. to go to H., G. said he would procure a transfer of A.'s vote to H., and he afterwards brought and handed to A. a printed paper, signed by the respondent, apparently one of a number of scrutineer appointments which the respondent had signed in blank and left with one B., his agent. A.'s name was not inserted by the respondent, and there was no evidence to shew by whom it was filled in. The number of the polling place was left blank, and never was filled in. G. was not examined as a witness, and there was no proof of the means by which he became possessed of this paper:—*Held*, Meredith, J.A., dissenting, that the petitioner had failed to establish that A. was an agent for whose acts the respondent was responsible.—It was contended that the election should be set aside under the common law of Parliament because of the corrupt acts of A. and G. and of a number of irregularities in the conduct of the election by the officials, among which were the appointment of a non-voter as deputy returning officer at one poll and of a clergyman at another, contrary to the statute. The operations of A. and G. were, however, confined to a small portion of the electoral district; A. was the only person found by the trial Judges to have been guilty of corrupt practices, and they also found that there was no reason to suppose that corrupt practices extensively prevailed at the election:—*Held*, that if, in such circumstances, an election could be avoided, it should be only on overwhelming proof of corrupt acts of so extensive a nature as virtually to amount to a repression or prevention of a fair and free opportunity to the electors of exercising their franchise and electing the candidate they wished to represent them; and that all irregularities of the kind indicated, not affecting the result, were cured by s. 214 of R. S. O. 1897, c. 9.—In respect of votes attacked upon a scrutiny:—*Held*, that a Crown land agent under the Free Grants and Homesteads Act, authorised to take entries and make locations for free homesteads, but not to sell or to receive moneys for the sale of public lands, was not disqualified as a voter by s. 4 of the Ontario Election Act.—2. An elector engaged by a deputy returning officer to drive voters to the poll is not an agent, within

the meaning of s. 94 (1) and (2) of the Act, who is entitled to the certificate of the returning officer enabling him to vote at a polling place other than the one where by law he is otherwise entitled to vote.—3. The votes of agents who voted on transfer certificates, but whose names were not in fact on the poll books of the polling subdivisions from which they purported to be transferred, were improperly received; the right to vote was disproved by the production of the poll book, and the petitioner was not bound to shew that the names were not on the original voters' list.—4. The votes of persons voting at a polling place other than that at which they were entitled to vote, without a transfer certificate enabling them to vote at the polling place at which they did vote, were improperly received, being in violation of s. 78 of the Election Act; except in the case of a tendered vote under s. 108, or a vote polled upon a transfer certificate under s. 94, no person is entitled to be admitted to vote unless his name appears on the list in the poll book.—5. The votes of persons voting on certificates issued in blank by the returning officer, whose names were afterwards filled in by the election clerk or other person, were improperly received, being against the provisions of s. 94.—6 and 7. Certificates given to constables and certificates sent by telegraph are not properly granted under s. 94, and cannot support votes received by virtue of them.—8. Upon the evidence W., an elector, did not tender his vote to the deputy returning officer at the proper polling place, and did not demand or receive a tendered ballot in the manner required by s. 108; and, even if there had been a proper demand and an improper refusal, there was nothing more than an irregularity. — *Per* Meredith, J.A.:—W. was entitled to a vote, but the rejection of the vote could be treated only as an irregularity which should have avoided the election only if it might have affected the result. *Re Port Arthur and Rainy River Provincial Election, Preston* v. *Kennedy*, 12 O. L. R. 453, 8 O. W. R. 46.

Agency—Sub-agent. *Shelburne Election, Cowie* v. *Fielding*, 1 E. L. R. 375.

Agents—*Prevention of connivance of candidate — Onus — Saving Clause — Disqualification — Evidence—Accounts—Omission—Breach of Act — Payment of agent's expenses — Costs.*] — Corrupt practices had been committed by five or six different agents of the respondent; and it was found, as regards at least two of such agents, that the respondent had given no orders or cautions against the commission of corrupt practices, and that the circumstances were such as to throw upon him the suspicion of having sanctioned or connived at the corrupt practices committed by a third agent, although he denied on oath having been guilty of any such conduct:—*Held*, that the offences proved could not be deemed to have been of a trivial, unimportant, and limited character, and that the onus was on the respondent to shew that the offences were committed contrary to his orders and without his sanction, and, as he had failed to satisfy the Court in that regard, the election must be set aside under s. 123 of the Dominion Election Act, 1900.—2. That in seeking to disqualify the respondent the onus was on the petitioner, and the evidence was insufficient to warrant a finding that he had been personally guilty of corrupt practices. Centre Wellington Case, H. E. C. 579, Russell Case, *ib.* 199, and Welland Case, *ib.* 187, followed.—3. That the omission from the election accounts of certain payments made by the respondent personally and not through his election agent, although contrary to the Election Act, was not a corrupt practice avoiding the election. Litchfield Division Case, 5 O.M. & H. 34, and Lancaster Division Case, *ib.* 39, distinguished.—4. That the payment by a candidate of an agent's legitimate expenses while engaged in promoting his election, is not a corrupt practice; and *quære*, whether payment for the services of such an agent would be so where not colourably made to secure the agent's vote.—5. Costs awarded according to the findings. In view of s. 15, s.-s. 4, of 54 & 55 V. c. 20, the Court allowed to the respective parties the witness fees and other actual disbursements incurred in respect of the issues on which the findings had been in their favour respectively. *Re Lisgar Dominion Election*, 21 C. L. T. 487, 13 Man. L. R. 478.

Avoiding election for — *Saving clause —Application of.*]—Where only two acts of bribery were proved, but the perpetrators were both active, and one was an important agent of the candidate, and neither was called at the trial, and one of the bribes, though only $2, was paid out of the general election fund, to which the respondent had contributed $250, and the respondent's majority was 65 out of a total vote of about 5,000:—*Held*, that the election was rightly avoided, notwithstanding the saving clause, s. 172 of R. S. O. c. 9. *Re North Waterloo Provincial Election—Shoemaker* v. *Lackner*, 2 Elec. Cas. 76.

Avoiding election for — *Saving clause —Application of.*]—The total vote polled was over 4,500, and the majority for the respondent was 29. The trial Judges had reported one person guilty of an act of undue influence, three being concerned in acts of bribery, and T., an agent, and two others, of providing money for betting:—*Held*, that s. 172 of the Election Act could not be applied to save the election. *In re East Elgin Provincial Election—Easton* v. *Brower*, 21 C. L. T. 10, 2 Elec. Cas. 100.

Bribery — *Charges indefinite—Evidence.*] —Where petitioner made several indefinite charges, and on examination for discovery refused to answer certain questions, it was held he must within two days give particulars as to such charges and verify same by affidavit. *Re West Peterborough Election* (1909), 14 O. W. R. 543.

Bribery — *Evidence.*]—In Bureau's case the evidence was that he purchased a dress and gave it to the daughter of Labossière, a hotel keeper. Bureau was working in the respondent's interest and stayed at Labossière's hotel; the daughter gave up her room to Bureau and he said he wanted to make her a nice present:—*Held*, that it was impossible to infer with any certainty that the present was made for the purpose of affecting the father's vote. *In re Lisgar Dominion Election*, 22 C. L. T. 433, 14 Man. L. R. 310.

Bribery — *Offer not accepted.*]—Where a charge is made of an offer not accepted of money to influence a voter the evidence is required to be particularly clear and conclusive. *Re Lisgar Dominion Election*, 22 C. L. T. 433, 14 Man. L. R. 310.

Bribery — *Payment of voters for trifling services.*] — The bribery by L. of two persons to abstain from voting against the respondent was established by the evidence, although it was not shewn that anything was said to them about voting; L. having paid them, for trifling services which he engaged them to perform upon election day, sums in excess of the value of such services, knowing them to be voters and to belong to the opposite political party. *In re East Elgin Provincial Election—Easton* v. *Brower*, 21 C. L. T. 10, 2 Elec. Cas. 100.

Conveying voters to poll — *Onus.*]—The taking unconditionally and gratuitously of a voter to the poll by a railway company or an individual, or the giving to a voter of a free pass or ticket by railway, boat, or other conveyance, if unaccompanied by any condition or stipulation affecting the voter's action in reference to his vote, is not a corrupt practice, and the onus is on the petitioner to prove that the railway tickets supplied had been paid for. *In re Lisgar Dominion Election*, 22 C. L. T. 433, 14 Man. L. R. 310.

Dismissal of charges against candidate and agents — *Concurrent findings of both trial Judges — Disagreement of trial Judges — Right of appeal.*]—The Judges at the trial of an election petition, having reserved judgment in respect of five charges, subsequently gave judgment dismissing four of these charges, both Judges agreeing as to the result. In respect to the fifth charge—a charge of payment of money by the candidate to a voter to induce such voter to vote for him—the Judges disagreed, one Judge being in favour of the dismissal of the charge, the other being of the opinion that the charge was proved:—*Held*, that the existence of a right of appeal in respect of one class of charges does not draw with it the right of appeal in respect of other charges, as to which there would otherwise be no right of appeal:—*Held*, also, that the portions of the Ontario Controverted Elections Act relating to the right of appeal in cases of disagreement between the Judges, must be construed in connection with the other provisions of the same Act; and also with the provisions of the Ontario Election Act, which are in *pari materia;* that the words "or otherwise" in s.-s. (5) of s. 57 of the Controverted Elections Act extend the effect of that sub-section to a difference or disagreement in every matter on which a candidate might be disqualified for a corrupt practice, and that s.-s. (6) extends it to candidates and others. That if an appeal lies in case of a disagreement between the trial Judges, a judgment in appeal finding a candidate or other person guilty of a corrupt practice would necessarily subject him to disqualification or other disability or penalty, notwithstanding the absence of a concurrent judgment to that effect of the two trial Judges, and that this would be contrary to the statute:—*Held*, Maclaren, J.A., dissenting, that an appeal did not lie in respect of any of the charges. *Re Lennox Provincial Election—Perry* v. *Carscallen*, 23 C. L. T. 255, 6 O. L. R. 203, 1 O. W. R. 730, 810, 2 O. W. R. 190.

Disqualification of candidate.] — The judgment of the trial Judges unseated and disqualified the member-elect. On appeal the members of the Supreme Court of Canada were equally divided in opinion, and the judgment stood affirmed. *Re St. James Dominion Election—Brunet* v. *Bergeron*, 34 C. L. T. 147, 33 S. C. R. 137.

Evidence — *Corrupt acts at former election—Agency — System of corruption.*]—A petition against the return of a member for the House of Commons at a general election in 1904 contained allegations of corrupt acts by the respondent at the election in 1900, which were struck out on preliminary objections. On the trial of the petition evidence of payments by the respondent of accounts in connection with the former election was offered to prove agency and a system, and was admitted on the first ground. A question as to the amount of one account so paid was objected to and rejected:—*Held*, that such rejection was proper; that the question was not admissible to prove agency, for agency was admitted or proved otherwise; nor as proof of a system, which could not be established by evidence of an isolated corrupt act:—*Held*, also, that where evidence is tendered on one ground, other grounds cannot be set up in a Court of Appeal. *Shelburne and Queen's Election Case, Cowie* v. *Fielding*, 26 C. L. T. 776, 37 S. C. R. 604.

Evidence—*Hiring vehicles — Conveying voters to poll—Agents—General corruption—Payment of electors — Pretended services—Expenditure of money—Account of expenses —Disqualification of candidate — Avoidance of election.*]—In the trial of an election petition, evidence of corrupt practices must be sufficiently clear to induce belief beyond reasonable doubt, and the respondent or party charged is entitled to the benefit of the doubt. —The hiring of vehicles for the conveyance of voters to the polls is a corrupt practice, and when the person who hires and directs the carters, etc., does so from a committee room, in the presence of the president of such committee, an agent of the candidate, the latter will be held responsible therefor.—The wholesale hiring of carriages from electors and conveyance of voters to the polls constitute the offence of general corruption.—The employment and payment of electors as chairmen and members of committees is not *ipso facto* a corrupt practice, but becomes such if the employment is merely colourable and is used as an indirect means to bribe.—The expenditure of money for election purposes by a candidate otherwise than through his election agent, though not declared a corrupt practice by the Dominion Elections Act, 1900, is presumed to have been made for corruption. Where an amount of from $5,000 to $7,000 is so expended, being handed in packages of several hundred dollars by the candidate to some ten agents styled presidents of committees, and by them distributed to electors colourably employed as locators, etc., the official account of the candidate's election expenses published by his election agent amounting to only $291.35, and the personal

expenses of the candidate by his own admission not exceeding $35, there is established in evidence a system of general corruption, with the consequent avoidance of the election and disqualification of the candidate.—6. The failure to give any account whatever of amounts of $400, $700, and $750, admitted by the candidate to have been spent, is evidence that they were used for corrupt purposes with the like consequence of the avoidance of the election and disqualification of the candidate. *Darlington* v. *Gallery*, 28 Que. S. C. 50.

Findings of trial Judges—Concurrence—Disagreement—Dismissal of charges—Appeal. *Re Lennox Provincial Election—Perry* v. *Carscallen*, 2 O. W. R. 190. *Re South Oxford Provincial Election—Patience* v. *Sutherland*, 6 O. L. R. 203, 1 O. W. R. 795, 2 O. W. R. 196.

Jurisdiction over foreigners — *Summary trial of offenders — Service of summonses in foreign country — Application of Con. Rule 162 (e) — Procuring personation of voters — Evidence of persons accused — Certificate of indemnity.*]—It is no defence to a charge, under R. S. O. 1897, c. 9, of having committed illegal and corrupt acts in connection with provincial elections, that the offenders were American citizens and that they were served properly outside the jurisdiction under Rule 162 (e); see Rule LXIV. passed 23rd Dec., 1903. Transportation by steamboat of voters does not come within s. 165 of the Ontario Election Act, R. S. O. 1897, c. 9, which makes it illegal to hire vehicles, etc., by candidates to convey electors to the polls. *Re Sault Ste. Marie Provincial Election—Galvon and Coyne Case*, 5 O. W. R. 782, 10 O. L. R. 356.

The Ontario Election Act, R. S. O. 1897, c. 9, s. 189, indemnifies a defendant from any penalty resulting from his disclosures in answer to questions put to him, and he cannot be convicted on his own testimony, seeing but for this section he would have been excused from answering the questions. His testimony being the only evidence, the Evidence Act, 4 Edw. VII., c. 10, s. 21 (O.) did not apply. *Re Sault Ste. Marie Provincial Election*—Lamont's Case, 5 O. W. R. 782, 10 O. L. R. 85.

Misdemeanours with penalty attached — *Electoral Law of Quebec, 1903—Omissions by official reporters, etc., to fulfil the obligations and formalities of the law—Error, but no evil intention—Burden of proof.*]—The penalty in s. 82 of the Electoral Law of Quebec, 1903, reflecting on official reporters and others who fail to fulfil their duties and the prescribed formalities is not incurred in the case of an error made without evil intention. Moreover, the complainant need furnish no further proof than that of the fact asserted; the burden of proof then falls on the defendant to shew the absence of evil intention. *Fortier* v. *Audet* (1909), 18 Que. K. B. 560.

Nova Scotia Election Act—Bribery — Action for penalty—Discretion of Judge as to amount. *Davidson* v. *Armstrong*, 2 E. L. R. 73.

Nova Scotia Election Act—Bribery — Action for penalty—Evidence of status of person bribed. *Davidson* v. *Hall*, 2 E. L. R. 75.

Penalties — Ontario Election Act — Bribery—Change in statute — Civil remedy — Voting without oath. *Carey* v. *Smith*, 5 O. L. R. 269, 2 O. W. R. 16.

Penalties — Ontario Election Act—Voting without right—Knowledge—"Wilfully"—Neglecting to take oath. *Smith* v. *Carey*, 5 O. L. R. 203, 2 O. W. R. 13.

Personal corruption — *Inference — Charge in petition—Amendment—Evidence.*]—On a charge of personal corruption by the respondent, if the adjudication by the trial Judges does not contain a formal finding of such corruption, this Court may insert it, if the recitals and reasons given by the Judges warrant it.—The respondent, the night before the election, took a sum of over $4,000 and divided it into several parcels of sums ranging from $250 to $1,500. He then, after midnight, visited all his committee rooms and gave to the chairman of each committee, personally and secretly, one of such parcels. His financial agent had no knowledge of this distribution, and no evidence was produced of the application of the money to legitimate objects:—*Held*, that the inference was irresistible that the money was intended for corruption of the electors, and the respondent was properly held guilty of personal corruption.—Allegations in the petition that the respondent had himself given and procured, and undertaken to give and procure, money and value to electors and others named his agents, to induce them to favour his election and vote for him, for the purpose of having such money and value employed in corrupt practices, were sufficient to cover the offence of which the respondent was found guilty. *St. Ann's Election Case, Gallery* v. *Darlington*, 26 C. L. T. 775, 37 S. C. R. 563.

Providing money for betting—*Loan.*]—Three persons each lent $10 to R. L., knowing that the moneys so lent were intended to be used by him, as he then told them, in betting on the result of the election. Any bet or bets which he made were to be his own bets, not theirs, and he was to return the money in a couple of days. He did not succeed in getting any one to bet with him, and he returned the money to each on the following day: — *Held*, that this was providing money to be used by another in betting upon the election, and was a corrupt practice within the meaning of s. 164 (2) of the Election Act. *Re East Elgin Provincial Election—Easton* v. *Brower*, 21 C. L. T. 10, 2 Elec. Cas. 100.

Remission in part.]—The applicant was convicted for corrupt practices committed at a provincial election, and was fined $800, being the penalties attached by the Election Act. Upon his application for remission of the penalties, in whole or in part, the amount was reduced to $300. Special circumstances of the case considered. *Re Baker*, 20 C. L. T. 326.

Summons for — *Limitation of time for prosecuting — Several charges — Marshalling evidence—Ontario Election Act.*]—The limi-

tation of one year for bringing actions prescribed by s. 195, s.-s. 3, of the Ontario Election Act, applies only to actions for penalties under that section, and not to proceedings by summons for corrupt practices under ss. 187-8, nor are the latter within the limitations of two years for actions prescribed by R. S. O. c. 72, s. 1. On such proceedings under ss. 187-8 the Judges may, if they see fit, hear the evidence on all the charges before giving judgment on any of them. *Re Halton Provincial Election—In re Cross*, 21 C. L. T. 21, 2 Elec. Cas. 158.

Treating — *Antecedent habit — Candidate.*]—The respondent admitted that he had treated on the day of the convention, after the convention was over, several times, at at least two hotels, several persons, some of whom might have been electors. He denied, however, that the treating had any relation to the election:—*Held*, that under s.-s. 2 of s. 162 (added by 62 V. (2) c. 5, s. 7 (O.)), treating generally or extensively or miscellaneously is only *prima facie* a corrupt practice. If it be shewn that the treating was not in fact done corruptly in order to be elected, or for being elected, or for the purpose of corruptly influencing votes, it is no offence any more than it was before the enactment of s.-s. 2. There may still be innocent treating, though, if it be general or extensive or miscellaneous, the onus of shewing that it is innocent is upon the respondent. And an antecedent habit of treating must still help, among other things, to rebut the inference of corrupt intent:—*Held*, also, that, although the respondent did not become a "candidate," within the meaning of s. 2, s.-s. 8, until the 27th March, yet if any corrupt acts in relation to the election were done by him before that date, they would affect the election, for the Act applies to everything done at any time before an election by a person who is afterwards elected. Youghal Election, 3 Ir. R. C. L. 53, 1 O'M. & H. 291, followed. *In re East Middlesex Provincial Election—Rose* v. *Rutledge*, 23 C. L. T. 183, 5 O. L. R. 644, 2 O. W. R. 233.

Treating—*Candidate — Corrupt intent—Habit.*] — The undisputed evidence shewed that the respondent from the time of his nomination as the candidate of his party frequently treated the electors and others in the bar-rooms of hotels whilst engaged in his canvass. He was not a man whose ordinary habit it was to treat, nor one who in the course of his ordinary occupations frequented bar-rooms: — *Held*, Osler, J.A., dissenting, that the trial Judges properly drew the inference that the treating was done with corrupt intent, so as to avoid the election of the respondent. Remarks by Burton, J.A., on the amendment to the Election Act, in respect to "the habit of treating," by 58 V. c. 4, s. 21. *In re West Wellington Provincial Election—McQueen* v. *Tucker*, 21 C. L. T. 10, 2 Elec. Cas. 16.

Treating—*Committee meeting.*]—Upon a charge of treating a committee meeting held at an hotel, the evidence was that McC., who was found to be an agent of the respondent, brought into the room where the meeting was being held a box of cigars for the use of the members of the committee. He said he did it at the request of the landlord. It was not shewn by whom payment was made:—*Held*, that the charge was not proved, for it is the person at whose expense the treat is supplied, or who pays or engages to pay for it, who alone is guilty of the offence. *In re Middlesex Provincial Election—Rose* v. *Rutledge*, 23 C. L. T. 183, 5 O. L. R. 644, 2 O. W. R. 233.

Treating — *Evidence.*]—In Jobin's case the treating was on polling day. He lived in a locality where there was no licensed tavern. He was accustomed, according to his own account, to keep considerable quantities of wine and spirits on hand and to supply them quite freely to others in the way of hospitality or as a matter of business: — *Held*, that under the circumstances the Court would not infer the intent necessary to create an offence under either s. 110 or s. 111 of the Dominion Election Act. *In re Lisgar Dominion Election*, 22 C. L. T. 433, 14 Man. L. R. 310.

Treating — *Evidence.*]—In the cases of Ami and Foley the charges were of treating in bars. The evidence of Ami's treating was of a very general and vague character. He stayed for some time at Labossière's hotel and treated considerably, even including, at times, all in the bar-room. The circumstances of the different occasions, or who were present, were not shewn:—*Held*, impossible, upon such evidence, to find the corrupt intent proved. In Foley's case the charge in the particulars was of treating all of the voters—a large number present in the bar of Tremblay's hotel on a particular evening —and that Foley then announced "that although he was not the Government candidate, he had their money to spend." The evidence shewed that Foley was at Labossière's, not Tremblay's hotel, and gave an invitation to all in the house to drink, and that what he said was that "if he wasn't a candidate, he had money to spend." Foley's name was one of those brought before the convention which nominated the respondent in the Government interest:—*Held*, that the evidence of the part taken by Foley in the contest was very vague and seemed in no way to support the view that this treating was done in the respondent's interest or for the purpose of influencing electors. *Re Lisgar Dominion Election*, 22 C. L. T. 433, 14 Man. L. R. 310.

Treating — *Evidence.*]—In the case of Watson, the charge against him and others associated with him, was of furnishing food for a meal at the house of an elector, to him and other electors, on the occasion of a meeting the night before polling day. It might be inferred that the refreshments were supplied with intent to influence the electors, and that, in that sense, it was done corruptly. The suggestion, after the votes had been polled, of a further "treat" for the night of polling day was not without importance. That suggestion fell through:—*Held*, that the case could not be brought within s. 111 of the Dominion Election Act, for which it seems necessary that either the meat or drink, or the money or a ticket to procure them, should be actually supplied. *In re Lisgar Dominion Election*, 22 C. L. T. 433, 14 Man. L. R. 310.

Treating — *Evidence — Particulars.*]—In Fiset's case it was charged in general

terms in the particulars that he travelled about in the constituency and canvassed a large number of voters in certain specified polling districts, and "corruptly treated them, to induce them to vote for the respondent." The evidence shewed that Fiset did go about canvassing and was driven by Jean Moreau. It was sought by the petitioners to shew that in so going about Fiset treated various electors, but objection was made to the allowance of such evidence on the ground that the particulars did not give the details required by the order, and the Court refused to hear evidence of treating in that way, not more definitely specified, or to allow the examination of Moreau for the purpose of obtaining information only. About a week before polling day Fiset spent an evening at Moreau's house; he had with him whisky and gin and gave a drink to one Cardinal, telling him it was "election whisky." The meeting was not arranged, but the neighbours just happened to come in. It was not shewn that Cardinal had a vote. Cardinal's evidence was given without objection, and he was cross-examined upon it:—*Held*, that the Court was not prevented from considering the charge on account of its not being specified in the particulars, but the way in which the evidence was brought out was to be taken into consideration. If such meetings were frequent or intentionally brought about, the inference of the corrupt intent would be almost irresistible. As it was, it could not be taken as absolutely clear. *Re Lisgar Dominion Election*, 22 C. L. T. 433, 14 Man. L. R. 310.

Treating—*Intent — Candidate.*]—It was shewn that the respondent and his chief agent had on several occasions in the course of the canvass treated in bars. The respondent was a physician, with a large country practice, and constantly on the road. He was also a horse fancier, and, although an abstainer from liquor, a great consumer of cigars. It was not disputed that while on the road he was in the constant habit of treating, and he continued to treat after his nomination by the convention on the 1st February until the writ for the election was issued on the 22nd April: — *Held*, that no corrupt intent having been shewn in any of the instances of treating proved, the election was not thereby avoided. West Wellington Case, 1 E. C. 16, distinguished. *In re East Middlesex Provincial Election—Rose* v. *Rutledge*, 23 C. L. T. 183, 5 O. L. R. 644, 2 O. W. R. 233.

Treating—*Intent—Custom.*]—The treating of electors prior to and on polling day by an agent of the respondent, although done on a liberal scale, will not be assumed to have been done with the corrupt intent necessary to make it an offence, when the Court is satisfied that he was accustomed to keep at all times considerable quantities of liquors on hand and to supply them quite freely to others in the way of hospitality or as a matter of business, and there is no other evidence to shew that the treating was done in order to influence a voter or voters. The same rule applies to treating when done in compliance with a custom prevalent in the country and without express evidence of any corrupt intent in so treating; also to the supplying of meals at a private house to electors who have come from a distance, in the absence of evidence that this was done for the purpose of influencing the election. *In re Lisgar Dominion Election*, 22 C. L. T. 433, 14 Man. L. R. 310.

Treating — *Intent — Custom.*]—Where a person who was held to be an agent gave two bottles of whisky to an elector the day before polling day, the inference of fact was drawn that they were given with the corrupt intent of influencing the voter, although there was no direct evidence to shew the object for which they were given. Where a quantity of whisky was obtained from one agent of the respondent and taken to the home of another in the vicinity of one of the polling places, where it was drunk freely on election day by the electors generally, the inference of fact was drawn that it was provided by both these agents for the purpose of influencing the electors, though there was no direct evidence to that effect, and it was held to be a corrupt practice notwithstanding that apparently it did not have that effect. The evidence also shewed that a quantity of whisky was taken to a place in the vicinity of another polling place by an agent, where it was consumed by the agents and others on polling day:—*Held*, that this shewed a scheme on the part of the respondent's agents to influence the voters generally, and procure the election of the respondent by providing whisky at each of the polling places. *Quære*, whether an agent accustomed to carry about with him a bottle of whisky to treat those whom he should happen to meet, should not, if following this custom while actually engaged in canvassing, be held to have treated with a corrupt intent. *Leblanc* v. *Maloney*, 5 T. L. R. 402.

Treating — *Meeting of electors — Individuals.*] — The respondent requested M., who was found to be an agent, to go with him to a factory and introduce him to the workmen, some of whom were voters. M. did this, and the respondent addressed the workmen on behalf of his candidature. After the meeting was over and the workmen had dispersed, M. asked the foreman to have a drink at a neighbouring inn, which the foreman declined. M. also said that if the workmen who went home in that direction would go to the inn, he would "leave a drink for them there." This conversation was not in the presence of the respondent, nor heard by him. When the men were leaving their work for the day, the foreman told them what M. had said, and eight or ten of them called at the inn and got a drink of beer without paying for it:—*Held*, that a charge of treating a meeting assembled to promote the election, under s. 161 of the Ontario Election Act, failed upon this evidence, for the meeting had come to an end before anything was said about the treating, and the men were not told anything about it till nearly three hours afterwards. Nor did the evidence support a charge under s. 162 (1) of corrupt treating of individuals in order to be elected, M. being a customer of the factory and following a previous habit in his intercourse with the men. *In re East Middlesex Provincial Election—Rose* v. *Rutledge*, 23 C. L. T. 183, 5 O. L. R. 644, 2 O. W. R. 233.

Treating only disqualifies a voter after conviction and not *ipso facto*. *Que. West*

Election Case—Price v. *Neville, Power* v. *Power* (1900), 42 S. C. R. 140.

Treating—*Penalty and disqualification—Inscription in law—C. P. 191; R. S. C. c. 6, ss. 266, 280, 284.*]—The Superior Court is the proper tribunal to hear an action taken to recover the fine imposed upon every candidate found guilty of treating; it is not necessary that such petition should be made in conjunction with a petition to contest the election.—The conclusions of the penal action founded on acts of treating and taken against the elected candidate and asking for the annulment of the elections and the qualification of the candidate, are illegal and will be rejected on inscription in law. *Bourbonnais* v. *Lortie*, 11 Que. P. R. 145.

Treating a meeting—*Bribery.*]—Where, after a meeting of electors had broken up, an alleged agent of the respondent had treated, at the bar of the hotel where it had been held, a mixed multitude comprised of some who had been at it, and others who had not:—*Held*, Maclennan, J. A., dissenting, that this was not treating "a meeting of electors assembled for the purpose of promoting the election," within s. 161 of the Ontario Election Act, R. S. O. c. 9.—*Held*, also, reversing the decision of the trial Judges, that such treating was not "bribery," within s. 159. Corrupt treating in its nature runs very close to bribery on the part of a treater, but the circumstances in which a treat can be said to be a valuable consideration within s. 159, so as to amount to bribery on the part of the person accepting it, must be unusual. *In re North Waterloo Provincial Election—Shoemaker* v. *Lackner*, 2 Elec. Cas. 76.

Treating a meeting — *What amounts to.*]—A number of voters met at a voter's house for the purpose of going over the voters' lists and then of having a card party. After the lists were disposed of, the card party took place, and meat and drink were supplied by the host, but the drink, a quarter cask of beer, was paid for by subscription, according to the custom of the locality, a German settlement:—*Held*, not a corrupt practice within the meaning of the words "treating a meeting of electors assembled for the purpose of promoting the election," in s. 161 of the Ontario Election Act, R. S. O. 1897 c. 9. *Re South Perth Provincial Election—Ellah* v. *Montieth*, 2 Elec. Cas. 144.

Unlawful treating — *Security for costs—Exception to the form—C. P. 174, R. S. C. c. 6, ss. 266, 284, 285.*—No penal action for unlawful and corrupt treating in a Dominion election shall be commenced unless the person suing has given good and sufficient security to the amount of $50 for costs. This condition is a precedent one to the commencement of the action and is mandatory; if not complied with, the action will be dismissed on exception to the form. *Bourbonnais* v. *Lortie* (1900), 10 Que. P. R. 345.

Voting without right — *Knowledge — Aliens — Non-residents.*]—Actual knowledge on the part of a voter that he has no right to vote (*e.g.*, because an alien or non-resident) is necessary to constitute a corrupt practice under R. S. O. 1887 c. 9, s. 160. *Re South Perth Provincial Election—Malcolm* v. *McNeill*, 2 Elec. Cas. 30.

Voting without right — *Knowledge — Mala mens—Taking oath.*]—It was charged that a person had voted at the election, knowing that he had no right to vote, by reason of his not being a resident of the electoral district. He knew that his name was on the voters' list, and that it had been maintained there by the County Judge, notwithstanding an appeal, and he believed that he had, and did not know that he had not, a right to vote:—*Held*, that a corrupt practice under s. 168 of the Election Act, R. S. O. 1897 c. 9, was not established. Under that section the existence of the mala mens on the part of the voter, "knowing that he has no right to vote," not merely his knowledge of facts upon the legal construction of which that right depends, must be proved. The offence does not depend upon his having taken the oath; it may be proved apart from that; nor does the fact that he has taken the oath, even if it be shewn in point of law to be untrue, necessarily prove that the offence has been committed. Haldimand Case, 1 Elec. Cas. 529, distinguished. *In re East Elgin Provincial Election—Easton* v. *Brower*, 21 C. L. T. 10, 2 Elec. Cas. 100.

v. *Petition to Void Election.*

Affidavit — *Commissioner—Agent of solicitor.*]—The respondent to a petition under the Ontario Controverted Elections Act moved to set aside or dismiss the petition and to set aside the service thereof, and of the affidavit of bona fides and of notice of presentation, because the commissioner before whom the affidavit was sworn was the solicitor by whom the petition and affidavit were prepared, and by whom, as agent for the petitioner's solicitors, the petition was presented:—*Held*, that the commissioner was not disqualified. *Re Lennox Provincial Election—Perry* v. *Carscallen*, 22 C. L. T. 407, 4 O. L. R. 647, 1 O. W. R. 730.

Appeal—*Settlement of case.*] — No machinery has been provided by the Ontario Controverted Elections Act or by the Rules for the settlement of a case upon an apeal to the Court of Appeal from the judgment upon the trial of a petition under the Act. The trial Judges can give no direction as to the evidence to be submitted to the Court. *Semble*, that either party may treat the whole of the evidence taken at the trial as being before the Court of Appeal. *In re South Oxford Provincial Election—McKay* v. *Sutherland*, 23 C. L. T. 41, 5 O. L. R. 58, 2 O. W. R. 2.

Application to fix day for trial — *Delay—Extending time—Grounds — Discretion—Appeal—Form of order.*] — The petitions were presented on the 4th February, 1903; the Legislative Assembly sat from the 10th March to the 27th June. On the 5th November applications were made by the petitioners to a Judge on the rota to fix dates for the trial of the petitions, and if necessary to extend the time for bringing them to trial. Owing to the engagements of the other Judges on the rota, and the difficulty of immediately communicating with them, the

Judge was unable then to fix dates, and, the respondents not being prepared to agree to an extension of time, the applications stood over pending applications to be made to extend the time. On the 11th November the petitioners moved before the same Judge (one of the Judges of the Court of Appeal) for, and obtained, orders extending the time for the commencement of the trials, upon affidavits shewing that the petitioners believed that the Court could fix days for trial suitable to the Judges' other engagements; that bribery was extensively practised on behalf of the respondents; that the petitioners could prepare for trial in one month; that the requirements of justice rendered it necessary that the time for the commencement of the trials should be extended; that the applications were not made for delay:—*Held*, that the applications were in time to enable the trials to be commenced within 6 months from the date of the presentation of the petitions (excluding the time occupied by the session) within the meaning of ss. 47 and 48 of the Ontario Controverted Elections Act, and the failure to fix days could not be attributed to the petitioners; ss. 16 and 47 of the Act and Rules 26 and 27 leave the fixing of days in the hands of the rota Judges. It was not open to the respondents to complain of lack of diligence by the petitioners within the 6 months, no days for trial having been fixed. Much of what was necessary to be shewn on the applications to extend the time, transpired in the presence of the Judge, and the facts were within his own knowledge; there was no reason why he should not act thereon. The justice of the case was in favour of making the orders; the Judge rightly exercised his discretion upon sufficient grounds; and his orders should not be interfered with. The appropriate form of the orders would be to extend the time for fixing the days of trial rather than the time for the commencement. *In re North Norfolk Provincial Election, Snider* v. *Little—In re North Perth Provincial Election, Monteith* v. *Brown*, 24 C. L. T. 6, 6 O. L. R. 597, 2 O. W. R. 1079, 1104.

Application to substitute petitioner —*Delay in proceeding to trial—Parliament in session—Time—Necessity for respondent's presence at trial.*]—Application was made on behalf of B. to be substituted as petitioner against the respondent's return to the House of Commons. The application was based primarily on the ground that more than three months had elapsed since the presentation of the petition without the day for trial being fixed:—*Held*, dismissing the application, per Fraser, J., that the presence of the respondent at the trial being shewn to be necessary, the time during which Parliament was in session was not to be computed, and the period of three months had, therefore, not elapsed.—Per Russell, J., that the fact that the respondent's presence at the trial was necessary, was a complete answer to the application to substitute another petitioner, in so far as that application was based on the petitioner's assumed default in not having proceeded with the trial.—Townshend, J., dissented. *Re Colchester Dominion Election, Brenton* v. *Laurence*, 38 N. S. R. 232.

Change of solicitors — *Right to object to—Withdrawal of petition — Order for — Evidence on—Notice of motion — Publication —Collusion—Deposit—Security for costs — Substitution of petitioner—Time for.*]—The only person who can complain of an order changing the solicitor for the petitioner in an election petition is the solicitor removed. An ordinary voter has no status to attack the order, and an application by such an one to set aside an order can be considered only so far as the order is part of a scheme to get rid of the petition. 2. Assuming that an ordinary voter is a person who can move against an order giving the petitioner leave to withdraw the petition, there was no irregularity in the application to withdraw in this case, affidavits of the financial agents of the candidates not being necessary unless insisted on by the Judge who hears the application, and the notice of motion having been published in two newspapers in the electoral division. 3. It was not proved that there was collusion or that the petitioner did not in good faith authorize the application; and *semble*, if there had been collusion, the applicant would still have had the right to withdraw, but the Judge might have ordered that the deposit should remain as security upon a petitioner being substituted. 4. An application to substitute a petitioner is to be made at the time the motion to withdraw is made; and, if not then made, and an order for withdrawal granted, the petition is out of Court and cannot be revived. But *semble*, if there was power to make such an order at a later period, it should be applied for within a reasonable time and full explanation of any delay given. *Re South Leeds Dominion Election—Kelly* v. *Taylor*, 2 Elec. Cas. 1.

Charges not investigated at trial.]—*Excessive particulars — Witness fees.*] — A controverted election petition contained 685 charges and at the trial application was made to 8 or 10 more charges; 225 witnesses were subpœnaed and paid $530. Two charges were proved thereupon, the respondent admitted responsibility of an agent and did not claim protection of the statute. The Court declared the seat vacant:—*Held*, the practice of heaping up excessive number of charges could not be encouraged. Costs were not allowed for charges which failed nor for the supplemental charges, but the Court allowed the petitioner $230, as a reasonable apportionment of the expenses for witness fees. *Re North Norfolk Provincial Election —Snider* v. *Little*, 4 O. W. R. 314, 25 C. L. T. 9, 8 O. L. R. 566.

Contested Federal Elections Act — *Name on voters' list gives the right to act as petitioner—Powers of the deputy protonotaire of the Superior Court as regards election petitions—Powers of the petitioner — Omission of formalities in the Act appointing him.*]—Every person whose name is on the voters' list of a polling division which has been used at an election is capable of being a petitioner to contest the same, under the provisions of Federal Contested Elections Act, c. 7 S. R. C. 1906. The defendant is not permitted to set up against him by way of preliminary objections, acts of corruption he may have done during the election. The deputy protonotaire of the Superior Court has all the powers of the protonotaire regarding election petitions; hence, he may receive an election petition and attest the declara-

tion under oath that must accompany it, in the presence as well as in the absence of the protonotaire. The deputy protonotaire *de facto*, under a clouded title, has all the powers, notably the last mentioned, notwithstanding the omission of a formality (*e.g.*, the using of the protonotaire's seal) in the Act appointing him. *Boulet* v. *Roy*, 1909, 36 Que. S. C. 89.

Controverted election — *Alleged defective nomination of member-elect—Status of one nominator—Voters' list — Saskatchewan Election Act, ss. 121, 285—Onus of proof.*]—Respondent's nomination paper was objected to because one of his nominators was not on the voters' list, and because this nominator had not resided in the province for at least one year immediately preceding the date of the issue of the writ for the election:—*Held*, that the onus is on the petitioner, that under s. 285 above, for the purposes of nomination at all events, registration is not one of the qualifications required to constitute a voter, and that where the time in dispute as to the nominator's residence is only a few days, the presumption should be to uphold the franchise. Petition dismissed on this ground, trial to proceed on other grounds. *Re Last Mountain Provincial Election, Boyce* v. *Anderson*, 11 W. L. R. 78.

Controverted election — *Preliminary objections — Section 19 of the Act.*]—The preliminary objections were signed by A., as agent for the respondent:—*Held*, to be good, as the Act does not require respondent to sign them. Instead of filing a copy of these objections as required by section 19, a copy was served on the agent of the petitioner.—*Held*, that as the statute was not complied with the preliminary objections must be removed from the Court files. *McDonald* v. *Fraser*, 6 E. L. R. 140.

Controverted election petition — *Answer—Allegation of corrupt practices by candidate-petitioner — No necessity for cross-petition—Security.*]—The defendant in a contested provincial election case has a right to allege in his answer to the petition that the candidate-petitioner was guilty of corrupt practices, without being obliged to present a cross-petition nor to give security nor to make a deposit. *Walsh* v. *Tansey*, 10 Que. P. R. 47.

Controverted election petition — *Charges against petitioner — Preliminary objections—Status—Evidence.*] — Charges of corrupt practices against the petitioner in a contestation of an election for the provincial legislature can not be the subject of preliminary objections, and, even if established, can not affect the petitioner's status as such, because the evidence in support of said corrupt practices is irrelevant and inadmissible. *Walsh* v. *Tansey*, 10 Que. P. R. 32.

Controverted election petition — *Dominion Controverted Elections Act—Power of single Judge to dispose of preliminary objections—What are preliminary objections—Order extending time for service of petition—Application after expiry of ten days from presentation of petition—Order for substitutional service—R. S. C. 1906, c. 7, ss. 18, 19.*] — Under the Dominion Controverted Elections Act, R. S. C. 1906 c. 7, a single Judge of the High Court of Justice has jurisdiction to hear and determine all preliminary objections to a petition. Where an order was made extending the time for service of a petition under the Act and for substitutional service, objections that there was no jurisdiction to make such order under the circumstances, and that, even if there were, the order made was not authorised by the facts, and that substitutional service made under it should not be deemed personal service or allowed, are preliminary objections within the meaning of the Act, or at all events, objections which a single Judge of the High Court of Justice has power to deal with. *Montmagny Dominion Election Case*, 15 S. C. R. 1, followed.—The time for service of notice of the presentation of a petition under the Dominion Controverted Elections Act may be extended on application made after the expiry of the ten days allowed for such service by s. 18 of the Act.—Such order allowing further time is not bad by reason of substitutional service being also directed in it, notwithstanding the words of s.-s. 2 of s. 18. *Re West Peterborough Dominion Election, Burnham* v. *Stratton*, 17 O. L. R. 612, 13 O. W. R. 16.

Held, on appeal to the Supreme Court of Canada, affirming the above, that the provision in s. 18, s.-s. 2, of the Controverted Elections Act, R. S. C. 1906 c. 7, for substitutional service of an election petition, where the respondent cannot be served personally, is not exclusive, and an order for such service on the ground that prompt personal service could not be effected, as in the case of a writ in civil matters, may be made under s. 17.—*Held*, also, that the time for service may be extended, under the provisions of s. 18, after the period limited by that section has expired. *Gilbert* v. *Rex*, 38 S. C. R. 207, followed. *Re West Peterborough Dominion Election, Stratton* v. *Burnham*, 41 S. C. R. 410.

Controverted election petition—Order fixing day for trial—Irregularity—Publication of petition in weekly newspaper—Posting up — New Brunswick Controverted Elections Act. *Owens* v. *Upham* (N.B.), 6 E. L. R. 554.

Controverted election petition—*Particulars — Saskatchewan Controverted Elections Act, s. 11.*]—Application to have an election petition dismissed, particulars not having been delivered as directed:—*Held*, no power to dismiss petition at present stage. *Held*, further, that under s. 11 of above Act, further and better particulars cannot be ordered. Summons discharged. *Bowe* v. *Whitmore*, 10 W. L. R. 509, 2 Sask. L. R. 82.

Controverted election petition—Preliminary objections—Application to set aside — Dominion Controverted Elections Act — Presentation by agent of respondent — Copy for petitioner—Filing under s. 19. *Re Kings Dominion Election — McDonald* v. *Fraser* (P.E.I.), 6 E. L. R. 140.

Controverted election petition—*Preliminary objections — Corrupt practices by petitioner.*]—Corrupt practices in the course of the election by the petitioner afford no valid ground of preliminary objection to an

election petition, under the Quebec Election Act, 1903. *Walsh* v. *Tansey*, 35 Que. S. C. 89.

Controverted election petition—*Preliminary objections—Examination of parties — Time — Inscription.*] — In a petition to set aside the election of a member of the provincial legislature, the law does not authorise the examination of the parties upon preliminary objections before the Court has become seised of such objections upon inscription. *Walsh* v. *Tansey*, 10 Que. P. R. 33.

Controverted election petition—*Preliminary objections — Status of petitioners —Evidence — Voters' list—Certified copy—Notice under Canada Evidence Act — Oral testimony of petitioners—Notice of presentation of petition and of security — Clerical error—Copy of certificate of registrar—Receipt — Service — Deposit — Bank notes — Payment of cost of publication—Affidavit—Proof that election held—Pleading—North-West Territories Representation Act—Certified copy of voters' list — Canada Evidence Act—Notice of presentation of petition and nature of security—Receipt of security.*] — Upon the hearing of preliminary objections to a petition against the return of a member of the Dominion Parliament for the electoral district of Alberta, due notice having been given, a copy of the list of voters for a certain polling subdivision returned by the returning officer of the electoral district to the clerk of the Crown in Chancery, duly certified by the said clerk under his official seal, was put in evidence, and the petitioners identified their names thereon. They also swore that they were male British subjects, not Indians, of the full age of 21 years, and that they had resided in the North-West Territories for over twelve months, and in the electoral district for over three months immediately preceding the issue of the writ of election:—*Held*, that, in view of the provisions of the North-West Territories Representation Act, R. S. C. 1886, c. 7, the evidence of the petitioners was admissible to prove their status, and that the voters' list was properly proved by a certified copy, in spite of the absence in the Act referred to of any provision, such as is found in the Franchise Act, 61 V. c. 14, s. 16, for certified copies of the list being evidence. *Richelieu Election Case*, 21 S. C. R. 168, distinguished. —The notice of the presentation of the petition, handed to the petitioner immediately before the copy of the petition, referred to the presentation of a petition against the return of the petitioner as member for the electoral district of the west riding of Assiniboia (*sic*), but there was attached to the petition a certificate signed by and under the seal of the clerk of the Court that $1,000 had been deposited as security for the payment of costs, etc., in the matter of the petition against his return as member for the electoral division of Alberta: — *Held*, that the first notice was bad, but that the certificate gave a notice sufficient to comply with the provisions of s. 10 of the Controverted Elections Act, R. S. C. 1886 c. 9, although it was not signed by either the petitioners or their advocate. *Ottawa Election Case*, 2 Ont. Elec. Cas. 64, referred to.—Objection was taken that the evidence did not shew that the security was given in bills of a chartered bank: —*Held*, that the evidence was sufficient, and that the fact that the bank was a chartered bank sufficiently appeared from the Dominion statute extending its charter.—The cost of publishing the petition was not paid to the registrar at the time that the petition was presented:—*Held*, that this was no objection to the proceedings.—No evidence was given that any election had been held or that the respondent had been returned as elected:—*Held*, that no such evidence was necessary. *Coventry Election Case*, 20 L. T. N. S. 405, followed.—Objection was taken to certain paragraphs of the petition, on the ground that, even if true, they would not justify a declaration that the seat was vacant or the disqualification of the member:—*Held*, that the clauses should nevertheless not be struck out on preliminary objection. *Staleybridge Election Case*, 19 L. T. N. S. 660, followed. *Re Alberta Dominion Election*, 1 W. L. R. 486, 6 T. L. R. 329.

Controverted election petition—*Preliminary objections — Status of petitioners—Proof of—Reopening case — Trial — Time — Statute — Rules of Court — Practice.*]—Under the Manitoba Controverted Elections Act, R. S. M. 1902, c. 34, and ss. 92 and 93 of the King's Bench Act, R. S. M. 1902, c. 40, the Judge, at the trial of preliminary objections to an election petition, may, even after the petitioners have closed their case, reopen it and allow them to put in further evidence to prove their status as petitioners. —2. The requirement in s. 39 of the Dominion Controverted Elections Act, R. S. C. 1906, c. 7, that an election petition must be brought to trial within 6 months from the time of its presentment, is not imported into the law governing election petitions under the Manitoba Controverted Elections Act, R. S. M. 1902, c. 34, by the language of s. 13 of the latter Act. Such a provision would require a positive statute, as it deals with something more than a mere matter of practice and procedure. *Re Morris Provincial Election*, 7 W. L. R. 132, 233, 17 Man. L. R. 330.

Controverted election petition—*Service — Security — Returning officer — Deposit of money furnished by stranger.*] — Where the defendant, elected as a member of the provincial legislature, accepts a copy of the petition to set aside his election, instead of a regular service upon him, and the petitioner later abandons this mode of service, the fact of serving a new copy of the petition within the proper time does not constitute a new election petition; this last service is valid and is not vitiated by irregularities in the previous proceedings.—2. In such a case the petitioner is not obliged to give fresh security upon the latter proceeding. — 3. Where the petitioner has made no claim against the returning officer at the election, he is not obliged to furnish security in favour of that officer.—4. It makes no difference whether the sum deposited with the clerk of the Court belongs to the petitioner at the time of the deposit or whether it has been furnished for him by a stranger, such money representing for all legal purposes the security required by the statute. *Crevier* v. *Lévesque*, 10 Que. P. R. 1.

Copy—*Service — Amendment.*]—In the printed copy of the petition served upon the

respondent the concluding prayer had, by mistake of the clerk, a pen stroke drawn through it: — *Held*, that, though the copy was not strictly a "true copy" of the original, yet as the defect was a purely formal one, and could not possibly have misled the respondent, it was not fatal, and leave to amend was given. *In re Centre Bruce Provincial Election—Stewart* v. *Clarke*, 22 C. L. T. 286, 4 O. L. R. 263, 1 O. W. R. 503, 2 O. W. R. 1049.

Copy—*Neglect to deposit—Local registrar — Extension of time — Terms — Costs.*] — Election petitions filed with local registrars under 62 V. (2) c. 6 (O.) are received by them as registrars of the Court of Appeal. And, although a petitioner who does not leave with the local registrar at the time of filing the petition a copy of the petition to be sent to the returning officer, is in default under Election Rule 1 (2), still the time for doing so is subject to Election Rule 58, enabling the Court or a Judge in a proper case to enlarge the time appointed. And where, through inadvertence, the solicitor for a petitioner had omitted to leave the copy, and applied without delay, the time was extended, and an order for the dismissal of the petition was discharged, upon the terms as to costs. *Re North Grey Provincial Election—Boyd* v. *Mackay*, 23 C. L. T. 303, 6 O. L. R. 273, 1 O. W. R. 474, 483, 2 O. W. R. 231 604, 1131.

Costs—Charges which failed—Charges not investigated — Excessive particulars — Witness fees. *Re North Norfolk Provincial Election—Snider* v. *Little*, 4 O. W. R. 314, 8 O. L. R. 566.

Costs—*Conduct of respondent.*]—The respondent, having allowed the organisation of the contest to go into the hands of persons as to whom he could not or would not give any information, and having failed to shew that he had made any serious effort to prevent illegal practices, was refused any costs of his attendance or examination as a witness, the petition being in other respects dismissed with costs. *Re Lisgar Dominion Election*, 22 C. L. T. 433, 14 Man. L. R. 310.

Costs—*Counsel fees — Disbursements.*]—The fee of an advocate or counsel upon the trial of a controverted election petition is not to exceed the amount provided by 54 & 55 V. c. 20, s. 15 (D.).—2. The fee allowed by this section does not include disbursements in the cause nor the costs of preliminary proceedings. *Bergeron* v. *Brunet*, 5 Que. P. R. 434.

Cross-petition — *Security for costs.*] — Under s. 13 of the Controverted Elections Act, R. S. O. 1887, c. 10, security for costs is required only in the case of the original or principal petition, and not in that of a cross-petition. *Re Kingston Provincial Election—Vanalstine* v. *Harty*, 14 C. L. T. 420, 2 Elec. Cas. 10.

Death of petitioner—*Appointment of substituted petitioner — Rival applications.*] —The petitioner having died, the Court was moved on behalf of two persons each desiring to be substituted in his place, one being a person qualified to vote at the election, R., and the other the unsuccessful candidate, B. It was disclosed by the affidavits that R. was actively interested in securing the return of the respondent at the election, that he was a member of one of his committees, and that he was associated with leading members of the political party with which the respondent was identified:—*Held*, that, as R. was not, for these reasons, a person by whom the inquiry under the petition was likely to be prosecuted without partiality and with effect, his application, although prior in point of time, should not be granted, and that the interests of the electors concerned in the prosecution of the petition would be better served by the appointment of B.—*Held*, further, Fraser, J., dissenting on this point, that the appointment of B. should not be refused on grounds which would not have been available against him if he had been the original petitioner. *In re Pictou Dominion Election—Murray* v. *McDonald*, 38 N. S. R. 242.

Delay for bringing counter-petition *Delay expiring on a Sunday.*]—*Held*, (1) when the last of fifteen days for filing and serving a cross-petition in a contested election (Dom.) case is a Sunday, the filing and service may be legally effected on the following day. (2) An allegation of undue influence in an election petition may be made in general words, the party charged having the right to ask for particulars. *Billeau* v. *Price*, and *Price* v. *Power* (1909), 36 Que. S. C. 13.

Deposit—*Issue of Writ—Clerk or deputy clerk — Bank notes.*] — A petition under the Controverted Elections Ordinance (C. O. 1888, c. 5), was filed with the clerk of the Court at Calgary under s. 3, he being the clerk whose office was nearest to the residence of the returning officer, and afterwards forwarded to the deputy clerk at Edmonton. The deposit of $500 required by s. 5 was made with the deputy clerk, who thereupon issued the writ of summons under s. 7:—*Held*, that the deputy clerk was, by virtue of s. 3 of Ordinance 10 of 1891-2, the proper person to receive the deposit and issue the writ of summons. The deposit was made in notes of a chartered bank:—*Held*, that a payment or deposit of a sum of money required by statute need not, in the absence of express provision, be made in gold or legal tender; and that, therefore, the deposit was sufficient. *In re St. Albert Provincial Election, Prince* v. *Maloney*, 2 T. L. R. 173.

Deposit—Payment out — Petition abandoned before service—Grounds of abandonment—Affidavits denying collusion. *Re West Wellington Provincial Election—Patterson* v. *Tucker*, 1 O. W. R. 629.

Deposit—Rival claimants — Issue. *Re North Waterloo Election*, 1 O. W. R. 86.

Deposit of copy — *Preliminary objections.*]—Where a copy of an election petition was not left with the prothonotary when the petition was filed, and, when deposited later, the forty days within which the petition had to be filed had expired:—*Held*, Gwynne, J., dissenting, that the petition was properly dismissed on preliminary objections (8 B. C. R. 65, 21 C. L. T. 252). *Lisgar Election*

Case, 20 S. C. R. 1, followed. Per Gwynne, J. The Supreme Court is competent to overrule a judgment of the Court differently constituted, if it clearly appears to be erroneous. *Re Burrard Dominion Election*, 22 C. L. T. 10, 31 S. C. R. 459.

Discovery—*Examination for — Particulars.*]—Section 18 of the Controverted Elections Ordinance, C. O. 1898, c. 4, provides as follows: "The said petition and all proceedings thereunder shall be deemed to be a cause in the Court in which the said petition is filed, and all the provisions of the Judicature Ordinance, in so far as they are applicable and not inconsistent with the provisions of this Ordinance, shall be applicable to such petition and proceedings:"—*Held*, that the provisions of the Judicature Ordinance respecting examinations for discovery come within the above section.—2. That where particulars of the charges had been ordered the examination could not be compelled until after the delivery of the particulars. *Leblanc* v. *Maloney*, 5 T. L. R. 341.

Dominion Controverted Elections Act—*Preliminary objections — Petition presented too late—Application to extend time —Jurisdiction—R. S. C. 1906, c. 7, ss. 5, 12, 13, 87.*]—The petition was delivered to the registrar not at his office, but at his residence, after office hours, on the last day upon which, according to s. 12 of the Dominion Controverted Elections Act, it could be filed. —*Held*, that the petition was presented too late. *The North Bruce Case* (1891), 27 C. L. J. 538, distinguished. The Court has no power to extend the time for presenting a petition after the expiration of the time for presenting it prescribed by the Act has elapsed, and to such a case s. 87 of the Act has no application. The principle of the *Glengarry Case* (1888), 14 S. C. R. 453, applied and followed. *Re North Perth Dominion Election—Money* v. *Rankin* (1909), 18 O. L. R. 661, 13 O. W. R. 657.

Evidence — *Return.*]—In a controverted election petition it is not necessary that proof should be given that the respondent has been returned as member. *Leblanc* v. *Maloney*, 5 T. L. R. 402.

Examination of respondent for discovery—*Inquiry into corrupt practices committed at former election — Scope of — Lengthy examination — Discretion—Adjournment — Continuation.*]—Corrupt practices said to have been committed by the respondent to a controverted election petition at a former election on the petition against which he was declared to have been duly elected, cannot, as such and as committed with reference to that election, be enquired into for the purpose of invalidating the election in question. Therefore, the petitioner has no right, upon the examination of the respondent for discovery, to make a general enquiry into such corrupt practices, unless it can be shewn that they are in some way connected with and are still operative upon the election in question. Where a question was asked with reference to a discussion between the respondent and another person before the previous election, coupled with a statement that the discussion alleged was allowed to have been renewed at the election in question:—*Held*, that the question should be answered. If an examination for discovery is not conducted with discretion or becomes oppressive, the Court is empowered to declare that it shall be closed. Where the examination was continued until late at night, when the examiner became exhausted and was unable to proceed further with it:—*Held*, that the respondent must attend for further examination. *Re North York Provincial Election—Kennedy* v. *Davis*, 24 C. L. T. 11, 6 O. L. R. 714, 2 O. W. R. 1169.

Extending time for trial—Cross-petition. *Re North Norfolk Provincial Election*, 2 O. W. R. 1106.

Extending time for trial — *Orders —Discretion—Practice.*]—While there is nothing to prevent a petitioner from making an application to fix the time and place of trial, he cannot be said to be in default for not having done so. The obligation and initiation in that respect are cast upon the rota Judges, the only penalty (if so called) upon the petitioner being that, if three months elapse after the presentation of the petition until the day for the trial being fixed, any elector may, on application, be substituted for the petitioner, on proper terms. And where the Judges' other engagements are such as to make it difficult for them to try the petition, an application to extend the time for proceeding to trial will be granted almost as a matter of course. *In re Centre Bruce Provincial Election—Stewart* v. *Clark*, 24 C. L. T. 52, 7 O. L. R. 28, 1 O. W. R. 503, 2 O. W. R. 1094.

Jurisdiction of Superior Court and of its Judges in the province of Quebec, with reference to Dominion Controverted Election Act to be the same as if such petition were an ordinary cause within their jurisdiction, therefore no Judge can make an order in a Dominion controverted election case, in the nature of an order in chambers, outside of the chef-lieu of the district in which case is pending. Hence, an order made by a Judge at Knowlton to enlarge the delay to serve an election petition addressed to the Court and presented therein in the district of Bedford, of which the chef-lieu is Sweetsburg, is null and void.—The Superior Court, sitting as an election Court, has the power to declare an order, made by one of its Judges, null and void. *Robinson* v. *Fisher—Brome Election Case* (1909), 37 Que. S. C. 19.

Limit of time for trial—Incorporation by reference of provision of Dominion Act—Rules of Court—Practice or procedure. *Re Morris Provincial Election* (Man.), 7 W. L. R. 132.

Misdescription of electoral district—*Surplusage — Amendment.*] — The petition and other papers in an election case were headed in the proper Court and purported to be under the Ontario Controverted Elections Act, as to "the election of a member of the Legislative Assembly for the Province of Ontario for the electoral district of Lincoln and Niagara, holden on the 22nd and 29th days of May, 1902." No such provincial electoral districts as Lincoln and Niagara existed, but there was an electoral district of Lincoln, being the district intended:—*Held*, that the

misdescription was not fatal; that the additional words might be treated as surplusage and struck out, leave being given to the petitioner to make such amendment. *Re Lincoln Provincial Election—McKinnon* v. *Jessop*, 22 C. L. T. 362, 4 O. L. R. 456, 1 O. W. R. 564.

N. B. Controverted Election Act *C. S., c. 40, s. 81—Order fixing trial—Irregularity—Publication of petition in weekly newspaper—Posting up petition.*]—An order has been made fixing day of trial of this election petition:—*Held*, order made improvidently as petition had not been published. Publication in weekly newspaper not sufficient. No daily paper was published in the county. The petition had not been posted in the court house or at the registry office as provided by s. 81 above. *Queens* v. *Upham*, 6 E. L. R. 554.

Order for examination of respondent—Election Judges assigned before order acted on—Jurisdiction thereafter. *Halifax Election—Hetherington* v. *Roche*, 2 E. L. R. 109.

Particulars—*Affidavit of verification — Service — Vagueness of particulars—Objection on appeal.*] — In proceedings under the Controverted Elections Act, R. S. O. c. 11, it is sufficient to attach an affidavit of verification to the particulars filed, without serving it on the respondent.—2. It is too late on appeal from the judgment on an election petition to object to the insufficiency by vagueness of the particulars. *Re North Waterloo Provincial Election—Shoemaker* v. *Lackner*, 2 Elec. Cas. 76.

Particulars—*Extension of time—Appeal —Stay of proceedings — Appeal books — Costs.*]—Under the provisions of s. 18 of the Controverted Elections Ordinance and Rule 548 of the Judicature Ordinance, the Judge has jurisdiction to extend the time for applying for particulars even after the time limited by s. 11 of the former Ordinance has elapsed. Proceedings stayed pending appeal, time for applying for particulars enlarged, typewritten instead of printed appeal books allowed, and costs directed to abide result of appeal. *Re Banff Election—Brett* v. *Sifton* (No. 3), 4 T. L. R. 263.

Particulars—*Scrutiny — Supplementary particulars—General Rules 20, 24—Invalid votes—Transfer certificates obtained without request.*]—The word "particulars" in Rule 24 of the General Rules respecting the trial of election petitions means particulars of "votes intended to be objected to," this being the language in Rule 20, and is not confined to further details of particulars already given.—Where for the purpose of a scrutiny the respondent had filed and served particulars of votes objected to by him, and the scrutiny had been begun but not completed, he was allowed (upon terms) to add new particulars of other votes objected to. — *Semble*, that the votes of persons who voted on transfer certificates obtained from the returning officer without any personal or written request were invalid. *Re Port Arthur and Rainy River Provincial Election* (No. 2), *Preston* v. *Kennedy*, 12 O. L. R. 508, 8 O. W. R. 419.

Peremption — *Statute — Retroactivity.*]—The statute 1 Edw. VII. c. 7 (Q.), assented to on the 28th March, 1901, has, retroactively, the effect of perempting all election petitions in which the instructions *au mérite* has not been commenced within the three months which follow the publication in the *Official Gazette* of Quebec of the election of the respondent. *Ste. Marie* v. *Perrault*, 4 Que. P. R. 159.

Petition — *Copy — Service — An election stated as holden on "eighth" when polling day on "seventh."*]—Rule to shew cause why an election petition should not be set aside. In the copy served in the title the date of holding the election was omitted. Order made amending the title, otherwise Rule dismissed. The election is holden between the date when the sheriff is directed to open his Court and the date when he makes his declaration and return. *In re Queens Provincial Election*, 7 E. L. R. 329.

Petition to void election—A preliminary objection to an election petition claiming that the petitioner was not a person entitled to vote at the election should not be dismissed where the respondent to the petition is entitled to give evidence as to the status of the petitioner. *Quebec West Election Case, Price* v. *Neville, Power* v. *Price* (1909), 42 S. C. R. 140.—Where respondent alleged by cross-petition that the defeated candidate personally and by agents "committed acts and the offence of undue influence," *held*, that these facts could be obtained by a demand for particulars; a preliminary objection was properly dismissed. *Ibid.*

Petitioner — *Affidavit of — Lack of information — Preliminary objection — Receipt for deposit—Error.*]—The total absence or lack of information of the petitioner necessary to enable him to make the affidavit required in support of an election petition under the Dominion Controverted Elections Act, affords no ground of preliminary objection to such a petition.—The receipt of the clerk of the Court for the deposit made as the security required on the presentation of an election petition is sufficient if it state that a deposit of $1,000 has been made, though it should go on to give an erroneous description of the bills of which that sum consisted. *Pleau* v. *Ames*, 28 Que. S. C. 545.

Petitioner — *Information as to facts alleged in petition — Examination of informants — Solicitors.*] — Where the petitioner in a controverted federal election petition declares that he does not know except by hearsay the facts which he has alleged in his petition, the respondent will not be allowed to interrogate by way of preliminary examination the persons who have given such information to the petitioner, nor the petitioner's advocates upon the record. *Darlington* v. *Gallery*, 7 Que. P. R. 329.

Petitioner — *Status — Corrupt practices —Right to vote — Preliminary objections — Dominion Election Act — Interrogatories — Failure to answer.*]—Corrupt practices committed by a petitioner who contests a federal election do not deprive him *ipso facto* of his right to vote at such election, nor of his

right to be petitioner, except in the cases provided for by ss. 8 and 9 of 63 & 64 V. c. 12. Consequently, the disqualification resulting from practices other than those enumerated in ss. 8 and 9 cannot be pleaded by way of preliminary objection. *Aliter*, in the case of a provincial election.—2. Section 113 of the Dominion Election Act of 1900 should be strictly interpreted and should not be extended by analogy.—3. In the case of a petition to set aside an election the opposite party cannot be interrogated *sur faits et articles*, and if the party does not obey the order to answer such interrogatories, they will not be taken as affirmatively answered upon a motion to that effect. *Poirier* v. *Loy*, 4 Que. P. R. 23.

Preliminary objections — Affidavit of petitioners — Intituling — Receipt—Clerical error. *Re Qu'Appelle Dominion Election* (N. W.T.), 1 W. L. R. 496.

Preliminary objections — *Answer — Quebec Controverted Elections Act.*]—The Quebec Controverted Elections Act makes no provision for the making and filing of an answer to the preliminary objections, and if an answer be filed it will be struck out on motion. *Dyer* v. *McCorkill*, 7 Que. P. R. 167.

Preliminary objections — *Appeal — Stay of trial.*]—Where the respondent to a Dominion election petition has appealed to the Supreme Court of Canada from a judgment overruling his preliminary objections, the Superior Court cannot, as long as the appeal has not been decided, fix a day for trial on the merits, but the Court must stay the proceedings and postpone the trial of the petition. *Bergeron* v. *Brunet*, 5 Que. P. R. 156.

Preliminary objections — *Appeal — Trial of petition — Record — Copies of documents — Practice.*]—The statute permitting, on the one part, an appeal from decisions upon preliminary objections, and for that purpose the transmission of the record to the higher Court, and prescribing, on the other hand, that the appeal shall not have the effect of staying the proceedings nor delay the trial of the petition, without at the same time prescribing a method of supplying the absence of the record transmitted; the Court which is to try the petition must, *ex necessitate rei*, in order to give effect to the statute, proceed with the trial, pending such an appeal, upon certified copies of the essential documents contained in the record. *Bergeron* v. *Brunet*, 27 Que. S. C. 389.

Preliminary objections — Charges against returning officer — Misconduct — Corrupt practices—Common law of Parliament. *Re Lisgar Dominion Election, Re Selkirk Dominion Election, Re Brandon Dominion Election, Re Portage la Prairie Dominion Election* (Man.), 3 W. L. R. 268.

Preliminary objections — Disposal of —Status of petitioners—Time limit for trial —Incorporation by reference of provision of Dominion Act—Rules of Court—Practice or procedure. *Re Morris Provincial Election* (Man.), 7 W. L. R. 233.

Preliminary objections — *Dominion Controverted Elections Act, R. S. C. c. 9, s. 2 (f) and s. 7—Corrupt practices—Returning officer as party respondent to petition—Certainty in pleading.*]—Hearing of preliminary objections to election petitions against both the successful candidates and the returning officers. Each petition alleged, among other things, that the returning officer, acting in collusion with the elected member, unlawfully established different polling divisions from those arranged by the provincial authorities for provincial elections; that, instead of supplying the deputy returning officers with the copies of voters' lists received from the clerk of the Crown in Chancery, he made changes and erasures therein and removed therefrom the names of many persons entitled to vote, and so prevented such electors from voting at the election; that he had given copies of the voters' lists so improperly made out to his co-respondent and refrained from furnishing such copies to the opposing candidate, and concealed these matters entirely from the latter, and that all this had been done in furtherance of a design previously arranged between the respondents to embarrass and hinder those opposed to the election of the elected member; also that the returning officer had signed a large number of certificates in blank to enable voters to vote at polling places for which their names did not appear; and that the respondents had, in these and other ways, conspired to impede and interfere with the free exercise of the franchise of many voters: —*Held*, that the acts complained of might constitute corrupt practices within the meaning of s.-s. (f) and s. 2 of the Dominion Controverted Elections Act, R. S. C. c. 9, for, although they were not so declared by the Dominion Elections Act, or by any other Act of the Parliament of Canada, yet they were infractions of subsequent statutory provisions as to the conduct of elections, and might amount to corrupt practices within the common law of Parliament, as they might be of such extent that the constituency had not had a fair and free opportunity of electing the candidate whom the majority might prefer, this being the test applied by Lord Coleridge, C.J., in *Woodward* v. *Sarsons*, L. R. 10 C. P. at p. 743, and therefore the paragraphs of the petition setting forth such acts should not be struck out on preliminary objections.—2. The conduct of the returning officer in connection with the election being complained of, he was properly joined as a respondent under s. 7 of the Act. —3. An allegation in the petition that the returning officer, with the knowledge and consent of the elected member, in many ways improperly aided in the election of the latter, is too vague and should be struck out. *Re Lisgar Dominion Election, Re Selkirk Dominion Election, Re Brandon Dominion Election, Re Portage la Prairie Dominion Election*, 3 W. L. R. 268, 16 Man. L. R. 249.

Preliminary objections—*English rules —Copy of petition — When to be filed.*] — In order to have due presentation of an election petition under the Dominion Controverted Elections Act, R. S. C. c. 9, s. 9, a petitioner must, at the same time that he files his petition, leave with the clerk of the Court a copy of the petition to be sent to the returning officer. *In re Burrard Dominion Election—Duval* v. *Maxwell*, 21 C. L. T. 252, 8 B. C. R. 65.

Preliminary objections — Leave to supply new evidence after conclusion of hearing—Proof of status of petitioner—Production of voters' list. *Re Yukon Dominion Election—Grant* v. *Thompson* (Y.T.), 2 W. L. R. 136, 435.

Preliminary objections — *Motion to strike out—Appeal—Fixing time for trial.*] —Preliminary objections to an election petition having, on summons to strike them out or otherwise dispose of them, been struck out, on the ground that they were not filed in time, inasmuch as they were filed after office hours on the last day limiting for filing, and an appeal from the order to the Supreme Court of Canada being pending:—*Held*, that, inasmuch as the preliminary objections had not been considered upon their merits, and one of the objections if sustained would finally dispose of the petition, the Court should not fix a time for the trial of the petition. *In re West Assiniboia Dominion Election—McDougall* v. *Davin*, 2 T. L. R. 417.

Preliminary objections — *Order as to —Jurisdiction of Judge at Chambers—Rules of Court—Practice.*]—The words of O. 35 of the Rules of the Supreme Court made under the Dominion Controverted Elections Act, and the table of Chambers work indicating the order in which each Judge shall sit and the period of time during which he shall take the duties assigned, etc., fulfil the provisions of the Dominion Act of 1887, c. 7, s. 2, and there being both a practice as to the order of business and an arrangement of the order of business, a Judge sitting at Chambers has jurisdiction to make an order setting down preliminary objections to an election petition to be heard before one of the Judges of the Supreme Court. It is not necessary in Nova Scotia that there should be a rota before such an application can be heard, the English practice in that particular being different, and depending upon the wording of the English Act applicable in such cases. The words "order," "duties," and "arrange," as used in the Dominion Controverted Elections Act, are not used as conferring jurisdiction. *In re Cumberland Dominion Election—Ripley* v. *Logan*, 37 N. S. R. 349.

Preliminary objections—*Particulars — Examination of petitioner.*]—A respondent to a controverted election petition under the Quebec Act has no right to examine the petitioner before filing particulars of preliminary objections. 2. The respondent will be ordered to declare the names of agents and friends of the defeated candidate who have committed in regard to the petitioner, and of those in regard to whom the petitioner has committed, acts of corruption, corrupt practices, and election frauds, mentioned in the preliminary objections, with the places and dates, and describing the acts committed, and in what they consist. *Giroux* v. *Bergevin*, 5 Que. P. R. 45.

Preliminary objections — *Petition intituled in the matter of the election of "a member"—Return of two members—Affidavit —Security — Amendment.*] — A writ was issued for the return of two members to the House of Commons for the electoral district of Queens, in the province of Prince Edward Island. The returning officer returned two members as elected:—*Held*, that a controverted election petition against one of the members, intituled "In the matter of the election of a member," etc., was a nullity, and the affidavit and security accompanying the petition being also so intituled, there was no power to amend; and preliminary objections were sustained. *Re Queens County Dominion Election—Burke* v. *McLean*, 25 C. L. T. 46.

Preliminary objections—*Prejudice.*] — In preliminary objections, and a fortiori in those made to a petition against an election, there is no necessity to specifically allege prejudice. *Sweeney* v. *Lovell*, 3 Q. P. R. 422.

Preliminary objections — Security — Deposit of current money of Canada—Proof —Affidavit verifying petition—No necessity for—Rules of Court—Manitoba Controverted Elections Act—Power of Judges to make rules requiring affidavit—Practice and procedure—Statutes — Headings to groups of sections—Evidence of furnishing security—No necessity for service on respondent — Receipt—Scrutiny—Seat claimed on behalf of candidate at election—Status of petitioners—Proof of—Voters' lists — Preparation and revision—Lists actually used by deputy returning officers—Presumption — Failure to negative disqualification — Leave to supplement evidence. *Re Morris Provincial Election* (Man.), 6 W. L. R. 742.

Preliminary objections — *Several causes of complaint—No return—Illegal deposit—Parties to petition.*]—A petition under the Dominion Controverted Elections Act, R. S. C. c. 9, alleged that T., a respondent who had obtained a majority of the votes at the election, was not properly nominated, and claimed the seat for his opponent; and that, if it should be held that T. was duly elected, his election should be set aside for corrupt acts by himself and agents:—*Held*, that T. was properly made a respondent to such petition, which was properly framed under s. 5 of the Dominion Controverted Elections Act. Judgment of Street, J., 21 C. L. T. 169, affirmed. *Re West Durham Dominion Election—Burnham* v. *Thornton and Bingham*, 21 C. L. T. 365, 31 S. C. R. 314.

Preliminary objections — *Several causes of complaint — No return — Undue return — Corrupt practices.*] — An election petition was divided into two parts; the first being based upon the alleged invalidity of T.'s nomination, and the relief prayed with regard to that was that B., the other candidate, should be returned as elected, or that there should be a new election; and the second part being in the alternative, in case the Court should think T. should have been returned, that he should be declared to be disqualified by reason of corrupt practices. T. received a majority of the votes, but the returning officer made a special return of the facts and the facts and the return of "no member elected," on account of the supposed invalidity of T.'s nomination. The returning officer was made a respondent to the petition: —*Held*, upon preliminary objection to the petition, that, as a petition must, by statute, be filed within a certain number of days after

the election, and not after the return, that the two distinct sets of allegations and prayers for relief were properly included in the one petition. *Re West Durham Dominion Election—Burnham* v. *Thornton and Bingham*, 21 C. L. T. 169.

Preliminary objections — *Status of petitioner — Corrupt acts—Evidence—Dominion Elections Act, 1900, s. 113.*] — Section 113 of the Dominion Elections Act, 1900, provides that any person hiring a conveyance for a candidate at an election or his agent, for the purpose of conveying any voter to or from a polling place shall, *ipso facto*, be disqualified from voting at such election:—*Held*, that the right of an elector to present a petition against the return of a candidate at an election may be questioned, by a preliminary objection, on the ground that he is disqualified under s. 113, and that on the hearing of the preliminary objection evidence may be given of the corrupt acts which caused such disqualification. Beauharnois Election Case, 31 S. C. R. 447, distinguished.—*Held*, also, that though, unless the commission of the corrupt acts charged is admitted, it must be judicially established, such admission or judicial determination does not take effect merely from the time at which it is made, but relates back to the commission of the acts. *Re Cumberland Dominion Election, Logan* v. *Ripley; In re Pictou Dominion Election, McDonald* v. *Bell; In re North Cape Breton and Victoria Election, McKenzie* v. *Cannon*, 25 C. L. T. 134, 36 S. C. R. 542.

Preliminary objections — *Status of petitioner—Corrupt practices by — "oter—Discovery—Faits et articles.*]—In contesting a Dominion election, the fact that the petitioner has been guilty of electoral corruption, other than that mentioned in art. 113 of the Dominion Elections Act, does not make him incapable of contesting the election, such corruption not taking away from him *ipso facto* his right to vote at the election. 2. The Controverted Elections Act not having authorized the administration to the parties of interrogatories *sur faites et articles*, the default of the petitioner to answer such interrogatories is no evidence against him. *Poirier* v. *Loy*, 19 Que. S. C. 489, 4 Que. P. R. 412.

Preliminary objections — *Status of petitioner—Evidence — Premature service—Return of member.*]—On the hearing of preliminary objections to an election petition the status of the petitioner may be established by oral evidence not objected to by the respondent.—A petition alleging "an undue election" or "undue return" of a candidate at an election for the House of Commons cannot be presented and served before the candidate has been declared elected by the returning officer; Girouard and Idington, JJ., dissenting.—Judgment of Craig, J., 2 W. L. R. 136, 435, reversed. *Yukon Election Case, Grant* v. *Thompson*, 37 S. C. R. 495.

Preliminary objections — Status of petitioner—Evidence—Voters' list — Certified copy—Notice under Canada Evidence Act—Oral testimony of petitioners—Notice of presentation of petition and of security — Clerical error—Copy of certificate of registrar—Receipt—Service — Deposit — Bank notes—Payment of cost of publication of petition—Credit—Affidavit verifying petition —Proof that election held—Illegal acts of enumerators and deputy returning officers. *Re Alberta Dominion Election* (N.W.T.), 1 W. L. R. 486.

Preliminary objections — *Status of petitioner — Particulars — Corrupt practices.*]—A respondent to an election petition must, if he alleges that the petitioner's name is not lawfully upon the list of electors, point out the nature of the illegality charged. 2. The respondent will be ordered to give particulars of the corrupt practices of which he alleges that the petitioner has been guilty and the expenses which he has incurred and the electors whom he has treated. 3. He will also be ordered to give particulars of the conspiracies of which he accuses the petitioner, the payments and promises of money or rewards which he alleges the latter has made, and the particular circumstances of each offence. *Ste. Marie* v. *Perrault*, 5 Que. P. R. 430.

Preliminary objections — Status of petition—Proof of—Copy of voters' list certified by Clerk of the Crown in Chancery — Notice—Canada Evidence Act—Petition filed before return — Form of petition—Affidavit. *Re Yukon Dominion Election — Grant* v. *Thompson* (Y.T.), 2 W. L. R. 136, 435.

Preliminary objections — *Status of petitioner—Proof of—Notice of hearing of preliminary exceptions—Procedure on hearing—Particulars—Quebec Controverted Elections Act.*]—The allegation that the deposit required by law had not been made by the petitioner, and that the latter was only a *prête-nom*, are not good grounds of preliminary exception. If the respondent denies that the petitioner is a British subject and entitled to vote, it is for the petitioner to prove his qualification as a voter and his status to contest the election. The production of the original voters' list which was used at the poll or of a copy duly certified by the officer who has charge of the original, is the best proof of the status of the petitioner; and if the latter has voted at the election without objection on the part of any one, his status as an elector cannot be questioned. The production of a certificate of baptism setting out the date of the birth of the petitioner and the domicil of his father and mother in the province of Quebec at that time, although the baptism took place more than 24 years after such birth, is sufficient proof that the petitioner is a British subject; and the burden of proof is on the respondent to prove that the petitioner, although baptized in the province, was born in a foreign country. The law being silent as to the form of proceedings to be followed on a hearing of preliminary exceptions, the notes of evidence may be taken by a stenographer appointed by the Judges, and the witnesses may be sworn by the clerk of the Court (député protonotaire of the Superior Court) in the presence of the Judge; this procedure is conformable to the spirit of the law as set forth in ss. 473 and 500 of the Controverted Elections Act of the province of Quebec. To prove that an election has been held, it is not necessary to produce the writ nor the proclamation and commission of

the returning officer, but these facts may be established by oral testimony: s. 515, Quebec Controverted Elections Act. This Act and the Rules of practice under it do not contain any direction as to the length of the notice to be given of the hearing, leaving it to the Judge to give it, at his discretion, on the application of one of the parties, as he may deem convenient in the common interest of the parties and the public; and the rules followed in England in similar cases are not consistent with the rules of practice governing election petitions in the province of Quebec. The Judge may, without prejudice to the parties, fix a day for the hearing at the same time that he grants an application of the respondent for particulars, providing he limit such hearing to facts for which particulars are not demanded and of which proof can be made by the production of public and official documents, and adjourn the hearing on the other facts until after such particulars are furnished. It is not necessary to give public notice of the day fixed for the hearing, the only public notice required by the law being that of the discontinuance of the petition on abandonment of the contestation. *Re Brome Provincial Election—Dyer* v. *McCorkill*, 26 Que. S. C. 392.

Preliminary objections — *Status of petitioner—Proof of—Voters' list—Franchise Act, 1898.*]—On the trial of the preliminary objection to an election petition, filed under the Dominion Controverted Elections Act, that the petitioners were not persons entitled to vote at the election in question, it is not necessary since the passing of the Franchise Act, 1898, and the Dominion Elections Act, 1900, to prove that the names of the petitioners were on the list of voters which was actually used by the deputy returning officer at the particular polling division; but it will be sufficient to shew that their names were on the original list transmitted under s. 16 of the Franchise Act, 1898, by the custodian thereof, after final revision, to the Clerk of the Crown in Chancery, as this is declared by s.-s. 2 of s. 16 to be "the original and legal list of voters for the polling division for which the list of which it is a copy was prepared:" and under s. 10 of the same Act this list may be proved by the production of a copy authenticated by the ordinary imprint of the Queen's Printer. The Richelieu Case, 21 S. C. R. 168, and The Winnipeg and Macdonald Cases, 27 S. C. R. 201, distinguished on the ground of changes in legislation. *Re Provencher Dominion Election*, 21 C. L. T. 315, 13 Man. L. R. 444.

Preliminary objections—*Sufficiency of — Service of petition — Naming attorney—Affidavit in support of petition.*] — The Dominion Controverted Elections Act, defining, as it does, what are grounds on which an election petition may be deemed insufficient, the Courts can only entertain preliminary objections based on substantial error and want of formalities essential to a valid petition, especially when the want of form is not such as is calculated to prejudice, surprise, or mislead the party who urges it. After an election petition has been presented, the petitioner may get it from the registrar of the Court and deliver it to a bailiff for service in the same manner as in the case of writs of summons in civil matters. A petitioner is not bound to name an attorney, and, if he does, he need not state the residence of the attorney chosen. The affidavit filed by the petitioner in support of the petition, sworn before an officer qualified to take oaths and within the limits of his jurisdiction, is lawful although the place where it is sworn is not accurately stated in the *jurat*. *Bailey* v. *Hunt*, 27 Que. S. C. 84.

Presentation of — *Time — Computation.*]—An election petition under R. S. B. C. 1897 c. 67, s. 214, must be filed within 21 days of the exact time of the return. Decision in 22 C. L. T. 43, 8 B. C. R. 273, affirmed; Irving, J., dissenting. *In re New Westminster Provincial Election — Rae* v. *Gifford*, 9 B. C. R. 192.

Presentation of—*Time—Return to clerk of Crown in Chancery, when made—Notice of presentation.*]—The return of a member by the returning officer is made only when it has been actually received by the Clerk of the Crown in Chancery, and not when the returning officer has placed it in the express or post office for transmission to such Clerk; and a petition may be presented within 21 days after such receipt. R. S. O. 1897 c. 9, s. 135, and R. S. O. 1897 c. 11, s. 9, considered. 2. The omission to serve a separate notice of "presentation" of the petition is not fatal to the proceedings, where a copy of the petition itself is duly served, on which is indorsed: "This petition is filed," etc. Williams v. Mayor of Tenby, 5 C. P. D. 135, distinguished. *Re Ottawa Provincial Election —Randall* v. *Powell*, 2 Elec. Cas. 64.

Publication of notice of trial — *Sheriff's costs of—Payment out of deposit.*] —Where an election petition is dismissed at the trial without costs, the petitioner must pay to the sheriff the costs incurred in the publication of the notice of trial thereof; and, although the sum deposited as security is not security for such expenditure, payment out of Court will be ordered only on the condition of its being made good to the sheriff. No charge can be made by the sheriff for attending to the publication, no allowance therefor being authorized by the tariff. *In re East Middlesex Provincial Election*, 2 Elec. Cas. 150.

Publication of petition — *"Three consecutive days" — Practice.*] — Publication of an election petition in three consecutive issues of a weekly paper is not publication "for three consecutive days," and, therefore, not sufficient under s. 81 of the New Brunswick Controverted Elections Act, C. S. 1903, c. 4. *Herbert* v. *Hanington*, 14 N. B. R. 324, followed, and where publication of the petition is insufficient, an order cannot be made fixing the date of trial. *Owens* v. *Upham* (1909), 39 N. B. R. 198.

Qualification of petitioner—*"Reside" —Ontario Controverted Elections Act.*]—The word "reside" in s. 3 of the Ontario Controverted Elections Act, R. S. O. 1897 c. 11, as amended by 62 V. (2) c. 6, s. 1, is intended to denote the place where the petitioner "eats, drinks, and sleeps." And therefore a peti-

tioner who owned a farm assessed in all for more than $1,000, and all in one electoral district, but the house and part of the land, assessed for less than that sum, being in one township, and the main part of the land in another township, was held to be unqualified, the assessment of the part with the house being alone regarded. Leave was given to substitute a petitioner:—*Held*, on the evidence, that the signatures of the petitioners to the petition and accompanying affidavit had not been obtained by fraud. *Re North Renfrew Provincial Election—Wright* v. *Dunlop*, 24 C. L. T. 125, 7 O. L. R. 204, 3 O. W. R. 300.

Qualification of petitioners—*Signatures—Fraud—Question of fact—Corroboration — Insufficiency — Residence—Leave to substitute petitioner.*] — Within a few days after the presentation of an election petition, signed in a solicitor's presence, the affidavits accompanying it, sworn to before another solicitor, deposing to the presentation of the petition being in good faith, and with reason to believe that the statements contained in it were true in substance and in fact, and after a retainer of the first named solicitor to conduct the proceedings, two of the petitioners made affidavits virtually contradicting their former affidavits, one of them deposing to being intoxicated at the time and unable properly to realize what he was doing, while the petition had only been partly read over to him, some of the statements in which he had since found were wholly untrue, while as to others he knew nothing; the other petitioner stating that he was an old man, unable to read or write, and that without the petition being read over or explained to him, and without his having any independent advice and without his appreciating his position, he was induced by the first named solicitor and a hotel keeper to sign the petition and swear to the affidavits:—*Held*, that, in the absence, not only of any corroboration of the statements made in the subsequent affidavits, but in the face of their denial by the parties interested, as well as by another person then present, they were not sufficient to support an application made by the respondent to set aside the petition. Order of Moss, C.J.O., 24 C. L. T. 125, 7 O. L. R. 204, 3 O. W. R 300, dismissing application to set aside petition and allowing a new petitioner to be substituted for one whose qualification was insufficient affirmed. *Re North Renfrew Provincial Election—Wright* v. *Dunlop*, 24 C. L. T. 364, 8 O. L. R. 359, 3 O. W. R. 894.

Rules of Court—*Validity of—Payment into Court—Appointment of Master—Status of petitioners—Evidence on appeal.*]—Payment into Court in the usual way is a good payment in, within the meaning of Rule 16 of the Parliamentary Election Petition Rules, 1868 (Imperial). A Rule made by the Judges empowering the Senior Puisne Judge, or any other Judge of the Court, to perform the duties devolving by the Rules on the Chief Justice whenever the office of Chief Justice is vacant, or he is absent from the Province, is valid. Appointment of a new Master under said Rules operates *ipso facto* as a rescission of any former appointment, it being unnecessary to rescind any former appointment by express writing. The full Court on appeal allowed evidence to be adduced to prove the status of the petitioners, although the matter was not gone into in the Court below. *Re Esquimalt Provincial Election — Jardine* v. *Bullen*, 7 B. C. R. 471.

Security—*"Current money of Canada."*] —The petitioners, intending to comply with ss. 21 and 22 of the Manitoba Controverted Elections Act, R. S. M. c. 29, made a deposit with the prothonotary, consisting of Dominion notes, one for $500, one for $100, and 150 for $1 each, and got a receipt stating that the sum of $750 had been deposited as security "for the payment of all costs, charges and expenses which the Court shall award to be payable by the petitioners on the final disposal of the petition." On the hearing of preliminary objections it was shewn that the notes had been handed out by one bank to the petitioners' solicitor as Dominion notes in payment of a cheque; and that, after receiving them, the prothonotary deposited them in another bank, which received them as cash. The note for $500 was produced and identified at the hearing, but the others had been paid out in the course of business and could not be traced:—*Held*, (1), that it was not necessary to prove that the notes were genuine and signed by the proper officials with the same strictness as would be required in proving other documents before the Court, and that the evidence adduced was sufficient *prima facie* to establish compliance with the Act; and (2) That the petitioners were not bound by the form of the receipt given by the prothonotary as to the purposes for which the security given was intended, as no receipt is required by the statute to be given. The money was paid in as security for costs in the matter, and ss. 21 and 22 of the Act make it security for all purposes therein referred to. *Re St. Boniface Election*, 20 C. L. T. 183, 281, 13 Man. L. R. 75.

Security—*Notice—Affidavit of service — Rules of Court.*]—In s. 216 of the British Columbia Elections Act "proposed security" means "intended security," and a notice by the petitioner informing the respondent that that security would be given by depositing $2,000 with the Registrar was held a good notice pursuant to the section. The additional Rules made on the 27th January, 1875 (*i.e.*, in addition to the Parliamentary Election Petition Rules, Michaelmas Term, 1868), are in force in British Columbia. The petitioner after serving notice of the presentaton of the petition and of the proposed security omitted to file an affidavit of the time and manner of such service thereof:—*Held*, that the petition should not be struck off the files of the Court on that ground. *Re Lillooet Provincial Election—Stoddart* v. *Prentice*, 7 B. C. R. 498.

Service—*Extension of time—Special circumstances.*]—Under substituted s. 10 (s. 8 of c. 20, 1891), of the Dominion Controverted Elections Act, a Judge of the Election Court has jurisdiction to extend the time for personal service of the petition on the ground of special circumstances of difficulty in effecting service, if it appears that there was a *bona fide* attempt to serve, and ordinary dili-

gence is used in trying to effect a service, even though it is shewn that the petition was not delivered to the officer for service for four days after it was filed, and during the whole period allowed by the section for service the respondent was at or in the vicinity of his residence, and made no attempt and colluded with no person to avoid service, and might have been served if more than ordinary diligence had been used. *In re Sunbury and Queen's Dominion Election—Nason* v. *Wilmot*, 35 N. B. R. 457.

Service—*Irregularity — Extending time — Re-service—Preliminary objections.*]—The petitioner in a controverted election petition under the Dominion Act, after the appearance of the respondent, and the filing by him of preliminary exceptions in which he complains of the irregularity of the service effected upon him, may obtain *ex parte* an order of a Judge extending the time for service, and that before having desisted from the first service. *Labelle* v. *Leonard*, 5 Que. P. R. 77.

Service — *Order extending time for — Grounds for.*]—An election petition filed in the clerk's office on the 17th December was sent to the petitioner at C. by registered letter on the 20th, and was received at the post office at C. on the evening of that day, but, for some reason that was not explained, the letter was not delivered, and the petitioner had no knowledge of its receipt until the 27th, the last day for service:—*Held*, that an order extending the time for service was properly made. *Re Restigouche Dominion Election—McAllister* v. *Reid*, 35 N. B. R. 390.

Service— — *Personal — At Domicil — Abandonment — Time — Extension of — Motion to dismiss petition.*] — An election petition under the provisions of s. 10 of c. 9, R. S. C., as amended by s. 8 of c. 20 of the statutes of 1891, should, unless otherwise ordered by a Judge, be personally served.—2. Service made on the respondent of a copy of the election petition by leaving such copy for him at his domicil with his wife, without having previously stated the impossibility of making a personal service within the time described, and without the order of a Judge, is not good service according to the provisions of s. 8 of c. 20.—3. As in ordinary actions, a petitioner may abandon at his own expense, the service of an election petition made as above, without the authorisation of the Court or a Judge, which is necessary under s. 56 of c. 9.—4. Within the time allowed by law for the service of an election petition, a Judge of the Superior Court may, under s. 10 of c. 9, extend the time for such service, and a personal service, such as is required by s. 8 of c. 20, is a good and valid service of such petition.—5. A motion for the dismissal of an election petition, made before the time allowed by law or by a Judge has expired, is premature and will be dismissed with costs. *Labelle* v. *Leonard*, 4 Que. P. R. 420.

Service — *Substituted service — Order after time expired.*]—Under s. 8 of c. 20 of 54 & 55 V., substituted for s. 10 of the Dominion Controverted Elections Act, R. S. C. c. 9, the Court has jurisdiction to make an order for substituted personal service, where the application for the order is not made until after the time allowed for personal service has expired. The order is not bad because it omits to fix a time within which the substituted service must be made. Where the petitioner, by reason of a deception practised upon him, erroneously believed a personal service had been effected and allowed five days after the extended time to elapse before taking out the order for substituted service:—*Held*, that it was not too late. *Re York Dominion Election—McLeod* v. *Gibson*, 35 N. B. R. 376.

Service of notice of presentation — *Security for costs—Deposit—Moneys of solicitor.*]—The statute of Canada 54 & 55 V. c. 20, s. 8, allows three modes of service of the notice of presentation of an election petition:—(a) If service is made within ten days of the presentation, it may be made in the same way as in the case of a writ of summons in a civil cause. (b) If, by reason of special circumstances of difficulty in service, the petition has not been served within the ten days, the Court or Judge may allow further time, and in such case the service must be personal. (c) If it has not been possible to serve the defendant personally within the time allowed by the Court or Judge, then the Court or Judge may order another mode of service.—2. Rule 12 of the Rules of Practice of the Superior Court does not apply to a deposit, made in the matter of a contested Dominion election, of the moneys of the solicitor for the petitioner. *Belanger* v. *Carbonneau*, 5 Que. P. R. 8.

Service of petition—*Domicil — Irregularity — Preliminary objection.*] — Where an order was made by a Judge for the service of an election petition "on the defendant in person, or at his domicil or at the place of his ordinary residence, speaking to a reasonable person belonging to the family of the defendant, or by posting in a conspicuous place on the residence of the defendant, in the presence of a witness, the election petition and proceedings attached thereto," a service effected at the residence of the defendant's father, where his wife and children were temporarily residing, the defendant's house in which he had lived during the 8 previous years not having been closed, is not in compliance with the order, and, on preliminary objection made thereto, will be declared null and void. *Re Compton Dominion Election, Wetherall* v. *Hunt*, 30 Que. S. C. 32.

Service of petition — *Exhibition of original — Indorsement of service — Allegations of petition — Holding of election.*]—There is nothing in the law requiring that the original of a petition contesting a federal election be exhibited to the respondent at the time of the service. The omission by the bailiff to mention on the copy of the writ of summons or contestation of election the date of such service, is no ground for exception to the form, unless prejudice is shewn. It is sufficient in the contestation of an election held in one of the divisions of Montreal, to state that the same took place within the judicial district of Montreal. *Darlington* v. *Gallery*, 7 Que. P. R. 40.

Service of petition—*Second service.*]—An election petition cannot be served outside of Canada. Where the petition was served on the respondent abroad, and, subsequently, service was made on him in Ottawa:—*Held*, that the first irregular service did not invalidate that properly made afterwards. *In re Shelburne and Queen's Dominion Election—Cowie* v. *Fielding*, 25 C. L. T. 133, 36 S. C. R. 537.

Service of petition out of Canada—*Second service on agent.*] — Under the Dominion Elections Act, service of an election petition cannot be made outside of Canada: Idington, J., dissenting. By rule 10 of the Nova Scotia Rules under the Elections Act, a candidate returned at an election may, by written notice deposited with the clerk of the Court, appoint an attorney to act as his agent in case there should be a petition against him:—*Held*, that an agent so appointed is authorised only to act in proceedings subsequent to the service of the petition, and service of the petition itself on him is a nullity. *In re King's Dominion Election—Parker* v. *Borden*, 25 C. L. T. 135, 36 S. C. R. 520.

Service out of jurisdiction.]—A petition against the return of a member may be served personally on the respondent out of the jurisdiction; and it is not essential that an application should be made for leave to effect such service, or for allowing the service so made. *In re West Algoma Provincial Election—Whitacre* v. *Savage*, 14 C. L. T. 390, 2 Elec. Cas. 13.

Setting aside—*Summary application — Grounds.*]—*Held*, that a petition may be set aside upon summary application upon grounds other than those contained in s. 10 of the Controverted Elections Ordinance, N. W. T. *In re Banff Election—Brett* v. *Sifton* (*No. 2*), 4 Terr. L. R. 253.

Status of petitioner—*Fees—Credit for—Copy — Affidavit — Deposit — Service—Bailiff.*] — A party who contests a federal election has only to shew that he had a right to vote at the election in question, and the fact that he is on the voters' list as a tenant instead of as an occupant does not affect his status.—2. No court house tax is payable upon an election petition.—3. The respondent has no interest in urging that the prothonotary gave credit to the petitioner's attorney, instead of claiming his fee on the election petition at once.—4. A copy of an election petition which is followed by an affidavit is not invalid by the mere fact that a copy of the petition itself is not certified with the words "true copy" when the signature appears at the end of the last document, the affidavit.—5. A deposit of bank bills accepted by the prothonotary, is regular.—6. It is regular to serve a copy of the election petition and affidavit, not a duplicate thereof.—7. A bailiff will not be declared unqualified by the mere fact that no proof has been shewn that his guarantee policy has been renewed. *In re Missisquoi Dominion Election, Morin* v. *Mergs*, 6 Que. P. R. 372.

Status of petitioner—*Franchise Acts.*]—The principal contention raised on preliminary objections to an election petition was, that the petitioner had been guilty of corrupt practices before, during, and after the election, and that, by the effect of 61 V. c. 14 and 63 & 64 V. c. 12, the Dominion Franchise Act was repealed and the provisions of the Quebec Elections Act regulating the franchise in the province of Quebec substituted therefor, so as thereby to deprive the petitioner of a right to vote under s. 272 of the Quebec Elections Act, 59 V. c. 9, and being so deprived of a vote, that he had no status as petitioner. In the Election Court, evidence was taken on issues joined, and the Judge, holding that no corrupt practice upon the part of the petitioner had been proved, dismissed the preliminary objections. On appeal to the Supreme Court of Canada:—*Held*, that, as corrupt practices had not been proved, the question as to the effect of the statutes did not arise. *Per* Gwynne, J.:—A person properly on the list of voters for an election to the House of Commons cannot be deprived of his right to vote at such election by provincial legislation. *Re Beauharnois Dominion Election*, 22 C. L. T. 6, 31 S. C. R. 447.

Status of petitioner—*Statement—Sufficiency — Defeated candidate. Re Stormont Provincial Election—McLaughlin* v. *McCart*, 1 O. W. R. 504.

Status of petitioner — *Voters' list — Affidavit — Preliminary objection.*]—A list appearing on its face to be an imprint emanating from the Queen's printer, certified by the clerk of the Crown in Chancery to be a copy of the voters' list used at an election, and upon which the name of the petitioner against the return at such election appeared as a person having a right to vote thereat, is sufficient proof of his status. The jurat of the affidavit accompanying the petition was subscribed "Grignon & Fortier, Protonotaire de la Cour Supérieure dans et pour le District de Terrebonne:"—*Held*, *per* Gwynne, J., that an objection to the irregularity of the subscription to the jurat did not constitute proper matter to be inquired into by way of preliminary objection to the petition. *Re Two Mountains Dominion Election—Ethier* v. *Legault*, 22 C. L. T. 5, 31 S. C. R. 437.

Stay of proceedings pending appeal on preliminary objections — *Trial — Time—Extension.*] — Preliminary objections to an election petition filed on the 22nd February, 1902, were dismissed by a Judge on the 24th April, and an appeal was taken to the Supreme Court of Canada. On the 31st May the Judge ordered that the trial of the petition be adjourned to the thirtieth juridical day after the judgment of the Supreme Court should be given, and the same was given, dismissing the appeal, on the 10th October, making the 17th November the day fixed for the trial under the order of the 31st May. On the 14th November a motion was made before a Judge, on behalf of the member elect, to have the petition declared lapsed for non-commencement of the trial within six months from the time it was filed. This was refused on the 17th November, but the Judge held that the trial could not proceed on that day, as the order for adjournment had not fixed a certain time and place, and,

on motion by the petitioner, ordered that it be commenced on the 4th December. The trial was begun on that day:—*Held*, that the effect of the order of the 31st May was to fix the 17th November as the date of commencement of the trial; that the time between the 31st May and the 10th October, when the judgment of the Supreme Court on the preliminary objections was given, should not be counted as part of the six months within which the trial was to be begun; and that the 4th December, on which it was begun, was therefore within the six months:—*Held*, also, that, if the order of the 31st May could not be considered as fixing a day for the trial, it operated as a stay of proceedings, and the order of the 17th November was proper. *Re St. James Dominion Election, Brunet* v. *Bergeron*, 23 C. L. T. 147, 33 S. C. R. 137.

Substituting petitioner — *Grounds for —Jurisdiction of Court—Time—Collusion.*] —The Court has no power in a proceeding under the Dominion Controverted Elections Act to substitute a new petitioner unless either no day for trial has been fixed within the time prescribed by statute or notice of withdrawal has been given by the petitioner. And where a petition came regularly down for trial and the petitioner stated that he had no evidence to offer, an application of a third party to be substituted as petitioner, upon vague charges, made on information and belief, of collusion in the dropping of the petition, which were contradicted, and of corrupt practices, was refused; and the petition was dismissed with costs. *Re South Essex Dominion Election—Tofflemire* v. *Allan*, 2 Elec. Cas. 6.

Time for filing — *Return to clerk of council—Gazetting — Recount.*] — The returning officer having made his return to the clerk of the executive council, pursuant to s. 196 of the Manitoba Election Act, R. S. M. c. 49, but without waiting for the result of a recount of which he had received notice, the clerk, as required by s. 200, published the election of the respondent in the next number of the Manitoba Gazette. The petition was filed on the last of the 30 days thereafter in accordance with s. 18 of the Manitoba Controverted Elections Act, R. S. M. c. 29. After the result of the recount was made known confirming the election of the respondent, the returning officer sent another return to the clerk of the executive council, which he duly gazetted, but this was more than six weeks after the filing of the petition:—*Held*, that the petition was regular, and that a preliminary objection based on the contention that the first return and gazetting of the election were void, and that only a petition filed after the second return would be good, should be overruled. *Re Rosenfeldt Provincial Election*, 20 C. L. T. 282, 13 Man. L. R. 87.

Time for hearing—*Legislature in session — Quebec Controverted Elections Act.*] —An election petition under the Controverted Elections Act of the province of Quebec, must be brought on for hearing on the merits by the petitioner within four months following the publication of the notice provided for in s. 213 of the Election Act of Quebec, 1895, even if the legislature is or has been in session. After the trial is commenced the Court should adjourn it over the session on the request simply of the sitting member. *Rochon* v. *Gendron*, Q. R. 27, S. C. 163.

Trial—*Amendment.*]—At the trial of an election petition based on bribery, the petitioner asked for leave to amend by setting up that the election was void on the ground that the list of voters used at the election was compiled and signed by an unauthorised official, this fact having been discovered only after the commencement of the trial:—*Held*, that the amendment must be refused. *Martin* v. *Deane—North Yale Election Case*, 7 B. C. R. 128.

Trial — Charges and expenses of stenographers. *Re Ontario Controverted Elections Act*, 2 O. W. R. 495.

Trial — *Commencement — Extension of time.*]—An order fixing the time for the trial of an election petition at a date beyond the time prescribed under the Act operates as an enlargement of the time. *St. James Election Case*, 33 S. C. R. 137, and *Beauharnois Election Case*, 32 S. C. R. 111, followed. *Halifax Election Case, Hetherington* v. *Roche, Hetherington* v. *Carney, Roche* v. *Borden, Carney* v. *O'Mullin*, 26 C. L. T. 776, 37 S. C. R. 601.

Trial—Distinction between certificate and report of Judges — Certificate that election voided—Report against personal charges—Effect of appeal. *Shelburne Election, Cowie* v. *Fielding*, 1 E. L. R. 415.

Trial—*Enlargement of time — Appeal — Effect of.*]—An order may be made enlarging the time for commencing the trial of an election petition, if within the six months, although the case has not been set down for trial.—Where an order was made dismissing the petition, and an appeal was taken to the Supreme Court of Canada:—*Held*, that, during such time as the case was before that Court, the period of six months from presentation of the petition within which the petition is required to be brought on for trial would not run against the petitioner. *Shelburne Election, Cowie* v. *Fielding*, 1 E. L. R. 179, 369, 39 N. S. R. 517.

Trial—*Enlargement of time — Power of Court to order—Petition — Form of title—Laches—Waiver.*] — On application by the petitioner to have a day fixed for the trial, or, in the alternative, to have the time enlarged for the commencement of the trial, the Court dismissed the application to set the case down for trial, but made an order enlarging the time for the period of six months, and by a subsequent order enlarging the time for the commencement of the trial for the period of eight months:—*Held*, that the orders so made were within the jurisdiction of the Court, and that it was not essential to the exercise of the jurisdiction to enlarge the time under the statute, that the case should have first been set down for trial.—The petition was intituled "Election of a member for the House of Commons for the Electoral District of . . ." and the objection was taken that there were two

members to be returned for the county, and that the title should read "Election of members" or "Election of two members, etc.:" *Quære*, whether this was an irregularity.—*Held*, however, that the objection was too late, not having been raised until after a number of steps had been taken in the case. *Halifax Election, Hetherington* v. *Roche, Hetherington* v. *Carney*, 1 E. L. R. 122, 255, 39 N. S. R. 383.

Trial—Enlarging time—Fixing date for trial later than last day of enlarged period. *Halifax Election, Hetherington* v. *Roche, Hetherington* v. *Carney*, 1 E. L. R. 255.

Trial—Enlarging time. *Pictou Election, McDonald* v. *Bell*, 1 E. L. R. 262.

Trial—Enlarging time—Setting down for trial not condition precedent to time being enlarged—Preliminary objection—Intituling papers—Waiver. *Halifax Election, Hetherington* v. *Roche, Hetherington* v. *Carney*, 1 E. L. R. 122.

Trial—Enlarging time after date fixed. *Shelburne Election, Cowie* v. *Fielding*, 1 E. L. R. 369.

Trial— — *Expenses of—Sheriff's fees—Crier's fees.*]—A sheriff has a right to a fee for attendance at the trial of a controverted election petition only if his presence at the trial has been required. — 2. The fees of criers at the trial of election petitions will be taxed. *Bergeron* v. *Brunet*, 5 Que. P. R. 433.

Trial—*Extension of time—Appeal—Jurisdiction.*]—On the 25th May, 1901, an order was made by Belanger, J., for the trial of the petition against the appellant's return as a member of the House of Commons for Beauharnois, thirty days after judgment should be given on an appeal then pending from the decision on preliminary objections to the petition. Such judgment was given on the 29th October, and on the 19th November on application of the petitioner for instructions, another order was made by the same Judge which directed that judicial days only should be counted in computing the thirty days, and stating that such was the meaning of the order of the 25th May, and that the 6th December would be the date of trial. On the petition coming on for trial on the 6th December, the appellant moved for peremption on the ground that the six months' limitation for hearing had expired. The motion was refused, and on the merits the election was declared void. On appeal to the Supreme Court:—*Held*, Davies, J., dissenting, that an appeal would not lie from the order of the 19th November; that the Judge had power to make such order, and its effect was to extend the time for trial to the 6th December; and that the order for peremption was, therefore, rightly refused. *Re Beauharnois Dominion Election—Loy* v. *Poirier*, 22 C. L. T. 193, 32 S. C. R. 111.

Trial—Failure to bring on within six months — Order enlarging time for trial—Time does not run pending appeal as to preliminary objections. *Shelburne Election, Cowie* v. *Fielding*, 1 E. L. R. 179.

Trial—*Production of Voters' Lists—Certified copies—Costs.*]—Since the Franchise Act, 1898, provides that the voters' lists used at an election of a member of the House of Commons may be proved by the production of certified copies, it is unnecessary to procure the attendance of the clerk of the Crown in Chancery from Ottawa to produce the lists at the trial of an election petition, and the costs occasioned by procuring his attendance will not be allowed to the successful petitioner as against the respondent, but instead thereof only what the certified copies of the necessary parts of the lists if procured, would have cost. *Re Lisgar Dominion Election*, 14 Man. L. R. 268.

Verification — *Sufficiency of affidavit.*]—An affidavit which alleges that the allegations contained in an election petition are true "to the best of my knowledge," is not sufficient to satisfy the requirements of a statute which provides that the deponent shall swear "that he has reason to believe and does verily believe," etc. *Lemieux* v. *Paquet*, 27 Que. S. C. 159.

See APPEAL.

vi. *Recount.*

Appeal — *Notice of—Signature—Result of appeal—Majority.*]—The notice of appeal from the decision of the County Court Judge upon a recount of votes under s. 129 (1) of the Election Act, R. S. O. 1897 c. 9, need not be signed by the appellant candidate personally, but may be signed by his solicitor or agent on his behalf. Where both candidates appeal from the decision of the County Court Judge, and the result of the appeal of one, first heard and determined, is to give his opponent a majority, the appeal of the other will be heard and determined, although it cannot change the result except by increasing the majority. Neither appeal having been limited to particular ballots, it was open to the candidate whose appeal was first determined to object, when his opponent's appeal was being heard, to certain ballots not previously objected to. *Re North Grey Provincial Election—McKay* v. *Boyd*, 22 C. L. T. 287, 4 O. L. R. 286, 1 O. W. R. 474, 483, 2 O. W. R. 231, 604, 1131.

Ballots — *Absence of candidates' numbers.*]—Recount of votes cast at a provincial election:—*Held*, that the candidate's number, mentioned in s. 69 (3) of the Ontario Election Act, R. S. O. 1897 c. 9, is not an essential part of the ballot paper; and where a deputy returning officer, in detaching the ballot papers from the counterfoils, did so in such a manner that the candidate's numbers were left on the counterfoils, instead of appearing on and as part of the ballot papers, such ballot papers, when marked by voters, were not rejected. *Re Prince Edward Provincial Election—Williams* v. *Currie*, 22 C. L. T. 285, 4 O. L. R. 255, 1 O. W. R. 468.

Ballots—Dominion Election Act, R. S. C. 1906 c. 6, ss. 206-210—Jurisdiction of County Court Judge — Affidavit—"Credible witness"—Practice. *Re North Cape Breton and Victoria Dominion Elections* (N.S.), 6 E. L. R. 37, 532.

Ballots—*Irregular marking.*]—Upon the recount of ballots cast at the election of a member of the Ontario Legislature, there being two candidates, ballots were allowed which were marked (1) with a cross below and to the right of the lower compartment; (2) with a cross in one compartment and a line in the other; (3) with a cross in one compartment and a faint and probably unintentional mark in the other; (4) with a mark in the form somewhat of an inverted V, as being probably intended for a cross; (5) with three crosses in one compartment; and (6) with a mark which might fairly be taken to be a clumsy and ill-made cross; and ballots were disallowed which were marked (1) with a single stroke; the error in the head-note in *In re West Huron*, 2 Ont. Elec. Cas. 58, in which it is stated that ballots so marked were in that case allowed, being pointed out; (2) with a plain cross in one compartment and a fainter, partly smudged or rubbed out cross in the other; (3) with the name of the candidate written in the compartment; and (4) with a circle in both compartments. Ballots marked in due form but with indelible coloured pencil, were objected to on the ground that there was possibly a design to identify the voters, but these were allowed, there being no evidence, and evidence not being admissible, to shew whether a pencil of this kind had or had not been supplied by the deputy returning officer. *Re Halton Provincial Election, Nixon* v. *Barber*, 22 C. L. T. 362, 4 O. L. R. 345, 1 O. W. R. 501.

Ballots — *Irregular marking.*] — Four ballots counted for one of the candidates by a deputy returning officer were held to have been properly rejected by the County Court Judge on a recount, in consequence of each being marked with a cross in the division of both candidates. There was nothing to shew that, as was alleged, one of the crosses had been placed on each ballot after the counting by the deputy returning officer. A ballot having a distinct cross in the division of one candidate, and an obliterated cross in that of the other, was allowed for the first. But where there was a distinct cross in one division, and a very faint one in the other, the ballot was rejected. The following ballots were rejected:—Marked for one candidate and having the name of that candidate written on the back. Having, instead of a cross, a perpendicular, horizontal or straight slanting line. Having a cross on the back only. The following were allowed: — Properly marked, but having on the back words written by the deputy returning officer. Having several connected tremulous marks in one division. Having a strongly marked cross in one division, and a thin, faint upright pencil mark on the upper edge of the ballot in the other division, not indicative of any intention to make a cross. Having a distinct cross, and in the same division a slight irregular pencil marking, or a series of slight, cloudy, formless pencil markings. Having a mark consisting of two lines lying very close to each other, both distinctly visible, in one division, shewing an intention to make a cross. *Re North Grey Provincial Election, Boyd* v. *McKay*, 22 C. L. T. 286, 4 O. L. R. 286, 1 O. W. R. 474, 483, 2 O. W. R. 231, 604, 1131.

Ballots—*Irregular marking—Ballot not objected to before deputy returning officer.*] —A County Court Judge is not confined, on a recount, to the consideration of cases in which an objection was made before the deputy returning officer when counting the votes at the close of the poll. Where a ballot was marked with a cross outside, but near the upper line of, the top division:—*Held*, that it should be allowed. It is not essential to have a line on a ballot paper at all. Similarly all votes below the lower division must be counted for the candidate whose name is in it. Where a ballot was marked with a circle, not a cross, nor any apparent attempt to make a cross:—*Held*, bad. Where a ballot was well marked for one candidate, but in the other candidate's division there was an irregular, shapeless pencil mark, which was not, however, a cross or any attempt to make a cross, nor a mark by which the voter could be identified:—*Held*, a good vote for the candidate for whom the paper was well marked. Where a ballot, though well marked, had, in the same division, the initials S. A. in small but legible capitals:—*Held*, bad. Any written word or name upon a ballot presumably written by the voter, ought to vitiate the vote as being a means by which he may be identified. Where ballot papers had a cross or crosses in the division of both candidates. —*Held*, bad. *Re Lennox Provincial Election —Carscallen* v. *Madole*, 22 C. L. T. 363, 4 O. L. R. 378, 1 O. W. R. 472.

Ballots — *Irregular marking — Initialling.*]—Ballots marked with a straight line only are improperly marked and cannot be counted, while ballots marked with a cross upon or above the upper division line, or marked with a cross made by three or four pencil strokes, or marked with what might be taken for a "c," are properly marked and should be counted. In initialling the ballots a deputy returning officer at one subdivision put as his initials H. C. instead of his full initials H. C. G., and a deputy returning officer at another polling sub-division put McN., instead of his full initials, W. D. McN.:—*Held*, that such ballots were sufficiently initialled within the meaning of the Act, the object of such initialling being merely the identification of the voter, which was effected, there being no suggestion that the number of ballots cast at the polling subdivision was not correct; and semble, that under these circumstances the ballots should not be rejected, even if not initialled at all. *Re Muskoka Provincial Election—Mahaffy* v. *Bridgland*, 22 C. L. T. 322, 4 O. L. R. 253, 1 O. W. R. 487.

Dominion Election Act—*R. S. N. S. 1906, c. 6, ss. 193, 206, 210—Recount—Affidavits — Credible witness.*]—An order was made for recount of ballots, and now this motion was launched to rescind that order. Two of the affidavits in support of the application for a recount were sworn before barristers of the Supreme Court of Nova Scotia: — *Held*, that they were not empowered to take affidavits for the purpose of the Dominion Election Act:—*Held*, further, that an affidavit of information and belief is not one made by a credible witness as required by s. 193 of the Dominion Election Act. Order for a recount rescinded. *Re Do-*

minion Election Act and Re-election in Cape Breton, North, and Victoria Counties, 6 E. L. R. 37, 542.

Interference with by Superior Court Judge — *Method of counting votes.*]—A County Court Judge holding a recount of the votes cast at an election for the House of Commons, pursuant to s. 90 of the Dominion Elections Act, 1900, rules that a ballot could not be objected to before him because the same objection had not been raised when the ballot was counted by the deputy returning officer:—*Held*, that a motion to a Superior Court Judge for an order requiring the County Court Judge to entertain the objection was not warranted by s. 91; under that the County Court Judge could be directed to proceed, but not as to the mode by which he should proceed. *Re King's County Dominion Election*, 21 C. L. T. 57.

Irregularities.]—Upon a recount of the votes cast at the London election for the House of Commons objection was taken to three ballots without the official stamp of the returning officer and to five ballots from which the deputy returning officer had omitted to remove the counterfoils. The ballots were in other respects regular, and were counted and allowed by the deputy returning officer. The Judge refused to disallow them. *Re London Dominion Election*, 24 C. L. T. 401, 4 O. W. R. 402.

Jurisdiction of Deputy County Court Judge—*Absence of statement by Returning Officer as to result of poll — Substituted statement—Two crosses on ballot—Erasure of one—Irregular cross.*]—The County Judge was ill and a deputy took his place:—*Held*, the deputy had jurisdiction to hold recount of ballots in an election for the Provincial Legislature. A ballot had a cross in a division for one candidate and the ballot also shewed an erasure of another cross after the other candidate's name:—*Held*, properly counted for the candidate in whose division the cross was left unerased:—*Held*, also, that there was nothing in the Ontario Election Act to void the ballots cast at any particular poll where the deputy returning officer failed to make a statement of the votes cast in his returns; if the returning officer has no difficulty in ascertaining the number of votes cast the vote must be counted. *Re Prince Edward Provincial Election*, 5 O. W. R. 376, 9 O. L. R. 463.

Jurisdiction of Junior County Court Judge.]—A junior Judge of a County Court has jurisdiction under the Ontario Election Act, R. S. O. 1897, c. 9, ss. 124-131, to recount votes. *Re North Grey Provincial Election—Boyd* v. *McKay*, 22 C. L. T. 286, 4 O. L. R. 286, 1 O. W. R. 474, 483, 2 O. W. R. 231, 604, 1131

Marking of ballots — *Statutes—Directory.*]—By s. 46 of the Dominion Election Act, as amended by 58 & 59 V. c. 13, s. 4, the elector shall mark his ballot paper, "making a cross or crosses with a pencil on the white circular space or spaces opposite the name or names of the candidates for whom he intends to vote:"—*Held*, following the *East York Case*, 32 C. L. J. 481, that this provision is directory only, and that ballots marked in the division containing the name of a candidate, though not in the white space, are good. *Re Winnipeg Dominion Election*, 20 C. L. T. 92.

Mistake in initials of Deputy Returning Officer — *Torn ballot — Ballot without initials — Mistake of officer—Ballots wrongfully numbered by officer — Disclosing identity of voters.*]—*Held*, ballot marked but not initialled properly rejected.—2. Ballots marked on back with the number in the poll book opposite to the name of each voter properly counted.—3. Ballots with letters "B. S." on their back placed there by mistake for D. R. officer's initials "R. S.," were good by R. S. O. 1897, c. 9, s. 112, s.-s. 3.—4. Ballot torn in two and pinned together, good ballot. *Re West Huron Provincial Election*, 5 O. W. 378, 9 O. L. R. 602.

Place of holding — *Appeal.*] — A recount before a Judge of the Superior Court of the votes given at a Dominion election is not a judicial, but a ministerial and executive proceeding.—There is no right of appeal from such a Judge's order concerning such a proceeding to the Court of Queen's Bench.—The Judge of the Superior Court to whom application is made for a recount of the votes is not bound to act in such a proceeding at the chef-lieu of the district, but can grant such application and issue his summons at any place. *Meigs* v. *Comeau*, 3 Que. P. R. 307.

Production of ballots—*Jurisdiction to order.*]—The Court or a Judge thereof has no jurisdiction, under s. 154 of the Provincial Elections Act, to order the deputy provincial secretary to produce ballots for the purpose of a recount before a County Court Judge under s. 43 of the amending Act of 1899. *Re Fernie Provincial Election*, 10 B. C. R. 151.

Recount — *Ministerial proceeding—Place of holding—Right of appeal.*]—1. The proceedings on an application for a recount, by a Judge, of the votes given at a Dominion election, are executive and ministerial and not judicial, and do not pertain to the Superior Court.—2. Such recount need not necessarily take place at the chef-lieu of the district; the Judge may appoint another place. —3. There is no appeal to the Court of Queen's Bench, appeal side, from the proceedings on the recount. *Meigs* v. *Corneau*, 21 C. L. T. 50, 10 Que. Q. B. 56.

vii. *Scrutiny.*

Ruling of a trial Judge as to disqualification of class of voters—*Appeal to Court of Appeal—Jurisdiction—Finality of voters' lists.*]—Upon proceeding with the scrutiny consequent upon the judgment of the Court of Appeal, 12 O. L. R. 453, Teetzel, J., one of the Judges who tried the petition, made a general ruling to the effect that in cases of objection to votes on the ground that the persons who voted were under the age of twenty-one years or were aliens, although their names were on the voters' lists, he would receive evidence to shew minority or alienage, notwithstanding the provisions

of the Voters' Lists Act declaring that upon a scrutiny the voters' lists shall be final and conclusive:—*Held*, that no appeal lay to the Court of Appeal from such ruling. — *Per* Meredith, J.A., dissenting, that an appeal was competent, and should be entertained and allowed and the ruling reversed. *Re Port Arthur and Rainy River Provincial Election* (No. 3), *Preston* v. *Kennedy*, 13 O. L. R. 17, 8 O. W. R. 606.

Voters' list—*Finality — Infants and aliens — Irregularities — Transfer certificates.*] — *Held*, that, upon a scrutiny, the voters' list are final and conclusive evidence of the right of the persons named therein to vote; and no enquiry can be then entered into respecting the votes of persons on the lists, as, for example, that the voters were aliens or under age. Such questions of fact are, under the Ontario Voters' Lists Act, R. S. O. 1907, c. 7, to be tried and determined before the voters' list is finally settled, revised and transmitted, and the only exceptions are those mentioned in s. 24 of the Act. —Irregularities in respect to the issue by the returning officer of certificates of transfer under s. 94 of the Ontario Election Act, R. S. O. 1897, c. 9, commented on. *Re Port Arthur and Rainy River Provincial Election, Preston* v. *Kennedy*, 9 O. W. R. 347, 14 O. L. R. 345.

viii. *Trial.*

Judgment—*Voiding election — Effect on pending appeal by dissolution of legislature —Costs.*]—The trial Judges declared an election void. The case was appealed and while waiting for judgment the legislature was dissolved:—*Held*, the Court of Appeal could make no order as to costs or otherwise. *Re North York Provincial Election—Kennedy* v. *Davis*, 5 O. W. R. 478, 10 O. L. R. 93.

Judgment — *Session of Parliament* — Notwithstanding R. S. O. c. 11, s. 48, providing against trial of a petition during a session or within 15 days from the close thereof, when judgment has been reserved after examination of witnesses and hearing and the arguments of counsel, the trial Judges may give it and issue their certificate and report at any time, whether during or after a session. *Re North Waterloo Provincial Election — Shoemaker* v. *Lackner*, 2 Elec. Cas. 76.

Persons reported by rota Judges — Evidence—Doubt as to guilt—Discharge of summons. *Re Lennox Provincial Election—Re Miles and Smith*, 3 O. W. R. 142.

ix. *Voters.*

Appellant — *Non-qualification — Abandonment of appeal—Right to substitute new appellant.*]—By s. 33 of the Ontario Voters' Lists Act, R. S. O. 1897, c. 7, where an appellant "entitled to appeal" dies or abandons his appeal, or having been on the alphabetical list, etc., is afterwards found not to be entitled to be an appellant, the Judge may, "if he thinks proper," allow any other person who might have been an appellant to intervene and prosecute the appeal, on such terms as he may think fit. This Act was repealed by the present Voters' Lists Act, 7 Edw. VII. c. 4 (O.), s. 33, being the same as the repealed section, except that the words "entitled to appeal" are omitted, and the words "in his discretion" are substituted for the words "if he thinks proper." Section 15 defines an appellant, namely, any voter whose name is entered or who is entitled to have his name entered on the list for the municipality:—*Held*, that the substituted section does not empower the Judge—where an appellant, after the time for appealing has elapsed, abandons his appeal by reason of not being properly qualified—to allow a duly qualified appellant to be substituted. *Re West York Voters' Lists*, 11 O. W. R. 248, 15 O. L. R. 303.

British Columbia Elections Act — *Application for registration — Affidavits — Official to take — Statutes.*]—Under the Provincial Elections Act and amendments an affidavit or application to be placed on the register of voters for an electoral district may be sworn outside the province of British Columbia; and the venue and jurat of the affidavit, form A., Provincial Elections Act Amendment Act, 1902, may be varied to conform to that fact. The affidavit may be sworn before a commissioner for taking affidavits in and for the Courts of the province, or before any of the officers named in s. 4 of the Amending Act of 1902, provided they derive their power from provincial authority, or ordinarily reside and perform their duties within the province. The Lieutenant-Governor in council has power under the Elections Act and s. 11 of the Redistribution Act to make regulations providing that affidavits sworn outside the province may be received by collectors of votes, and the applicants' names be placed upon the register. *Per* Walkem and Drake, JJ., Acts affecting the franchise should be construed liberally so as not to disfranchise persons having the necessary qualifications of voters. *In re Provincial Elections Act*, 24 C. L. T. 33, 10 B. C. R. 114.

Case stated by County Court Judge — "*General question*" — *Specific cases.*] — Section 39 of the Ontario Voters' Lists Act, 7 Edw. VII., c. 4, only authorises a County Court Judge to state a case for the consideration of the Court of Appeal upon some "general question" which has arisen or is likely to arise in the revision of the lists by the Judge.—It is not competent for a County Court Judge to ask the Court of Appeal to determine simple questions of fact arising in any particular case, nor within the competence of the Court to relieve him of his duty to find, in such particular cases as were here stated, whether, at the times necessary to confer a right to vote, a particular person was in good faith a resident of and domiciled in some particular municipality, and had continuously resided in the electoral district, as the Ontario Election Act requires.—*Re Voters' List of Township of Seymour*, 2 Ont. Elec. Cas. 69, distinguished. *Re Norfolk Voters' Lists*, 10 O. W. R. 743, 15 O. L. R. 108.

Collector of votes—*Jurisdiction—Time —Prohibition.*]—After the collector of votes under the British Columbia Elections Act, 1897, as amended in 1899, has placed on the register of voters the names of persons ob-

jected to, an application for prohibition on the ground that the collector proceeded without jurisdiction is too late.—*Semble*, in any event prohibition is not the proper remedy.—*Quære*, whether the Crown Office Rules have any application in civil matters. *Re O'Driscoll and Wright*, 8 B. C. R. 424.

Court of Revision—*Appeal — Jurisdiction—Voter's qualification—Territories Election Ordinance — Residence — Controverted Elections Ordinance.*] — In the case of an election under the Territories Election Ordinance, a Judge sitting in appeal from the Court of Revision is limited in the exercise of his jurisdiction to the same extent as the Court of Revision. The jurisdiction of the Court of Revision is limited to enquiring whether any of the formal statements, subscription to which the Ordinance provides, may be required from a person tendering a vote, is "false in whole or in part;" if false in whole or in part, the vote is to be disallowed; if altogether true, the vote is to be allowed. New polls were held in two polling divisions; votes were challenged on the following grounds: (a) voter was deputy returning officer in another polling division on the day of the general election; (b) voter was resident in another polling division on the day of the general election and entitled to vote there, and (c) voter was absent from electoral district on day of general election; and in each case the voter could not possibly have voted on that day at either of the two polling divisions in question; the Court of Revision disallowed these votes; the Judge in appeal held that he had no jurisdiction sitting in appeal (but only in proceedings under the Controverted Elections Ordinance) to consider the validity of these votes, though he doubted their validity. "Residence" means a man's habitual physical presence in a place or country which may or may not be his home; the word "habitual" does not mean presence in a place for either a long or short time, but the presence there for the greater part of that period. *Re Banff Election—Brett* v. *Sifton* (No. 1), 19 C. L. T. 119, 4 T. L. R. 140.

Lists—*Appeal — Notice of Complaint — Loss of—Parol evidence.*]—A list of appeals, containing names sought to be added to the voters' list, was prepared, and a voter's notice of complaint in Form 6 to the Ontario Voters' Lists Act, R. S. O. c. 7, was signed, by the complainant, attached to the list of names to be added, and handed to the clerk in his office within the thirty days required by the statute. When the list was produced by the clerk in Court the notice of complaint was missing:—*Held*, that it was competent for the Judge to hear and receive parol evidence as to the form and effect of the notice in question and of its loss; and that, upon his being satisfied by such evidence that a sufficient notice of complaint was duly left with the clerk, the complaint might be dealt with. *Re Marmora and Lake Voters' Lists*, 21 C. L. T. 114, 2 Elec. Cas. 162.

Lists — *Assessment made in previous year—Qualification arising after final revision of roll—Freeholders—Tenants.*]—Where the assessment for a city, on which the rate for the year 1898 was levied and the voters' list based, was made in the previous year, the roll having been finally revised on the 2nd December, 1897, freeholders who were such between that date and the last day for the revision of the voters' list were, under s. 86 of the Municipal Act, R. S. O. 1897, c. 223, and s. 14 (7) of the Ontario Voters' Lists Act, R. S. O. 1897, c. 7, held, entitled to be placed on the list; and freeholders also who had parted with property for which they were assessed, but had acquired other sufficient property, were held entitled to remain on the list; otherwise as regards tenants, under similar circumstances, the form of oath required to be made by them precluding them. *Re St. Thomas Voters' Lists*, 2 Elec. Cas. 154.

Lists—*Finality—Scrutiny.*] — No inquiry can be made upon a scrutiny under s. 76 of the Controverted Elections Act, R. S. O. 1897, c. 11, as to voters being under the age of twenty-one years, as the voters' lists are final and conclusive on that point. *Re South Perth Provincial Election — Ellah* v. *Monteith*, 2 Elec. Cas. 144.

Lists—*Notice of complaint — Service on clerk—Registered letter.*]—A notice of complaint, with list of names, was received by the clerk through the mail by registered letter, in due time:—*Held*, that s. 17 (1) of the Voters' Lists Act, R. S. O. c. 7, had been complied with. *Re Madoc Voters' Lists*, 21 C. L. T. 115, 2 Elec. Cas. 165.

Lists—"*Resided continuously*"—*Temporary absence.*]—The provision of s. 8 of the Ontario Voters' Lists Act, R. S. O. 1897, c. 7, that persons to be qualified to vote at an election for the Legislative Assembly must have resided continuously in the electoral district for the period specified, does not require a residence *de die in diem*, but that there should be no break in the residence; that they should not have acquired a new residence; and where the absence is merely temporary, the qualification is not affected. Where, therefore, persons resident within an electoral district, and otherwise qualified, went to another province merely to take part in harvesting work there, and with the intention of returning, which they did, their absence was held to have been of a temporary character, and their qualification not thereby affected. *Re Seymour Voters' Lists*, 2 Elec. Cas. 69.

Notice of appeal — *Leaving at Clerk's residence.*]—The language of R. S. O. 1897, c. 7, s. 17, s.-s. 1, "give to the clerk or leave for him at his residence or place of business" notice in writing, etc., means, when the notice is not personally given to the clerk, that it is to be left for him at his residence or place of business in such a place or under such circumstances as to raise a reasonable presumption that it reaches his hands within the time allowed by the statute. And where, between 9 and 10 o'clock of the evening of the last day for serving notices of appeal, certain notices were left on the outside knob of one of two doors of the clerk's dwelling-house by a person who first knocked but received no response, and such notices did not come to the knowledge of the clerk till about noon the next day, the service was held insufficient. *Re Voters' Lists of Hungerford*, 23 C. L. T. 43, 5 O. L. R. 63, 2 O. W. R. 1.

Notice of complaint — *Form of — Grounds of objection — Subjoined lists — Amendment of notice.*] — In a list of complaints contained in a notice of complaint under the Ontario Voters' Lists Act, R. S. O. 1897, c. 7, the names of persons wrongfully omitted from the voters' list were given, and in the column headed "grounds on which they are entitled to be on the voters' list," "M. F. and" appeared:—*Held*, having regard to the provisions of s. 6 (1) and (7), and Form 6 (list 1) of the Voters' Lists Act, and of ss. 1 (12), 13, and 56 of the Assessment Act, and of s. 4 of the Manhood Suffrage Registration Act, that the letters "M. F." could be properly read as meaning "Manhood Franchise," and those words were sufficient for the purposes of the notice, while the word "and" should be treated as surplusage. —2. The notice of complaint consisted of fifteen sheets, each in itself in the form given in the schedule to the Voters' Lists Act as No. 6, the lists Nos. 1, 2, 3, and 4, being printed on the backs of forms of notices of complaint; only the notice of complaint on the last sheet was filled out and signed by the complainant; but evidence was given that the whole fifteen sheets were attached together when the complainant signed the notice, and handed the whole to the clerk; and they so appeared before the Court. The notice referred to the "subjoined lists:"—*Held*, that the lists were part of the complaint, and it was sufficient in that regard.—3. *Held*, that, if it were necessary, in order to make the notice of complaint a good one, to amend it so that it should refer explicitly to the annexed sheets, the amendment should not be allowed under s. 32. *Re Voters' Lists of Carlton Place*, 22 C. L. T. 108, 3 O. L. R. 223, 1 O. W. R. 105.

Ontario Elections Act—*Notice of complaint—Non-compliance with form—Amendment.*]—It is not essential that the form given in the schedule to the Ontario Voters' Lists Act, R. S. O. 1897, c. 7, for objections to names wrongfully inserted in the voters' lists, should be followed with exactness; all that is required is that the nature of the objections to the names should be stated with reasonable clearness. Where, therefore, in giving notice of the wrongful insertion of names in the voters' list, the complainant used list No. 2 of form 6 in the schedule, being the list for persons wrongfully named, instead of list No. 3, being the list for those wrongfully inserted in the voters' list, but it was quite apparent what the grounds of the objections were, the notice was held sufficient. An amendment in such case might be made, if such was necessary. *Re Rawdon Voters' Lists*, 24 C. L. T. 12, 6 O. L. R. 631, 2 O. W. R. 1058.

Ontario Elections Act—*Preparation of lists—Dominion Franchise Act, 1898, s. 9—Appointment of persons to prepare lists — Order in council — Prohibition — Powers of High Court.*]—The High Court of Justice for Ontario has power to prohibit persons assuming to exercise judicial functions in the preparation of voters' lists for an election to the House of Commons for Canada, if these persons have no authority in law for the exercise of any judicial functions in respect of such lists. *Re North Perth, Hessin* v. *Lloyd*, 21 O. R. 538, distinguished. The Dominion Franchise Act of 1898 changed completely the whole law in regard to the preparation of voters' lists, adopting the provincial lists, instead of having parliamentary lists prepared; but, to provide against the possibility of there being no sufficiently recent provincial lists in some of the electoral districts, s. 9 was passed. This section means that when provincial lists exist—"are prepared"—they shall be used, but when they do not exist the mode of preparing them provided in the section may be adopted. On the facts of this case, it was within the power of the Governor-General in Council to appoint all necessary officers for the preparation of the lists, thus making them officers of a federal Court constituted by the section. These officers are to follow, as far as possible, the provisions of the laws of the province regulating the preparation and revision and bringing into force of the provincial lists. If the order in council appointing the officers gives directions to them in conflict with the statute, the order, to that extent, has no effect. If the officers do not proceed in accordance with the statute, they are answerable to Parliament, not to the Court, upon an application for prohibition. *Re West Algoma Voters' Lists*, 24 C. L. T. 397, 8 O. L. R. 533, 4 O.W. R. 229.

Ontario Elections Act — *Revision of lists—Correction of lists — Complainant — Posting up lists—Time for objecting — Deputy registrar of deeds.*]—A person resident in, and entitled to be placed upon the manhood suffrage register for a town forming part of an electoral district, is entitled to require the revision under s. 13 of the Ontario Voters' Lists Act, R. S. O. 1897 c. 7, of the voters' lists for another municipality forming part of the same electoral district, and is also entitled to require the subsequent revision of such lists provided for by ss. 22 and 23 of the Ontario Voters' List Act R. S. O. 1897 c. 7. A deputy registrar of deeds is not entitled to vote at an election of a member of the Legislative Assembly for Ontario for the electoral district in which he is acting as such deputy registrar, and is not entitled to be placed on the voters' lists in such district. The date mentioned by the clerk of the municipality, in the advertisement published by him pursuant to s. 12 of the Ontario Voters' Lists Act, R. S. O. 1897 c. 7, as that upon which the voters' lists have been posted up in his office, is the date from which the time for taking proceedings, limited by s. 17, runs, even though the clerk has in fact posted up the lists some days before the date named in the advertisement. *In re Huron Voters' Lists*, 24 C. L. T. 83, 7 O. L. R. 44, 3 O. W. R. 139.

Quebec Election Act — *Income voter—Domicil—Residence.*]—A person must have his domicil in the electoral district, in order to have his name put on the list of electors, on qualification of income. *Semble*, that having such a domicil in one municipality, an elector can be put on the voters' list of the place of his actual residence, in another municipality, in the same electoral district. *Barker* v. *Cowansville*, 24 Que. S. C. 333.

Registration of electors — *Manitoba Election Act, secs. 6, 7, 10 — Sittings of registration clerk — Order in Council —*

Proclamation—Change in date — Power of executive—Unauthorized change in notices before extending order — Mandamus — No power to fix time.]—Pursuant to s. 6 of the Manitoba Election Act, 1904, an order of the Lieutenant-Governor in council was passed on the 28th April, and proclaimed in the Manitoba Gazette on the 30th April, appointing registration clerks for a certain electoral division, and fixing the 23rd May as the date, and A.'s house as the place for receiving applications for registration of electors. Notices as provided for in sec. 7 were posted up as required, naming the 23rd as the date. The King's Printer, for certain reasons, deemed the date inconvenient, and printed and on the 4th May sent out new posters naming the 16th May as the date, and these were posted 10 days before the 16th May. On the 10th May an order in council was passed amending the proclamation of the 30th April by substituting the 16th for the 23rd May:—*Quære*, whether the Lieutenant-Governor in council had power to change the date mentioned in the proclamation.—*Semble*, that, at all events, the King's Printer had no authority to issue the amended notices, and the notice thus given was not a compliance with sec. 9, which requires the notice to be posted at least 10 days before the commencement of the registration sitting:—Upon an application for a *mandamus* to compel the registration clerk to hold a sitting at A.'s house, the applicant swore that he had seen the notice appointing the 23rd, but did not become aware of the change of date until after the sitting had been held on the 16th:—*Semble*, that it was no answer to the application that the applicant might have attended at another place in the electoral division on a subsequent day; his right was to have the clerk sit at the places named in the proclamation.—But *held*, that to make a *mandamus* effective the clerk must be ordered to attend at some future time; the Court had no power to fix a time, and the clerk was equally powerless. The Lieutenant-Governor in council might have the power under sec. 10, but the Court had no jurisdiction to compel the exercise of it; and the Court will not grant a *mandamus* unless it can be made effective. *Re Assiniboia Electoral Division. Re Carr* (1910), 14 W. L. R. 392.

Revision — *Contestation — Status of contestant—Proof of qualification.*] — The production of the voters' list, on which appears the same name as that of the person who contests the list, is not alone sufficient to establish the identity of the latter with the person named in the list; and, therefore, it cannot be said to be evidence of his qualification as a voter. *Laricée* v. *Corporation of St. Vincent de Paul*, 8 Que. P. R. 150.

Right to vote—*Refusal of ballot—Action —Damages.*]—The plaintiff resided in St. John, New Brunswick, and his name was on the voters' list in St. John, and also in Dalhousie, Annapolis county, Nova Scotia, at which latter place the defendant acted as deputy returning officer in the last Dominion election. The plaintiff presented himself at the Dalhousie booth, and demanded a ballot. Under the Nova Scotia statute, which was passed with a view to provincial elections only, it is provided, in effect, that an elector can only vote once in the province at any election; that he must vote in the county in which he resides at the teste of the election writ, if qualified, and not elsewhere; and that a non-resident elector, having a right to vote in two or more polling districts, may vote in either. The plaintiff was required to swear before receiving a ballot that "at the teste of the writ for this election I resided in the city of St. John, New Brunswick; that I am not qualified to vote in the said city . . . ." He declined to take the oath and was refused a ballot and brought this action to recover damages:—*Held*, that the plaintiff had a right to vote in Dalhousie; and damages were assessed at $350. *Anderson* v. *Hicks*, 21 C. L. T. 507.

Status of appellant — *Residence — Forms.*]—Under the Ontario Voters' Lists Act, 7 Edw. VII. c. 4, ss. 14 and 15, no person is entitled to be entered as an appellant in respect of the voters' list of a municipality, except a person who is entered, or entitled to be entered, on such list as a voter.—Discussion and application of the rule that the operation of the enacting clause of a statute must not be restrained or enlarged by the language of a form or schedule given by such statute. *Re South Fredericksburgh Voters' Lists*, 10 O. W. R. 746, 15 O. L. R. 308.

x. *Writs and Returns.*

Bye-election — *Issue of writ for—Session.*]—The Legislative Assembly of Ontario has power while in session to order the issue of a writ to hold a bye-election, s. 33 of R. S. 1897 c. 12 applying only to vacancies occurring while the assembly is not in session. *Re South Perth Provincial Election—Ellah* v. *Monteith*, 2 Elec. Cas. 144.

Special return — *Election not held — New writ—Petition—Costs.*]—The returning officer decided that, owing to the absence of proper voters' lists, the election could not be held on the days fixed by the writ, and publicly so declared, and notified the two prospective candidates that there would be no meeting for nomination on the day appointed. He made a special return to the writ, setting forth why it had not been duly executed, and the executive government accepted such return, and issued a new writ, under which due proceedings were had and one M., a former candidate, was nominated and declared elected by acclamation. The petitioner, who was to have opposed M., refused to recognize the authority of the returning officer to decline to hold a meeting for nomination, and on the day originally appointed left with a clerk of the returning officer a nomination paper and deposit, and he filed a petition under the Dominion Controverted Elections Act to have it declared that he had been duly elected for the district. M. was not made a party:—*Held*, that, apart from the question of the jurisdiction to entertain such a petition, no practical result could follow from an attack upon the returning officer as sole defendant. If the special return was illegal, the Court would go no further than to declare that it was an invalid return upon which Parliament might direct the issue of a new writ; but that was what executive government had done, and was not what the petitioner had sought. It was not

the duty of the Court under its statutory jurisdiction to pronounce upon the constitutional right of the executive to direct the issue of a new writ; that was a matter for the House of Commons. *In re Nipissing Dominion Election—Klock* v. *Varin*, 21 C. L. T. 258.

xi. *Other Cases.*

Dominion Elections Act — *Deputy Returning Officer—Conditional refusal to vote —Non-resident's oath — Damages—Malice.*] —Plaintiff, who resided at St. John in the province of New Brunswick, was a property owner and entitled to vote at Dalhousie, in the county of Annapolis and province of Nova Scotia, where his name appeared on the list of voters as a non-resident. Plaintiff presented himself before the deputy returning officer at Dalhousie at an election and demanded a ballot paper, but the officer refused to deliver a ballot paper or to permit plaintiff to vote unless he took the non-resident's oath:—*Held*, that the oath proposed was not applicable to the case of a property owner residing in another province, and that the officer was wrong in his refusal to permit plaintiff to vote. Per Macdonald, C.J., and Ritchie, J., that plaintiff's right to vote being clear, defendant was responsible in damages for his refusal to permit him to do so; that defendant, in undertaking to determine plaintiff's right to vote, was not acting in a judicial capacity, but was merely a ministerial officer to carry out the provisions of the Act; and that, even assuming that defendant was acting in any respect in a judicial capacity, his action in refusing the ballot paper not being *bona fide*, but being wilful and corrupt, the action was maintainable even on the theory that proof of malice was necessary. Per Weatherbe, J., and Graham, E.J., that defendant was a public officer having a quasi judicial duty to perform, and that he could not be made liable for an error of judgment; that, in order to make defendant liable, malice must be shewn; that the burden of shewing malice was on plaintiff, and that the evidence adduced was not sufficient for that purpose. *Anderson* v. *Hicks*, 35 N. S. R. 161.

Jurisdiction—*Disavowal and proceedings to annul judicial acts—Court different from that in which the attorney's mandate was violated.*] — Disavowal and proceedings to annul judicial acts resulting from the violation of an attorney's mandate, can only be taken before the Court where the suit, in which such violation took place, was pending. Hence, the Superior Court of Quebec is not competent to take cognizance of an action to disavow an attorney and to have his judicial acts annulled, in a case before the Superior Court sitting as a Dominion Court to try an election petition.—*Per* Cross, J.:—Judgments in election petitions, under the Dominion Controverted Elections Act, are given in the public interest as much as in the interest of the parties to such petitions. They are governed exclusively by the provisions of that Act and disavowal not being therein provided for, cannot be the basis of a suit-at-law once a decision on the election petition has been given and forwarded to the Speaker of the House of Commons. *Quesnel* v. *Methot* (1910), 20 Que. K. B. 57.

Recount of ballots — Dominion Election Act, R. S. C. 1906 c. 6, ss. 206-210—Jurisdiction of County Court Judge—Affidavit—Mandamus. *Re North Cape Breton & Victoria Dominion Election*, 6 E. L. R. 37.

Returning officer — *Return — Injunction — Violation by agent—Contempt of Court — Solicitor's advice — Validity of return — Jurisdiction of Court of King's Bench—Mandamus.*] — An injunction order was made *ex parte* restraining the defendant, who was the returning officer for an electoral division, his servants and agents, from making a return to the clerk of the Executive Council that H. was elected as a member of the Legislative Assembly for that electoral division. Before notice of the injunction order reached the defendant, he had delivered his return, to the effect that H. was elected by acclamation, to an express company for conveyance to the clerk. The agent of the express company was notified of the injunction order, and knew that it restrained the defendant, his servants and agents from delivering the return; but, several hours afterwards, delivered it to the clerk:—*Held*, that, although the express company were the agents of the defendant, and had committed an act in violation of the injunction, and were guilty of contempt of Court, the status as it existed at the time they received notice of the injunction, could not be restored, because the return could not be recalled, and it could not be said that it, although made in violation of the injunction, was a nullity; and the Court had no jurisdiction to declare void a return which was not on its face a nullity.—The return having been actually made, its validity or invalidity must be dealt with under the Controverted Elections Act; and the Court could not grant a *mandamus* to the defendant to compel him to declare that the plaintiff had been duly nominated as a candidate at the election in question, for to do so would involve a finding that the return made was illegal; and to continue the injunction would be futile.—*Semble*, that the violation of the injunction by the express company was deliberate and intentional, and it was no excuse that the agent had been advised by his solicitors to do as he did. *Davis* v. *Barlow* (1910), 15 W. L. R. 49.

Telegrams — *Action for price—Illegality —Pleading.*]—To an action begun by a telegraph company to recover the price of a certain number of telegrams, the defendant will not be allowed to plead simply that such telegrams were sent in the course of a parliamentary election; in order to defeat the action in such a case, it is necessary to allege that such telegrams were sent for the purpose of illegally influencing the election. *Great North-Western Telegraph Co.* v. *Dalby*, 5 Que. P. R. 92.

Voters' lists — *Manhood suffrage voters —Assessment roll—Change of domicile—Rural M. F. voters—Assessment Act—Election Act—Voters' Lists Act.*]—If the assessor has placed the name of a person on the assessment roll as a rural "M.F." voter under s. 24 of the Assessment Act, 4 Edw. VII. c. 23 (O.), the duty of the clerk of the municipality is to place the name of such person on the voters' list thereof, and the

conditions of that section as to his residence and domicile are those to be regarded by the Judge when finally revising the list under s. 25 (3) of that Act and s. 14 of the Voters' Lists Act, 7 Edw. VII. c. 4 (O.)—A. B., having been properly placed on the assessment roll for the township of Adolphustown as M. F., removed to an adjoining township in the same electoral district, and was domiciled there at the time of hearing complaints against the voters' list for the former township, and of the final revision thereof. No appeal was made to the Court of Revision for Adolphustown to have his name removed from the assessment roll, and the municipal clerk placed his name on the voters' list. He took no steps to have his name entered on the assessment roll or voters' list of the township to which he had removed, nor was any application made to have his name so added. An appeal or complaint, however, was filed to have his name struck off the Adolphustown list:—*Held*, that his name should not be struck off the latter list.—The conditions as to the residence of the rural M. F. voters are to be looked for in the Assessment Act, 4 Edw. VII. c. 23, s. 24 (O.), and the Election Act, 8 Edw. VII. c. 3, s. 16 (O.). See also the Voters' Lists Act, 7 Edw. VII. c. 4, s. 6 (O.) *In re Adolphustown Voters' List*, 12 O. W. R. 827, 17 O. W. R. 312.

Voting — *Ballots — Counterfoil not detached—Mistake of deputy returning officer —Number on back—Identification of voter.*]—At an election held under the Ontario Election Act, 8 Edw. VII. c. 3, a deputy returning officer omitted in every instance to detach the counterfoil from the ballot paper when he received it from the voter, and to destroy it, as required by s. 104 of the Act, and placed the ballot paper with its attached counterfoil in the ballot box:—*Held*, that the official number printed on the back of the counterfoil, as required by s. 70 (2), (6), is not a mark on the ballot paper by means of which the voter can be identified, within the meaning of s. 114 (c) of the Act, and that the ballot papers were properly counted. *Re Stormont Provincial Election*, 12 O. W. R. 518, 17 O. L. R. 171.

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2 MUNICIPAL ELECTIONS.

Abandonment of proceedings—*Intervention of electors.*]—There is nothing in the charter of the city of Montreal prohibiting qualified electors of a ward from intervening in a contestation of the election of one of the aldermen of that ward, when they allege that the plaintiff has manifested the intention of abandoning the proceedings. —Although the intervenants may be, by reason of the delay elapsed since the election, precluded from instituting direct proceedings to contest the said election, the lapse of the delay does not deprive them of the right to intervene upon proceedings instituted within the delays, for the purpose of continuing the same, in the event of the plaintiff failing to do so.—Such intervention cannot place the intervenants in a better position than that of the plaintiff, and they can only ask to be allowed to continue the plaintiff's contestation in the event of his failing to do so, but they cannot ask that the suit be continued as if they had been the original plaintiffs, nor take conclusions which the plaintiff himself has not taken. *Moreau* v. *Lamarche*, 3 Que. P. R. 301.

Alberta Village Act, 1907 — Villages already organised — Application of Act — Resignation of candidate—No power to withdraw — Void election. *Re Stoney Plain Municipal Election* (Alta.), 8 W. L. R. 54.

Alderman — *Petition to set aside election — Procedure — Quo warranto — Corrupt practices — Recrimination — Exception to form—Service of petition—Authorization of Judge.*]—The remedy given by art. 987, C. P. C., may be invoked to set aside, on the ground of corruption, the election of an alderman of a city whose charter prescribes no special procedure for that purpose.—A defendant called on to answer a petition in the nature of a demand for a *quo warranto* cannot set up, as a ground of exception to the form, the fact that the petitioner has himself committed electoral acts forbidden by the law, in the course of the election in question.—A petitioner who proceeds under art. 987, C. P. C., is not obliged to serve upon the defendant the authorization of the Judge prescribed by art. 980, and failure to serve it is not a ground for setting aside the service of the petition. *Simson* v. *Taschereau*, 29 Que. S. C. 313.

Alderman — *Property qualification — Motion—Parties.*]—In *quo warranto* proceedings under the Municipal Act, it is permissible to join two or more persons in the one motion only when the grounds of objection apply equally to both.—Where, therefore, the objection was to the qualification of two aldermen, which was separate and distinct, the joining of the two in one motion was held to be improper.—Property which has been in the undisputed possession of an elected candidate for fourteen years, he paying no rent nor giving any acknowledgment of title thereto, his title being admitted by the previous owner, who a few days after the election executed a conveyance thereof to him, was held to constitute a sufficient qualification.—The qualification which by s. 75 of the Municipal Act is allowed to be "partly freehold and partly leasehold," is satisfied by half the amount being freehold and half leasehold. *Regina ex rel. Burnham* v. *Hagerman and Beamish*, 20 C. L. T. 104, 31 O. R. 636.

Alderman for city — *Property qualification—Declaration before nomination — Insufficiency of — Subsequent declaration — Actual qualification.*]—A candidate for the office of alderman, though in fact possessing the necessary property qualification, misstated it in his declaration, made pursuant to s. 129, s.-s. 3 (a), of the Municipal Act, 1903, as amended 4 Edw. VII. c. 22, s. 4 (O.), and, as there set out, it was insufficient. This declaration, however, he supplemented by another before taking office, as required by s. 311, in which he shewed sufficient property qualification:—*Held*, in the circumstances, that it was too late, after the election, to contend that the misstatement in the former declaration was ground for setting aside his election otherwise free from

objection. *Rex ex rel. Martin* v. *Watson*, 11 O. L. R. 336, 7 O. W. R. 282.

Alderman for city — Property qualification — Tenancy of house — Value — Assessment roll — Yearly tenant—Indefinite term. *Rex ex rel. Martin* v. *Moir*, 7 O. W. R. 300.

Appeal — *Amending statute — Pending cause.*]—The amendment made to Art. 283 of the charter of the city of Montreal for the purpose of allowing an appeal to the Court of Review from judgments of the Superior Court in contested municipal election cases is not applicable to a cause pending at the time of the assent to the amending statute, which cause is governed, as to the right of appeal, by the statute in force when it is begun. *Renault* v. *Gagnon*, 3 Que. P. R. 209.

Appeal — *Statute limiting right — Interlocutory order.*]—The prohibition by the charter of the city of Montreal of an appeal to the Court of Queen's Bench in the matter of contested municipal elections applies to interlocutory as well as final judgments. —Such prohibition is legal and *intra vires*. *Jacques* v. *Clarke*, 3 Que. P. R. 64.

Ballot — *Form of — Statute not followed —Interpretation Act, s.* 7 (35).]—In voting on a local option by-law the ballots used were in the form of "For the By-law" and "Against the By-law." The Liquor License Act, s. 141 (8) requires the ballots to be in the form of "For Local Option" and "Against Local Option." Apart from using this form of ballot the voting was conducted according to the Municipal Act, under which the voting took place.—Meredith, C.J.C.P., refused to quash the by-law. — Divisional Court affirmed Meredith, C.J.C.P., holding that the defect in form was cured by the Interpretation Act, 7 Edw. VII., c. 2, s. 7 (35), which reads "Where forms are prescribed, deviations therefrom not affecting the substance or calculated to mislead, shall not vitiate them." *Re Giles and Almonte* (1910), 16 O. W. R. 530, 21 O. L. R. 362, 1 O. W. N. 920.

Ballots — *Marking — Town charter — Provincial Election Act.*]—The town charter of Ste. Anne de Bellevue has not made part of its election machinery s. 136 of the Provincial Election Act, which says that in voting the cross is to be marked in the white circular space upon the ballot opposite the name of the candidate.—Even if this section did apply to the town, the cross marked in the white space containing the name of the candidate, would be valid, for s. 183 of said Provincial Election Act, in its list of the causes which justify rejection of a ballot paper, does not include a breach of the rule laid down by s. 136. *St. Denis* v. *Théoret*, 7 Que. P. R. 415.

Ballots — *Recount — Scope of inquiry— Duty of Judge.*]—Upon a recount of the ballots cast at a municipal election, the Judge is limited to verifying the ballots in the same way that the deputy returning officer does so; he cannot strike off the vote of an elector on the ground of the omission of some formality required in order to prevent possible frauds. *Ex p. Metayer dit St. Onge*, 7 Que. P. R. 386.

Ballot papers — *Statutory form — Motion to quash by-law — Illegality — Municipal Act, sec.* 427 — *Notice to electors —Publication — Time — Liquor License Act, sec.* 66 — *Recount — County Court Judge — Marking of ballots—Findings conclusive — Status of electors — Voters' List —Finality — Voters assisted by deputy returning officer in marking ballots—Absence of oath—Deducting votes from majority — Secrecy of ballot.*]—By the amendment made to the Liquor License Act by 9 Edw. VII. ch. 31, sec. 4 (a), a new form of ballot paper for voting on local option by-laws is introduced, whereby the voter is to make his mark opposite the words "for license" or "against license:"—*Semble*, that the import was sufficiently clear, and a voter would not be misled by the form of the ballot.—But *held*, that a by-law can, upon a motion to quash, be questioned only for illegality: sec. 427 of the Municipal Act, which is applicable to a by-law under the Liquor License Act; and there was nothing illegal in supplying to voters ballot papers in the form prescribed by statute.—It was contended that the notice given by the council stating that the by-law had passed its first and second readings, and where and when the vote thereon was to be taken, etc., was not given within such time before voting as is prescribed:—*Held*, that the matter of notice is wholly regulated by sec. 66 of the Liquor License Act, and sec. 376 of the Municipal Act is not incorporated, and is, indeed, inconsistent with sec. 66, which requires nothing more, in point of time, than that the notice should be published as soon as possible after the second reading, and at least one month before the vote is taken, which does not mean for one month immediately preceding polling-day.—The by-law having had its first and second readings on the 9th October, the notice was published in the Manitoba Gazette on the 16th, 23rd, and 30th October and the 6th and 13th November, and in the proper local newspaper on the 14th, 21st, and 25th October and 4th and 11th November.—*Held*, that this was in strict compliance with sec. 66, and constituted notice of one month. —*Hall* v. *Rural Municipality of South Norfolk*, 8 Man. L. R. 437, followed.—*Held*, also, that the findings of the County Court Judge, upon a recount of the ballots cast at the voting upon the by-law, with reference to objections bearing on the place where and the manner in which electors marked their ballot papers, were conclusive, and would not be reviewed upon a motion to quash the by-law. —*Held*, also, that the last revised list of electors was conclusive evidence of the status of the electors therein named.—*Held*, also, that, in no circumstances, and whatever be the grounds of the request, can a voter be assisted by the deputy returning officer in marking his ballot without having first taken the oath prescribed by sec. 116 of the Municipal Act; and the votes of 4 electors who had been so assisted without their taking the oath should not be counted.—*Held*, also, that evidence could not be received to shew how these 4 electors voted; the votes should be deducted from the poll, and, as the vote, on the result of the recount, stood 76 for and

78 against license, there was, after deducting the 4 votes, no majority against license; and the by-law should be quashed. *Re Shoal Lake Local Option* (1910), 14 W. L. R. 302.

Bribery — *Disqualification of candidate —Penalty — Prosecution — Accomplice — Bar.*]—When a candidate at a municipal election for the city of Montreal withdraws therefrom because of his disqualification under a provision of the city charter, the giving and accepting of a sum of money, to and by him, to defray the expenses incurred by him to the time of his withdrawal, is an act of bribery within the meaning of ss. 227, 228, and 230 of the charter.—2. A person, though ineligible to office by reason of a legal disqualification, may none the less be a candidate at an election to the office, and as such be liable to the penalties and forfeitures imposed on candidates who are guilty of bribery.—3. No penalty for bribery can be pronounced upon, nor recovered from, a party (other than the principal in the offence), who has brought suit against an accomplice or accomplices for the same offence, on the day on which he was himself prosecuted therefor. *Masson* v. *Hébert, Hébert* v. *Gagnon. Lapointe* v. *Hébert, Drolet* v. *Lapointe*, 27 Que. S. C. 435.

Bribery of candidate — *Inducement to withdraw — Go-between.*] — Where a candidate at a municipal election for the city of Montreal, who was ineligible, was induced to withdraw upon payment of his election expenses, effected by means of two promissory notes, the first signed by the principal in the transaction, for whose advantage the withdrawal took place, in favour of a third party, who, in turn, signed the second for a like amount in favour of the candidate, the aforesaid third party in thus acting as the mere go-between, did not commit the offence of bribery punishable under ss. 227 and 230 of the city charter, 62 V. c. 58. *Lapointe* v. *Berthiaume*, 27 Que. S. C. 469.

Bribery or undue influence—*Evidence —Affidavits in answer — Statute.*]—Upon an application in the nature of a *quo warranto* to set aside a municipal election upon the ground of bribery or undue influence, as defined in ss. 245 and 246 of the Municipal Act, R. S. O. c. 223, all the evidence both pro and con, and not merely the evidence adduced by the relator in support of the charge, is to be taken *viva voce;* this is the true construction of s. 248, to aid which the heading "evidence as to corrupt practices to be taken *viva voce*," may be read into the section; and affidavits in answer to oral evidence cannot be received. *Rex ex rel. Carr* v. *Cuthbert*, 21 C. L. T. 190, 1 O. L. R. 211.

Conduct of presiding officer—*Fraudulent practices—Closing poll.*]—In a municipal election, the facts that the presiding officer has given to a supporter of the candidate elected, privately and in a low voice, advice as to the election law; that shortly before four o'clock on the first day of the voting certain supporters of the candidate elected, who have not voted, withdraw from the hall in which the voting is going on, in order that, by reason of their presence in the hall, the voting may not be adjourned to the next day; that the presiding officer said to an elector, who afterwards entered the hall, "if you do not wish to have the poll go on to-morrow, vote immediately or go out," after which the elector, who swore that he did not wish to vote, retired without having voted—did not constitute fraudulent practices justifying the setting aside of the election. *Théoret* v. *Boileau*, 21 Que. S. C. 209.

Contestation — *Time — Intervention.*] —The lapse of the delay precluding a party from contesting a municipal election in the city of Montreal, does not deprive him of the right to intervene upon the proceedings instituted within the delays for the purpose of continuing the same, in the event of the plaintiff failing to do so. *Larin* v. *Nault*, 8 Que. P. R. 205.

Contestation of municipal election— *Must the petition be served? — Affidavit — Fiat — Exception to the form—C. P. 174; 62 Vict, c. 58, s. 280.*]—It is not necessary to serve upon the opposite party, a petition wherein the election of an alderman for the city of Montreal is contested.—It is for the Judge to decide as to the sufficiency of the affidavit attached to the petition.—If the Court, having seen the petition that has been presented to it, orders the issue of the writ, it is not necessary to file a fiat. *Casavant* v. *Gauvin & Montreal* (1910), 11 Que. P. R. 325.

Contestation of a municipal election under the Cities' and Towns' Act— *Security—3 Edw. VII, c. 58, ss. 292, 293, 294.*]—The petitioner, in contesting a municipal election, must furnish security to the extent of $500 in virtue of the Cities' and Towns' Act, s. 294. *Desjardins* v. *Leclerc*, 11 Que. P. R. 32.

Controller of city—Summary proceedings in nature of *quo warranto*—Application of—Construction of Municipal Act—Prohibition. *Re Rex ex rel. Snider* v. *Richardson*, 3 O. W. R. 276.

Controverted election—Action for declaration that election void and for injunction—Expiry of time for proceeding under Municipal Controverted Elections Act — Proper remedy—*Quo warranto*—Application for interim injunction. *Penny* v. *Brent*, 4 E. L. R. 437.

Controverted election — *Inability to read and write—Quo warranto—Interest of relator.*]—Any interested party can object to a person who cannot read and write unlawfully holding and exercising the position of mayor, by a writ of *quo warranto*, issued at any time after he has taken the oath and entered into the functions of his office. *Page* v. *Genois*, 10 Que. P. R. 95.

Controverted election — *Petition—Affidavit—Notice—Time — Abolition of terms — Charter of town — Incorporation of code by reference — Construction of statute.*] — The affidavit mentioned in Rule 47 of the Rules of Practice of the Superior Court, applies only to incidental motions or petitions in the course of a pending suit, and not to such as themselves form the commencement of suits. 2. The Act 61 V. c. 20, s. 3, having abolished the terms of the Circuit Court and the Su-

perior Court, at Quebec, there are no longer, practically, terms or sessions of the Court at Quebec, or, to put it in another way, the whole year constitutes a single term, and, therefore, if notice of a petition in contestation of a municipal election is given within 15 days after such election, it may be presented to the Court at any time afterwards. 3. In this case the charter of the corporation of the town of Levis, referring, as regards contestations of elections, to arts. 348-358, inclusive, of the Municipal Code, and declaring that they are to be regarded as forming part of it, these articles as they existed at the time the charter was passed by the Quebec Legislature, and not those which have been substituted for them by the legislature, are to be considered as incorporated in the charter. *Mercier* v. *Belleau*, 23 Que. S. C. 136.

Controverted election — *Petition—Affidavit—Security for costs—Terms of Circuit Court.*]—It is not necessary that a petition in contestation of a municipal election should be accompanied by an affidavit. 2. The security for costs which the party contesting the election of a municipal councillor must give, in which the surety declares that he is the owner of an immovable of the value of $200 over and above all his debts, is sufficient. 3. Although it is declared in s. 2352, R. S. Q., that in the district of St. Francois all judicial days are term days, nevertheless, if the Bar of St. Francois has, by resolution, approved by all its members and accepted and followed for several years, fixed certain days as term days for the Circuit Court, that resolution has the force of law. *Labbe* v. *Morin*, 23 Que. S. C. 269.

Controverted election — *Petition — Pleading—Amendment.*]—The insufficiency of a pleading in a contestation of a municipal election, governed by the provision of the Municipal Code, is a cause of nullity. 2. After the expiration of the time for serving the contestation an amendment will not be allowed. *Brisson* v. *Pelletier*, 5 Que. P. R. 295.

Controverted election — Practice — Affidavit — Irregularity — Waiver—Notice of motion — Service—Mayor of town—Disqualification—Membership in school board—Construction of statute—Costs. *Rex ex rel. McCallum* v. *McKimm*, 2 O. W. R. 162.

Controverted election — *Quo warranto —Contestation—Deposit.*] — The right to a seat in the municipal council of the city of Quebec may be contested by *quo warranto*. 2. The remedy by *quo warranto* under the Code of Procedure is not affected by arts. 427 *et seq.*, R. S. Q. 3. A petition invoking reasons against the validity of an alderman's claim to hold a seat in the city council of the city of Quebec, and asking that he be ousted and his seat given to the petitioner, and that the city clerk be ordered to proclaim him elected, is a contestation of the election, and therefore the deposit of $200 required by 58 V. c. 49 (Q.), as security for the costs of contestation, must be made. *Roy* v. *Martineau*, 22 Que. S. C. 1.

Controverted election—*Recount of ballots—Petition—Jurisdiction of County Court Judge to try — Sufficiency of petition — Ballots — Objections to.*]—The declaration of the county clerk on a recount of votes under the Municipal Act, R. S. N. S. 1900 c. 70, ss. 64, 65, 66, is simply the return which the presiding officer should have made had he correctly counted the ballots, and does not in effect differ in any way from the return of that officer, and does not deprive the County Court Judge of his jurisdiction to try an election petition, conferred by the Municipal Controverted Elections Act, R. S. N. S. 1900 c. 72.—A petition which complains of an undue return and sets forth facts sufficient, if true, to shew that such is the case, complies sufficiently with the provisions respecting the presentation of the petition contained in s. 7 of the Act. On the trial of the petition evidence was given to shew that petitioner, on the day of the election, paid for the dinners of several electors who took dinner at the same house with him, but it appeared that such payment was not made in pursuance of any previous intention or arrangement, or with the intention of corruptly influencing the voters:—*Held*, affirming the judgment of the trial Judge on this point, that, as the payment, while unlawful, was not made "on account of the voters having voted or being about to vote," it was not a corrupt practice within the meaning of the Act, rendering the candidate liable to disqualification and other penalties.—Of the three ballots rejected by the clerk and allowed by the County Court Judge, one had a finger mark or smudge on it, another had two crosses instead of one, in the space opposite the name of the candidate, and in the case of the third ballot the voter had made his mark below the name of the candidate whose name was printed last in order on the paper, and below the double lines printed at the bottom of the paper:—*Held*, Townshend, C.J., dissenting as to the last mentioned ballot paper, that all three ballots were properly counted. *Stephen* v. *Flemming*, 42 N. S. R. 282, 4 E. L. R. 402.

Controverted election — Setting aside petition — Time — Security — Recognisance —Commissioner. *Nicholls* v. *Rawding*, 6 E. L. R. 41.

Controverted election—*Two petitions—Security for costs — Practice — Ambiguity.*] —1. The formalities in respect of security, in a contested municipal case, should be strictly interpreted. And, when two petitions have been presented, the second while the first is under consideration, the security given for the first petition cannot avail for the second, unless it clearly appears that the surety has intended to become such with respect to the second petition as well.—2. In this case, the security, bearing the number of records of the Court affixed to the first petition, struck out in pencil and not replaced, does not sufficiently indicate that it is given on the second petition, and therefore the security and the petition in contestation should be set aside. *Rousseau* v. *Pelletier*, 34 Que. S. C. 289.

Controverted election of reeve—*Proper qualification — Interest in property — Freehold estate for life.*]—The respondent who had an annual rent charge of $125 on certain property for life, with a home

thereon for life, had a freehold interest sufficient to qualify him for reeve. No opinion expressed as to it not being permissible to make second motion for respondent's removal, first having been dismissed. *Rex el rel. Ingoldsby* v. *Speers*, 13 O. W. R. 611.

Controverted election petition—*Corrupt practices — Particulars.*] — The petitioners contesting the validity of a municipal election will be required to furnish the following particulars: (a) the dates, places, and circumstances of acts of violence, corruption, fraud, trickery, threats, payments of money, gifts, or promises, to which reference is made in the petition, and the names of the persons involved in these practices; (b) the dates, places, and circumstances relating to the payment of municipal taxes, the names of persons who paid such taxes, and for whom; (c) the nature of the threats and acts of intimidation which were made to certain electors; (d) the names of the agents mentioned as having devised and carried out a system of corruption, threats, intimidation, general treating, and the use of intoxicating liquors. *Lachapelle* v. *Pauzé*, 9 Que. P. R. 233.

Controverted election petition—*Security for costs—Art. 352, M. C.—Failure to comply with—Nullity of petition.*]—Article 352 of the Municipal Code, which enacts that petitioners to set aside a municipal election "must give security for costs at least ten days before the petition is presented to the Court, otherwise such petition cannot be received," is prohibitive in its terms, and failure to comply with it imports nullity of proceedings had. The Court has, therefore, no power to allow a petitioner who has not given sufficient security to put in another and different bond, and the petition received under an insufficient bond must be declared null and void. *Rousseau* v. *Pelletier*, 33 Que. S. C. 355.

Corrupt acts by agent — *Treating—Voiding election.*] — The Court has power under the provisions of the Municipal Controverted Elections Act, R. S. N. S. 1900 c. 72, ss. 4, 16, 22, aided if necessary by s. 64, to set aside the election of a municipal councillor for corrupt acts of an agent, whether committed with or without the knowledge and consent of the candidate.—The giving of a drink on election day, by a person standing in close relationship with the respondent, to a voter who had "changed" from the petitioner three days before the election and decided to support the respondent, was held sufficient to render the election of the respondent void. *Kaulback* v. *McKean*, 38 N. S. R. 364.

Corrupt practices—*Effect on election—Votes of unqualified persons — Scrutiny.*]—Promises, gifts, favours, or threats, which may induce an elector to vote for a candidate, are corrupt practices, the effect of which is to annul the election of the candidate for a municipal office, whatever be the number of votes whom he has thus corrupted. But illegal votes which are so because of want of qualification of the voter, do not invalidate the election, if, such votes being deducted, the candidate elected still has a majority of legal votes. *Labbé* v. *Morin*, 23 Que. S. C. 407.

Corrupt practices by candidate — *Particular election.*]—The corrupt practice referred to in s. 249 of the charter of the city of Montreal, 62 V. c. 58, is a corrupt practice committed by the candidate in the election in which he is a candidate, and not in another election in which he is not a candidate. *Tanguay* v. *Vallières*, 6 Que. P. R. 122, 26 Que. S. C. 122.

Councilman — *Proceedings not intituled in any Court—Notices of holding meeting not duly posted.*]—Application to oust from office a member of a local improvement district council:—*Held*, that it is unnecessary for the proceeding to be intituled in any Court, and that evidence shews respondent to have been duly elected. No proof, even if notices required to be posted, had been posted, that result of election would have been different. *Re Jones and Stribell*, 10 W. L. R. 508. *In re Local Improvement District* No. 11-a-3, 2 Sask. L. R. 80.

Councilman — *Votes of unqualified persons—Saskatchewan Local Improvement Act, 1906, s. 18—Non-payment of taxes.*]—Application requiring respondent to shew cause why he should not be ousted from his position as councilman on the grounds that certain parties had voted whose taxes had not been paid. Summonses discharged, there being no evidence that local improvement taxes in question were not paid. Summonses defective, having been signed by clerk in chambers instead of by Judge who granted same. *Rex ex rel. Dale* v. *Lanz*, 10 W. L. R. 508, 2 Sask. L. R. 78.

Councillor — *Alien — Naturalization pendente lite.*]—A municipal councillor who was an alien at the time of his election as such and at the time of the issue of a writ of *quo warranto* to deprive him of the office on the ground that he was not a British subject, cannot, by becoming naturalised *pendente lite*, obtain the discharge of the writ, naturalization not having a retroactive effect *Campeau* v. *Grosboillot*, 17 Que. S. C. 116.

Councillor—*Disqualification of—School trustee — Term not expired — Motion to set aside election—Costs—Disclaimer.*]—The respondent was elected school trustee in January, 1903, for two years, and took the oath of office on 21st January, 1903; (2) that on 26th December, 1904, he was nominated as councillor, and on the same day was nominated (with four others) as school trustee; but next day filed with the secretary of the school board a memorandum in these words: "I hereby tender my resignation as candidate for trustee for 1905;" (3) that the first meeting of the new school board was held on 18th January, 1905, when the same was organised; (4) and that Mr. Cook took the oath of qualification as councillor on 27th December, 1904, made his declaration of office as councillor on 9th January, 1905, and took his seat in the council. On 7th February the relator caused a letter to be written to the respondent pointing out that he was disqualified by reason of 3 Edw. VII. c. 19, s. 80, s.-s.

1, as having been a member of the school board at the time of his election, and inviting him to consult his solicitors as to the advisability of disclaiming so as to save costs of proceedings to have him unseated. *O'Connor* v. *City of Hamilton*, 8 O. L. R. on pp. 409 and 416, followed. Motion to set aside the election of the respondent as a town councillor granted, with costs, as the respondent did not avail himself of the notice to disclaim. *Rex ex rel. Jamieson* v. *Cook*, 5 O. W. R. 359, 9 O. L. R. 466.

Councillor—*Overdue taxes—Residence—Misconduct.*]—A paragraph in the petition accompanying a writ of *quo warranto* to void a municipal election, alleging that the defendant owes taxes to the municipality of which he is one of the councillors will be struck out on demurrer if it does not also allege that the defendant owed these taxes at the time of his election.—2. That *prcuve avant faire droit* will be ordered as regards allegations that the defendant has not his residence nor his place of business within the limits of the municipality; that he has caused to be cancelled a sale of municipal debentures, for the purpose of ratifying, for his personal interest, a subsequent sale thereof more advantageous to him; and that he has caused to be paid to a creditor of the municipality a larger sum than is due with the object of obtaining a commission thereout. *Yale* v. *Bayard*, 2 Que. P. R. 524.

Councillor — *Qualification — Pleading—Particulars—Quo warranto.*]—Upon a motion for a *quo warranto* against a person who occupies the position of a municipal councillor, founded upon the allegation that he has not the qualification of landed proprietor required by the statute, where the respondent by his pleading affirms that he has such qualification, the petitioner had no right to demand, by a motion for particulars, the description of the property which he has and the production of the title deeds upon which it rests. *Trudel* v. *Boucher*, 28 Que. S. C. 192.

Councillor—Qualification—Poll tax payer is not ratepayer—Disqualified person retaining office—*Quo warranto* proceedings for removal — Statute — Construction — Effect to be given to form. *In re Mack*, 1 E. L. R. 222.

Councillors — *Disqualification—Licensed vendor of liquors — Inspector—Canada Temperance Act.*]—A licensed vendor under the second part of the Canada Temperance Act is disqualified from being a member of the municipal council; *per* Tuck, C.J., Hanington, Landry, Barker and McLeod, JJ.—An inspector, under the Canada Temperance Act, appointed by the municipality, is disqualified from being a member of the municipal council; *per* Tuck, C.J., Landry, Barker and McLeod, JJ. *Ex p. Williams, In re Dickie*, 3 E. L. R. 378, 38 N. B. R. 156.

Councillors — Disqualification — Paid official of municipality — Duties of office completed before nomination. *Rex ex rel. Smith* v. *Schick* (N.W.P.), 5 W. L. R. 533.

Councillors — *Qualification—Ratepayer—Quo warranto—Time of election.*]—Under the provisions of the Towns Incorporation Act, R. S. N. S. 1900, c. 71, s. 26 (2), two things are necessary to qualify a person to serve as councillor of an incorporated town: (1) he must have been a ratepayer for one year before his nomination; (2) he must continue to be a ratepayer.—Where it appeared that the respondent was not a ratepayer at the time of his election:—*Held*, that this condition being once shewn to exist, it must be presumed to continue; that for a disqualification continuing after the election, *quo warranto* was the proper remedy; and that no distinction can be made between a disqualification existing at the time of the nomination and a disqualification existing at the time of the election. *Rex* v. *Mack*, 2 E. L. R. 263, 41 N. S. R. 128.

Councillors—*Petition to avoid election—Allegations — Claiming seat — Nomination—Voters' lists — Misnomer of voters — Corrupt practices — Bribery — Candidates — Agent.*]—In a petition contesting the election of a municipal councillor, where the petitioner prays not only the voting of the election of the respondent, but also that he himself shall be declared elected, it is sufficient to allege that votes were cast for each of them, without more formally alleging their nomination as candidates.—In a town wherein the provisions of 40 V. c. 29 (Q.), regarding voters' lists, are in force, those only may vote whose names are on the list. The faulty spelling of names and the substitution even of one family name for another (*e.g.*, Moreau for Morency), where it is plain that it results from an error of the copyist, and that the identity of the person is not in doubt, do not form an obstacle to persons voting.—The corruption aimed at in s. 33 of 36 V. c. 9 (Q.), as a ground for contesting an election, must be understood as that recognised at common law in England, and not that defined in the federal and provincial election laws. It exists only in a case where by a bargain concluded between the briber and the elector, the latter, in consideration of an advantage given or promised, engages to vote in a particular way. The offer or proposal to give on the one side, without acceptance on the other, does not constitute the offence.—A single act of corruption by the candidate is sufficient to avoid his election. It is otherwise as to acts of others for his benefit. It is necessary, in order that they should have the same effect, that they should constitute, by their number, general corruption, and raise a doubt as to whether the election was the result of the free and honest vote of the electors, rather than of corrupt practices. *Langlois* v. *Auger*, 29 Que. S. C. 373.

Councillors — *Presiding officer—Declaration of result—Postponement—Mandamus—Nomination paper—Completion of formalities.*]—The signatures upon the nomination paper of a candidate at an election for councillors of a town must be certified or attested by affidavit, and the officer presiding at the election may adjourn the proclamation of the result of the election, in order to permit a candidate to comply with this requirement. Therefore, such an adjournment should not be taken as a refusal to announce the result such as to afford ground for a mandamus against the presiding officer. *Manseau* v. *Mercure*, 30 Que. S. C. 153.

Councillors — *Qualification of voters—Husband qualifying on wife's property — Assessment roll — Non-payment of personal tax — Contested election — Defence — Status of petitioners — Preliminary objection —Practice.*]—A personal tax imposed, by virtue of the Municipal Code, upon persons who are liable for no other tax, may be exacted from a husband whose wife's name is on the assessment and collector's rolls as the owner of taxable property and who has paid the taxes thereon. Therefore, a husband, in these conditions, who has not paid his personal tax, has not the qualification of a municipal elector. A husband has the qualification of a municipal elector by reason of lands possessed by his wife only when his name is on the assessment roll.—Defendants in contestations of the election of municipal councillors should set up all their grounds of defence at the same time, and are not bound to set up as a preliminary objection the petitioners' want of qualification as municipal electors. *Julien* v. *Bernier*, 31 Que. S. C. 481.

Councillors—*Voting for—Procedure.*]—Where there are two councillors to elect and four candidates are proposed, the presiding officer ought to count the electors favourable to the four candidates and declare elected the two who have the greatest number of votes irrespective of the question whether the candidates have been nominated in opposition to one another. *Dean* v. *McFie*, 7 Que. P. R. 196.

Councillors for township—Election of candidates duly nominated who had notified withdrawal—Names on ballot papers—Date of receipt of notice by clerk—Disclaimer — Costs. *Rex ex rel. Pillar* v. *Bourdeau*, 3 O. W. R. 245.

Declaration of qualification — *Invalidity — Property qualification—Joint assessment — Fixed assessment—Including school taxes—Invalidity of by-law—Conflicting interest—Contract with corporation — Corrupt practices — Evidence — Powers of Master in Chambers.*]—The Consolidated Municipal Act, 1903, 3 Edw. VII. c. 19, s. 129 (3a), as amended by 4 Edw. VII. c. 22, s. 4, requires every candidate for the office of mayor or councillor in a town to file in the office of the clerk of the municipality a statutory declaration of qualification in accordance with the form contained in s. 311 of the Act, or to the like effect, in default of which such candidate shall be deemed to have resigned, and his name shall be removed from the list of candidates. By 6 Edw. VII. c. 34, s. 10, s.-ss. 1 and 2, the form of declaration is amended by adding to it statements that the candidate is "not a citizen or subject of any foreign country," and that the estate in respect of which he qualifies is assessed in his name, or in the name of his wife, on the last revised assessment roll of the municipality to the value specified in the declaration. Neither of these requirements was complied with in the declarations filed by the persons elected as mayor and councillors of a town:—*Held*, that the omission of these statements rendered the declarations invalid, and they could not be cured by virtue of s. 204 of the Act, and that the persons elected must be deemed to have resigned their offices. —*Semble*, that the declaration of qualification is invalid if made before the town clerk. —A councillor was jointly assessed with five other persons as tenant of a property assessed at $6,780, so that his one-sixth share was less than $1,200, being the amount required by s. 76, s.-s. 1 (b), read in connection with s. 93 of the Act:—*Held*, that the qualification was insufficient.—Principle of *Regina ex rel. Harding* v. *Bennett*, 27 O. R. 314, applied.—A councillor was a member of a partnership to which the town had assumed to grant by by-law a fixed assessment "for all purposes, including school taxes:"—*Held*, that such agreement was *ultra vires* of the corporation under s. 591a, clause (*g*), of the Municipal Act; that the partnership firm was liable to an action by the corporation to have the proper school rates levied upon the true assessable value of the property; and that the councillor's qualification was insufficient.—*Rex ex rel. Macnamara* v. *Heffernan*, 7 O. L. R. 289, followed.—A councillor had done work for the school board which had to be done to the satisfaction of the town engineer, the account for which was not passed and paid until February, 1908:—*Held*, that, as a member of the council, he was in a position where his duty might conflict with his interest, and must therefore be disqualified.—The mayor, as a member of the Citizens' League, had entered into a contract with the corporation, under an indemnity given by the League as to certain costs, by which he was apparently liable for the sum of $19.66:—*Held*, that he was thereby disqualified, and that to such a case the principle "*de minimis non curat lex*" does not apply.—*Nell* v. *Longbottom*, [1894] 1 Q. B. 767, followed.—In proceedings instituted under the Municipal Act to unseat a member of the municipal council, the Master in Chambers has power, under s. 248, as interpreted by s. 219, s.-s. 2, of the Act, to direct evidence as to alleged corrupt practices to be taken before a County Court Judge.—*Regina ex rel. Whyte* v. *McClay*, 13 P. R. 96, followed.—*Rex ex rel. Beck* v. *Sharp*, 16 O. L. R. 267, 11 O. W. R. 493, distinguished. *Rex ex rel. O'Shea* v. *Letherby*, 16 O. L. R. 581, 11 O. W. R. 929.

Declaration of qualification to be filed by candidate after nomination—*Declaration made before election—Duty of clerk of municipality—Objection taken after election—Irregularity not affecting result—Municipal Act, 1903, ss. 129 (3a), 204.*]—The declaration of qualification required by s. 129 (3a) of the Municipal Act, 1903, to be filed by the candidate for municipal office in certain cities, within (at the most) 48 hours after the hour of nomination, may be made and subscribed before the nomination. If the declaration tendered on behalf of a candidate be made after the final revision of the assessment roll upon which the candidate must be qualified, if it avers the possession of the necessary qualification, specifying the property, and if such averment be corroborated by the last revised assessment roll, the city clerk should file the declaration and place the candidate's name on the ballot paper, even if, as in this case, the declaration was made and subscribed six weeks before the nomination.—*Semble*, that, even if the declaration may not be made before the nomination, the objection cannot be taken

after the election; and the declaration in this case having been made in good faith, as a compliance with s. 129 (3a), and acted upon in good faith by the city clerk, there was at the worst an irregularity not affecting the result of the election: s. 204 of the Municipal Act, 1903. *Rex ex rel. Armstrong* v. *Garratt*, 9 O. W. R. 636, 14 O. L. R. 395.

Declaration of result of poll—*Place for making—Municipal Act, s. 178—Failure to comply with—Irregularity—Curative provision of statute, s. 204—Costs.*]—By s. 178 of the Municipal Act, 3 Edw. VII. c. 19 (O.), the clerk "shall, at the town hall, or if there is no town hall, at some other public place . . . publicly declare to be elected . . . the candidates having the highest number of votes." The township of O. had a township hall, but at the election of the reeve and council for 1907 the clerk made the declaration at another hall: — *Held*, that "town hall" includes "township hall," and that the declaration was irregular, but that the election was not thereby invalidated, having regard to the curative provision of the Act, s. 204. A motion to set aside the election was dismissed without costs. *Rex ex rel. Armour* v. *Peddie*, 9 O. W. R. 393, 14 O. L. R. 339.

Deputy reeve of town—"*Actual occupation*" — *6 Edw. VII. c. 35, s. 1 (a).*]—On a proceeding to set aside election of respondent as deputy reeve of Brampton, it was held: (1) that the question whether that town is entitled to a deputy reeve cannot be determined on this motion, nor can it be raised by one who voted at such an election; (2) that respondent having agreed to sell his equity of redemption will not disqualify him; (3) that his having control over the freehold and right to possession is "actual occupation" within the meaning of s. 76 (f), Municipal Act, 1903. *Rex ex rel. Sharpe* v. *Beck*, 13 O. W. R. 457. Appeal dismissed. *Ibid*, 539.

Details — *Particulars — Declaration.*]—If a defendant, without contending that the setting forth of the causes of action contained in the declaration is insufficient, asks the Court to order the plaintiff to furnish him with certain details which are necessary to him for the purpose of making his defence, this demand is not an *exception à la forme* and is not subject to the same formalities.—2. The Court can always, in the course of an action, order one of the parties to furnish to another details which the latter requires.—3. This demand of details, granted to facilitate the administration of justice, is different from that upon which the party demanding asks that the allegations of the pleading shall be struck out if particulars are not given in the time fixed by the Court; this latter demand should be treated as an *exception à la forme*.—4. If a judgment dismissing an *exception à la forme* reserves to the defendant the right to demand details, the Court seized of this last demand cannot dismiss it because it does not comply with the formalities required for *exceptions à la forme*.—5. In contested municipal election cases it has been the practice to order particulars without considering the demands therefor as *exceptions à la forme*.—6. In a contested municipal election case the petitioner will be ordered to give the names, Christian names, and residences of the agents of the defendant, the fraudulent acts and corrupt practices, bribery and fraud, committed by the defendant and his agents, with his approbation and to his knowledge, the dates and places, as far as possible, where and when they were committed, and how the defendant and his agents, and other persons, have hindered the petitioner from being nominated. *Clarke* v. *Jacques*, 3 Que. P. R. 78.

Details—*Status of petitioner.*]—In a petition to void an election the absence of details warrants a motion for details, but not an *exception à la forme*.—2. An objection that the petitioner is not an elector goes to the merits and not to the form. *Moreau* v. *Lamarche*, 3 Que. P. R. 121.

Disqualification of alderman—*Alienation of lands—Unregistered conveyance — Land Registry Act, B. C., 1906, s. 74.*]—A candidate for alderman in the city of Victoria had, prior to his nomination, conveyed away the lands on the alleged ownership whereof he claimed qualification under s. 13, s.-s. (b), of the Municipal Clauses Act, but the conveyance remained unregistered. In an action to establish disqualification, and for penalties under s. 20 of the Act:—*Held*, that the effect of s. 74 of the Land Registry Act, c. 23, 1906, is to make registration of conveyances taking effect after the 30th June, 1905, a *sine qua non* of the vesting of any interest, legal or equitable, in the grantee.—*Falconer* v. *Langley*, 6 B. C. R. 444, considered. *Levy* v. *Gleason*, 13 B. C. R. 357.

Disqualification of county councillor — *Membership in school board — Resignation—Relator's claim to seat — Notice to electors.*]—By 2 Edw. VII. c. 29, s. 5 (O.), s. 80 of the Municipal Act, R. S. O. 1897, c. 223, is amended so as to provide that "no member of a school board for which rates are levied" shall be qualified to be a member of the council of any municipal corporation. The respondent was a member of a school board for a section which had no school or teacher of its own; but the board was organised, and paid over the rates levied on the section to the board of an adjoining section, which provided accommodation for the school children living within the first-named section:—*Held*, a school board for which rates are levied, within the meaning of the amendment:—*Held*, also, following *Regina ex rel. Rollo* v. *Beard*, 3 P. R. 357, and *Regina ex rel. Adamson* v. *Boyd*, 4 P. R. 204, that the respondent, being a member of a school board on the day of the nomination for the office of county councillor, was disqualified for the latter office, although he resigned his membership in the school board before the day of polling. No objection to the respondent's qualification was taken until the day of polling, on which day notices were posted up in five out of the twelve polling booths, warning the electors not to vote for the respondent:—*Held*, not sufficient to entitle the relator to the seat. *Rex ex rel. Zimmerman* v. *Steele*, 23 C. L. T. 196, 5 O. L. R. 565, 2 O. W. R. 242.

Disqualification of county councillor — *Membership in school board — Statutes — Saving clause — Resignation — Relator claiming seat—Notice—Costs.*] — In a *quo*

warranto proceeding in which it was sought to unseat the respondent as a county councillor because he was a member of a school board for which rates were levied, and to seat the relator:—*Held*, that the relator was not entitled to the seat, as he had not objected to the disqualification of the respondent at the nomination or given any notice on the election day to the electors that they were throwing away their votes on account of the respondent's disqualification.—2. That s. 76 of the Municipal Act does not apply to county councillors.—3. That at the time of the respondent's election he was a member of a school board for which rates were levied, and if he were then disqualified, his resignation after his election and before taking his seat would not remove his disqualification. *Regina ex rel. Rollo* v. *Beard*, 3 P. R. 357, followed.—4. That the words "for which rates are levied," used in 2 Edw. VII. c. 29, s. 5 (O.), disqualify any member of the council of any municipal corporation who was at the time of his election a member of a school board for which rates are levied, whether levied by the municipal corporation for which he was elected or by any other.—5. That the saving clause in s. 5 refers to the election of the member of the council of any municipal corporation, and not to the election of a school trustee. *Rex ex rel. Zimmerman* v. *Steele*, 23 C. L. T. 196, 5 O. L. R. 565, followed. Therefore at the time of his election as county councillor the respondent was disqualified; and a new election was ordered. The relator was allowed the costs of proceedings so far as he had succeeded, and the respondent his costs of opposing the application to seat the relator; such costs to be set off *pro tanto*. *Rex ex rel. O'Donnell* v. *Broomfield*, 23 C. L. T. 202, 5 O. L. R. 596, 2 O. W. R. 295.

Disqualification of township councillor — *Membership in school board—Resignation—Non-acceptance — Designation of board — Relator's claim to seat—Notice to electors—Costs — Status of relator—Discretion.*] — *Held*, that the respondent being a member of the school board for a union school section, a school board for which rates were levied, and his resignation as such not having been accepted by his co-trustees, was by 2 Edw. VII. c. 29, s. 5 (O.), disqualified for the office of township councillor; and it was not material whether the school corporation of which he was a member was called a "board of public school trustees of union section," etc., or a "public school board." The respondent's qualification not having been objected to at the nomination, so that the electors might have an opportunity of nominating another candidate, the defeated candidate was not entitled to the seat. *Rex ex rel. Zimmerman* v. *Steele*, 23 C. L. T. 196, 5 O. L. R. 565, followed. It appearing to be the fact, but there being no actual proof, that the relator was put forward by the clerk of the township, and the relator having put the respondent to expense by his unsuccessful claim to have the defeated candidate seated, while the election was set aside and a new election ordered, no costs were given to either party. *Rex ex rel. Robinson* v. *McCarthy*, 23 C. L. T. 203, 5 O. L. R. 638, 2 O. W. R. 298.

Electoral roll—*Status of voters—Representatives of incorporated company—Representation limited to one person—Court of Revision—Excess of jurisdiction — Certiorari — Misconstruction of statute—Injunction—Costs.*]—A voter may not enjoin any other registered voter from voting. A Court of Revision allowed five names, representatives of a company, to remain on the electoral roll instead of one. A mandamus was therefore directed to the clerk in whose custody the roll was to expunge the four contested names from the roll. *R.* v. *North Saanich*, 12 W. L. R. 639, 15 B. C. R. 1.

Forum — *Petitioner — Qualification — Pleading—Writ of summons—Quo warranto —Security—Notice.*]—A petition to contest a municipal election addressed to the Superior Court may be received by a Judge of the Superior Court.—2. The petitioner sufficiently alleges his qualification to contest an election when he alleges that he is an elector duly qualified to vote at the municipal elections at which the defendant was elected, and that his name was duly entered on the list of electors of the district for which the defendant was elected.—3. An action to void the election will not be dismissed upon *exception à la forme* because the plaintiff has made illegal allegations besides those he had a right to make.—4. The words "*quo warranto*" added to an ordinary writ of summons do not change its nature and do not make it irregular.—5. *Semble*, that it is necessary in an *exception à la forme* in which the sufficiency of the security and of the notice thereof is attacked in contesting an election, to set out in what respects the security and the notice are insufficient. *Archambault* v. *Tansey*, 3 Que. P. R. 50.

Fraudulent practices—Tampering with ballots—Disregard of provisions of Municipal Act as to secrecy—Voiding election — New election — Costs — Agency of wrongdoers. *Rex ex rel. Macklin* v. *Thompson*, 11 O. W. R. 935.

Illegal voting — *Electors voting more than once—Presumption—Affecting result of election—Corrupt practices — Illegal voting by respondent and relator.*]—At a municipal election for reeve, at which upon a large vote the successful candidate obtained a majority of six, it was shewn that a widespread belief prevailed among the electors of the right to vote at each sub-division in which the name of the elector appeared; that four electors had in fact voted twice; and that several others had received ballot papers within a polling booth, after having already voted for reeve:—*Held*, that the statutory presumption arising under the Municipal Act, R. S. O. 1897 c. 223, s. 162, s.-s. 3, did not apply in proceedings to set aside an election, and that as, owing to the destruction by the clerk of the ballot papers pursuant to the provisions of the Act, it was impossible to tell whether more than four voters had voted twice, the election should not be set aside, the voting twice by four electors not having, in the opinion of the Court, affected the result.—*Held*, also, that if, as alleged, the respondent had himself voted twice, this was not a cause for setting aside the election; voting twice not being in itself a corrupt practice, and the commission of that offence not being, under the statute, a disqualification for office during the current year.—

Held, also, that, there being strong reasons to believe that the relator had himself voted more than once, and there being undoubted evidence that he had advised other electors to vote more than once, he could not successfully urge this objection against the validity of the election. *Rex ex rel. Tolmie* v. *Campbell*, 22 C. L. T. 236, 4 O. L. R. 25, 1 O. W. R. 268.

Invalidity — *Absence of declarations by voters—Unauthorised vote by ballot—Early closing of poll — Relator — Acquiescence—Local Improvement Act — Imperative provisions.*]—An election of a councillor for a Local Improvement District, under the Local Improvement Act, was adjudged void because the election was not held in the manner prescribed by the statute, in that the persons who voted did not make the declaration required, that the voting was by ballot, though that was not authorised by a resolution of the council, and that the poll was only open for half an hour.—The relator, who was a candidate, consented to the vote being taken by ballot, but not to the omission of the declaration:—*Held*, that the consent of the relator could not validate the election, and at any rate the omission of the declaration was fatal, s. 21 of the Act being imperative. *Woodward* v. *Sarsons*, 32 L. T. 870, followed. *R. ex rel. Gunder Bjorge* v. *Zellickson* (1910), 13 W. L. R. 433.

Invalid nomination—*Failure to observe formalities — Written nomination paper — Time for delivery to returning officer.*]—According to the Act respecting city and town municipalities of 1903, the written nomination of the candidate may be delivered to the returning officer at any time between the publication of the notice of the election by the secretary-treasurer and the day of nomination of candidates, but on the day of nomination it cannot be delivered to him unless before 10 o'clock.—2. The failure to observe any one of the formalities prescribed by arts. 166, 167, 168, 169, 171, and 172 of this statute, completely avoids a nomination, and the returning officer has no right to give effect to it. *Bérubé* v. *Chapleau*, 34 Que. S. C. 182.

Irregularities — Declarations of qualification—Saving clause of statute—Compliance with statute — Subscription — Commissioner. *Rex ex rel. Cavers* v. *Kelly*, 7 O. W. R. 280, 600.

Irregularity—*Quo warranto application —Status of relator—Voting for respondent—Disclaimer.*]—The relator attacked the election of the respondents as county councillors for non-compliance with certain statutory formalities:—*Held*, that the relator, by voting for M., one of the respondents, who was in the same class with the others, acquiesced in and became a party to the irregularity, and could not be heard to complain. The fact that M., after service of the notice of motion, disclaimed office, was *nihil ad rem*. *Rex ex rel. McLeod* v. *Bathurst*, 23 C. L. T. 201, 5 O. L. R. 573, 2 O. W. R. 246.

Irregularity in procedure — *Circuit Court—Discretion.*]—The Circuit Court has a discretion to exercise in the matter of the contestation of municipal elections, and will not annul an election, on the application of a defeated candidate, by reason of irregularities in form and in the procedure followed in the holding of the election, when such informalities have caused no prejudice to such candidate. *Jones* v. *Gauthier*, 19 Que. S. C. 100.

Justification of complainant—*Exception to the style of cause—C. P. 174, R. S. Q. 4227, 4275.*]—The lack of qualification of the complainant in a motion to set aside a municipal election may be legally invoked by an exception to the style of cause. Anyone who has not paid his school taxes cannot be nominated for the position of municipal councillor, according to s. 4227 of R. S. Q.; moreover, he is not qualified to be the complainant in motion to set aside the election. *Latour* v. *Lefebvre* (1909), 10 Que. P. R. 336.

Last revised voters' list—*De facto certified voters' list—Ontario Voters' Lists Act, ss. 17 (4), 21, 24—Con. Mun. Act (1903), s. 148.*]—Motion to quash a local option by-law on grounds: (1) that there was no valid complaint against the list prepared by the clerk of the municipality, because, as was contended, the only person who complained was not a voter, and (2) that the notice of the holding of the Court for the revision of the list was not published, as required by sub-sec. 4 of sec. 17 of the Ontario Voters' Lists Act:—*Held*, that the last *de facto* certified voters' list filed in the office of the Clerk of the Peace is all that the clerk of the municipality is to concern himself with, and . . . where an election has been held at which such a list has been used, it was not intended that the election should be open to attack because of some informality or omission on the part of the Judge or of any of the officers intrusted with duties in connection with the list in the performance of their duties under the Act in accordance with its provisions. Motion dismissed with costs. *Re Ryan and Alliston* (1910), 16 O. W. R. 794, 1 O. W. N. 1116, 21 O. L. R. 582.

Lists of municipal electors—*Quashing —Injunction — Other remedy.*] — Lists of municipal electors made under the provisions of art. 4515 *et seq.*, R. S. Q., may be quashed on the ground of illegality, under the provisions of art. 4376, as provided by art. 4522. 2. A writ of injunction will not be granted when the law provides a special remedy for the grievances complained of. *Wallace* v. *Languedoc*, 4 Que. P. R. 361.

Local improvement district — *Qualification of voters — Payment of taxes — Declaration of voter.*]—*Held*, that, while it is not expressly provided in the Local Improvement Act that only electors who have paid their taxes may vote, still the legislature, having amended the declaration to be signed by voters before voting, so as to insert a declaration that their taxes have been paid, must have intended that only those who could make that declaration could vote, and therefore, as a majority of those voting for the respondent had not paid their taxes, the election was irregular, and the respondent should be ousted. *Rex ex rel. Tobey* v. *McDonald*, 8 W. L. R. 83, 1 Sask. L. R. 114.

Local option by-law. *See* INTOXICATING LIQUORS.

Local option by-law—*Voting—Form of ballot paper — Inconsistent directions — Facsimile ballot — Notice of by-law — Publication — Time — "As soon as possible" — Weekly newspaper—Proclamation —Mistake in—Explicit notice of voting — Third reading—Time for recount not elapsed —Publication of notice before final passing—Municipal Act, sec. 376 (b)—Construction—Liquor License Act, secs. 65, 68—Polls not opened in time—Proof—Affidavit—Information and belief—Effect on vote—Accidental delay—Substantial compliance with Municipal Act, sec. 89—Imperative or directory provision—Appointment of scrutineers — Time and place not fixed—Scrutineers appointed and acting.*]—Upon an application to quash a local option by-law:—*Held*, that, although the legislature, in amending the Liquor License Act in 1909 by prescribing a new form of ballot paper, did not amend schedule F. to the Act, containing directions to voters and a facsimile ballot paper, the municipal officers were justified in substituting the proper form of ballot as prescribed by the amending Act, and would also have been justified in changing the words of the directions, but the by-law was not invalid because they did not do so.—*Re Hatch and Rural Municipality of Oakland, ante 309, and Ward* v. *Owen Sound*, 15 O. W. R. 443, followed.—2. That the notice required by sec. 66 of the Liquor License Act be published in the Manitoba Gazette and a local newspaper "as soon as possible," was published in time, the second reading having been on the 5th October, and the publications in the Gazette on the 16th, 23rd, and 30th October and the 6th and 13th November, and in a local weekly newspaper on the 14th, 21st and 28th October and the 4th and 11th November. The publications might have been a week earlier in each case, but "as soon as possible" did not mean that the clerk should neglect his other duties and devote himself to the preparation and publication of this notice; he must publish it as soon as possible, following the ordinary routine of official duty. And the municipal officers were not bound to select as their medium a daily newspaper because of earlier publication, the weekly circulating more largely in the municipality.—3. That the by-law was not illegal because the proclamation published pursuant to sec. 376 (b) of the Municipal Act stated in one paragraph that "in the event of a poll being required, the said poll will be taken at the following places" —naming them; another paragraph containing an explicit notice of the voting on the by-law.—4. That the by-law was not illegal because it was given its third reading before the time for applying for a recount had elapsed.—*In re Coxworth and Village of Hensall*, 17 O. L. R. 431, approved and followed.—5. Without considering whether sec. 376 (b) of the Municipal Act was made applicable by sec. 68 of the Liquor License Act, that the requirement of sec. 376 (b), that before the final passing of the by-law the council shall publish in a newspaper in at least one number of such paper each week for 3 successive weeks, and once in the Manitoba Gazette, at least two weeks in advance of the day of voting, a notice signed by the clerk, etc., was complied with by the publications in October and November (set out in paragraph 2 of this head-note), the voting taking pace on the 21st December; and that, in construing sub-sec. (b) of sec. 376, the provisions of sub-sec. (a) are not to be considered, in view of the new section substituted for sec. 65 of the Liquor License Act by sec. 4 of ch. 26 of the Acts of 1908.—6. That an objection that one of the polling places was not opened until after 11 o'clock on the day of polling should not be considered, the only evidence in support of the fact being an affidavit of the applicant on information and belief.—7. That the admitted fact that another poll was not opened until after 10 o'clock (9 being the hour for opening) did not invalidate the by-law, the deputy returning officer having made an honest effort to comply with the by-law, but having been delayed by stress of weather, and it not being shewn that the result was affected. And *semble*, that sec. 89 of the Municipal Act, fixing the hours of voting, is directory only. All that is required is a substantial, not a literal compliance.—8. That effect should not be given to an objection based on the fact that the by-law did not fix a time and place for the appointment of scrutineers, as required by sec. 377 of the Municipal Act, it being shewn as a fact that scrutineers were appointed and did act. *Re Shaw & Portage la Prairie* (1910), 14 W. L. R. 542.

Local option by-law—*Voting on—Last revised voters' list—De facto certified voters' list—Ontario Voters' List Act, ss. 17 (4), 21, 24—Con. Mun. Act (1903), s. 148.*] —Motion to quash a local option by-law on grounds: (1) that there was no valid complaint against the list prepared by the clerk of the municipality, because, as was contended, the only person who complained was not a voter, and (2) that the notice of the holding of the Court for the revision of the list was not published, as required by sub-sec. 4 of sec. 17 of the Ontario Voters' Lists Act.—Meredith, C.J.C.P., *held* (16 O. W. R. 794, 21 O. L. R. 582, 1 O. W. N. 1116), that the last *de facto* certified voters' list filed in the office of the Clerk of the Peace is all that the clerk of the municipality is to concern himself with, and . . where an election has been held at which such a list has been used, it was not intended that the election should be open to attack because of some informality or omission on the part of the Judge or of any of the officers intrusted with duties in connection with the list in the performance of their duties under the Act in accordance with its provisions. Motion dismissed with costs.—Divisional Court dismissed an appeal from above judgment with costs. *Re Ryan & Alliston* (1910), 17 O. W. R. 222, 2 O. W. N. 161, O. L. R.

Local option by-law—*Voting on—Scrutiny before County Judge—Mun. Act s. 263 —Motion to prohibit Judge from certifying to the result.*]—A local option by-law was submitted to the voters of a town, and 440 votes were cast, 264 for the by-law, exactly the three-fifth majority required by statute. A scrutiny of the ballots was had under the Mun. Act, s.-s. 263 and following, before the County Judge, who found that the by-law was carried by the requisite majority. Mo-

tion was then made to prohibit the Judge from certifying to the result of the scrutiny. —Meredith, C.J.C.P., *held*, that a *certiorari* does not lie to bring up and quash a certificate of the County Judge, because of suggested error in determining matters over which he has jurisdiction, but where a Judge has no jurisdiction to enter upon an inquiry at all, by reason of his failure to observe the statutory requirements, his certificate may be quashed. Motion dismissed with costs.—*Re Saltfleet*, 16 O. L. R. 293, 11 O. W. R. 356, 545, distinguished. *Re Schumaker & Chesley* (1910), 17 O. W. R. 174.

Manner of marking ballot.] — Any ballot upon which the elector has clearly and in good faith indicated his intention to vote for a particular candidate is valid.—In the present case, the ballot was marked by a cross being placed immediately under the figure alongside of one of the candidates' names and should be counted as a vote for the candidate so named, the form of the ballot leading one to the belief that the whole space below the heavy line separating the names of the two candidates belonged to the candidate whose name was printed below such line.—*Semble*, there is such a close connection between the name and the number of a candidate on the ballot paper that in marking his ballot with a cross inside of the line subdividing the lower part of the ballot and containing the figure, the voter is presumed to have voted for the candidate whose name bears such figure.—Art. 9 of the Cities and Towns Act applies to a municipal election the same as to all other business of the municipality. *Robidaux* v. *Brunet*, (1910), 16 R. de J. 59.

Mayor—*Inability to read or write—Petition to avoid—Objection to jurisdiction — Time for — Declinatory exception—Costs.*] —The election by a rural municipal council of a mayor who can neither read nor write can only be attacked in the manner provided in the Municipal Code. The question of absence of jurisdiction, *ratione materiæ*, may be raised at any stage, but the party who has not raised it by a declinatory exception, if he succeeds, ought not to have the same costs as if he had so taken it. *Marois* v. *Lafontaine*, 27 Que. S. C. 174.

Mayor of local municipality—*Incapacity to read and write—Disqualification from holding office—Contestation of election—Quo warranto.*]—*Quo warranto* proceedings under art. 987, C. P., lie to oust a person from the office of mayor of a local municipality, on the ground that he can neither read nor write. This incapacity not only makes the party ineligible, but disqualifies him from holding the office. It is, therefore, not merely a ground of contestation of the election in the manner and within the delay specially prescribed, but may be urged at all times by the above proceeding, although it existed at the time of the election. *Pagé* v. *Génois*, 34 Que. S. C. 541.

Mayor of village — *Property qualification.*]—By s. 51 of the Municipal Act, R. S. M. c. 100, the persons eligible for election as mayors or councillors of villages must be the owners respectively, at the time of the election, of freehold or leasehold, or partly freehold and partly leasehold, real estate, rated in their own names respectively on the last revised assessment roll of the village to at least $500, over and above incumbrances.—The respondent lived with his wife in a village upon a property assessed in the name of the wife as owner at $600. His name appeared on the roll as occupant or tenant of the same property, and opposite his name, under the heading "description and valuation," were dots. His name did not otherwise appear on the roll. The title was in the wife, and the property was incumbered to the extent of $550:—*Held*, that the respondent had not the necessary qualification for mayor of the village. *In re Morden Municipal Election—Ruddell* v. *Garrett*, 19 C. L. T. 254, 12 Man. L. R. 563.

Money by-law—*Revision of voters' list—Assessment Act, s. 62—Voters' List Act — Quashing by-law.*]—An application to quash a money by-law of the township of Blanchard, granting $20,000 aid to the St. Mary's and Western Ontario Rw. Co. At trial the objections in substance resolved themselves into two: (1) that the by-law did not receive a majority of the votes of persons qualified to vote thereon; (2) that the voting was not conducted in accordance with the principles laid down in the Municipal Act. The majority for the by-law was 4. — Mulock, C.J.Ex.D., *held*, 16 O. W. R. 86, that whether the Court omits to hold a legal meeting, or holding a legal meeting omits to try all complaints as required by s. 62 of the Assessment Act, in either case an appeal lies to the County Judge, and if no appeal is taken, the Voters' List Act applies. In this case no appeal was taken, therefore the objection to use of 1909 list failed. That it is not competent to the application to call in question the findings of the County Court Judge as to the qualifications of the persons whose names he placed upon the voters' list. This objection therefore failed; the evidence shewed that the election was conducted substantially in accordance with the principles laid down in the statute, and that the result of the election was not affected by any non-compliance, mistake, or irregularities. Motion dismissed but, under the circumstances, without costs.—Divisonal Court *held*, that it was unnecessary to express an opinion upon any of the grounds urged against the by-law except whether (1) the voters' list upon which the voting took place was by force of s. 24 of the Voters' List Act, or for any other reason, conclusive as to the right of the persons named in it to vote on the by-law; and whether (2), if it was not conclusive as to their right to vote, the appellant had succeeded in establishing that a sufficient number of unqualified persons voted to overcome the majority which was cast in favour of the by-law. — Their Lordships answered the first question in the negative and on finding that five votes had been cast which were bad, they quashed the by-law, respondents to pay costs throughout. *Re Dale and Blanchard* (1910), 16 O. W. R. 349, 21 O. L. R. 497, 1 O. W. N. 1018.

Mortgage registered against the immovable property upon which a candidate in a municipal election relies to qualify is a charge within the meaning of 3 Edw. VII. c. 38, Que., although given to secure a con-

tract with a term. C. C. 1089. *Laframboise* v. *Charbonneau* (1910), 16 R. de J. 389.

Nomination of councillors — *Time of holding — Irregularity —Saving clause.*]—Notwithstanding the Municipal Amendment Act, 1898, the nomination of candidates for the office of councillor, in towns having a population of not more than 5,000 persons, and where the election is to be by general vote, may take place at the same time and place as the nomination for mayor, and therefore at ten o'clock in the forenoon:—*Semble*, that an error in this respect as to the time and place of the nomination would come within the curative provisions of s. 204 of the Municipal Act, R. S. O. 1897 c. 223, and would not be a fatal objection to the validity of the subsequent election. *Rex ex rel. Warr* v. *Walsh*, 23 C. L. T. 94, 5 O. L. R. 268, 2 O. W. R. 108, 129.

Penalty—*Elector voting without right at municipal election—M. C. 316.*]—If a voter, in good faith, exercises his franchise at a municipal election when, as a matter of fact, he is not qualified to do so, he does not incur the penalty provided by art. 316 M. C. *Genest* v. *Deshaies* (1910), 16 R. L. n. s. 526.

Petition — *Affidavit—Discretion—Service —Certificate of bailiff.*]—It is for the Judge to whom a petition contesting a municipal election under the charter of the city of Montreal has been presented, to judge of the sufficiency of the affidavit accompanying the petition; and the Court cannot afterwards, upon an exception to the form, interfere with the exercise of discretion by the Judge. 2. The service on the defendant is not void because the bailiff who effected it certifies that he has served on the defendant the writ and declaration thereto annexed—the word "declaration" evidently referring to the petition. *Reneault* v. *Gagnon*, 17 Que. S. C. 542.

Petition — *Exception to form—Status of petitioner.*]—In the case of a petition to set aside a municipal election the objection that the petitioner is not an elector is not an objection to the form but to the merits. *Moreau* v. *Lamarche*, 18 Que. S. C. 34.

Petition — *Exception to form—Status—Justification—Particulars.*] — If a petition contesting an election is served within 15 days from such election, and another service is ordered, the delay given for the presentation of the petition being insufficient, the petition shall not be dismissed on the ground that the second service of the petition was made more than 5 days after the election. 2. Such petition need not be accompanied by affidavit. 3. The absence of justification shewing a surety to be qualified as required by law is not a ground of nullity of the bond justifying a demand for dismissal of a petition in contestation of election, but the respondent is entitled to have the said surety justify that he complied with the requirements of the law. 4. The fact that some allegations of the petition are not sufficiently detailed does not constitute ground for the rejection of the petition. *Thérien* v. *Sénécal*, 4 Que. P. R. 66.

Petition — *Service—Return-day.*]—The delay between the service of a petition in contestation of a municipal election, and the presentation thereof, is the ordinary delay for the return of a summons, and not merely one clear day. *Trudel* v. *Guay*, 3 Que. P. R. 481.

Petitioner in controverted election, under 3 Edw. VII. c. 38, Que., must prove that he is a qualified voter in order to contest an election for mayor or alderman. *Laframboise* v. *Charbonneau* (1910), 16 R. de J. 389.

Petition to avoid—*Allegations—Particulars — Corruption — Treating — Committee meetings—Undue influence.*]—In a contestation of a municipal election a general allegation of fraudulent acts and corrupt practices will be struck out as too vague. 2. Acts of corruption by a candidate and his agents, consisting in payment of treats, cannot be proved unless the name of the keeper of the hotel at which these treats were paid for is mentioned. 3. If refreshments were offered at a committee meeting in support of a candidate, this fact can only be proved in relation to the committee mentioned in the petition. 4. All the persons accused of having unduly influenced the electors must be mentioned in the petition. 5. It is necessary to give the names of the electors having the right to vote who have been influenced. 6. Vague accusations, such as "a large number of persons" and "in a number of other restaurants" will be struck out on motion. *Pepin* v. *Vallières*, 6 Que. P. R. 364.

Petition to avoid—*Exception—Lis pendens.*]—An alderman whose election is contested cannot, by exception of *lis pendens*, plead that an analogous action, brought by another elector, is actually pending. *Tanguay* v. *Vallières*, 6 Que. P. R. 269.

Petition to avoid — *Misnomer of petitioner—Class of action—Costs.*]—A petition in contestation of a municipal election will not be dismissed, upon exception to the form, because one of the petitioners is described sometimes by the Christian name of "Auguste," sometimes by that of "Augustine." 2. Contestation of municipal elections in cities and towns are actions of the third class. *Masson* v. *Hébert*, 6 Que. P. R. 342.

Petition to avoid—*Qualification of petitioner.*]—Where a candidate at a municipal election is not duly qualified for the office which he seeks, he may nevertheless be the petitioner in a petition contesting the election of his opponent. *Têtreau* v. *Beaudry*, 6 Que. P. R. 156.

Petition to avoid — *Quo warranto — Superior Court — Territorial jurisdiction—Special town charter—Discretion.*]—A petition in the nature of a *quo warranto*, for the purpose of ousting a municipal councillor from his office, is a contestation of his election, and therefore, by art. 4276, R. S. Q., the jurisdiction of the Court is confined to the district where the election was held. 2. The charter of the town of Chicoutimi excludes the recourse by *quo warranto* to oust a municipal councillor from his office. 3. The granting of leave to file an informa-

tion in the nature of a *quo warranto* is not a matter of strict right, but is subject to the exercise of a wise judicial discretion by the Court. *Guay* v. *Fortin, Guay* v. *Lépine*, 24 Que. S. C. 210.

Petition to avoid—*Security for costs—Examination of surety.*] — Where the petitioner in a petition to set aside a municipal election gives notice that he will furnish two sureties at a certain hour, and does not come to the process office until a later hour, and then with only one of the sureties, after the solicitor for the respondent has departed, an order will be made for the appearance again of this surety to be interrogated by the respondent. *Pepin* v. *Vallières*, 6 Que. P. R. 280.

Petition to avoid—*Security for costs—Single surety.*] — A bond for security for costs of a petition to avoid a municipal election will not be set aside on the ground that it is furnished by a single surety only, if the solvency of such surety is not contested, and this although the notice of filing the security mentions the names of two sureties. *Pepin* v. *Vallière*, 6 Que. P. R. 345.

Petition to avoid—*Status of petitioner—Allegation of—Amendment.*] — Upon a petition to quash the decision of a municipal council in an election matter, the petitioner should allege his status as an elector, or make it appear in his petition. He will not be permitted to amend his petition in this regard after the time for commencing proceedings has expired. *Brousseau* v. *Village of Ahuntsic*, 7 Que. P. R. 33.

Petition to set aside election—*Particulars — Corrupt practices.*]—A petition to set aside the election of a councillor for the city of Montreal should indicate in a summary manner the corrupt practices committed by the candidate or his agents, and the dates and places where these acts of corruption were committed. *Larin* v. *Nault*, 7 Que. P. R. 482.

Petition to set aside election—*Particulars of corrupt practices.*]—Upon motion of the defendant respondent, the petitioner in a petition to set aside a municipal action was ordered to declare: (a) At what date, at what places, and in what circumstances, by whom, and in what ways, certain funds, of which a named person was the depositary, had been employed for purposes of corruption. (b) Where, when, and how persons named had employed funds, of which they were the depositaries, for purposes of corruption. (c) What persons were intended to be designated under the names of "friends and agents of the defendant or duly authorised agents of the defendant, or his agents." (d) Where, when, and how drivers of conveyances, among whom were some electors, had been engaged and paid, and to distinguish the drivers to whom allusion was made. (e) Where, when, and how professional politicians had been engaged and paid to work on behalf of the defendant, which of such politicians were electors of the district in question, and which had voted for the defendant. (f) Who were the persons intended to be designated by the words "agents duly authorised of the defendant," and who were the persons to whom the defendant and his agents had paid out different sums of money. (g) At what dates, at what places, and in what circumstances, the defendant and his agents had induced divers persons to commit the offence known as "personation." That part of the motion seeking to obtain the names of the friends who had furnished money to the defendant, was not granted, because it was not important to know the names of such friends. *Levy* v. *Lamarche*, 5 Que. P. R. 16.

Petition to set aside election—*Security.*]—By virtue of the Act respecting town corporations, applicable to the town of Maisonneuve, a petition to avoid a municipal election, filed by a single elector, and not preceded by security, is illegal and will be dismissed upon exception to the form. *Dufresne* v. *Fortin*, 5 Que. P. R. 57.

Petition to set aside election—*Security — Particulars — Notice — Amendment—Signature of attorney.*]—A security filed under Art. 352 of the Municipal Code, in support of a petition against the election of a councillor, must set forth the name, Christian names, quality, occupation, and residence of the surety, and in default thereof the security is void. 2. The want of such particulars cannot be supplied by mentioning them in the notice in respect to which the security was given. 3. The security cannot, after the expiry of the time mentioned in art. 352 of the Municipal Code, be amended by adding the necessary particulars which are wanting. *Semble*, that a petition in contestation of a municipal election can be signed only by the attorney himself, and that a signature by another person, with the authorisation of such attorney, is void. *Pariseau* v. *Tiémens*, 21 Que. S. C. 222.

Petition to set aside election—*Security for costs—Bond—Time for filing—Expiry of—Substitution of security.*] — The bond which must be furnished by a party who contests a municipal election in the city of Montreal, must cover all the costs of such contestation, and cannot be limited to any amount.—When the delay for putting in security has lapsed, the Court has no power to allow an amendment thereto or the substitution of another security in lieu of the one complained of. *St. Denis* v. *Mercier*, 8 Que. P. R. 20.

Petition to set aside election—*Trial—Procedure—Absence of rules of Court.*]—A Judge has jurisdiction to fix a time and place for the trial of an election petition under the Municipal Elections Act, notwithstanding no rules for regulating such a trial have ever been made as provided by s. 86 (d) of the Act. Remarks as to the procedure to be followed at such a trial. It is not necessary that Judges should exercise power to make rules regulating the trial of election petitions, if the ordinary machinery of the Court is sufficient for that purpose. *In re Slocan Municipal Election*, 9 B. C. R. 113.

Pleading — *Previous recount—Review of—Allegations of petition—Particulars.*]—In a petition to void a municipal election, under the charter of the city of Montreal, 62 V.

c. 58 (Q.), it is not sufficient, for the purpose of obtaining a review of the decisions of a Judge upon a recount, to allege generally that ballots cast in favour of a candidate have been improperly rejected by the deputy returning officers and by the Judge, while irregular ballots cast in favour of the candidate declared elected have been admitted, and that the effect has been to change the result of the election; the petition must point out the irregularities complained of and give the number of ballots irregularly admitted.—Upon such a recount the Judge cannot enter into the merits so as to reject ballots for fraud or want of qualification of voters; his functions are limited to making the count which the deputy returning officers should have made at the close of the poll; but when the election is contested by subsequent action, his decision may be reviewed. —In such a case the petitioner, where he asks that the votes of certain unqualified persons should be struck off, must make it appear that the admission of such votes has affected the result of the election, and therefore allege that these votes have been given for the candidate declared elected. *Renault* v. *Gagnon*, 17 Que. S. C. 315, 3 Que. P. R. 115.

Proceeding to avoid — Disclaimer — Costs. *R. ex rel. Mooney* v. *Robertson* (1910), 1 O. W. N. 455.

Proper voters' list—*Use of wrong list—Irregularity — Consolidated Municipal Act, 1903, ss. 148, 204.*]—Inasmuch as s. 148 of the Consolidated Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), enacts that the proper list of voters to be used at municipal elections shall be the last list of voters certified by the Judge and delivered or transmitted to the clerk of the peace under the Ontario Voters' Lists Act, 7 Edw. VII. c. 4 (O.), even though a later list has been validly certified by the Judge, but not delivered or transmitted to the clerk of the peace, at all events before the opening of the poll on polling day, it is not the proper list of voters to be used at the election.—*Semble*, that the list to be used must be a list that has been certified by the Judge and delivered or transmitted to the clerk of the peace before the time at which nomination takes place.—*Held*, that the use of a wrong list is not such a non-compliance with the Act as to the taking of the poll or such an irregularity as may be held cured by the provisions of s. 204 of the Consolidated Municipal Act. — *Quære*, whether a list certified on Sunday can be valid. *Rex ex rel. Black* v. *Campbell*, 18 O. L. R. 269, 13 O. W. R. 553.

Qualification for office—*Declaration of qualification—Commissioner for taking oaths and affidavits—Consolidated Municipal Act and amendments—Canada Evidence Act.*]—The statutory declaration as to the possession of the necessary qualification for office required by s. 129, s.-s. 3 (a), of the Consolidated Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), as amended by 4 Edw. VII. c. 22, s. 4 (O.), from every candidate for the office of mayor, reeve, etc., in cities, etc., may be made before a commissioner for taking affidavits, and need not be expressed in the form of a statutory declaration under the Canada Evidence Act, R. S. C. 1906, c. 145, s. 36. Section 315 of the first-mentioned Act, which requires the head and other members of the council and the subordinate officers of every municipality to make their declaration of office and qualification "before some Court, Judge, police magistrate, or other justice of the peace, having jurisdiction in the municipality," has no application to s. 129, s.-s. 3 (a), and the statutory declaration therein referred to.—*Semble*, that s. 93 of the Consolidated Municipal Act, 1903, to the effect that when joint owners or occupants are rated at an amount sufficient, if equally divided between them, to give a qualification to each, then each shall be deemed rated within the Act, otherwise none of them shall be deemed so rated, does not apply to the qualification of candidates.—Where persons elected as controllers of a municipality, when purporting to make the declaration required by s. 311 of the Consolidated Municipal Act, 1903, as to their property qualification, omitted the statement as to incumbrances contained in the form embodied in the section, and, in place of it, stated that they were "in the actual occupation of the said premises," intending to take advantage of the provisions of s. 76, s.-s. 1, by which the value of the property, if occupied, where otherwise sufficient, shall not be affected or reduced by the incumbrances:—*Held*, that this was a sufficient compliance with the provisions of the Act, and the declarants were not to be prejudiced by the fact that the legislature had failed to alter the form of declaration in s. 311, suitably for such a case.—*Held*, also, that the fact that in the declaration, in referring to their qualification, the declarants had used the present tense, instead of referring to the time of the election, was not a fatal objection, and an opportunity should be given to them to file a declaration in the proper form. *Rex ex rel. Milligan* v. *Harrison*, 16 O. L. R. 475, 11 O. W. R. 554, 678.

Qualification of alderman — *Bare ownership of property — Assessment roll — Inconclusiveness.*] — In an action to annul the election of an alderman of the city of Montreal, for want of the required real estate qualification, the fact that the defendant's name appears on the valuation and assessment roll as "proprietor" of the property on which he qualifies, is not conclusive, and does not preclude investigation of the nature of his title, notwithstanding the final clause of s. 29 of 62 V. c. 58 (Q.), which says that the qualification is to be established by the valuation and assessment roll in force at the date of nomination.—2. Where it appears that the defendant is the donee of the immovable property on which he qualifies, and that by the terms of the deed of donation he has the mere ownership (*nue propriété*), the usufruct for life being reserved by the donor, he is not "seised of" and does not "possess as proprietor," within the meaning of s. 29. *Archambault* v. *Tansey*, 23 Que. S. C. 170.

Qualification of alderman under 3 Edw. VII. c. 38 (Q.), is to possess in the municipality, in his own or his wife's name, during the whole of 12 months preceding nomination, immovables to the value of $600, after deduction of all registered charges, according to valuation roll in force at date of

nomination. He must be able to read and write with ease. *Laframboise* v. *Charbonneau* (1910), 16 R. de J. 389.

Qualification of candidate—*Mortgaged real estate — Plea to the merits—Powers of returning officer.*]—*Held*, on a petition contesting a municipal election, in which the petitioner and respondent were nominated as candidates, and a poll was granted and held without protest or objection, and without notification of any kind to the electors, or its being shewn that those who nominated or voted for the petitioner had knowledge of his lack of qualification, that averments by the respondent to the effect that the petitioner had not the necessary property qualification to be put in nomination, and that the respondent was, consequently, the only candidate duly nominated, and was and should have been declared elected by acclamation, are matters of plea to the merits and not of exception to the form.—2. Where a candidate's real estate was hypothecated for payment of insurance premiums, as well as for the principal obligation, such accessory hypothec must be taken into account in ascertaining the net value of the real estate over the above hypothecary charges.—3. Notwithstanding the lack of property qualification on the part of one of the candidates, the returning officer, in the absence of any protest or objection, has no authority to reject his nomination paper, and consequently the other candidate is not entitled, *ipso facto*, to claim that his election was, and should be held, an election by acclamation. *Martin* v. *Ricard*, 25 Que. S. C. 461.

Qualification of candidate — *Payment of taxes.*]—In order to be elected a municipal councillor, a candidate must at the time of his election, whether there was polling or not, have paid all municipal and school taxes: Arts. 283, 291, 306, C. M. *Rockingham* v. *Leith*, 6 Que. P. R. 77.

Qualification of councillor—"*Householder*"—*Lodger.*]—A statutory qualification for a municipal office described in the English version by the word "householder," and in the French by the words "*qui tient feu et lieu*," means, as the English word expresses it, one who lives in and is the master of a house. Hence, one who lives in his father's house, and carries on business therein, having the use of one room to sleep in and of another in which to receive clients, and who contributes to the household expenses, is not a householder within the meaning of the statute. *Prévost* v. *Ménard*, 34 Que. S. C. 31.

Qualification of councillor — Interest in freehold property—Joint ownership—Value of interest—Assessed value—Incumbrance—Joint assessment—Assessment roll—Finality —Costs. *Rex ex rel. Beck* v. *Sharpe*, 11 O. W. R. 642, 827.

Qualification of municipal elector—*M. C. 315.*]—1. There is no refusal on the part of an elector to take the oath when, upon being requested by the presiding officer to swear that he is the person whose name appears upon the roll as proprietor of the lands thereon mentioned, the voter declares that he will verify the cadastral numbers of his property as shewn upon the roll for the purpose of establishing that he is the real proprietor of the lands as described upon the roll.—2. The law does not intend to disqualify an elector from voting under such circumstances, Art. 315 M. C. applying only when an elector who has signified his intention of voting, positively refuses to take the prescribed oath.—3. The vote of an elector whose family name is properly inscribed upon the list should be received, even though the voter's Christian name be not properly designated thereon, but when the elector is known under such Christian name and when, in any event, the elector is otherwise qualified on the property mentioned upon the roll. *Perrault* v. *Beaudry* (1909), 16 R. de J. 449.

Qualification of petition may be proved by secy.-treas. producing before the Court the voters' list used at the election and giving evidence to establish petitioner's identity and qualification as a voter, if not objected to by adverse party. *Laframboise* v. *Charbonneau* (1909), 16 R. de J. 389.

Qualification of voter—*Tenant—Cessor of occupancy by—Corrupt act.*]—It is not the amount of rent paid, but the annual value of the premises occupied as appears in the assessment roll, which is the basis of qualification, as a voter, of a tenant. The position of the elector at the time of the election is what should be considered, and that which appears by the assessment roll, but if an elector, who takes the oath and votes as an occupant, has ceased for two months before the election to occupy the premises on which he qualifies, his vote ought to be rejected. In order that the payment of an elector's taxes or travelling expenses may be considered a corrupt act, either at common law or under the Municipal Code, it is necessary that it be made with corrupt intent, that is to say, for the purpose of influencing and inducing the voter to vote for a particular candidate; it is not sufficient that the payment is made for the purpose of enabling him to qualify only. To entitle an elector to vote it is only necessary that he pay the taxes for which he is rated on the collection roll, and it is not necessary that he should pay those owing on land which he has purchased from a third person some days before the election, nor is it necessary that he should have paid taxes levied for county purposes which have not been entered on the collector's roll of the local corporation and of which an estimate has not been sent to the latter. Proof of personal corruption by a candidate will only void an election when the result has been thereby affected. *Laframboise* v. *Ladouceur*, 26 Que. S. C. 85.

Quebec license law—*Qualifications of municipal elector—Certificate for restaurant license—Certificate confirmed — Opposition—Nullity and setting aside of by-law confirming certificate.*] — The quality of municipal elector which is necessary for the plaintiff in a suit having for object the setting aside of by-law confirming a certificate for a restaurant license, is sufficiently established by his name being inscribed upon the voters' list, and he is not submitted to the further condition that his taxes are paid.—An opposition couched in general terms to the confirmation of any certificate for a restaurant license within a certain district and for a

certain period of time and filed by those authorised by law and in due legal form, has the same effect as a special opposition filed against the confirmation of a certificate granted to a particular individual. Hence, a resolution of a municipal council which confirms a license for a certain district, after an absolute majority of the voters therein residing has prepared and filed an opposition to the confirmation of any such certificate, is null and should be set aside as such. *Montmagny* v. *Belanger* (1910), 19 Que. K. B. 256.

"**Quo warranto**"—*Municipal councillor —Petitioner's qualifications—C. P. 987, M. C. 346.*]—The qualification of a municipal elector, required under the provisions of Arts. 346 and following M. C., is not necessary on proceedings by *quo warranto*, Art. 987 C. P., to oust from the office of municipal councillor. In such a case, the interest of petitioner is sufficiently shewn if it is alleged and established that he is an elector and ratepayer residing in the municipality. *Campbell* v. *Blakely*, 16 R. de J. 234.

Quo warranto proceeding — *Affidavits —Cross-examination on — Discretion — Refusal.*]—In a proceeding to set aside a municipal election it is in the discretion of the Judge or Master to allow or refuse to allow the parties to cross-examine deponents on their affidavits. And in this case permission was refused by the Master in Chambers, who was of opinion that a cross-examination would not be helpful. *Rex ex rel. Ross* v. *Taylor*, 22 C. L. T. 183, 1 O. W. R. 265, 582.

Quo warranto proceeding — *Appeal to Judge of High Court—Order of County Court Judge quashing proceedings—Right of appeal—Power to make order.*]—In a *quo warranto* proceeding, in which the fiat giving leave to serve a notice of motion to set aside the election of a township reeve had been granted by a County Court Judge, and the proceedings were intituled in his County Court, a motion was made before him to set aside all the proceedings upon the relation, and he made an order setting them aside and quashing them with costs:—*Held*, that no appeal from such an order lies to a Judge in Chambers, as appeals from the County Courts in ordinary cases are to a Divisional Court, and the appeal from the decision of a County Court Judge to a Judge of the High Court, given by 55 V. c. 42, s. 187, s-s. 3 (O.), "under this section," is from the decision of the County Court Judge upon the merits on the trial of the contested election, and not the quashing without a trial of the fiat upon which the proceedings were founded. *Quære*, whether the County Court Judge had power to make such an order. *Regina ex rel. Grant* v. *Coleman*, 7 A. R. 619, referred to. *Rex ex rel. McFarlane* v. *Coulter*, 22 C. L. T. 414, 4 O. L. R. 520, 1 O. W. R. 636.

Quo warranto proceeding—*Notice of motion—Time — Wrong day of the week—Mistake—Amendment.*]—A notice of motion in the nature of a *quo warranto* to contest the validity of the election of the respondents as aldermen of a city, was, by fiat of the Master in Chambers under s. 220 of the Municipal Act, R. S. O. 1897 c. 223, allowed to be served upon the respondents, and was served on the 15th February (seven clear days' notice being required by s. 221) for "Tuesday the 24th day of February"—the 24th February being in fact a Monday. Afterwards the relator served upon the respondents a notice to the effect that the day on which the motion would be made was Tuesday the 25th February, but this notice was not a seven clear days' notice:—*Held*, that the notice of motion was good and sufficient notice for Tuesday the 25th February, and that the sureties upon the relator's recognizance, as required by s. 220, would have no ground of objection because of the proceedings not being properly prosecuted. *Eldon* v. *Haig*, 1 Chit. 11, followed. *Semble*, that the practice in actions in the High Court is applicable to these *quo warranto* proceedings. *Rex ex rel. Roberts* v. *Ponsford*, 22 C. L. T. 146, 3 O. L. R. 410, 1 O. W. R. 223, 286, 590, 645.

Quo warranto proceeding—*Tampering with ballots—Delivery of ballot box to clerk —Evidence—Affidavits—How voters voted—Cross-examination.*]—Where in a *quo warranto* proceeding under the Municipal Act, R. S. c. 223, before a County Judge, to set aside the election of a town councillor, it was found by the Judge upon a scrutiny of the ballot papers, having regard to the character of the evidence, both *viva voce* and by affidavit, that such ballot papers had been tampered with, and that there was also a breach of the Act in the deputy returning officer taking the ballot box to his own house, instead of directly to the town clerk, and it was impossible to say that the result of the election was not affected thereby, an order of the Judge setting aside the election was affirmed. Affidavit evidence may be supported at the trial by *viva voce* evidence, although not mentioned in the notice of motion. *Regina ex rel. Mangan* v. *Fleming*, 14 P. R. 458, referred to. The provision of s. 200 of the Act that "no person who has voted at an election shall in any legal proceeding to question the election or return, be required to state for whom he voted," must be construed, in furtherance of the object of the Act, as absolutely excluding such testimony. After the trial of such proceeding has commenced, it is discretionary with the Judge to allow a person who has made an affidavit to be cross-examined, though before the commencement of the trial cross-examination may properly be had. *Rex ex rel. Irison* v. *Irwin*, 22 C. L. T. 299, 4 O. L. R. 192, 1 O. W. R. 371.

Recognizance — *Allowance of — Appeal —Defective nominations—Powers of returning officer — Statute — Directory or imperative.*]—Where, in a controverted municipal election case, a recognizance has been duly entered into with sureties and affidavit of justification, as required by R. S. O. 1897 c. 223, s. 220 (2), the security is completed; but the Judge may postpone indorsing his allowance of it until objection raised. Such interlocutory procedure is matter of discretion, and not subject to appeal. The provisions of s. 128 (1), that every nomination is to state the full name, etc., of the candidate, are directory, not imperative; and the presiding officer cannot, after the close of the meeting for nominations, reject those made on account of non-compliance with such requirements. *Semble*, if objection is taken at

the time, and the nominations are not amended, the presiding officer should then and there reject them. *Rex ex rel. Walton* v. *Freeborn*, 2 O. L. R. 165.

Reeve—Motion to avoid election of—Delay for nine months after relator's knowledge of disqualification—3 Edw. VII. c. 18, s. 33 (O.)—Construction—Dismissal of motion—Interest in contract with corporation. *Rex ex rel. Hunt* v. *Genge*, 8 O. W. R. 583.

Reeve for town—*Irregularities in counting ballots—Neglect of deputy returning officer to comply with provisions of Municipal Act—Saving Clause 264—Inapplicability of—Section 167 of Municipal Act.*]—Election of reeve of Orangeville set aside owing to following irregularities: (1) impossibility of saying how many votes cast; (2) changing totals after agents had left; (3) ballots not put in packet; (4) deputy returning officer taking ballot boxes to his house; (5) noncompliance with s. 167. *Rex ex rel. Hewson* v. *Riddell* (1909), 14 O. W. R. 49.

Rejection of ballot cast for relator—Concurrence of relator—Incapacity through drunkenness. *Rex ex rel. Park* v. *Street* (N.W.T.), 1 W. L. R. 202.

Right of town clerk to vote—*Illiterates voting—Passing by-law on Good Friday—Validity of by-law—Town clerk printing voters' lists — Agent voting on certificate—Persons named in voters' list—Right to vote—Unauthorised person present at voting—Names entered in poll-book before day of voting—9 Edw. VII. c. 73, s. 9; Con. Mun. Act, s. 264.*]—A local option by-law was submitted to the voters of a town and 440 votes were cast, 264 for the by-law, exactly the three-fifths majority required by statute. Applicant moved to quash the by-law on 22 different grounds:—*Held*, (1) that the town clerk has a right to vote on local option by-laws by virtue of 9 Edw. VII. c. 73, s. 9.—(2) That the by-law was validly passed on Good Friday, by the town council, there being no statute nor anything at common law forbidding the council holding a meeting on Good Friday.—(3) That the town clerk had a right to print the voters' list, there being no incompatibility in the dual position of town clerk and printer, as in *R.* v. *Tizard*, 9 B. & C. 418, and he could not be held to have vacated his office of town clerk because he printed material for the temperance people. —(4) That an agent producing a certificate signed by the mayor was entitled to vote at the division where he was acting, although said certificate did not state the property in respect of which the agent voted, as required by statute.—(5) That where a voter has no property in the division where his name appeared on the voters' list, the Court cannot inquire into his real qualification by 7 Edw. VII. c. 3, s. 24.—(6) That where a number of persons voted openly without having previously declared their inability, the objection cannot be considered.—*Re Ellis & Renfrew*, 15 O. W. R. 880, followed.—(7) That all persons named in the voters' list are entitled to vote, with certain minor exceptions, by 7 Edw. VII. c. 3, and it matters not what their qualifications may be, they are entitled to vote so long as they are named in the voters' list. —*In re McGrath & Durham*, 17 O. L. R. 514, and *Re Armour & Onondaga*, 14 O. L. R. 608, followed. — (8) That unauthorised persons were allowed to be present when electors were voting did not invalidate the election.—*Re Ellis & Renfrew*, 15 O. W. R. 880, followed.—(9) That it was irregular to enter names in the poll-books before the day of polling, but it could not affect the result of the election and could not affect the right of any voter to vote.—(10) That s. 204 of the Con. Mun. Act was effective in saving the by-law. Motion dismissed with costs. *Re Schumacher and Chesley* (1910), 16 O. W. R. 641, 21 O. L. R. 522, 1 O. W. N. 1041.

Scrutiny of ballots before County Judge—*Voters' Lists Act (1907), s. 24—Persons.*]—Motion for an order prohibiting the Judge of the County Court of Dufferin from making any allowance for, or taking into consideration in his certificate to be given, as the result of a scrutiny under s. 371 of Con. Mun. Act, 1903, of the ballot papers which were cast when a vote was being taken on a proposed local option by-law of the municipality of Orangeville, any votes which he might consider illegal by reason of disqualification of the voters, or in the alternative for a mandamus directing him to inquire how the persons voted who may be found not entitled to vote, and to take evidence for the purpose of that inquiry: — *Held*, that the Judge had no authority to require any person who voted to state how he voted. But upon a scrutiny of the ballots, under s. 371, the Judge has jurisdiction to enter upon an inquiry as to the right to vote of the persons who have voted.—*In re Local Option By-law of Township of Saltfleet* (1908), 16 O. L. R. 293, 11 O. W. R. 365, 545, followed.—Order granted prohibiting the County Judge from entering upon any inquiry as to the right to vote of any person whose name was entered on the voters' list upon which the voting took place, unless under provisions of Con. Mun. Act, 1903, subsequent to the list being certified, he had become, by change of residence, disentitled to vote. No order as to costs. *Re Orangeville* (1910), 15 O. W. R. 564, 20 O. L. R. 476, 1 O. W. N. 536.

Security for costs—*Intervention—Irregularity—Sufficiency.*]—In an action to void the election of an alderman for the city of Montreal, under Art. 279 *et seq.* of the charter of the city of Montreal, 62 V. c. 58 (Q.), security furnished by an intervenant more than three days after the filing of his intervention, and upon an irregular notice, will, nevertheless, not be declared void, if it appears that the defendant whose election is protested will not suffer any prejudice from the irregularity of the security, and if the defendant complains only of the irregularity, and not of the sufficiency, of the security; but an opportunity will be given to the defendant to examine the sureties as to their solvency. *Moreau* v. *Lamarche*, 3 Que. P. R. 149.

Security for costs—*Surety—Bailiff.*]—A petition in contestation of a municipal election will be dismissed on exception to the form, where one of the sureties given is a bailiff of the Superior Court. *Charbonneau* v. *Ouimet*, 3 Que. P. R. 206.

Security for costs.]—The language of R. S. N. S. c. 72 is applicable to any security

petitioner puts up, whether insufficient in point of amount or in any other way to meet respondent's costs; whether right in form or amount, provided it is genuinely filed as a security for purposes of the petition. *Pease* v. *Norwood*, L. R. 4 C. P. 235, distinguished; *Young* v. *Figgures*, 19 T. L. R. 499, followed. *Nichols* v. *Rawding*, 43 N. S. R. 192, 6 E. L. R. 41.

Statutory proceeding to set aside election — *Affidavits—Cross-examination—Forum—Judge or officer before whom proceeding pending.*]—In proceedings instituted under the Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), to unseat a member of a municipal council, the cross-examination of affiants on their affidavits can only be had on leave obtained therefor from the Judge or Master in Chambers or the officer before whom the proceedings are being carried on, who must take such cross-examination himself, no authority being conferred on him to direct any one else to do so. *Rex ex rel. Beck* v. *Sharp*, 16 O. L. R. 267, 11 O. W. R. 493.

Submission to electors—*Liquor License Act, ss. 66, 68—Voting—Application of ss. 376, 377, of the Municipal Act—Summing up of votes—Posting of notices—Publication in newspaper.*]—The legislature in passing s. 68 of the Liquor License Act intended that those sections of the Municipal Act which provide for situations not directly covered by the Liquor License Act should be applicable. Summing up is a necessary part of the proceedings in taking the vote upon a by-law submitted to the electors. Section 377 of the Municipal Act provides a just and reasonable method for the appointment of a time and place of summing up, and also that those interested in promoting or opposing the by-law may be present thereat. A local option by-law which did not appoint a time and place for summing up was quashed.—Section 66 of the Liquor License Act provides that the council shall, "as soon as possible" after the first and second readings of the by-law, publish a notice in a newspaper, and that such notice shall be published for at least one month before the vote is taken:—*Semble*, that the statute does not require two such advertisements:—*Held*, that s. 376 (b) of the Municipal Act, providing for the posting up of notices, in 4 conspicuous places, is made applicable by s. 68 of the Liquor License Act to the voting upon a local option by-law. *Re South Cypress* (1910), 14 W. L. R. 299.

Submission to electors — *Neglect of municipal officers to comply with statutory requirements—Principles of Municipal Act—Result of voting—Saving clause, s. 200—Publication of notice—Time—Liquor License Act, s. 66—Polling place closed during polling hours—Form of ballot paper—Inconsistency with directions to voters—Literal compliance with statute — Final passing of by-law — Time—Opportunity for recount.*]—If the method of procedure prescribed by statute in respect to the submission of a by-law to the electors is not substantially followed, the by-law will be declared invalid, unless it can be shewn that the voting was conducted in accordance with the principles laid down in the statute, and that the non-compliance, mistake, or irregularity did not affect the result of the voting; s. 200 of the Municipal Act.—*Hull* v. *Rural Municipality of South Norfolk*, 8 Man. L. R. 437, and *Re Hickey and Town of Orillia*, 17 O. L. R. 317, followed.—A local option by-law received its first and second readings on the 5th June. Notice of the by-law and of the vote to be taken thereon was published in a newspaper on the 14th, 21st, and 29th October, and the 11th November:—*Held*, that a first publication on the 14th October was not a publication "as soon as possible after the first and second readings," as required by s. 66 of the Liquor License Act.—On the day of voting one of the polling places was closed for three-quarters of an hour, during the hours of polling, while the deputy returning officer, poll clerk, and scrutineers were at lunch. It was said that all parties interested consented to this, and that it had been the custom for many years at parliamentary and municipal elections to close this polling place during an adjournment for lunch. There was no evidence that any person had been deprived of his vote by the closing, neither was there any evidence that some electors might not have been deprived:—*Held*, that the closing of the polling place was fatal to the by-law.—In 1909 the Liquor License Act was amended by prescribing that the form of ballot paper should read "for license" and "against license," instead of "for the by-law" and "against the by-law." The printed directions for voters were not changed, and were inconsistent with the new form of ballot paper. At the voting the ballot papers used were printed according to the new form, and the printed directions in use were not changed:—*Held*, that the by-law could not be quashed for illegality because of the inconsistency, even if some electors were misled. The provisions of the statute had been complied with.—It was objected that the by-law was finally passed by the council before the two weeks during which there might have been a recount had expired:—*Held*, that there was nothing in this objection. *In re Coxwell and Village of Hensall*, 17 O. L. R. 431, 12 O. W. R. 279, 936, followed.—*Semble*, that, if there had been any satisfactory evidence that the closing of the one polling place did not affect the result of the election, it would have been saved by s. 200 of the Municipal Act; but, even if there had been such evidence, the disregard of s. 66 of the Liquor License Act would have necessitated the quashing of the by-law. *Re Hatch & Oakland* (1910), 14 W. L. R. 309.

Summons in nature of quo warranto —Relation — Requirements of — Acceptance and oath of office—Term for which respondent elected. *Rex ex rel. Park* v. *Street* (N.W.T.), 1 W. L. R. 87.

Time — *Statutes—Quo warranto—Service—Petition—Corrupt practices — Particulars.*]—When a special statute does not fix the time for taking proceedings under it, the times prescribed by the Code of Civil Procedure most applicable to the matter in litigation should be applied.—2. The charter of the city of Montreal does not require the petition and the writ of *quo warranto* to be served on the alderman whose election is contested during the thirty days which follow the polling or election by acclamation.—3. The presentation of the petition for a writ of *quo warranto* is made *ex parte*, the Judge himself fixing, if he finds the affidavit satisfactory, the

time in which the defendant is to appear; and afterwards the petitioner must serve copies of the writ, petition, and order of the Judge in the periods of time appropriate to the nature of the litigation and sufficient to allow the defendant to defend himself with certainty and with a full knowledge of the cause.—4. An interval of six days between the service of the copy of the writ and the other papers and the return of the writ is sufficient. —5. The order of the Judge allowing the issue of the writ of *quo warranto* and other papers is not exhausted by the service of a copy of these papers upon the wife of the defendant in the street, his house being shut up; the order does not become exhausted until the return-day, by the return itself or by default of return.—6. The Judge who receives a petition verified by oath exercises purely ministerial functions, and the Court cannot consider whether the reception was justified.—7. The omission to mention the names and residences of persons accused of having committed corrupt practices in an election and to particularize the nature of these practices and the dates, places, and circumstances in which they were committed, is a ground for a motion for particulars, but not for an *exception à la forme* asking for the dismissal of the action.—8. That such particulars can be demanded after the time fixed for filing an exception. *Clark* v. *Jacques*, 3 Que. P. R. 12, 17 Que. S. C. 322.

Time for holding election—*Duty of town clerk—Proclamation — New election—Warrant—Necessity for.*]—Under s. 212 of the Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), dealing with a new election of members of a municipal council, the issue by the clerk of his proclamation for the holding of the election, by which the nomination and polling days are fixed, and the polling places, deputy returning officers, and poll clerks named, is not alone sufficient. He must also issue his warrant for such election, directed to himself, as returning officer, and to the deputy returning officers and poll clerks.—An election held without a warrant is not validated by s. 204, as not coming within its curative provision, that section having reference merely to the conduct of the election, and not to what is its very foundation:—*Held*, also, assuming that a proclamation alone would have been sufficient, that the election would not have been avoided by reason of its not having taken place within the fifteen days provided for by s. 214, such provision being merely directory. *Rex ex rel. Bawkes* v. *Letherby*, 12 O. W. R. 664, 675, 17 O. L. R. 394.

Town councillor — Disqualification — Contract with corporation — Exemption of partnership from taxation—Qualification—Interest in partnership property in part exempted—Status of relator — Voting for respondent — Secrecy of ballot. *Rex ex rel. Payne* v. *Chew*, 5 O. W. R. 389.

Vacancy in town council—*Election of alderman—Act respecting Cities and Towns, 1903—Days of nomination and election—Fixing by mayor—Resolution of council—Ratification—Imperative enactment—Objection to form—Voters' lists—Effect of statute—Repeal of town charter.*]—The Act respecting Cities and Towns, 1903, having provided (s. 59) for the filling of a vacancy in the office of alderman by delegating to the mayor the power of fixing days for the nomination and election in case of a contest, a resolution of a town council to that end is void.—Such resolution, although void, being signed by the mayor and acted upon without objection on his part, must be considered as ratified by him and as equivalent to an order made by him fixing the dates for holding the nomination and election. All the more is this so, because the statute above mentioned is not imperative; and, in the absence of a provision as to the manner in which the mayor is to exercise the powers given to him, application must be made of the rule of s. 9 that no objection to form or founded upon the omission of formalities, even imperative, in municipal matters, is to prevail unless some real injustice results from it.—The provision in a statute passed to repeal the charter of a town and apply to it the Act respecting Cities and Towns, 1903, that "the by-laws, resolutions, *procès-verbaux* . . . and other acts and documents whatsoever done or executed by a town council and now in force, shall continue to have their full effect until they shall be annulled, amended, repealed," etc., includes voters' lists. Therefore the lists existing at the time of the passing of this statute remain in force and are to be used in future elections until they are replaced by lists under the Act respecting Cities and Towns, 1903. *Perrault* v. *Town of Lévis*, 30 Que. S. C. 537.

Voters — *Qualification of—Controverted elections—Payment of taxes—M. C. 291, 346, 955.*] — Purchaser of an immovable under a promise of sale in which it is stipulated that, even after possession, such promise of sale will not transfer title to the immovable, is not a qualified municipal elector under the heading of "proprietor."—To qualify as an occupant it is necessary to dwell upon an immovable.—To qualify as a tenant the annual value of the immovable must be mentioned on assessment roll.—To qualify as a municipal elector, it is necessary to be a British subject. —When such taxes have not been entered upon assessment roll, a voter who qualified as an occupant may vote even when he has not paid his business tax and a dog tax.—Art. 346 M. C. enumerates all causes for which a municipal election may be annulled, but as to the extent and meaning of expressions therein contained, inasmuch as the Code is silent on the point, the common law of England must be consulted, and not Dominion or Provincial statutes, nor even common parliamentary law, which are but exceptional statutory enactments and do not regulate municipal elections in this country.—Corruption, mentioned in Art. 346 M. C., as one ground for annulling a municipal election, is the corruption recognised by the common law of England, and in so far as particular and independent acts are concerned, for it to exist it is necessary that both the corrupting party and the voter should have the corrupt intent, viz., there should be a complete understanding between them whereby, for a consideration, latter obliges himself to vote as former may direct.—Even when done with object of influencing their votes, the fact of treating voters cannot affect the result of a municipal election; to have such influence, it is necessary that the treating be general in such a way that the voters have been rendered in-

capable of voting freely and independently.—Moneys advanced to electors, under form of loans, for purpose of enabling them to pay their taxes, cannot, in the present case, affect the result of the election, since, to obtain such a result, it would have been necessary to establish, which was not done in present case, that the advances made were of such a nature as to constitute real acts of corruption.—In the present case, respondent's election was conducted irregularly and petitioner was justified in contesting it, and, under circumstances, although petition is dismissed, each party will pay his own costs. *Hebert* v. *Legare*, Que. (1908), 16 R. de J. 309.

Voters—Qualification of—Local Improvement Ordinance—"Occupant"—"Owner"—Homestead entry—Payment to sub-agent. *Re Clark* (N.W.T.), 3 W. L. R. 311.

Voters — *Qualification — Owners of real estate—Necessity for registration.*]—In order to qualify as a voter at municipal elections under s. 6 of the Municipal Elections Act, as enacted by s. 2 of the Municipal Elections Act Amendment Act, 1902, with respect to real estate, it is necessary that the applicant should be the registered owner of such real estate under s. 74 of the Land Registry Act, c. 23. 1906. *Re Kaslo Municipal Voters' List*, 12 B. C. R. 362.

Voters' list—*Municipal Act, 1903, s. 148—Last list of voters—Saving clause, s. 204, inapplicable.*]—The municipal elections, 1909, took place on 4th January. The County Court Judge of Lincoln finished comparing the necessary three copies on Sunday, the 3rd January, his certificate being dated 2nd January. The copy for the clerk of the peace was given him by the Judge on the morning of the election. The election took place on this list:—*Held*, that under the circumstances the 1908 list should have been used. Election set aside, and new election ordered. *Rex ex rel. Black* v. *Campbell*, 13 O. W. R. 553.

Voters' list — *Revision of—Persons assessed for less than $100—Widows—Resident householders—R. S. O. (1897), c. 225, s. 18—52 Vict. c. 37, s. 3.*]—Male persons assessed for less than $100 are entitled to be placed on municipal voters' lists by virtue of R. S. O. (1897), c. 225, s. 18.—Widows, who are resident householders, have no such right to be so placed on said lists as that section applies only to male persons. See *Re Ryan* (1910), 16 O. W. R. 1001. *Re Hagar Voters' List* (1910), 17 O. W. R. 1.

Voters' list—*Valuation roll—Amendment by council — Irregularity—Poll book—Councillors—Voting for—Declaration of poll.*]—An amendment made by a municipal council in the month of January of a valuation roll by adding new names to it without notice or previous demand in writing, is void.—2. At the time of the election of a municipal councillor the fact that the names of the voters have been entered by the returning officer upon detached sheets, and not upon the pages duly numbered and ruled of the poll book, does not constitute a sufficient irregularity to annul the election if no fraud or prejudice is proved.—3. When more candidates than there are councillors to elect have been nominated and a poll is held, the electors vote for as many candidates as there are councillors to elect, and the returning officer must declare elected those who have obtained the largest number of votes, without regard to whether a certain candidate has been proposed in opposition to another candidate. *Bourret* v. *Prévost*, 24 Que. S. C. 236.

Voters' lists—Qualification of voters—"Householders"—Construction of statute—Payment of taxes—"Exempt"—Road tax—Man over 50 — Civil servant — Pensioner—Payment of water rates. *Re Victoria Municipal Voters' Lists*, 7 W. L. R. 372.

Voters' lists—*Revision—Absence of certificate—Injunction.*]—Where it appears that the lists of municipal electors of a town corporation have not been certified and signed by the secretary-treasurer, as required by Art. 4516, R. S. Q., and that the board of revisors is proceeding to the revision and amendment of the lists without the same being so certified, there is sufficient ground for granting an interlocutory injunction, on the petition of a municipal elector, to prohibit the board of revisors from revising or homologating the lists, until the final hearing upon the petition, or until the interlocutory order be further judicially dealt with. *Wallace* v. *Languedoc*, 21 Que. S. C. 115.

Voters' lists—*Revision—Injunction to restrain—Remedy by motion to quash—Costs—Defendants severing.*] — There is no ground for an injunction when the law gives a special remedy for the grievances complained of, and, therefore, recourse cannot be had to an injunction to prevent the revisors of a town corporation from revising and homologating a list of municipal electors on the ground that such list has not been prepared according to law; Arts. 4376 and 4522, R. S. Q., allowing such list to be quashed on the ground of illegality.—2. Each of the revisors defendants, having filed a separate defence invoking the same grounds, the costs should be taxed against the petitioner as if the revisors had filed only a single defence. *Wallace* v. *Languedoc*, 21 Que. S. C. 298.

Voters' qualifications — *Lessee.*] — A tenant, to be inscribed upon the list of voters must, under the provisions of the Quebec Election Act of 1903, s. 9, pay an "annual" rent for real estate, and not merely for part of a year; moreover, his ordinary place of residence should be at the same place. A clerk, employed by a merchant whose place of business is not within the limits of the municipality, is neither the son of a proprietor nor of a farmer, within the meaning of the said law, and his name cannot be entered upon the voters' list. *Filiatrault* v. *St. Rose* (1910), 16 R. de J. 256.

Writ of summons—*Affidavit for—Order of Judge—Review—Affidavit of service—Mistake.*]—A Judge in Chambers having been satisfied with an affidavit brought before him upon which he allowed the issue of a writ to inquire into a contested municipal election, the Court will not review his order, even though the affidavit does not conform to the requirements of the law.—The statement of

the bailiff in his report as to service that he has served the "declaration," instead of the "petition," is not a fatal irregularity. *Renault* v. *Gagnon*, 2 Que. P. R. 517.

Writ of summons in nature of quo warranto—*Validity of election—Practice—Term of office.*]—The practice in the Territories providing for a writ of summons in the nature of a *quo warranto*, differs from that in England. There the question raised is the right of the respondents to use and exercise the office. Here, what is to be decided is, whether there was an election; if so, whether the respondent was elected; and, if so, whether his election was valid. Consequently it is not necessary in proceedings here that the material should shew that the respondent has accepted the office or the term for which he was elected. *Rex ex rel. Park* v. *Street*, 6 Terr. L. R. 137, 1 W. L. R. 87.

See MUNICIPAL CORPORATIONS — COSTS—DEFAMATION—DEED — ELECTIONS—MUNICIPAL CORPORATIONS—MUNICIPAL ELECTIONS—PARLIAMENTARY ELECTIONS—SCHOOLS.

ELECTRIC COMPANIES.

See ASSESSMENT AND TAXES — COMPANY—CONTRACT.

ELECTRIC LIGHT.

Supply — Tolls and charges — *Nova Scotia Act, 1907, c. 40—"Readiness to serve" charge — Non-compliance with statutory requirement as to filing schedule of rates.*]—Plaintiffs sued for electric light current supplied to defendant. One of the charges was known as a "readiness to serve" charge:—Held, that defendant is liable to pay this, although the current may never be served. The above Act required the plaintiffs to file a schedule of their prices by the 1st of July. On the 2nd July, they filed a statement.—*Held*, further, that the statement was sufficient; at any rate, the price charged was only a re-arrangement and a reduction in rates. Appeal dismissed. *Chambers* v. *Cantwell*, 6 E. L. R. 529.

See CONTRACT—MUNICIPAL CORPORATIONS.

ELECTRIC RAILWAYS.

See STREET RAILWAYS.

ELECTRIC WIRES.

See CONTRIBUTION AND INDEMNITY—LIMITATION OF ACTIONS — NEGLIGENCE—RAILWAY.

ELECTRICITY.

See MUNICIPAL CORPORATIONS.

ELEVATOR.

See NEGLIGENCE.

EMBEZZLEMENT.

See BANKS AND BANKING—EXTRADITION.

EMBLEMENTS.

See LANDLORD AND TENANT.

EMMENAGOGUE.

See CRIMINAL LAW.

EMPHYTEUSIS.

See LANDLORD AND TENANT—RAILWAY.

EMPLOYERS' LIABILITY ACT.

See NEGLIGENCE.

EMPLOYERS' LIABILITY INSURANCE.

See INSURANCE.

ENCLAVE.

See WAY.

ENCROACHMENT.

See BUILDINGS — LANDLORD AND TENANT—WAY.

ENGINEER.

See CONTRACT — DRAINS — MUNICIPAL CORPORATIONS—STREET RAILWAYS—WATER AND WATERCOURSES.

ENTAIL.

See ESTATE.

ENTIRETIES.

See HUSBAND AND WIFE.

ENTRY FOR TRIAL.

See TRIAL.

EQUALIZATION OF ASSESSMENTS.

See ASSESSMENT AND TAXES.

EQUITABLE ASSIGNMENT.

Disposition of fund — *Claim of judgment creditor—Receiver by way of equitable execution—Contest with assignee — Parties — Assignor — Parol assignment — Validity — Refund of moneys paid under order subsequently reversed.*]—Where the application of a judgment creditor for a receiver by way of equitable execution of a fund is opposed by a party claiming under a prior equitable assignment, by proceedings (*e.g.*, Chambers summons) analogous to interpleader, the assignor is not a necessary party.—*Bowden's Patents Syndicate* v. *Herbert Smith & Co.*, [1904] 2 Ch. 86, distinguished. — A valid equitable assignment may be made by parol, and may be enforced notwithstanding J. A. 1873, s. 25, s.-s. 6 (Imperial). — When moneys have been paid out of a fund under an order which is subsequently reversed, the party who has received them may be ordered to refund them, in whole or in part, under Judicature Ordinance, s. 8, s.-s. 5. *Detro* v. *Haggard, Re Pepler*, 8 W. L. R. 156, 1 Alta. L. R. 221.

Funds in hands of chattel mortgagees—Written order by mortgagors—Mistake as to balance due—Assignment by mortgagors — Rival claimants of fund — Interpleader application — Dismissal — Subsequent interpleader action—Disposal of fund —Costs. *Elgie* v. *Edgar*, 9 O. W. R. 614.

Gift of moneys arising from contract — Voluntary assignment — Death of donor — Solvency — Mental competence — Issue — Costs. *Walker* v. *Clarke*, 10 O. W. R. 169.

Trust — *Bill of exchange.*]—McE., who had mortgaged certain land to P. to secure a sum of $5,000, conveyed it to McK. and M. in trust for McK., subject to a life estate to McE., McK. assuming and covenanting to pay off $1,500 of the mortgage debt, and McE. covenanting to pay off the balance. Subsequently, on the 4th January, 1900, McE., who had a deposit account with M., who was a private banker, authorised M. to pay $650 to P. on the mortgage, and for such purpose signed the following document: "B. M. & Co., Bankers. Pay to P. (on mortgage McE.'s share) or bearer $650;" which he delivered to M., who a day or two afterwards informed P. of his having the money, though he did not tell him of the execution of the document, and he also notified McK. P. said he did not want the money before the beginning of next month, and M. did not pay over the money until the 29th January, and after the death of McE., who had died in the meantime, of which all the parties had notice:—*Held*, by Falconbridge, C.J., K.B., that under s. 72, s.-s. 2, and s. 74 of the Bills of Exchange Act, 53 V. c. 33 (D.), the document was not a cheque, being drawn on a private bank, but a bill of exchange, and that it was not revoked by McE.'s death. On appeal to a Divisional Court, the judgment was affirmed, but on the ground that the transaction amounted, either to an equitable assignment of the $650, or a trust to pay over same to P., which became irrevocable on its being communicated to the parties and assented to by them. *Trunkfield* v. *Proctor*, 21 C. L. T. 519, 2 O. L. R. 326.

See ATTACHMENT OF DEBTS—CHOSE IN ACTION—ASSIGNMENT OF.

EQUITABLE CHARGE.

See DOWER—MERGER.

EQUITABLE ESTATE.

See DOWER.

EQUITABLE EXECUTION.

See EXECUTION.

EQUITABLE INTEREST.

See LANDLORD AND TENANT.

EQUITABLE JURISDICTION.

See PARENT AND CHILD.

EQUITABLE LIEN.

See LANDLORD AND TENANT—SALE OF GOODS —SHIP.

EQUITABLE MORTGAGE.

See BANKRUPTCY AND INSOLVENCY—REGISTRY LAWS.

EQUITABLE RELIEF.

See COURTS — FRAUDULENT CONVEYANCE — INJUNCTION—JUDGMENT—RECEIVER.

EQUITY OF REDEMPTION.

See DOWER—EXECUTION—MORTGAGE.

EROSION.

See CROWN.

ERROR.

See APPEAL — CRIMINAL LAW — DIVISION COURTS.

ESCAPE.

See ARREST — CRIMINAL LAW — EXTRADITION—IMMIGRATION ACT.

ESCHEAT.

See CONSTITUTIONAL LAW — TRESPASS TO LAND.

ESCROW.

See COMPANY — CRIMINAL LAW — DEED — SPECIFIC PERFORMANCE — TRUSTS AND TRUSTEES — VENDOR AND PURCHASER.

ESTATE.

Action in partition — *C. P. 1037—Transferee of the heir of an undivided part of a share in an estate—C. C. 311.*]—The action in partition does not belong to other than an individual co-heir or to a transferee of the major portion or of a part only of the rights of a co-heir in an estate.—Such action cannot be taken by the transferee of an undivided part of a special immovable forming part of an estate; as being in the place and stead of his transferor and in the exercise of the latter's rights, the transferee has no other action than one for the partition of the whole estate. *Gauvin* v. *Belanger* (1910), 16 R. de J. 351.

Estate tail—*Bar of entail—Mortgage—Will—Construction.*]—By a will made in 1847, a testator, who died in 1854, devised to his son a piece of land, describing it, and proceeded: "All which shall be and is hereby entailed on my said son and his heirs for ever." In 1859 and again in 1860 the son granted the land in question in fee by way of mortgage, each mortgage being duly registered within a few days of its execution and each containing the usual proviso that it was to be void on payment at a named date. No discharge of either mortgage or reconveyance of the mortgaged land had been registered, and there was no evidence whether either mortgage had in fact been paid:—*Held, per* Osler and Moss, JJ.A., that under this will the son did not take an estate tail: Maclennan and Lister, JJ.A., *contra.*—But *held*, also, *per curiam*, that, even if the son did take an estate tail, that estate tail had been barred and converted into an estate in fee simple in his own favour as well as in that of the mortgagee by the execution and registration of the mortgages.—*Lawlor* v. *Lawlor*, 10 S. C. R. 194, and *Plomley* v. *Felton*, 14 App. Cas. 61, applied. *Culbertson* v. *McCullough*, 20 C. L. T. 349, 27 A. R. 459.

Parceners—*Tenancy from year to year.*]—Children of a deceased tenant from year to year are co-parceners or tenants in common, and the widow of the deceased tenant has no power to dispossess them. *McIntyre* v. *McIntyre* (1874), 1 P. E. I. R. 500.

Successions—*Acceptance of and renunciation to—Heirs when succession opens—Surviving consort — Accounting — Costs—C. C. 607, 636, 637, 639, 645, 650, 651, 736, 1068, 1198, 2002, 2003—C. P. 105, 113.*]—To legally accept an estate, one must have been called to it at the time of its acceptance.—The heir has three courses to pursue; accept the estate purely and simply, or accept it under benefit of inventory or renounce the succession according to legal formalities.—When an heir is sued and pleads as a ground of defence his title and quality of heir and his failure to renounce the succession, he thereby accepts the succession.—Once he has accepted, an heir cannot renounce the succession unless for reasons of fear, fraud or violence.—The surviving consort cannot be held responsible for the cost of her mourning, nor for charges of last illness and burial, because she is not reputed to be an heir and such expenses do not arise from marriage.—The legal heirs, when sued by the surviving consort, cannot set up her failure to account for her meddling in the estate without conclusions of an action to account.—In any event, an account can be rendered by direct action. *Vaudry* v. *Belanger* (1910), 16 R. de J. 359.

Tenants in common — *Joint tenants—Title by prescription — Statute of Limitations.*] — Where of five tenants in common of a farm, three acquired a title against the other two by virtue of the Statute of Limitations:—*Held*, that the title so acquired by the three tenants in common was a joint tenancy of the two-fifths, and they were then tenants in common of their original three-fifths, and joint tenants of the two-fifths so acquired. *In re Livingstone*, 21 C. L. T. 521, 2 O. L. R. 381.

See DEED — DOWER — EXECUTORS AND ADMINISTRATORS — INTOXICATING LIQUORS —MORTGAGE — SETTLEMENT — SUBSTITUTION—SUCCESSION—WILL.

ESTATE DUTY.

See REVENUE.

ESTOPPEL.

Accounts of municipal treasurer — *Recovery from municipality of moneys paid by treasurer out of his own pocket—Statement of account — Audit — Laches.*] — In February, 1899, the defendants appointed the plaintiff treasurer *pro tem.*, and gave him an order expressed to be on "the treasurer of the township of Malahide," for $5,799.52, balance in hand of the previous treasurer at the time of his death. The plaintiff carried forward this balance in his cash book, though he had not in fact received the money, and went on honouring orders upon him drawn by the defendants, and his statements of receipts and expenditures for the year 1899 were prepared and audited as if there had been no change in the treasurership; and although long before the end of 1899 the estate of the deceased treasurer proved to be insol-

vent, he continued from year to year pursuing the same course, shewing each year balances in favour of the township non-existent except upon the footing of his having actually received the $5,799.52. During 1899 he proved the debt against the deceased treasurer's estate in the name of the defendants, and received two dividends, and a third in 1901, amounting to $1,481.56. He did not, however, bring the facts clearly to the notice of the council or make any claim against the township until 1905; and the defendants apparently remained in ignorance of the facts until shortly before this action was brought to recover the balance due the plaintiff:—*Held*, that the plaintiff was entitled to recover, as there had been no direct representation by him that the original order given him by the defendants had been paid, and the advances subsequently made by him were all made on orders given by the defendants in respect to the ordinary debts and expenditures of the township; and the defendants had incurred, so far as appeared, no debts or liabilities, and had entered upon no expenditures or undertakings which they would not have done if they had received the clearest notice at the earliest moment, that their late treasurer's estate was insolvent.—*Held*, however, that there must be a reference to the Master to report as to any loss defendants might have sustained by the plaintiff's laches, and the amount for which the plaintiff was entitled to judgment should be reduced accordingly. *Leslie* v. *Malahide*, 8 O. W. R. 511, 13 O. L. R. 97.

Agreement to sell stock—*Accounting—Consideration — Finding of trial Judge.*]—In an action to recover a balance alleged to be due for sales of stock, in a company of which the plaintiff and defendant were joint promoters, it was alleged by the plaintiff, and found by the trial Judge, that an agreement was entered into between them for the sale of 50,000 shares of stock at 25c., and for an equal division of the proceeds after paying commissions, etc. The plaintiff's version of the transaction was supported by two letters written by the defendant, indicating a recognition on his part of the arrangement that the sales of stock and divisions of the proceeds were to be in equal proportions:—*Held*, that the finding of the trial Judge on this point should not be disturbed.—In response to a demand made by the plaintiff for an account of sales, in which he credited himself with the larger proportion of the shares sold, and, after deducting former payments, shewed a balance in favour of the plaintiff of $1,636.51, for which his cheque was handed to the plaintiff's solicitors, who gave their receipt therefor: — *Held*, *per* Townshend, C.J., Russell, J., concurring, that, in the absence of evidence to shew that the amount so paid was paid or accepted as a compromise or settlement of their differences, the plaintiff was not estopped thereby from claiming payment of his full share of the proceeds of stock sold in accordance with the agreement.—*Held*, also, that the mutual interest of the plaintiff and defendant in connection with the company, and their interchange of services in carrying on the enterprise, afforded consideration to support the agreement as found to have been made. *Fleming* v. *Hayes*, 42 N. S. R. 164, 4 E. L. R. 185.

Agreement to sell stock of company —Acceptance of moneys thereunder — Evidence. *Fleming* v. *Hayes*, 4 E. L. R. 185.

By acts — *Ejectment—Escrow—Conveyance to dead grantee—Trespass.*]—The locus had been granted to plaintiff, whose father agreed to give him a deed of a property called S., provided plaintiff would convey the *locus* to his sister, defendant's wife. The father, to secure performance of this agreement, gave the deed of S. to his wife as an *escrow*, to be delivered to plaintiff on his conveying the *locus* to his sister. A deed from plaintiff to his father had been prepared in the latter's lifetime. After the father's death plaintiff obtained the deed of S. from his mother, at the same time executing and delivering to her the deed to his father, on the understanding that in pursuance of the agreement he thereby resigned his title to the *locus* to his sister. The jury found for defendant, and plaintiff moved for a new trial:—*Held*, that plaintiff was estopped by his own acts from treating defendant as a trespasser. *McKinnon* v. *McKinnon* (1852), 1 P. E. I. R. 59.

Charge on land — *Lien memorandum—Consideration — Representation as to ownership — Subsequent conduct — Extension of time for payment — Registered judgment — Homestead exemption.*]—Action to recover balance due for a threshing outfit sold and delivered by the plaintiff company to the defendants, C. H., and his wife, E. H., under a written agreement signed by the defendants, which provided that promissory notes were to be given on approved security for the amounts payable at the dates mentioned. When the machinery had been delivered at the defendants' farm, the plaintiffs' agent called there to take settlement for it. The defendants then signed the notes asked for, and the agent demanded a lien on the farm as security for the notes, and, relying on the representations of both defendants then made, that the wife owned the land, accepted a lien on the land for the amount, signed by E. H. in the presence of her husband, and did not insist, as he might have done, that the husband should also sign it. It appeared that the title to the land was then actually in the husband, and had remained so ever since. Renewal notes had been given by the defendants, and the original periods of credit considerably extended, and during this time the husband wrote several letters, in which the wife was spoken of as the actual owner. The chief contention at the trial was as to whether the plaintiffs were entitled to a lien on the land for the debt as against the defendant C. H.:—*Held*, that there was ample consideration for the giving of the lien, as the plaintiffs might have removed the machinery and refused to carry out the transaction if it had been refused.—2. That the defendant C. H. was estopped by the representations he had made, and subsequently repeated, from denying that the land in question was his wife's property and from claiming it as his own as against the plaintiffs. *Freeman* v. *Cooke*, 2 Ex. 654, followed.—3. C. H. was also thereby estopped from asserting that the land was exempt, as land occupied by him, from proceedings under a registered judgment.—Judgment declaring that the lien claimed formed a valid charge on the land

for the plaintiffs' claim and costs. *John Abell Co.* v. *Hornby*, 15 Man. L. R. 450, 1 W. L. R. 3.

Conduct—*Principal and agent — Unpaid receipted accounts.*]—Where a debt or obligation has been contracted through an agent, and the principal is induced by the conduct of the creditor to reasonably believe that the agent has paid the debt or discharged the obligation, and in consequence of such belief pays or settles or otherwise deals to his prejudice with the agent, the creditor is not permitted to deny as between himself and the principal that the debt has been paid or the obligation discharged.—A railway engineer, who was supplied with money by a railway company to pay for supplies and the board of his men, being credited with the amounts of the receipted accounts as they came in, induced a firm of hotel-keepers who had furnished both items, to receipt the accounts in advance, on the representation that the company as part of their system required receipts before they would pay the accounts: —*Held*, that the company were justified in relying on these representations that the accounts were paid, and, as they had altered their position—the engineer having left their employment without accounting—on the faith of them, the hotel-keepers were estopped from setting up to the prejudice of the company that the accounts were not in fact paid. *Gentles* v. *Can. Pac. Ry. Co.*, 9 O. W. R. 601, 14 O. L. R. 286.

Deed — *Privies in estate—Reservation—Mines and minerals — Action.*]—A person who had acquired title by possession to certain lands, nevertheless, afterwards took a conveyance from the owner by paper title, for an expressed consideration of $900, reserving to the grantor the mines and minerals, and gave a mortgage back for $300, "saving and excepting the mines, which said mortgagor has no claim to:"—*Held*, that this did not revest the mines in the grantor, nor was a subsequent owner estopped by the exception in the mortgage, from claiming the mines as against one deriving title from the grantor, the action not being based on the mortgage, but being wholly collateral to it. *Dodge* v. *Smith*, 22 C. L. T. 52, 3 O. L. R. 305, 1 O. W. R. 46, 803, 2 O. W. R. 561.

Ejectment — *Condition of re-entry for want of property to distrain—Tenant denying to bailiff that there was property to distrain not estopped from shewing the truth at the trial—His credibility a question for the jury.*]—A bailiff was sent to search premises for property to distrain, and had also a demand in ejectment, under a condition of re-entry, to serve should no property be found. He found nothing, but on passing a hovel he asked defendant if there was any property there, and defendant said there was not, and the bailiff did not search it and served the demand. On the trial defendant admitted his formal denial that there was property, but proved there was sufficient to satisfy half a year's rent. The Judge held he was not estopped, and plaintiff submitted to a non-suit:—*Held*, on motion to set the non-suit aside, that defendant was not estopped, but that the non-suit should be set aside on the ground that plaintiff had a right to have the credibility of defendant's testimony in contradicting his former statement submitted to a jury. *Stewart* v. *McPhee* (1863), 1 P. E. I. R. 236.

Ejectment—*Death of landlord terminates tenancy at will—Ground not taken at trial—Costs.*]—G. laid off lands in lots and streets (not dedicated to the public), and conveyed a lot fronting on Cedar street to defendant. At defendant's request, G. pointed out his lot to him, and he built on the land so pointed out. G. had made a mistake and the land pointed out was really Cedar street. G. told defendant so and wished him to move his house back, offering to pay the expenses. On defendant's not moving, G. told him he must move at his own expense. G. afterwards died having devised his lands to plaintiffs, who brought this action to eject defendant. Defendant contended he was tenant at will and entitled to demand possession, while plaintiffs argued that G.'s acts and declarations were themselves a determination of the tenancy. The Judge charged the jury that if they found that G. had pointed out the land as alleged, his subsequent conduct was not sufficient to terminate the tenancy at will, and their verdict ought to be for defendant, and they so found. Plaintiff moved to set aside the verdict for mis-direction, and also on the ground, not taken at the trial, that the tenancy at will was determined at G.'s death:—*Held*, that the direction was right, (2) that G.'s death terminated the tenancy, and a new trial must be granted on that ground, but as it had not been taken at the trial, plaintiffs must pay the costs of the first trial. *Green* v. *Higgins* (1873), 1 P. E. I. R. 466.

Ejectment — *Estoppel by acts.*]—Green had laid off land in building lots and streets, but there was nothing to shew where the streets were situated, and they had not been dedicated to the public. He sold a lot described as fronting on Cedar street to defendant, who wishing to build asked Green to shew him his lot, and Green pointed out a plot of land and told him he could build there. Defendant built on the land so pointed out, but it turned out that Green had made a mistake and that the land was really part of Cedar street. Plaintiffs wished defendant to move his house back, and on his refusal brought this action to eject him. At the trial the Judge told the jury that Green's acts estopped him, and there was a verdict for defendant. A rule was then moved for to set aside the verdict for mis-direction:—*Held*, Peters, J., that the direction was right, and the plaintiffs were estopped. *Green* v. *Higgins* (1874), 1 P. E. I. R. 496.

Fraud—Patent for mining land—Registration — Mortgage — Notice. *Barr* v. *Bird*, 1 O. W. R. 30.

Rent—Claim for, by president of company — Annual statement. *Lindsay* v. *Strathroy Petroleum Co.*, 1 O. W. R. 355.

Work and labour—Claim for price of —Application on purchase money of land—Mortgage for purchase money. *Reading* v. *Coe* (N. W. P.), 6 W. L. R. 279.

See ARBITRATION AND AWARD — ASSESSMENT AND TAXES — BANKS AND BANKING

—Bankruptcy and Insolvency — Bills and Notes—Bills of Sale and Chattel Mortgages—Chose in Action, Assignment of — Club — Company — Contract — Covenant — Crown — Crown Lands — Deed — Executors and Administrators—Fraud and Misrepresentation—Guarantee — Husband and Wife — Insurance —Judgment — Land Titles Act—Landlord and Tenant — Liquor Licenses — Mechanics' Liens — Mines and Minerals —Mortgage — Partition — Partnership —Patent for Invention — Principal and Agent — Release — Sale of Goods — Schools — Solicitor — Street Railways —Trespass to Goods—Trespass to Land —Trusts and Trustees—Vendor and Purchaser—Way.

ESTREAT.

See Bail—Criminal Law.

EVICTION.

See Bills and Notes — Landlord and Tenant—Vendor and Purchaser.

EVIDENCE.

1. Admission or Rejection, 1701.
2. Affidavits and Depositions, 1705.
3. Commencement of Proof in Writing, 1710.
4. Corroboration, 1712.
5. Documentary Evidence, 1714.
6. Expert Evidence, 1720.
7. Foreign Commissions, 1721.
8. Motion—Evidence on, 1730.
9. New Evidence after Hearing, 1733.
10. Parol Evidence, 1735.
11. Secondary Evidence, 1740.
12. Witnesses, 1741.

1. Admission or Rejection.

Admissibility — Collision action—Preliminary act—Allegation of fact omitted — Evidence to prove same offered at hearing. *Magdalen Islands Steamship Co.* v. *The "Diana,"* 3 E. L. R. 158.

Admissibility — *Title — Declaration against interest—New trial.*]—See *Lloyd* v. *Adams*, 37 N. B. R. 590.

Admissions — Promissory note—Action by administrator of payee—Admissibility of admissions by deceased. *Peck* v. *Robinson*, 3 E. L. R. 381.

Cause of death — *Way — Non-repair—Negligence—Statements of person injured—Res gestæ—Other evidence.*]—In an action brought by the father and mother of a young girl to recover damages in respect of her death, which resulted, as was alleged, from a fall on a stone in a highway under the control of the defendants, it was proved that the stone in question had been allowed to remain for a long time in a part of the highway used by foot passengers; that several persons had tripped over it; that the deceased had left her house on a certain evening to go to another house, the direct route to which would be by the highway in question; that she came to the other house apparently suffering great pain, and stated that she had tripped on the stone and hurt herself; that, about the time she would in the ordinary course have been passing the place in question a witness saw a young girl, whose description answered to that of the deceased, lying beside the stone, who stated to him that she had fallen on the stone and hurt herself; and that the girl died from peritonitis resulting, in the opinion of the doctor who attended her, from an injury such as would have been the result of a fall on a stone:—*Held*, that the statement of the deceased to her friends at the house to which she came, and, assuming that the identity had been proved, her statement while lying near the stone, were not admissible in evidence as part of the *res gestæ*, these being at most statements made in reference to the accident after it had happened, and after the deceased had had time for consideration, distinguishable therefore from those involuntary and contemporaneous exclamations made without time for reflection, which alone are properly admissible as part of the *res gestæ*. *Regina* v. *McMahon*, 18 O. R. 502, applied. But the identity of the deceased with the person seen by the witness lying near the stone was established; and, excluding her statements, there was ample evidence to justify the conclusion that the deceased had received injuries by falling on the stone; and, as the highway was by reason of the presence of the stone in a dangerous condition and out of repair, the defendants were liable. *Garner* v. *Township of Stamford*, 24 C. L. T. 52, 7 O. L. R. 50, 2 O. W. R. 1167.

Cousins-German to a party in the cause—Is their evidence admissible? Discussed in *McCarthy* v. *Judah* (1858), C. R. 2 A. C. 407.

Exchequer Court of Canada—*Statutes —Conflict.*] — In a proceeding in the Exchequer Court of Canada, if a conflict arises between the rules of evidence established by a provincial statute and those subsisting by virtue of a Dominion statute, the latter will prevail. *Regina* v. *O'Bryan*, 7 Ex. C. R. 19.

Improper admission — *Action under Workmen's Compensation Act—Proof of insurance by defendants against accident — New trial — "Substantial wrong or miscarriage" — Rule 785.*]—In an action by a workman under the Workmen's Compensation Act, the plaintiff's counsel was allowed, against the strong objection of counsel for the defendants, to prove the fact that the defendants were indemnified against any verdict that might be given in favour of the plaintiff, by a policy of insurance with an accident and guarantee company. The trial Judge warned the plaintiff that he must be prepared to take the risk of submitting

the evidence, and, in charging the jury, told them that it should form no element whatever in their decision:—*Held*, that the evidence was improperly admitted.—*Held*, also (Anglin, J., dissenting), that, by reason of the admission of the evidence, a "substantial wrong or miscarriage" had been occasioned within the meaning of Con. Rule 785, and that the defendants were entitled to a new trial. *Lougheed* v. *Collingwood Shipbuilding Co.*, 16 O. L. R. 64, 11 O. W. R. 697.

Improper admission — *Hearsay — Declarations of deceased persons—Plan filed in Crown Land Office—Certified copy — Witnesses and Evidence Act.*]—On the trial of an action for damages for trespass to land, witnesses were permitted, notwithstanding the objection of the plaintiff's counsel, to give evidence of what they had been told or understood, and of declarations of deceased persons, in relation to lines and boundaries in dispute. Also a certified copy of a plan found in the Crown land office, and supposed to relate to the property in dispute, was received in evidence:—*Held*, that the evidence was wrongly received, and that the verdict for the defendant, entered upon the findings of the jury, must be set aside with costs; and that the statute (Witnesses and Evidence Act, R. S. N. S. 1900, c. 160, s. 20), making admissible in evidence plans on file in the Crown land office, was one that must be strictly construed. *Bartlett* v. *Nova Scotia Steel Co.*, 37 N. S. Reps. 259.

Inadmissible evidence — *Acquiescence —Inadmissibility pointed out for the first time on appeal — Domicil — Rooming place where goods may be seized—Right of exemption—The owner of boarding house — Replevin of goods.*]—The party who at the trial in the Court below permits inadmissible evidence is not entitled to have it struck out on appeal. A person living in a boarding house has his domicil there and the bailiff having a writ of execution against his goods may seize them there. The owner of the house is not entitled after the seizure to put in a claim under the pretext that the goods seized belonged to a third party in the sense of Art. 677 C. P. and the seizure was held to be by way of garnishee. The owner of the house as a creditor with a lien has recourse to make a motion to set aside the seizure of a piece of furniture which he has a right to keep. *Mercier* v. *Pigeon*, 1909, Q. R. 36 S. C. 324.

Indecent assault — *Complaints to husband.*]—In an action for damages by a husband and wife for assaults alleged to have been committed on the wife, under circumstances which made them the criminal offence of an attempt to commit rape or an indecent assault:—*Held*, that evidence of statement and complaints made by the wife to the husband after the alleged assaults took place was properly received. *Hopkinson* v. *Perdue*, 24 C. L. T. 339, 8 O. L. R. 228, 3 O. W. R. 934.

Interrogatories upon articulated facts — *Must be clear and precise—C. P. 365.*]—An articulated fact reading as follows: "If you don't recognise to owe the said amount, state how much you recognise to owe," is irregular and contrary to Art. 365 C. P. *Comet Motor Co.* v. *Dominion Mutual Fire Ins. Co.* (1909), 11 Que. P. R. 297.

Knowledge of trial Judge of facts in another action.] — Where it was evident from the conduct of counsel on both sides that they took it for granted that the trial Judge had knowledge of certain facts established in another action which had been tried before him with a jury, and out of which this action arose, and that for that reason no evidence was given of such facts: —*Held*, that the trial Judge might properly make use of his knowledge. *Pease* v. *Town of Moosomin*, 5 Terr. L. R. 207.

Negligence—*Fire—Sparks from steamer.*] —In an action to recover the value of buildings destroyed by fire started, as was alleged, by sparks escaping from the defective smokestack of a steamboat, evidence that on prior and subsequent days sparks of large size escaped from this smokestack may be admissible to prove its defective construction; but opinionative evidence that, having regard to the force and direction of the wind on the day in question, sparks of this size if they escaped might have been carried to the building in question is too conjectural and speculative. *Peacock* v. *Cooper*, 20 C. L. T. 201, 27 A. R. 128.

Negligence — *Safeguards — Subsequent placing.*]—Where an injury is alleged to have been caused by the negligence of the defendant in not furnishing proper safeguards at some place of danger, evidence of safeguards placed there by him after the injury is not admissible for the purpose of shewing his prior negligence; and upon an examination for discovery the defendant is justified in declining under advice to answer questions relating to such subsequent placing. *Cole* v. *Can. Pac. Rw.* Co., 20 C. L. T. 103, 19 P. R. 104.

Oral testimony — *Replevin—Ownership —Proof of — Defence — Tenancy — Rebuttal — Exclusion — Nonsuit set aside.*]—In an action of replevin, the plaintiff proved ownership and rested his case. The defendant then moved for a nonsuit, the decision on which was reserved until he had presented his case. The plaintiff offered evidence in rebuttal to meet the case made by the defendant, which was rejected, on the ground that evidence to prove the non-existence of the tenancy alleged would be merely confirmatory of the plaintiff's case, and the action was disposed of by allowing the defendant's application for a nonsuit:—*Held*, that, in the circumstances, the rejection of the evidence tendered by the plaintiff in rebuttal could be sustained only on the ground that the onus of proof on the issues to which it related was at the outset of the case on the plaintiff; and that the course adopted by the trial Judge admitted the evidence for the defendant to and excluded the evidence for the plaintiff from review by the Court of Appeal. *McAdam* v. *Kickbush*, 11 B. C. R. 488.

Presentation of evidence rejected— *New trial.*]—Where a party seeks a new trial on the ground of wrongful rejection of evidence, he should shew that the evidence

sought to be adduced was put squarely before the Judge, so that his mind was applied to the point. *Hopkins* v. *Gooderham*, 24 C. L. T. 104, 10 B. C. R. 250.

Presumptions — *Discretionary power of the Judge—Presumption of the extinction of an obligation by reason of continued activity on the part of the creditor.*]—Presumptions, to make proof, must be serious, precise, pertinent, clear and uniform. The Judge may disregard them.—The proof of an obligation to refund the sum paid for another, by the production of a written discharge from the original creditor, cannot be rebutted by a presumption that the debt is extinguished by reason of the settlement of the price of a sale subsequently entered into by the parties and from the continued inactivity of the creditor. *Meunier* v. *Forand*, 37 Que. S. C. 209.

Reference — New Master—Adoption of evidence taken before former Master—Order requiring—Jurisdiction of Master in Chambers. *Evans* v. *Jaffray*, 1 O. W. R. 29, 158, 2 O. W. R. 678, 3 O. W. R. 877, 6 O. W. R. 733.

Reference to Master for trial—Rulings on evidence — Interlocutory appeals—Admission and rejection of evidence—Interpretation of contract — Form of questions. *Askwith* v. *Capita Power Co.*, 4 O. W. R. 235.

Relevancy — *Fraud — Similar transactions.*]—In an action to set aside a bill of sale of a mineral claim, on the ground that it was forgery by one of the defendants, evidence was given by the plaintiff and his witnesses as to matters which, whether material or not, were intended to make the Judge give a readier credit to the plaintiff's case. For the defence witnesses were allowed to give evidence shewing that the plaintiff and his witnesses, in respect of the same mineral claim, had been parties or privy to a fraudulent transaction involving perjury and conspiracy, and tending to shew that a like fraudulent scheme was being attempted in this case, and the result was that the Judge was so influenced by this evidence that he gave judgment for the defendants:—*Held*, that the evidence on behalf of the defendants was properly admitted. *D'Avignon* v. *Joncs*, 23 C. L. T. 71, 9 B. C. R. 359; affirmed, 32 S. C. R. 650.

Way — Non-repair — Negligence—Fatal Accidents Act—Cause of death — Statement of deceased—Narrative of event — Municipal corporations—Joint liability. *Garner* v. *Township of Stamford*, 2 O. W. R. 1167.

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2. AFFIDAVITS AND DEPOSITIONS.

See AFFIDAVITS.

Another action.]—The provision of Art. 292, C. P., "A Judge may order that the evidence taken in one action may serve in another," must be interpreted as applying to evidence not already taken, but which is to be taken, the parties being aware at the time that it will be useful in another cause. *Boutin* v. *Traders' Advertising Co.*, 5 Que. P. R. 359.

Contradicting witness.]—A deposition tendered in evidence for the purpose of contradicting a witness, held to be improperly received where the attention of the witness was not called to the writing before it was tendered. *Blois* v. *Midland Ry. Co.*, 39 N. S. R. 242.

Correction—*Affidavit.*]—A demand by a witness to correct his deposition will be granted only in exceptional cases, by reason of grave errors which seriously affect the cause, and this procedure ought to be promptly adopted. But a witness will not be permitted to retract, restate, or change his deposition, nor to give a new one. *Lavallée* v. *Cournoyer dit Poulet*, 10 Que. P. R. 274.

Correction of affidavit.] — The Court will not receive the affidavit of a witness to correct a mistake which he says he made in his deposition, especially where the affidavit is put on the record at the instance of the party opposed to the one on whose behalf the witness was called. *Camirand* v. *Durand*, 10 Que. P. R. 174.

Cross-examination of party on affidavit.]—Where a party has been cross-examined on an affidavit made by him, the opposite party can use such examination at the trial as evidence in rebuttal of the evidence of the same party. *Livingstone* v. *Colpitts*, 21 C. L. T. 102, 4 Terr. L. R. 441.

Deceased plaintiff—*Taken on examination for discovery — Action continued by executor—Principal and agent — Agent instructed to purchase mining shares for principal—Bought pooled shares for himself — Costs.*]—Original plaintiff brought action to recover $500 entrusted to defendant to purchase 500 shares of mining stock. This defendant failed to do, but bought 2,000 shares of pooled stock in same company in his own name. Plaintiff died after having been examined for discovery. Her executor obtained an order to continue the action in his own name.—At the trial Riddell, J., rejected the evidence of original plaintiff taken on examination for discovery, but *held*, that defendant did not buy any shares for original plaintiff, and in not carrying out his instructions exactly, his authority was revoked, and plaintiff was entitled to judgment with costs. *Johnson* v. *Birkett*, (1910), 16 O. W. R. 445, 21 O. L. R. 319, 1 O. W. N. 917.

Discovery — *Ex-officer of corporation.*]—An examination for discovery of an ex-officer of a corporation is not inadmissible at the trial merely because the person examined was not such officer at the time of examination. *British Columbia Electric R. W. Co.* v. *Manufacturers Guarantee and Accident Ins. Co.*, 7 B. C. R. 512.

Discovery — *Ex-officer of corporation.*]—If an appointment is taken out for the examination for discovery of an ex-officer of a corporation, and the corporation's solicitor does not attend, and gives notice that he will object to the deposition being received at the trial:—*Held*, following Osler, J.A., in *Leitch* v. *Grand Trunk R. W. Co.*, 13 P. R. 369, that it should not be received. *Bank of British Columbia* v. *Oppenheimer*, 7 B. C. R. 448.

Discovery — *Ex-officer of corporation.*]— On an examination for discovery of an ex-officer of a corporation the corporation's counsel attended and objected to certain questions being put:—*Held*, that the deposition was admissible at the trial. *Walkley* v. *City of Victoria*, 7 B. C. R. 481.

Discovery—*Officer of company.*]—On an examination for discovery of the plaintiffs' manager the plaintiffs took no part:—*Held*, that the deposition was admissible at the trial. *Royal Bank of Canada* v. *Harris*, 8 B. C. R. 368.

Discovery—*Parties.*]—The depositions of the defendant B. taken at the instance of the plaintiff for the purposes of discovery before the trial, under Rule 201 of the Judicature Ordinance, N. W. T., and offered and received in evidence at the trial under Rule 224, were held admissible as evidence, not only as against the defendant B., but also as against his co-defendants, all the defendants being members of the committee of management of an unincorporated association, and all being represented on the examination of the defendant B. by the same counsel, who had the opportunity of cross-examining B. if he wished to do so, and did in fact cross-examine him. *Allen* v. *Allen*, [1894] P. 246, followed. *Saltmarsh* v. *Hardy*, 42 L. J. Ch. 422, distinguished. *Carte* v. *Dennis*, 21 C. L. T. 267, 5 Terr. L. R. 30.

Discovery of ex-officer of plaintiff banking company — Non-admissibility—Proof of admissions by stenographer as witness — Rule 439 (a)—Promissory note — Wife indorsing for benefit of husband — Improper admission of evidence — New trial. *Bank of Montreal* v. *Scott*, 7 O. W. R. 496, 3 O. W. R. 523, 6 O. W. R. 411.

Evidence taken in another cause—*Adjudication.*]—Articles 291 and 292, C. P., relate only to the trial of causes pending and tried at the same time; therefore, evidence taken in a cause already adjudicated upon cannot serve as evidence in a pending cause. *Quebec Central Rw. Co.* v. *Dionne*, 4 Que. P. R. 424.

Former action—Admissibility—Lack of opportunity for cross-examination. *Graham* v. *Frank* (Y.T.), 1 W. L. R. 510.

Former trial — *Divorce.*] — In divorce proceedings the evidence of a witness who cannot be found, given at a former trial proving misconduct, may be read over to the petitioner at the trial and verified by her as a correct note of the evidence as given by the witness and used as proof of misconduct. *Cunliffe* v. *Cunliffe*, 8 B. C. R. 18.

General reputation of house—*Affidavits.*]—*Held*, that evidence of the general reputation of a house in which a Chinese immigrant has lived is admissible in *habeas corpus* proceedings directed against the Collector of Customs who is detaining such immigrant for deportation to China on the ground that she is a prostitute. An affidavit drawn up in a language not understood by the deponent, may be read in Court if it appears from the *jurat* that it was first read over and interpreted to deponent. *In re Ah Gway*, 2 B. C. R. 343, not followed. *In re Fong Yuk*, 21 C. L. T. 490, 8 B. C. R. 118.

Injunction motion—Cross-examination on affidavits—Refusal to produce books — Proper custodian — Order for production—Forum—Alternative motion to commit. *Canada Foundry Co.* v. *Emmett*, 2 O. W. R. 1032, 1102, 3 O. W. R. 53, 630.

Interlocutory application — *Information and belief—Grounds for.*]—An affidavit leading to an order for an *ex jurie* writ containing allegations of the fact which must necessarily have been founded on information and belief only, must state the source of the information. *Tate* v. *Hennessey*, 8 B. C. R. 220.

Jurat—*Illiterate person.*]—The jurat to an affidavit for an order for replevin, made by an illiterate person, after the words "sworn, etc.," containing the words, "And I certify that this affidavit was read in the presence of the deponent, and that the said deponent seemed perfectly to understand the same:"—*Held*, that the affidavit was bad, being apparently signed by an illiterate person, and there being no certificate that it was subscribed in the presence of the commissioner. *Kassop* v. *Day*, 36 N. S. Reps. 430.

Marksman—*Jurat.*]—In the jurat of the affidavit of a marksman, upon which a rule had been obtained, instead of the words "he (or who) seemed perfectly to understand the same," were the words "seemed fully to understand the same:"—*Held*, a sufficient compliance with Rule 1 of Hilary Term, 1848. *Ex. p. Allain*, 20 C. L. T. 87, 35 N. B. Reps. 107.

Party in former action.]—*Ray* v. *Port Arthur, Duluth, and Western R. W. Co., Ray* v. *Middleton*, 2 O. W. R. 345, 3 O. W. R. 160.

Practice — Swearing before solicitor for affiant — Necessity for independent commissioner — Determination of question whether commissioner acting as solicitor—Authority of commissioner. *Gougeon* v. *Thompkins* (N.W.T.), 1 W. L. R. 114.

Signature — *Irregularity* — *Amendment* —*Appeal.*]—Where the depositions of witnesses taken in longhand are not signed by the witnesses, such a grave irregularity makes the depositions void; and the Court in review will not entertain an appeal upon them, but will send back to the Court of first instance in order to permit the parties to remedy the mistake. *Lamarre* v. *Villecourt*, 8 Que. P. R. 154.

Special examiner—*Wrong person—Suppression.*]—An order appointed "E. K. A. of Neihart, Montana, U.S.A., a justice of the peace," a special examiner to take the depositions of certain witnesses; the depositions were in fact taken by one G. P. M., a justice of the peace, it appearing that E. K. A. had ceased to hold office, and that G. P. M. was his successor in office. An agent for each party appeared on the taking of the depositions, and it did not appear that any objection was made to G. P. M. taking

the depositions:—*Held*, that the depositions were taken by G. P. M. without authority and, therefore, could not be used in evidence. —*Held*, also, that the depositions being taken without authority and being not merely irregular, a substantive motion to suppress was not necessary, and that the objection could be taken upon their being tendered in evidence. *Claverie* v. *Gory, Pagnac* v. *Claverie*, 4 Terr. L. R. 470.

Statute—*Form prescribed—Officer to take —Justice of the Peace — Commissioner — Exception to form.*]—The provisions of a special statute, enacting that an affidavit shall be made according to the form contained in the Act, which indicates that it is to be made before a justice of the peace, have not the effect of restricting the power conferred on a commissioner of the Superior Court by art. 23, C. P. C.; but these provisions indicate only that a justice of the peace can also take such affidavit. The fact that an affidavit does not read in the first person is not a ground for taking exception to its form, if it is not shewn that the other party has been prejudiced thereby. *Lapointe* v. *Berthiaume*, 26 Que. S. C. 35.

Swearing — *Foreign notary.*]—A notary public for the State of New York has authority, under art. 30, C. P., to receive affidavits, within his State, for use in the Courts of the Province of Quebec. *Schwab* v. *Baker*, 5 Que. P. R. 441.

Taken de bene esse — *Admissibility— Evidence as to absence of witness—O. 35, r. 17.*]—Where the evidence of a witness taken *de bene esse* is tendered upon the trial, and the trial Judge, on being satisfied from the evidence before him that the witness is absent from the province, receives it, the fact that it is subsequently made to appear that the witness was at the time within the province, in the absence of any fraud practised upon the Court, is not ground for setting aside the verdict and ordering a new trial.—The rules providing for taking the evidence of a witness about to leave the province, make the admission or use of the evidence so taken to depend not upon the absence in fact of the witness at the time the evidence is offered, but upon the trial Judge being satisfied as to his absence, O. 35, r. 17. Graham, E.J., and Lawrence J., dissented on the ground that it had been made to appear that, at the time the evidence was tendered, the Court was misled as to the fact of the absence of the witness from the province, and for that reason, there should be a new trial. *Rogers* v. *Troop*, 43 N. S. R. 279.

Testimony at former trial—*Absence of witness at subsequent trial—Search for witness—Reception of evidence.*]—Where it is sought to give in evidence at the trial of an action oral testimony taken under oath in another judicial proceeding, in which the adverse party had the power to cross-examine, on the ground that the witness cannot be called as being beyond the jurisdiction of the Court or otherwise, it is sufficient to shew that after diligent search the witness cannot be found.—Answers to enquiries made as to his whereabouts are admissible to prove an unsuccessful search for a witness, and are not for that purpose to be treated as hearsay evidence.—*Monro* v. *Toronto Rw. Co.*, 9 O. L. R. 299, 312, distinguished. *Cuff* v. *Frazee Storage and Cartage Co.*, 9 O. W. R. 691, 14 O. L. R. 263.

Witness—*Forum.*]—A deposition necessary to obtain judgment in an action by default should be taken before the Judge or the prothonotary and not before a commissioner of the Superior Court. *Morris* v. *Everett*, 3 Que. P. R. 466.

Witness at former trial—Rejection—No substantial miscarriage. *Glasgow* v. *Toronto Paper Manufacturing Co.*, 5 O. W. R. 104.

Witness before coroner's inquest—Action under Fatal Accidents Act—Admissibility. *Fleming* v. *Can. Pacific Rw. Co.*, 5 O. W. R. 588, 589, 805.

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3. Commencement of Proof in Writing.

Admissibility of oral testimony — *Architect's fees—Retainer.*]—In an action by an architect to recover a sum of money, in accordance with a tariff, for professional services, a letter of the defendant contained after an admission of previous conversations, these words: "You have even made a sketch without my asking for it, but I do not understand that I have thereby retained your services; nevertheless I am ready to pay for this sketch if you desire it:"—*Held*, a commencement of proof in writing which rendered oral testimony admissible to prove a request for the plaintiff's services and to establish their value. *Turgeon* v. *Dubeau*, 35 Que. S. C. 211.

Admission — *When inadmissible—C. C. 1243.*]—The rule that an admission cannot be divided is subject to exception when it is off-set by other statements made under oath at different times and which are not only contradictory as to one another, but are equally so in face of the admission contained in the plea. Such contradictions have the effect of dividing the admission, and hence any such admission must be considered as a commencement of proof in writing authorising the admission of oral testimony. *Auger* v. *Lessard* (1910), 16 R. de J. 258.

Admission of oral testimony—*Promissory note.*]—An affidavit to the effect that the payee of a promissory note has transferred it to the person making the affidavit, joined with the admission of the latter that the holder of the note did not receive from him any consideration for transferring it to him, constitutes a "commencement de preuve" in writing of a promise by the transferee of such note to pay the amount thereof to the transferor, sufficient to admit oral testimony of such promise. *Jewell* v. *Latimore*, 26 Que. S. C. 450.

Admissions — *Divisibility — Architect— Plans—Agreement.*]—In an action brought by architects, claiming fees for the preparation of sketches or designs for the defendant, the latter, when examined as witness, admitted that the sketches had been prepared for him by the plaintiffs, but stated that there

was an understanding that they were not to be paid for unless used by him, and that they had not been used. It appeared that the defendant, at the time the plans were invited, had not yet purchased the land for the proposed buildings, and that he had asked for plans from several architects:—*Held*, that the admission of the defendant could not be divided, for the purpose of obtaining a commencement of proof, there being no improbability in his statement, or indication of bad faith, or other circumstance, to bring the case within the exceptions of 60 V. c. 50, s. 20 (Q.), amending Art. 1243 of the Civil Code. *Vox* v. *Pacaud*, 23 Que. S. C. 9.

Admissions — *Divisibility.*] — Where a contract is admitted to have been entered into by the party against whom it is set up, no commencement of proof in writing is necessary in order to permit of the reducing of evidence by parol as to the amount of the consideration or as to the conditions of the contract. In such a case, the rule that admissions cannot be divided against the party making them does not apply. *Campbell* v. *Young*, 23 C. L. T. 38, 32 S. C. R. 547.

Admissions — *Oral evidence — Admissibility—Sale of immovables.*]—Where a sale of an immovable is alleged against a party as the seller, admissions by him: (*a*) of negotiations for the sale to the alleged buyer for a stated price, payable partly in cash and partly by instalments; (*b*) of possession of the immovable by the alleged buyer, following the negotiations, and continued during twenty years; (*c*) of a plea by himself to an action subsequently brought by an hypothecary creditor against him as *tiers-détenteur* of the immovable, that he was not in possession of it, as owner, but that the alleged buyer was in possession, form a *commencement de preuve par écrit* which allows proof to be made of the sale by oral testimony. *Cantin* v. *Bérubé*, 34 Que. S. C. 78.

Admissions—*Parol evidence—Estoppel—Vendor and purchaser—Contract for sale of land—Part performance.*]—The admission by a party to a suit, examined as a witness, that he had entered into an agreement to sell certain immovable property, under the condition that it was to pass only on payment of the price, coupled with further admissions, that he had subsequently allowed the intending purchaser to take possession of it and that he had received from him a sum of money, at a time when nothing else could be due him but the price of sale in question or part of it, affords a commencement of proof in writing, and entitles the purchaser to prove payment of the price in full by parol testimony.—2. The party who makes the above admissions, independently of complete proof of the payment of the price, is estopped from ignoring the agreement and treating it as non-existent and a petitory action brought by him to revendicate the property from the purchaser's *ayant-cause*, without offering to return the amount received under the agreement, will be dismissed. *Filiatrault* v. *Guilbault*, 28 Que. S. C. 486.

Authentic and private writings.]—A writing which is not authentic by reason of defects which deprive it of its authenticity, will avail as a private writing if it have been signed by all the parties whose signatures thereto were necessary if made as a private writing. 2. Verbal evidence is not admissible to establish the amount payable under a private writing (not referring to any specific transaction), signed with the amount in blank, unless there be a commencement of proof in writing as to the amount; and the signature of the person obliging himself would not constitute such commencement of proof. Judgment in 19 Que. S. C. 82, affirmed. *Gauthier* v. *Rioux*, 19 Que. S. C. 473.

Continuation of contract between principal and agent—*Acceptance of contract procured by agent.*]—The written acceptance by the vendor of real estate of an offer to purchase made on the 16th March to an agent of the vendor, is not a commencement of proof in writing which permits of proving by witnesses (in a case in which the sum demanded exceeds $50) the continuation until that date of an agreement between the vendor and the agent relative to the sale of the land, which came to an end on the 1st February preceding. *Massicotte* v. *Poissant*, 35 Que. S. C. 300.

Loan of money—*Indorsement of cheque.*]—The indorsement of a cheque by a third person after the indorsement of the payee, is not a commencement of proof in writing that the amount thereof has been lent by the payee to the person who has so indorsed after him. *Pouliot* v. *Lavigne*, 29 Que. S. C. 539.

"Proceeding" from a party—*Sale of horse—Warranty — Certificate of veterinary surgeon—Delivery by vendor—Breach—Redhibitory action — Reasonable diligence.*]—Three things are necessary to constitute a commencement of written proof (*commencement de preuve par écrit*): first, a writing; secondly, the writing must have proceeded (*avoir émané*) from the party against whom it is used; thirdly, it must make the fact to be proved, probable (*vraisemblable*).—2. A writing may be said to proceed (*émaner*) from a party, though not in his handwriting, nor signed by him, if he uses it or makes it his own by manifesting his concurrence in its contents. So, where an exchange of horses took place, a certificate of the soundness of his horse, delivered by one of the parties to the other, not written by himself, but by a veterinary surgeon, may be used against him as a commencement of proof in writing that his warranty of the soundness of the horse was part of the bargain.—3. The provisions of art. 1230, C. C., respecting redhibitory actions for breach of warranty, apply only to cases of legal warranty. When an exchange of horses took place on the 13th October, a redhibitory action for breach of a contractual warranty, in which process was served on the 30th of the same month, was brought with reasonable diligence. *Odell* v. *Lavigueur*, 32 Que. S. C. 99.

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4. CORROBORATION.

Action against executor—*Contract.*]—The corroboration required by s. 50 of the Evidence Act (B.C. stat. 1900, c. 9, s. 4),

must refer specifically to the contract on which action is based, and not to some part of it, so as to leave the effect of the whole unascertained. *Biacquiere* v. *Corr*, 10 B. C. R. 448.

Action against representative of deceased — *Cestui que trust.*]—The material corroborative evidence required by R. S. O. 1897 c. 73, s. 10, in a proceeding by or against the executor of the will, or the administrator of the estate, of a deceased person may be given by one who is interested as *cestui que trust* in the matter of the claim in question in the action. The interest of such a witness in the result may well be considered by the jury in considering the weight to be attached to it, but the evidence could not be withdrawn from their consideration. *Batzold* v. *Upper*, 22 C. L. T. 257, 4 O. L. R. 116, 1 O. W. R. 381.

Action against representative of deceased — *Promissory note—Comparison of handwriting.*]—In an action on a promissory note against the personal representatives of the maker, tried by a Judge without a jury, a duplicate registered mortgage purporting to be executed by the maker of the note, with the registrar's certificate of registration upon it, was produced in evidence to prove by comparison the signature of the note:—*Held*, that the Judge was entitled to compare the signatures, and act on his own conclusion as to their identity, and having found them identical, the corroboration was sufficient to satisfy R. S. O. 1897, c. 73, s. 10. *Thompson* v. *Thompson*, 4 O. L. R. 442, 1 O. W. R. 431.

Action by executors for money demand — *Defence — Payment to testator—Testimony of defendant—Corroborating circumstances.*]—In an action by executors to recover money due from C. to the testator, it was proved that the latter when ill in a hospital had sold a farm to C., and that $1,000 of the purchase money was deposited in a bank to the testator's credit; that subsequently C. withdrew this money on an order from the testator, who died some weeks afterwards, when none was found on his person, nor any record of its having been received by him. C. admitted having drawn out the money, but swore that he had paid it over to the testator; no other evidence of any kind was given of such payment:—*Held*, reversing the judgment of the Court of Appeal, 2 O. W. R. 356, and restoring the judgment of a Divisional Court, 1 O. W. R. 205, that a *prima facie* case having been made out against C., and his evidence not having been corroborated as required by R. S. O. 1897 c. 73, s. 10, the executors were entitled to judgment. *Thompson* v. *Coulter*, 24 C. L. T. 48, 34 S. C. R. 261, 3 O. W. R. 82.

Breach of promise of marriage — *Imperial statute.*] — The Imperial statute 32 & 33 V. c. 68, s. 2, requiring the plaintiff's evidence in an action for breach of promise of marriage to be corroborated by some other material evidence in support of such promise, is in force in Manitoba, not being either expressly or by implication repealed by the Manitoba Evidence Act, 57 V. c. 11, now c. 57 of R. S. M. 1902. *Cockrell* v. *Harrison*, 23 C. L. T. 123, 14 Man. L. R. 366.

Claim against estate of deceased person—Statute of Limitations. *Wilson* v. *Howe*, 1 O. W. R. 272.

Corroboration of a criminal charge —*Rex* v. *Walkem*, C. R., [1908] A. C. 197, digested under CRIMINAL LAW.

Interested party.]—In an action by or against the representatives of a deceased person, the corroborative evidence required by R. S. O. c. 73, s. 10, may be found in the other facts adduced in the case, raising a natural and reasonable inference in support of the evidence whereof corroboration is required:—*Semble*, also, that corroborative evidence within the meaning of that section may be given by an interested party, so long as he is not the party obtaining the decision. *In re Curry—Curry* v. *Curry*, 20 C. L. T. 383, 32 O. R. 150.

Partition of land — Proof of identity. *Fuller* v. *Grant*, 1 O. W. R. 452.

See HUSBAND AND WIFE.

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5. DOCUMENTARY EVIDENCE.

Appeal—*Acquittal for perjury at trial of action.*]—For perjury alleged to have been committed by the defendant at the trial of this action, he was tried and acquitted before the hearing of an appeal in the action, and, on the appeal, his counsel moved the full Court to be allowed to read the verdict of the jury in the criminal trial. The motion was refused. *Borland* v. *Coote*, 24 C. L. T. 383, 10 B. C. R. 493.

Books of account—*Improper reception—New trial—Goods sold—Admissions of defendant.*]—In an action for the price of goods sold and delivered, to which the defence set up was that the goods in question were only delivered to the defendant as manager of the plaintiffs' business and not otherwise, books of account kept by the plaintiffs were received in evidence against the defendant:—*Held*, that the evidence in question was improperly received; and the Court, being unable to say with certainty that the evidence did not enter into the materials that produced upon the mind of the trial Judge the conviction expressed in his judgment in favour of the plaintiffs, and being unable to say with certainty what the judgment of the trial Judge excluding the evidence improperly received would have been, directed a new trial. It was argued that the reception of the books of account was "harmless error," inasmuch as they could only have been received to fix the value of the goods sold and delivered, and such value was fixed independently of the books by the admission of the defendant. The whole question in dispute being whether the defendant was a purchaser or not, and there being evidence that he was not aware that the plaintiffs were making a claim against him until shortly before the action was brought, the admission relied upon being vague in its character, and the amount of goods sold being only capable of being ascertained from the plaintiffs' books:—*Held*, that the admission was not of the nature or effect which such an argument required. Semble, if it

were conceded that the defendant was a purchaser of the goods sent, the evidence as to his admissions on this point would probably suffice to fix the amount. *Carstens* v. *Muggah*, 37 N. S. R. 361.

Business books — *Consent—Irrelevancy—New trial.*]—To an action for the price of goods sold and delivered, the defence was that the goods were received by the defendant as the plaintiffs' manager and not otherwise. There was a verdict at the trial in favour of the plaintiffs, which was set aside by the Supreme Court of Nova Scotia and a new trial directed (37 N. S. R. 361), on the ground that the plaintiffs' books of account were improperly received in evidence against the defendant. The Supreme Court of Canada reversed this decision and restored the verdict at the trial, holding that the books were received on the taking of evidence under commission by the express consent of both parties, and their reception could not afterwards be objected to on the general grounds that they were irrelevant and immaterial to the issue. *Carstens* v. *Muggah*, 36 S. C. R. 612.

Certified copy of document—*Notice—Requisites—Trial—Specification of sittings.*]—A notice of intention to offer in evidence a certified copy of a document need not state the particular court at which the document will be offered; it is sufficient if it states generally that the document will be offered at the trial of the cause, and it is good until the cause is tried. *Smith* v. *Smith*, 37 N. B. R. 7.

Claim to immovables — *Variance between title and cadastre, as to description—Proof of identity.*]—A plaintiff who brings suit respecting an immovable described by its cadastral number, and sets up a title granted before the *cadastre* of the locality was made, and which varies, as to the description of the immovable, from the cadastral book of reference, must prove the identity of the lots described, to justify his claim. *Fraser* v. *Cayer*, 35 Que. S. C. 75.

Confession of judgment — *Pleading—Estoppel by record.*]—A confession of judgment for a portion of plaintiff's claim is a judicial admission of the plaintiff's right of action, and constitutes complete proof, against the party making it. Judgment appealed from reversed and judgment at the trial, Q. R. 21 S. C. 241, restored. *Hudon Cotton Co.* v. *Canada Shipping Co.*, 13 S. C. R. 401, followed. *Great North West Central R. W. Co.* v. *Charlebois*, [1899] A. C. 114, 26 S. C. R. 221, distinguished. *Citizens' Light and Power Co.* v. *Town of St. Louis*, 24 C. L. T. 165, 34 S. C. R. 495.

Copy of plan—*Crown lands—Description in grant—Plan of survey—Certified copy.*]—The provisions of s. 20 of the Evidence Act, R. S. N. S. 1900, c. 160, so not permit the reception of a certified copy of a plan of survey deposited in the Crown lands office, to make proof of the original annexed to the grant of lands from the Crown. *Nova Scotia Steel Co.* v. *Bartlett*, 35 S. C. R. 527.

Entries — *Proof of debt—Sufficiency.*]—Where regular entries of sales of goods were made, and invoices were rendered and demands for payment frequently made, and the debtor only questioned one small item of 50 cents, and, promising to pay, asked for delay:—*Held*, that the indebtedness was sufficiently established. *Laporte* v. *Duplessis*, 20 Que. S. C. 244.

Entries in books—*Onus.*]—An entry in a merchant's books, shewing that the defendant is indebted in a certain amount, with proof that the plaintiffs did sell goods to him and that the books were regularly kept, is not sufficient, *per se*, to put the defendant, who, by his plea, denied his indebtedness, upon proof of the incorrectness of such entry. *Garth* v. *Montreal Park and Island Ry. Co.*, 18 Que. S. C. 463.

Entries in merchant's books — *Oral testimony—Admissions.*]—The entries made by a merchant in his books must be accepted as presumably representing, faithfully and correctly, the facts; and, unless an error is established by legal proof, they are evidence against him: Arts. 1226, 1227, C. C. 2. The oral testimony of the merchant himself cannot destroy such proof, and as against him does not constitute legal proof to the contrary. 3. An authentic act may be contradicted and its terms may be changed by a judicial admission of the party against whom such admission is invoked. *Resther* v. *Matte*, 13 Que. K. B. 198.

Exhibit — *Copy of document — Acquiescence.*]—Where the defendant has not objected to a copy of writing *sous seing-privé* set out in the plaintiff's declaration being produced in lieu of the original, which the plaintiff asserts is in the possession of a third party, he cannot ask that *ex parte* proceedings since the return be rejected on the ground that the defendant has contravened Arts. 155, 157, C. P. *Latour* v. *Brazier*, 3 Que. P. R. 174.

Goods sold—*Books of vendor.*]—By a notice printed on the pass-book containing entries of the goods sold by the plaintiffs to the defendant, the pass-book was not to be conclusive as to the amount of the purchaser's indebtedness, and it further appeared that the book contained errors and discrepancies:—*Held*, that, in view of the notice on the pass-book and the fact that the book contained errors, the plaintiffs were not precluded from making proof, by the books of the company, of the actual amount of the defendant's indebtedness. *Montreal Brewing Co.* v. *Jones*, 16 Que. S. C. 422.

Instrument in duplicate—*Variation—Less—Secondary evidence—Demand of performance of obligation—Default.*]—When a written instrument is made in duplicate, all that one contains more than the other is non-existent so far as the holder of the latter is concerned. In order that secondary evidence may be admitted of a document, it is not necessary to shew that it was lost by no fault of the party or unforeseen accident; it is sufficient to shew to the satisfaction of the Court that it is impossible to find it, and that it has not been purposely destroyed. Damages cannot be recovered for non-performance of an obligation unless the party seeking to recover has demanded performance so as to place the other in default. *Lefrance* v. *Larochelle*, 27 Que. S. C. 153.

Letter written "without prejudice" —Objection on appeal. *McLennan* v. *Gordon*, 5 O. W. R. 98.

Marriage registry — *Legitimacy—Pedigree—Declarations by deceased parent and others ante litem.*]—A. was married at St. Paul's Church, Halifax, in 1809. In the entry of the marriage in the church's marriage registry his name appears with the addition "batr"—a contraction for bachelor. There was nothing to shew by whom the entry of the addition was made, or that it was made in pursuance of a duty prescribed by statute:—*Held*, that the registry, while admissible in proof of the marriage, could not be received as evidence that A. had previously not been married.—To prove that C. was the legitimate son of A. by an alleged previous marriage, it was shewn that he resided for two or three years at A.'s home, previous to departing to learn a trade, and at a subsequent time for a few months; that he addressed him as "father," was treated as a member of the family, was treated by A.'s wife as his son, and by children by her as their brother; that after his removal to the United States he wrote letters to A., in one of which he informed him of his (C.'s) marriage; that subsequently to his death D., a son of A., corresponded with a son of C., during which he referred to C. as a half brother; and that in an oral declaration by A. in the hearing of a witness, who was a neighbour of the family, he referred to the Christian name of his former wife, and to her personal appearance:—*Held*, that C.'s legitimacy had been proved: — *Quære*, whether declarations in letters written *ante litem motam*, between D., a son of A., and G., a son of C., in which D. recognised C.'s relationship to him, were admissible in D.'s lifetime; but, *semble*, that where *prima facie* evidence of C.'s legitimacy had been given, declarations in G.'s letters, he being dead, were admissible. *Johnston* v. *Hazen*, 26 C. L. T. 317, 3 N. B. Eq. 147.

Mortgage — *Alteration—Presumption—Proof of execution—Registry Act.*] — The production of the registered duplicate original of an instrument with the registrar's certificate indorsed thereon is, by virtue of s. 63 of the Registry Act, R. S. O. c. 136, *prima facie* evidence of the due execution thereof, notwithstanding the fact that material alterations appear on the face of the instrument, all questions as to these alterations being however still left open.—Whenever it would be an offence to alter an instrument which has been completed, the legal presumption is that material alterations appearing on the face of the instrument were made at such a time and under such circumstances as not to constitute an offence. *Greystock* v. *Barnhart*, 19 C. L. T. 381, 26 A. R. 545.

Notes of, taken at trial.]—The notes of evidence taken at the trial are conclusive as to what took place thereat. *McDougall* v. *McLean*, 1 Terr. L. R. 450.

Notice to produce — *Object of.*]—The only object of a notice to produce is to enable the party giving it to put in secondary evidence the contents of a writing, if the original, being in the possession of the party to whom the notice is given, is not produced by him.—If the party chooses to produce the original without notice, or if the party desiring to put in the original gets possession of it and puts it in, it is no object that a notice to produce was not given. *Carte* v. *Dennis*, 21 C. L. T. 267.

Oral contract — *Petition to open up judgment — Discovery of fresh evidence.*]—A party who has declared, in compliance with a judgment ordering him to file particulars, that he was suing upon an oral contract, may, without fraud, file documentary evidence at the trial, in support of such so-called oral contract.—2. At any rate, it is the duty of the adverse party, when such documents are filed, to object to their production and take proceedings to have the case re-opened while it is under advisement, and a *requete civile* will not be received when the party might have had the case re-opened before judgment.—3. A judgment will not be revoked by reason of the discovery of new evidence, unless it is shewn that the party made reasonable efforts to discover it before the trial, or could have discovered it by reasonable diligence. *Union Home and Real Estate Co.* v. *Estates Limited*, 6 Que. P. R. 383.

Privilege — *Notary—Jury trial—Objections to charge—Objections after verdict—New trial—Misdirection — Discretion.*]—H., to qualify as candidate in a municipal election, procured from a friend a deed of land giving him a *contre-lettre* under which he collected revenues.—Having sworn that he was owner of real estate to value of $2,000, B., in his newspaper, accused him of perjury and he took action against B. for libel.—On trial the deed to H. was produced and the existence of the *contre-lettre*, proved, but the notary having the custody of both documents refused to produce the latter, claiming privilege on ground that it was a confidential document.—Trial Judge maintained this claim but the substance of document was proved by oral testimony.—A verdict having been given in favour of H.:—*Held*, that trial Judge erred in ruling that the notary was not obliged to produce the *contre-lettre* and there should be a new trial. B., in his newspaper article, also accused H. of being drunk during the election, and the Judge in charging the jury said: "You should consider the case as if the charge of drunkenness had been made against yourself, your brother or your friend:"—*Held*, that this was calculated to mislead the jury and was also a reason for granting a new trial.—If objection to one or more portions of the Judge's charge is not presented until after the jury have rendered their verdict, the losing party cannot demand a new trial as of right, but in such a case an appellate Court, to prevent a miscarriage of justice, may order a new trial as a matter of discretion.—Appeal allowed with costs. *Barthe* v. *Huard* (1909), 42 S. C. R. 406, 29 C. L. T. 169.

Production — *Confidential report made to tramway company as to accident—Action by person injured—Privilege.*]—Action for personal damages sustained by plaintiff while a passenger on defendant's tramway.—*Held*, that the report to the defendants by the conductor as to the accident was privileged from production. *Snell* v. *British Columbia Electric*, 10 W. L. R. 198.

Production of book—Refusal of trial Judge to allow — Substantial wrong — New trial—Costs. *Matthews* v. *Moody*, 1 O. W. R. 47.

Proof of contract for sale of goods—"*Writing*" *required by art. 1235* (4), *C. C.*—*Letter and enclosure—Terms of bargain.*]—A letter by the sellers to the purchaser, suggesting that he should write to them, "along the lines" of an inclosed draft, in their handwriting, is held to embody the latter and form with it one document, which is a sufficient "writing," as evidence of a contract for the sale of goods under art. 1235 (4), C. C.—2. A writing in which the quantity and description of the goods and the price are given, with a statement that delivery is to be made "before the close of navigation," contains all that is required under the article. *Stevens* v. *Hill*, 18 Que. K. B. 65.

Proof of foreign judgment—*Certificate—Seal — Canada Evidence Act.*]—A document purporting to be a transcript of the judgment roll of the Circuit Court for Walworth County, South Dakota, was tendered in evidence. The seal affixed was engraved "Clerk of the Circuit Court, Sixth Judicial District, South Dakota, Walworth County;" the certificate appended under the hand of the clerk of the Court stated, "I have hereunto set my hand and affixed the seal of the said Court:" — *Held*, that the certificate, signed by the officer who would ordinarily have the custody of the seal of the Court, was *prima facie* proof that the seal was that of the Court; and that the judgment purported to be under the seal of the Court as required by s. 10 of the Canada Evidence Act, 1893. *Beebe* v. *Tanner*, 6 Terr. L. R. 13.

Proof of relationship of heirs-at-law—*Register of births—Marriage.*]—Relationship of heirs-at-law, as brothers and sisters of the *de cujus*, is proved by the acts of birth in the registers of civil status, describing the parties as born of the same father and mother as he was. It is not necessary to produce the certificate of marriage of the parents; it is enough to shew that they were in possession of the status of husband and wife. *O'Meara* v. *Ouellet*, Que. 28 S. C. 418.

Provincial laws in Canada—*Judicial notice—Conflict of laws—Negligence—Common employment—Construction of statute—"Longshoreman"—"Workman."*]—As an appellate tribunal for the Dominion of Canada, the Supreme Court of Canada requires no evidence of the laws in force in any of the provinces or territories of Canada. It is bound to take judicial notice of the statutory or other laws prevailing in every province or territory in Canada, even where they may not have been proved in the Courts below, or although the opinions of the Judges of the Supreme Court of Canada may differ from the evidence adduced upon those points in the Courts below.—*Cooper* v. *Cooper*, 13 App. Cas. 88, followed.—Judgment in 31 Que. S. C. 469; 3 E. L. R. 132, affirmed. *Logan* v. *Lee*, 27 C. L. T. 781; 39 S. C. R. 311.

Reference — *Admissions in pleading—Entries in books — Discretion of referee — Appeal.*]—Where a reference is directed to the clerk of the Court and the plaintiff adduces evidence, he will not be allowed to rely on admissions in the statement of defence.—Entries in a ledger, sworn to have been made in the usual course of business, from memoranda regularly made, which memoranda had been accidentally destroyed by fire are not evidence.—On a reference the clerk refused to receive further material evidence tendered by the plaintiff after the close of the defendants' case:—*Held*, that the matter was in the discretion of the clerk, that in this case he had exercised such discretion reasonably, and that the case would not be referred back by a Judge on appeal. *Cummings* v. *Gourlay*, 1 Alta. L. R. 86.

Revival of action—*Petition by child of deceased plaintiff—Proof of status—Certificate of baptism—Marriage contract.*]—Upon a petition for leave to continue an action in the name of the petitioner as the daughter of the deceased plaintiff:—*Held*, that the certificate of the petitioner's baptism attested only her filiation, but not that her parents were man and wife, which fact could only be proved by the marriage settlement or other similar documents. *Connelly* v. *Consumers' Cordage Co.*, 6 Que. P. R. 150.

Title to land—*Plan of survey—Onus of proof—Findings of jury—Error—New trial.*]—Where it appeared that in directing the jury at the trial the Judge attached undue importance to the effect of a plan of survey referred to in a junior grant as against a much older plan, upon which the original grants of the lands in dispute depended, and that the findings were not based upon evidence sufficient in law to shift the onus of proof from the plaintiff, and were, likewise, insufficient for the taking of accounts in respect to trespass and conversion of minerals complained of.—*Held*, affirming the order for a new trial made by the judgment appealed from, 1 E. L. R. 293, that, in the absence of evidence of error therein, the older grants and plan must govern the rights of the parties. *Bartlett* v. *Nova Scotia Steel Co.*, 38 S. C. R. 336.

Will — *Validity—Letters probate.*]—Probate of a will devising real estate is not conclusive evidence of the validity of the will in a Court of equity. *Turner* v. *Turner*, 24 C. L. T. 243, 2 N. B. Eq. Reps. 535.

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6. Expert Evidence.

Comparison of handwritings.]—Proof, by comparison of handwritings, of a signature denied under oath, is admissible, even in a case in which the writing to which the signature is attached has all the essential requirements of a promissory note. *Paquin* v. *Turcotte*, 37 Que. S. C. 118.

Expert evidence.] — Jury is not qualified to assess value of lands expropriated without expert evidence. See *Beaudry* v. *Montreal* (1858), C. R. 2, A. C. 342.

Handwriting compared of instrument served on, with two other documents put in evidence and admitted to be genuine. *McCarthy* v. *Judah* (1858), C. R. 2, A. C. 407.

Obligation to testify — *Witness fees—Tariff allowance.*]—An "expert" witness, whether or not coming within either of the classes mentioned in items 119 and 120 of tariff B, where he has not been required to qualify himself by study or preparation, is not entitled to refuse, until he has been paid a fee beyond the amount fixed by the tariff, to testify as to any matter relevant to the issues, as to which he is competent to speak, though it be requisite for him to use his technical knowledge or skill in order to answer the questions put to him.—Judgment of the County Court of York reversed. *Butler* v. *Toronto Mutoscope Co.*, 11 O. L. R. 12, 6 O. W. R. 527.

Opinion—*Witness fees.*]—A medical man who has attended the victim of an accident, and who is afterwards called as a witness, must disclose all the facts of which he has knowledge; but is not obliged to express an opinion in his capacity of physician until his fees as such have been paid or guaranteed. *Marquis* v. *Robidoux*, 3 Que. P. R. 433.

Opinion evidence.] — See *Wright* v. *Shattuck*, 5 T. L. R. 264.

Opinions.]—Where there is direct contradiction between equally credible witnesses, the evidence of those who speak from facts within their personal knowledge should be preferred to that of experts giving opinions based upon extra-judicial statements and municipal reports. *Crawford* v. *City of Montreal*, 30 S. C. R. 406.

Testimony of experts—*Handwriting—Comparison of writings.*]—The testimony of experts in handwriting, like all scientific testimony, offers serious dangers as to the credit to be given to it, and should be accepted only after strict testing, and merely for what it is worth, having regard to the other elements of proof in the cause.—Proof by comparison of handwriting is insufficient to establish the authenticity of a signature denied on oath by the person against whom it is invoked. *Deschênes* v. *Langlois*, 15 Que. K. B. 388.

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7. Foreign Commissions.

Absent witness — *Time—Adjournment of trial—Refusal of commission — Reversal on appeal.*]—A defendant who has an apparently serious defence, and who counted upon the presence at the trial of his principal witness, who lives abroad, may obtain, even after the proper time therefor has expired, a commission to examine such witness, if there has been no negligence on his part.—A judgment which improperly refuses a motion for a commission will be reversed on appeal. *Nash* v. *Baie des Chaleurs Rw. Co.*, 7 Que. P. R. 381.

Action to recover value of professional services—Defence of criminal charge—Relevancy of evidence to shew what was paid for defences of similar charges. *Arnoldi* v. *Cockburn*, 11 O. W. R. 109.

Application for—Affidavit in support—Purpose of evidence sought. *Spencer* v. *Drysdale* (B.C.), 1 W. L. R. 6 & 7.

Application for—*Evidence on.*]—Application was made for commission to examine a witness resident in the United States, the application being based on an affidavit of the partner of the defendant's solicitor, on information obtained by him from M., the defendant's agent. There was no affidavit from M., personally, and nothing to shew that the evidence of the witness could not have been obtained before he left the jurisdiction, or that the facts said to be in the knowledge of the witness could not be supplied by other persons; — *Held*, that the application was properly dismissed. *McPherson* v. *Ritter-Conley Mfg. Co.*, 35 N. S. R. 429.

Application for—Examination of witness abroad—Affidavits—Nature of evidence sought—Abandonment of part of case—Dispensing with evidence—Reserving right to apply at trial. *Barrett* v. *Canadian Bank of Commerce* (Y. T.), 6 W. L. R. 714.

Application for commission—*Expenses* — Convenience — Fraud — Terms—Amendment of issue—Name of company claimants —"Limited." *Carbonneau* v. *Letourneau* (Y.T.), 3 W. L. R. 219.

Application for, during trial — *Refusal—Adjournment by consent — Appeal—Estoppel.*]—During the progress of the trial, and after a number of witnesses on behalf of the plaintiffs had been examined, the defendants' counsel applied for a commission for the examination of a witness who was absent in British Columbia, and for a postponement of the trial. The witness in question was a son of one of the defendants, who was aware of his absence, but the fact was not brought to the attention of the defendants' counsel until the day on which the trial was commenced. The trial Judge having refused both the commission and the postponement:—*Held*, that there was no reason for interfering with his discretion on these points. After the commission applied for had been refused, the plaintiffs' counsel offered to agree to an adjournment for a reasonable time, to be fixed by the Court, to enable the defendants to produce the witness, should they desire to do so, and the case was adjourned from the 8th January to the 17th February. On the latter day, the case being called, the defendants' counsel stated that he had no further evidence to offer, and judgment was given for the plaintiffs:—*Held*, that the defendants, having accepted the offer made on behalf of plaintiffs, and obtained an adjournment of the case, were not in a position to revert back to their original rights, and claim a review of the judgment. *Stephen* v. *Thompson*, 35 N. S. R. 390.

Application for—*Examination abroad of officers of plaintiff company—Production of books of company before commissioner—Convenience — Case made on affidavits — Sufficiency.*] — A plaintiff suing in a foreign forum should not ordinarily be excused from

appearing there and giving his evidence; *per* Chitty, J., in *Ross* v. *Woodford*, [1894] 1 Ch. at p. 42; and the proof that the interests of justice require the issue of a commission to take his evidence abroad should be of the clearest kind and best nature that can be got, affidavits sworn to only on information and belief being insufficient. The issue of such commission should be the exception, and should only be resorted to when the inconvenience or expense caused by requiring the plaintiff's personal attendance at the trial would pretty nearly thwart the ends of justice.—*Keeley* v. *Wakley*, 9 Times L. R. 571, followed.—These principles applied upon an application by the plaintiffs, a company whose head office was in Ottawa, Ontario, for the issue of a commission to take the evidence of a number of the company's officers at Ottawa, in spite of affidavits tending to shew that the books of the company at the head office, which would have to be put in evidence, were in constant use there and could not be brought to Winnipeg without great inconvenience and loss, also that it would be practically impossible to carry on the business of the company if all the officers whose evidence would be necessary at the trial had to be absent from the head office for the time necessary to attend the trial at Winnipeg. The Court was of opinion that the material was not sufficient to shew that all the books must be kept at the head office all the time, and that, if the evidence were taken on commission at Ottawa, the defendant would probably have to go there himself in order to instruct counsel on cross-examination of the witnesses as to entries in the books.—Order for commission set aside with all costs to the defendant in any event. —*Semble*, if a proper case were made, an order might go for the examination of some of the officers of the company at Ottawa on some of the facts which the plaintiffs wished to prove; and that the books, or at all events all those that were not absolutely required all the time at the head office, might be brought to Winnipeg with the other officers to verify them, so that the Court might see those books themselves rather than certified copies or portions of them. *Canadian Railway Accident Insurance Co.* v. *Kelly*, 8 W. L. R. 738, 17 Man. L. R. 645.

Commission to examine witness abroad refused, when unnecessary delay in making application.]—Defendant was father of W. B. Dawson, who absconded, having assigned his property to defendant as trustee, who claimed to be a creditor for a large sum. The trial had already been postponed one term, and now defendant applied for a commission to examine his son abroad, alleging that he had not done so before because he did not know where his son was, but this was not positively stated, but left to be inferred argumentatively from the affidavits. He and his attorney admitted having been all along in communication with the son, but through a third person. To grant the commission would cause the trial to be put off for another term.—*Held*, Peters, J., that there was no valid reason for the delay, and that the rule must be refused. *Union Bank* v. *Dawson* (1868), 1 P. E. I. R. 279.

County Court—*Examination of plaintiffs —Expense.*]—In an action in a County Court on a promissory note for $65.40 the defendant pleaded that the note was obtained from him under duress and the plaintiffs, who lived in Ontario, applied for a commission to take their evidence there:—*Held*, that, as the probable expenses of the commission would not exceed a quarter of the expenses of the plaintiffs attending the trial, and the application was made *bona fide*, it should be granted. *Thompson* v. *Henderson*, 9 B. C. R. 540.

Depositions — *Foreign commission — Reading at trial — Discretion.*] — Whether all the evidence taken upon commission in an action shall be read at length, or read in part, and stated in part, or stated by counsel at the trial, is a matter in the discretion of the trial Judge. *Marks* v. *Marks*, 6 W. L. R. 329, 13 B. C. R. 161.

Depositions returned—*Use at trial.*]—A party who has procured evidence to be taken on commission is not bound to put it in at the trial, but if it has been duly returned into Court, the opposite party has a right to put it in on his own behalf if he desires.—*Gordon* v. *Fuller*, 5 O. S. 174, followed. *Richardson* v. *McMillan*, 18 Man. L. R. 359, 9 W. L. R. 632.

Discretion — *Appeal.*] — The granting of a commission to take evidence is in the discretion of the Judge to whom the application is made, but where strong reasons are shewn to the Court why the commission should not have been granted, such as failure to exercise due diligence on the part of the party applying, or unreasonable delay caused to the opposite party, the discretion will be reviewed. In a case which had been twice tried, and was coming on for a third trial, where it appeared that two commissions had already been obtained, and evidence taken under each; that the facts sought to be established had been previously known to, or their existence suspected by, the party applying; where it was not alleged that the evidence sought to be obtained was material and necessary, and that the party could not safely proceed to trial without it, but only that the examination would be effectual; and where no defence based upon the fact sought to be established had been set up, and no application had been made to amend the pleadings so as to enable it to be set up:—*Held*, that the order for the commission must be set aside with costs. *McLeod* v. *Insurance Companies*, 32 N. S. R. 481.

Enlargement of time for return — Company — Winding-up order — Practice —Varying order. *Re Port Hood Coal Co.*, 5 E. L. R. 377.

Examination abroad of defendants as witnesses on their own behalf—*Terms.*]—The defendants, a solicitor practising his profession in Ontario, and his wife, were still in Ontario when two actions were brought, one against both of them by a former client of the husband, and the other against the husband alone. Shortly afterwards they removed to the North-West Territories to take up their permanent residence there. The actions were respectively for an account of moneys intrusted to the solicitor for investment and to set aside assignments

of life insurance policies:—*Held*, reversing the decisions of a Divisional Court and of a Judge and the Master in Chambers, that, in the circumstances shewn by affidavits, the defendants should be allowed to have their evidence taken on commission in the Territories, as witnesses on their own behalf, for use at the trial of the actions, but upon terms advantageous to the plaintiff as to the expense of executing the commission. *Ferguson* v. *Millican*, 11 O. L. R. 35, 6 O. W. R. 661.

Examination abroad of plaintiff on his own behalf—Bona fides—Discretion. *Cleveland* v. *Asam* (Y.T.), 8 W. L. R. 970.

Examination abroad of real plaintiffs—Action by nominal plaintiff—Terms—Security for costs of commission. *Mills* v. *Small*, 9 O. W. R. 307.

Examination of absent plaintiff.]—Action of replevin. After the commencement of the action one of the plaintiffs left the jurisdiction. Application was made on behalf of the plaintiffs to examine the absent plaintiff under a commission, the plaintiff's solicitor stating that the absent plaintiff was joined by mistake:—*Held*, that the plaintiffs ought to have leave to issue a commission. The delay was satisfactorily accounted for, and, even if the absentee was a real plaintiff, the law permits a commission to be issued to take the evidence of a party. The fact that it is on the part of the plaintiff makes no difference. *Willis* v. *Behie*, 22 C. L. T. 430.

Examination of defendant and witness abroad — Failure to make case on application. *Stearns* v. *Kimmell* (Y.T.), 1 W. L. R. 390.

Examination of defendants abroad—Discretion—Appeal—Terms—Costs. *Ferguson* v. *Millican*, 6 O. W. R. 661, 11 O. L. R. 35.

Examination of former servant of plaintiffs on their behalf—Necessity for presence at trial. *Woods-Norris Co.* v. *Cobalt Nipigon Syndicate*, 11 O. W. R. 733.

Examination of party.]—A party to a suit in the Superior Court has no right, even though he resides outside the province or at a distance of more than a hundred miles from the place where the Court is held, to obtain a commission *rogatoire* to have himself examined as a witness. *Deslandes* v. *Saint-Jacques*, 33 Que. S. C. 380, 9 Que. P. R. 213.

Examination of party—*Default as to interrogatories.*]—A defendant against whom interrogatories upon articulated facts have been declared *pro confessis*, and who has left the country, cannot obtain a rogatory commission for his examination abroad. *Bernard* v. *Carbonneau*, 6 Que. P. R. 350.

Examination of party — *Interrogatories.*]—A party to an action in default for answers to interrogatories *sur faits et articles* may, by motion, and on paying the costs incurred by his default, ask to be examined upon commission at his new domicil out of the province. *Burelle* v. *Palardy*, 4 Que. P. R. 73.

Examination of party—Place for—Expenses—Costs. *Smith* v. *McDearmott*, 2 O. W. R. 316, 475.

Examination of party.]—Under a general commission to examine witnesses abroad on behalf of both parties, the witnesses intended to be examined not being named in the order or the commission, it is not permissible for the plaintiff to give his evidence before the commissioner, and, where the commission is open at the trial, the plaintiff's depositions on being tendered in evidence will be rejected. *Wright* v. *Shattuck*, 4 T. L. R. 317.

Examination of plaintiff abroad—Exceptional circumstances. *Lewcin* v. *Cheesewerth*, 6 O. W. R. 481.

Examination of plaintiff abroad—Terms—Costs. *Watt* v. *Mackay*, 5 O. W. R. 93, 170.

Examination of plaintiff as defendant to counterclaim—*Discovery.* *Levi* v. *Edwards*, 5 O. W. R. 83.

Examination of witness abroad under foreign commission—Production of books and documents by opposite party before commissioner—Order for—Convenience—Jurisdiction—Practice. *Lennox* v. *City of Toronto*, 12 O. W. R. 402.

Examination of witnesses in foreign state — Letters rogatory—Necessity for—Jurisdiction of local Master. *Keogh* v. *Brady*, 6 O. W. R. 552, 846.

Foreign commission.] — Plaintiffs applied for an order to examine as witnesses, officers of their company out of the jurisdiction. It was a question whether plaintiffs were holders in due course of certain notes which admittedly had been obtained from the makers by fraud. Application refused as justice would not be obtained in this case unless witnesses examined in open Court. *Union Investment Co.* v. *Perras* (1909), 12 W. L. R. 76.

Foreign commission—*Security for costs—Plaintiff out of jurisdiction.*]—An administrator moved for a commission to take evidence in Italy as to support deceased gave his relatives during his lifetime. He was cross-examined on his affidavit in support of the motion. On the next day he left for Italy. Thereupon defendants moved for security for costs:—*Held*, that it would be better to leave the doors of the Court open to the litigant, than to make the graver mistake of unwarrantably closing them to him, until he should have given security, thereby (almost certainly) closing them entirely.—*Sharp* v. *G. T. Rw. Co.*, 1 O. L. R. at p. 206, followed. *Cicchetto* v. *Guelph* (1910), 15 O. W. R. 340.

Foreign commission—*Solicitor a partner of commissioner—Application to suppress evidence of commission — Con. Rules 512, 522.*]—Motion to set aside an *ex parte* order extending for two days the time for the return of a commission sent to take evidence at Dundee, Scotland, and to suppress same. Motion dismissed, leaving defendants to avail

themselves of their right to make any valid objections at trial. *Jackson* v. *Hughes* (1910), 15 O. W. R. 412.

Grounds for ordering — Terms—Security for costs. *McGregor* v. *Johnson*, 2 O. W. R. 531.

Interrogatories — *Foreign commission —Evidence — Motion to strike out—Jurisdiction.*]—Motion by defendant to strike out interrogatories served by plaintiffs upon defendant as proposed to be used upon a commission to take evidence in Scotland. No authority was cited in support of the motion; against it was the authority of Hume-Williams and Macklin on Evidence on Commission (1903), p. 101, where it said that great care should be taken in framing interrogatories, for, "if the interrogatories contain leading questions or are immaterial, irrelevant, or otherwise objectionable, the opposite party may object to the answers being received at the trial. It is not the present practice for the Master to consider interrogatories proposed to be administered to witnesses on commission, because the rules which so provide apply only to interrogatories *inter partes*; but the practice seems at one time to have been different." The only rule dealing with the subject is 503:—*Held*, in the absence of express authority, there was no power to deal with these interrogatories. A party examining on interrogatories cannot be interfered with as is sought to be done in this case. If the other side objects to his interrogatories, it may be wise to alter them. But a party is not obliged to do so. If he chooses he is free to take his risk of the commission evidence being rejected either in whole or in part by the Judge at the trial. Motion dismissed with costs to plaintiffs in the cause. *Toronto Industrial Exhibition Assn.* v. *Houston*, 5 O. W. R. 493, 9 O. L. R. 527.

Interrogatories—*Names of witnesses.*] — When a commission in the nature of a commission *rogatoire* is issued to examine witnesses, the interrogatories will be allowed and settled notwithstanding the fact that the party at whose instance the commission issued, declares he is unable to disclose the names of all the witnesses he intends examining. *Milliken* v. *Laurentide Pulp Co.*, 6 Que. P. R. 134.

Irregularity — *Waiver — New trial—Defect in evidence.*]—Where a commission to take evidence was issued without a formal order therefor, but merely on an informal memorandum of a Judge, containing no direction as to the commissioner's name, or the time, place, or manner of taking the evidence, but the commission, before being sent out, had been shewn to the advocate for the opposite party, and due notice of the time and place of taking the evidence under the commission had been served on him, and on the return of the commission it had been opened at his instance:—*Held*, that the irregularities in connection with the issue of the commission, which might at an earlier stage have been taken advantage of by motion to suppress, were waived by the advocate for the opposite party, with knowledge of the irregularities, causing the commission to be opened; that being a fresh step within the meaning of s. 541 of the Judicature Ordinance.—2. That in any case, the trial Judge having received the evidence, and s. 501 of the Judicature Ordinance providing that a new trial shall not be granted on the ground of the improper admission or rejection of evidence, unless, in the opinion of the Court to which application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial, and the Court being of the contrary opinion, no effect should be given to the objection. Trial of an action adjourned to enable plaintiff to supply defect in the evidence in support of his case under s. 236 of the Judicature Ordinance. *Hamilton* v. *McNeill*, 2 T. L. R. 31.

Irrelevant testimony — Terms—Costs and expenses. *Toronto Industrial Exhibition Assn.* v. *Houston*, 5 O. W. R. 303, 349, 493.

Issued by plaintiff — Depositions returned into Court—Right of plaintiff to refuse to make depositions part of his case—Right of defendants to adduce depositions in evidence. *Richardson* v. *McMillan*, 9 W. L. R. 632.

Loss of stenographer's notes of evidence taken—Extension of time for return of commission — Postponement of trial — Order for second commission. *Howes* v. *Beatty*, 12 O. W. R. 699.

Master's office — *Affidavit verifying account—Commission to cross-examine deponent.*]—On a reference to take accounts, a party is entitled *ex debito justitiæ* to a commission to cross-examine the opposite party (out of the jurisdiction) upon an affidavit filed in proof of accounts.—*Townshend* v. *Hunter*, 3 C. L. T. 310, followed.—*Plenderleith* v. *Parsons*, 10 O. L. R. 436, 6 O. W. R. 145, distinguished. *Horlick* v. *Escheveiler*, 11 O. L. R. 140, 7 O. W. R. 43.

Master's office—*Partnership accounts—Defendant out of jurisdiction—Preliminary examination as to surcharge—Discretion of Master — Commission — Appointment of Master as Commissioner.*] — The discretion vested in the Master by Con. Rules 608 and 609 as to preliminary examinations in taking accounts is very wide, and where in the proper exercise of his discretion an examination of a party is directed, it will not be interfered with; but he has no power to require the attendance within the jurisdiction of a defendant residing thereout, or to issue a commission naming himself as commissioner. As it appeared in this case that it would be in the interests of justice that the examination should be held before the Master personally, the Court directed a commission to issue for such examination, naming him as the commissioner. *Connolly* v. *Connor*, 12 O. L. R. 304, 8 O. W. R. 74.

Order for — *Lapse—Extension of time.*] —An order allowing the issue of a commission rogatory returnable within a time fixed lapses at the expiration of that time, if the commission has not been issued, and consequently the Court cannot extend the time for the return. *Giraud* v. *City of Montreal*, 3 Que. P. R. 160.

Order made for a commission to take evidence of a witness at Presqu'ile, Me., as it was clear that the witness would not be able to attend the trial. If the evidence proved to be immaterial or was not used, plaintiffs, if successful, may apply to be allowed their costs of attending. *Ontario Sewer Pipe Co.* v. *Macdonald* (1909), 14 O. W. R. 941, 1 O. W. N. 185.

Order of foreign Court for examination of witnesses in Manitoba—*Cross-examination on affidavits — Manitoba Evidence Act and Amending Act, 1905—Manitoba Rules, 343, 650—Jurisdiction.*]—In an action in Ontario High Court, R. and J., officers of the company garnished, made affidavits. The Master at Toronto ordered that R. and J. should be cross-examined on these affidavits. An order was made *ex parte* by Mathers, J., directing them to appear before an examiner for such cross-examination. R. and J. moved to set aside this *ex parte* order:—*Held*, (1) that they had lost their right to object through laches and acquiescence; (2) that the order was interlocutory, therefore might be supported by affidavits on information and belief disclosing source of information; (3) there was power to order production limited to documents relevant and under their control; (4) that there was no jurisdiction to make the order and it must be set aside. *Re Bank of Nova Scotia* v. *Booth*, 10 W. L. R. 94.

See 13 O. W. R. 209, 294, 10 W. L. R. 313.

Postponement of trial—Delay—Terms—Security for costs. *Lemoine* v. *MacKay*, 2 O. W. R. 390, 400.

Return — *Delay—Nullity—Omission to put questions.*] — The execution of a foreign commission and the return of the commissioner after the time fixed, by the consent of the parties, are not necessarily causes of nullity, especially when no prejudice has been occasioned.—2. If the commissioner has omitted to put to a witness certain questions, his return will not be received, his proceedings being incomplete, but such omission does not render the proceedings void, and the Court, in that case, will order the record to be sent back to the commissioner with instructions to put the questions and so complete his proceedings. *Thibault* v. *Poulin*, 22 Que. S. C. 371, 5 Que. P. R. 189.

Terms—Costs—Delay in applying—Cross-interrogatories. *Glass* v. *Grand Trunk Rw. Co.*, 7 O. W. R. 517.

Time — *Extension — Issue—Return.*]—Where a commission *rogatoire* has not been issued within the time allowed for its return, the order allowing it to be issued lapses, and the Court cannot extend the time for taking testimony under such commission or for its return. *Girard* v. *City of Montreal*, 18 Que. S. C. 315.

Trial Judge — *Postponement of trial.*]—The Judge to whom an application is made for a commission *rogatoire* may refer the same to the trial Judge, who will, in his discretion, after having heard the evidence, grant or refuse the motion, and, in the former case, postpone the trial in order to permit the execution of the commission. *Armstrong* v. *Gillies*, 5 Que. P. R. 423.

Witnesses out of province—*Examination of — Procedure.*]—Under Art. 373, C. P., the *commissaire-enquêteur* to be appointed must reside in the province of Quebec, and the witness to be examined must also reside therein. If the witnesses reside out of the province, the party who finds it necessary to examine them must proceed under Arts. 380 *et seq. Patterson* v. *Crépeau*, 19 Que. S. C. 147, 3 Que. P. R. 404.

See Chose in Action, Assignment of—Sale of Goods—Street Railways—Trial.

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8. Motion—Evidence on.

Admissions — *Withdrawal—Leave—Motion for judgment.*]—After all parties had agreed upon a statement of facts, and the plaintiff had served notice of motion for judgment thereon, he delivered a statement of claim and served on the defendants a notice withdrawing the statement of facts and countermanding the notice of motion. On the statements of facts, which had not been filed:—*Held*, that it was not necessary for the plaintiff to make an independent motion to be relieved from his admissions contained in the statement of facts, which had not been acted upon or brought before the Court; after the filing of the statement of claim and the notice of withdrawal, it was not competent for the plaintiff to get judgment on the statement of facts; and if the sanction of the Court were needed for the course taken by the plaintiff, it might be given upon the defendant's motion. *East* v. *O'Connor*, 21 C. L. T. 28, 19 P. R. 301.

Cross-examination of deponent on affidavit — Refusal to answer questions—Motion to compel answers—No notice served on deponent—President of defendant company—Motion to commit — Motion for declaration that questions should be answered—Rule 455. *Kleinert Rubber Co.* v. *Eisman Manufacturing Co.*, 11 O. W. R. 574.

Cross-examination on affidavit — *Attachment of debts—Salary of municipal officer — By-law — Production.*] — An order having been made attaching all debts due to a judgment debtor by a city corporation, the paying teller of the corporation made an affidavit that nothing was due from the corporation to the debtor at the time of service of the attaching order. Cross-examined, he said that the debtor was assessment commissioner for the corporation and in receipt of a salary, but that advances had been made to him on account of it, by the authority of the treasurer of the city, so that nothing was due:—*Held*, that the affiant should be compelled to answer all questions put to him on cross-examination on his affidavit bearing on the advances made in the past to the debtor, and those bearing on the affiant's authority to make them, and his motives in doing so if he were exercising a discretion. — *Held*, also, Street, J., dissenting, that the affiant should answer the question whether he had ever made advances on account of salary to any other employee of the city, and, if he should answer it in the affirmative, he might be further interrogated as to the number of such instances, but he was not to be compelled to

disclose the names of persons to whom such advances had been made.—*Held*, also, that the affiant was not compellable to produce any of the city by-laws, not being the custodian thereof. *Wilson* v. *Fleming*, 20 C. L. T. 377, 19 P. R. 203.

Depositions of witnesses—*Use on motion for new trial — Contradicting evidence given at trial.*]—The plaintiff, having given notice of motion for a new trial on the ground of surprise, in that certain witnesses, called for the plaintiff, had withheld evidence which they could have given in his support at the trial, and were willing to give such evidence if a new trial were granted, subpœnaed three of these witnesses under Rule 491, for examination before a local registrar upon the motion for a new trial:—*Held*, that Rule 491 applies to motions for a new trial pending before a Divisional Court.—*Held*, however, that evidence of persons who had been witnesses at the trial that the evidence they then gave was not in fact true, and that certain statements made by them before trial to the plaintiff's solicitor (which was avowedly the evidence sought to be obtained here by the examination in question) were true, would not be receivable. *Rushton* v. *Grand Trunk R. W. Co.*, 23 C. L. T. 295, 6 O. L. R. 425, 2 O. W. R. 654.

Examination of party as witness on motion for security for costs—Refusal to answer questions — Relevancy — Disclosing defence. *Stone* v. *Stone*, 11 O. W. R. 337.

Examination of plaintiff in support of defendant's motion for security for costs—Action against justice of the peace—R. S. O. 1897, c. 89, s. 2—Right to examine plaintiff — Appointment — Motion to set aside — Refusal — Appeal — Costs. *Lowry* v. *Wood*, 12 O. W. R. 855.

Foreign commission to take — *Trial postponed until return.*]—Where the evidence sought was material, an order was granted for a commission to take evidence in England and to postpone the trial until the return. *Harris* v. *Wishart* (1910), 15 O. W. R. 430, 1 O. W. N. 503.

Motion by defendant for better particulars—Attempted examination of plaintiff in support of—Refusal to be sworn—Discovery. *Arnoldi* v. *Cockburn*, 10 O. W. R. 641.

Motion for better affidavit on production of documents — Examination of witnesses in support of motion—Appointment for, set aside—Discovery. *McLeod* v. *Crawford*, 10 O. W. R. 1042.

Motion for interim injunction — *Cross-examination of deponent on affidavit—Relevancy of questions—Use of trade name—Misrepresentation by plaintiffs as to their goods.*]—On a motion for an injunction to prevent the use or imitation of the plaintiffs' trade names for their medicinal preparations, the truth or falsity of the representation as to the curative value and ingredients of such preparations made by the plaintiffs in the advertisements issued by them is relevant, and questions addressed to the plaintiffs' manager on his cross-examination on his affidavit filed in support of the motion, with a view to elicit evidence of such falsity, must be answered by him. *Theo Noel Co.* v. *Vita Ore Co.*, 6 W. L. R. 466, 17 Man. L. R. 87.

Motion for interim injunction — Examination of witnesses in support of — Refusal to answer questions—Rule 491—Relevancy of questions — Full disclosure — Party to action—Duty to prepare for examination — Production of documents — Duty of examiner — Fraud — Privilege — Examination of solicitor as witness — Discovery—Costs. *Clisdell* v. *Lovell*, 9 O. W. R. 687, 10 O. W. R. 203.

Motion for security for costs — Examination of party on—Refusal to answer questions — Relevancy — Disclosing defence. *Stone* v. *Stone*, 10 O. W. R. 1088.

Presumption of death—*Declaration—Evidence.*] — Motion by executors for an order declaring William Goble, who has not been heard of for many years, to be dead:—*Held*, that the Court should be chary in making such order. Further affidavits to be filed. If an order is eventually made, a bond to refund moneys paid out, in the event of the return of the absentees, will be required. *Re Goble* (1910), 1 O. W. N. 624.

Second commission — Postponement of trial — Terms — Costs. *Canadian Bank of Commerce* v. *Matheson* (Y.T.), 8 W. L. R. 972.

Security for costs—*Nominal plaintiff—Insolvency — Affidavit — Notice of motion.*]—The decision of Rose, J., 20 C. L. T. 309, 19 P. R. 180, affirmed on appeal; Street, J., dissenting:—*Held*, *per* Boyd, C., that an application for security for costs on the ground that the plaintiff is insolvent and is only nominally interested in the action, should be based on an affidavit of belief on the defendant's part that such are the facts, and such an affidavit should at least be furnished by the defendant before he attempts to establish the facts by examining the plaintiff. — *Semble*, that the proper practice in such a case is to have the grounds set forth in the notice of motion, as was done in *Port Rowan & Lake Shore Ry. Co.* v. *South Norfolk Ry. Co.*, 13 P. R. 327; and if this method were adopted, an affidavit of belief might be dispensed with if it was proposed to establish the facts alleged out of the mouth of the plaintiff.—*Held*, *per* Falconbridge, C.J., that the finding of Rose, J., that the plaintiff had a substantial interest, should be adopted, and such being the position, the defendant had no right to prove the plaintiff's poverty out of his own mouth on this application. — *Per* Street, J., dissenting, that the defendant was entitled to examine the plaintiff for the purpose of shewing that he was a mere nominal plaintiff suing for the benefit of another, as well as for the purpose of shewing his insolvency; and the defendant could not be required to establish each particular proposition involved in his motion, in its logical order, before proceeding with the next. — Leave was given to the defendant to proceed in proper form with his application for security. *Pritchard* v. *Pattison*, 20 C. L. T. 435, 19 P. R. 277.

Security for costs—*Nominal plaintiff—Insolvency.*]—The plaintiff, being examined by the defendant as a witness upon a motion made by the defendant to set aside the proceedings and dismiss the action or for security for costs, on the ground that the plaintiff had no interest in the company on behalf of whose shareholders as well as himself he was suing, was asked what means he had of satisfying the costs in the action: — *Held*, that the defendant could not interrogate the plaintiff as to his financial position until, at least, a *prima facie* case had been made out that he was only the nominal, and not the real and substantial plaintiff; and the evidence given upon the motion before the examination of the plaintiff shewed that he had a substantial interest. *Pritchard* v. *Pattison*, 20 C. L. T. 309, 19 P. R. 180.

Testimony of a plaintiff on his own behalf—Absence of special circumstances. *Gwillim* v. *Dawson Electric Light and Power Co.* (Y.T.), 6 W. L. R. 437.

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9. New Evidence after Hearing.

Action to revoke a judgment—*Subsequent discovery of evidence not available at the trial—Must be material.*]—New evidence alleged, in an action to revoke a judgment, to have been discovered subsequently to the trial, must be material, that is, of such a kind and nature, that if it had been adduced thereat, the judgment impugned might have been different. *American Asbestos Co.* v. *Johnson Co.* (1909), 38 Que. S. C. 32.

Application to admit fresh evidence after judgment — Affidavit — Grounds—Orders XXXIV., XXXV. *Hekla* v. *S. Cunard & Co.*, 40 N. S. R. 611.

Application to let in fresh evidence—*Knowledge of party.*]—A petition to open up judgment in order to prove an allegation in the declaration (which the plaintiff forgot at the hearing) will not be granted unless it appears that the facts which it is desired to prove did not come to the knowledge of the plaintiff until after the close of the examination of witnesses. *Canadian Breweries (Limited)* v. *Allard*, 4 Que. P. R. 305.

Application to reopen judgment and let in fresh evidence—Corroborative evidence — Inconclusiveness. *Duck* v. *Daniels*, 9 W. L. R. 19.

County Court — *Admission of further evidence after trial—County Courts Act, s. 131—Discretion—Appeal.*]—In an action in a County Court for conversion of a chattel the evidence at the trial shewed that the defendants had received the chattel from the plaintiff and could not account for its disappearance. The County Court Judge reserved judgment and afterwards gave a written judgment in which he said that the plaintiff was entitled on the evidence to a verdict for a named sum, but, the evidence being unsatisfactory, that he would suspend judgment for 10 days to allow the defendants to give further evidence. The defendants had made no application for leave to adduce further evidence, but, after this deliverance, they obtained from the Judge an appointment for the taking of further evidence; they did not then or later disclose the names of the witnesses or the nature of the proposed new evidence:—*Held*, on appeal, that, if the Judge had power and discretion, under s. 131 of the County Courts Act or otherwise, to make such an order as to the taking of further evidence, he had not exercised his discretion properly; and the order should be set aside, and judgment entered for the plaintiff. *Tett* v. *Bailey Supply Co.* (1910), 13 W. L. R. 5.

Court of Appeal—Leave to adduce further evidence on appeal. *Klees* v. *Dominion Coat and Apron Co.*, 3 O. W. R. 841, 937, 6 O. W. R. 260.

Discovery of fresh evidence—*Opening up—Judgment.*] — Where the plaintiff, whose action had been dismissed, presented a petition supported by an affidavit shewing that since the judgment he had discovered two new witnesses who would prove facts essential to the success of his action, an order was made remitting the parties to the same position as they were in before judgment in order that the plaintiff might produce the two witnesses, with leave to the defendant to give evidence to contradict them, and reserving costs. *Brousseau* v. *Déchêne*, 3 Que. P. R. 397.

Exchequer Court—*Patent for invention—Experiments after trial.*]—An application was made, after the hearing and argument of the cause but before judgment, for leave to the defendants to file as part of the record certain affidavits to support the defendants' case by additional evidence in respect of a matter upon which evidence had been given by both sides. It was open to the defendants to have moved for leave for such purpose before the hearing was closed, but no leave was asked. It also appeared that the affidavits had been based upon some experiments which had not been made on behalf of the defendants until after the hearing:—*Held*, that the application must be refused. *Humphrey* v. *The Queen*, 2 Ex. C. R. 286, and *DeKuyper* v. *VanDulken*, 3 Ex. C. R. 88, distinguished. *General Engineering Co. of Ontario* v. *Dominion Cotton Mills Co.*, 20 C. L. T. 52, 6 Ex. C. R. 306.

Fresh evidence — *Motion to discharge délibéré—Reopening of trial.*]—A motion to discharge délibéré will be granted where it appears by the affidavit in support of the motion that the new evidence sought to be adduced is material, and that the failure to adduce it at the *enquête* was inadvertent. *Hétu* v. *Butter and Cheese Association of Dixville*, 8 Que. P. R. 103.

Leave to adduce, after judgment in appeal—*Amendment of record.*]—After the judgment of the Court of Appeal affirming the judgment of the trial Judge dismissing the action, had been pronounced, drawn up, and entered, and while an appeal was pending therefrom to the Supreme Court of Canada, the plaintiffs moved for leave to adduce further evidence for the purpose of shewing that an exhibit which was used as part of the evidence in the case was not a true copy of the orignal document. It was not suggested that there was any error in the judg-

ment of the Court of Appeal which could be corrected by the introduction of the proposed evidence, or that, if the proposed evidence had been given while the appeal was pending, the judgment would have been different. It might tend to displace one of the grounds on which the trial Judge relied, or might prevent the defendants from relying upon that ground if the case went further, but that was all that could be said:—*Held*, that the application should be refused. Rule 498, which empowers the Court to receive further evidence, is clearly confined to cases where such evidence is sought to be introduced for the purpose of the appeal. *Dueber Watch Case M'f'g. Co.* v. *Taggart*, 20 C. L. T. 374, 19 P. R. 233.

Motion to Divisional Court for new trial—Discovery of fresh evidence—Examination of witnesses on pending motion — Appointment for—Motion to set aside — Rules 491, 498. *Trethewey* v. *Trethewey*, 10 O. W. R. 684, 893.

Reference—Report of assessors on previous reference—Evidence in contravention—Evidence of additional facts — Admissibility — Damages. *Saunby* v. *London Water Commissioners*, 11 O. W. R. 1076.

Revision of sentence—*New witnesses.*] —Upon a demand for revision of a sentence of interdiction pronounced by the prothonotary, the Court can hear other witnesses than those who were examined before the prothonotary. *Bond* v. *Barry*, 16 Que. S. C. 365.

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10. Parol Evidence.

Admissibility — *Oral evidence—Error or fraud—Evidence of facts alleged in pleadings — Irrelevancy — Weight.*]—Oral evidence is always admissible to establish error or fraud.—2. The Judge at the hearing on the merits should not exclude evidence of the facts alleged in the pleadings, the irrelevancy of which has not been attacked by inscription in law. He should admit the evidence, subject to his power of determining the weight of it in adjudicating upon the merits. *Mancotel* v. *Tétrault*, 32 Que. S. C. 500.

Admissibility—*Oral evidence—Lease for 5 years—Rental exceeding $50—Commencement of proof in writing — Agent — Admissions — Divisibility.*]—Parol evidence is not admissible to prove a contract of lease for a period of five years, at a yearly rental of $600, unless there be a commencement of proof in writing of it.—2. Such a commencement of proof in writing may be found in the admissions of a party examined as a witness under oath.—3. The admissions by a party cannot be divided except in the special cases stated in art. 1243, C. C.—*Quære*, can the admissions by an agent have the same value as proof in writing, or as a commencement of proof in writing, as if made by the principal? *Sobinsky* v. *Allard*, 16 Que. K. B. 530.

Architect — *Plans and specifications—Contract — Proof of — Oral evidence — Inadmissibility — Time to move for rejection.*]—1. A contract with an architect for the drawing, at a cost exceeding $50, of plans and specifications for a proposed building, is not a commercial matter, and cannot be proved by parol testimony.—2. When inadmissible evidence is received without objection, the party against whom it is given may move for its rejection at any time before the trial is over. *Wright* v. *Davies*, 33 Que. S. C. 346.

Cheque — *Deposit of, as security—Commercial matters.*]—Bills of exchange, promissory notes, and cheques are commercial terms by themselves, and with respect to all persons and all contracts or transactions relating thereto are commercial matters. Therefore, one who alleges that he has given a cheque to another as security for an obligation which he has assumed to the holder of the cheque to attempt to collect the amount of the latter's deposit in a bank in liquidation, may prove his allegation by oral testimony. *Town of Maisonneuve* v. *Chartier*, 20 Que. S. C. 518.

Contract — *Construction — Oral evidence of surrounding circumstances.*]—For the purpose of the interpretation of an agreement the terms of which are ambiguous, evidence of witnesses in regard to circumstances, such as the manner in which the parties have executed it and a prior agreement for the same purposes, is admissible. *Gregoire* v. *St. Charles de Bellechasse School Commissioners*, 29 Que. S. C. 215.

Contract — *Sale of standing timber — Representation as to quantity — Inadmissible evidence.*]—Oral evidence is inadmissible to establish that, at the time of a contract in writing for sale of the right to cut timber upon "lot number 15, range 13, Magog, Hattley, and lying on the east side of the road called Beach road," the vendor represented to the purchaser that the lot contained 125 to 150 acres, when in reality its extent was only 75 acres. *Hamel* v. *Smith*, 31 Que. S. C. 298.

Contradicting valid writing — *Commencement of proof by writing—Documents—Inscription de faux.*]—Oral evidence will not be admitted to contradict the terms of a writing validly made whether as a commencement of proof by writing or any other kind of oral testimony. 2. An inscription de faux is only required when it is desired to prove the falsity of what a public officer declares that he saw or heard himself. *O'Malley* v. *Ryan*, 21 Que. S. C. 566.

Conveyance — *Cutting down to mortgage.*] — The plaintiff executed a transfer absolute in form of land to the defendants. The plaintiff alleged that the transfer was executed to secure the defendants against their liability as indorsers of a promissory note for him; that he made default in payment at maturity; and that eventually the whole amount had been paid, partly by the plaintiff, and partly by the proceeds of the sale of a portion of the property transferred; and claimed an account and re-conveyance. The defendants alleged that the transfer was intended to operate according to its terms, i.e., as an absolute conveyance. The trial Judge found the facts in favour of the plain-

tiff upon evidence which, beyond the transfer and the notes, was wholly parol:—*Held*, that the plaintiff was entitled to judgment declaring the transfer though absolute in form to be a mere security, and directing an account and the reconveyance of the residue of the property. *Blunt* v. *Marsh*, 1 Terr. L. R. 126.

Custom of commerce — *Proof of.*]—Evidence may be given of the usage of commerce not only when the terms of the contract are ambiguous, but even when the intention of the parties is not clearly shewn according to the circumstances of the transaction. *Prior* v. *Atkinson*, 19 Que. S. C. 210.

Default of answer to interrogatories —*Promissory note — Prescription — Interruption — Part payment.*]—The default of the defendant to answer *interrogatories sur faits et articles* is sufficient proof to establish part payments made by him upon a promissory note for more than $50, and therefore to prove the interruption of prescription. *Charrier* v. *St. Pierre*, 19 Que. S. C. 103.

Evidence to explain contract — *Collateral security.*]—The plaintiff sued on a promissory note, and tendered with his action a certificate of shares which he said the defendant had transferred to him as collateral security for the loan represented by the note. The defendant pleaded that the note was made in connection with a contract by which the defendant sold to the plaintiff eleven shares of Kensington Land Company stock subject to the right of redemption within six months on certain conditions, and that the note was only collateral to the contract, and made at plaintiff's request to enable him to obtain the money by discount. The note and contract were produced:—*Held*, that taking the note and contract together, and also seeing the admission in the declaration that the two documents were connected with the same transaction, parol evidence was admissible in explanation of the contract as between the parties thereto. *Walker* v. *Brown*, 19 Que. S. C. 23.

Money lent — *Action to recover — Non-commercial action — Oral evidence — Inadmissibility.*]—Although a loan made by a banker or a money-lender, in the ordinary course of his business, is always an act of commerce, whatever be its object and whatever be the capacity of the borrower, a loan which he makes outside of the ordinary course of his business to a non-trader—for example, to a friend to oblige him—is non-commercial, and, if it exceeds $50, oral evidence of it is not admissible. *O'Brien* v. *Heirs of Daniel Church*, 34 Que. S. C. 16.

Notarial deed — *Description of land—Discrepancy — Parol testimony.*]—When in the description of an immovable in a notarial deed, there is a discrepancy between the area stated and the boundaries given, parol testimony is admissible to prove a mistake as to the latter. *David* v. *Hains*, 31 Que. S. C. 489.

Oral evidence — *Admissibility—Proof of contract between trader and non-trader.*]—A contract, as regards the proof of it, is civil, commercial, or mixed, that is to say, civil for one of the contracting parties and commercial for the other. In regard to mixed contracts, in matters where the amount claimed exceeds $50, oral evidence is admissible against a trader, but not in his favour. Therefore, an innkeeper will not be admitted to prove by witnesses a contract with a non-trader under which he claims a sum exceeding $50. *Pellerin* v. *Vincent*, 33 Que. S. C. 51.

Oral evidence—*Proof of a sum exceeding $50 by means of partial payments of less than $50—Presumption of payment—Imputation of payment at the end of a term of a lease.*]—Oral evidence is not admissible to prove the payment of a debt over $50 by means of partial payments of less than $50 each. The imputation that the tenant made a payment at the end of the term of his lease raises an inference that he paid the former terms. *Deslieres* v. *Deslieres et al.*, 35 Que. S. C. 528.

Oral testimony — *Contradicting deed—Pleading — Absolute deed — Security.* —An allegation in a pleading that a deed, in form a deed of sale, is in reality a pledge, allows the opposite party to prove by oral evidence that the deed is of a different nature, *e.g.*, a certificate of deposit for the benefit of a firm. *Whitney* v. *Joyce*, 14 Que. K. B. 406.

Oral testimony — *Contradicting deed—Redemption—Payment of sum named—Oral evidence to vary amount—Inadmissibility.*] —The vendor or his representative, who, in the exercise of the right of redemption, pays to the purchaser the sum agreed upon, executes a deed of re-purchase in which such payment is stated, and by a subsequent document, although of the same date, protests against the amount of such payment, will not be allowed to prove by witnesses that there has been a mistake in the amount.—Accordingly, his action for recovery of part of the sum paid, supported by that kind of evidence only, will be dismissed. *Saint-Onge* v. *Chopin*, 28 Que. S. C. 206.

Oral testimony — *Interruption of prescription — Agreement — Indemnity.*]—The interpretation of the short prescription of actions for damages resulting from torts or *quasi-torts*, cannot be proved by witnesses, any more than an agreement to pay an indemnity exceeding $50. *McLennon* v. *McKinnon*, 28 Que. S. C. 536.

Oral testimony—*Matter of public order —Consent to admission — Proof of.*]—The exclusion of oral testimony, except in cases provided for by art. 1233, C. C., is a matter of public order. Therefore, where such testimony has been adduced in a case where the principal sum demanded exceeds $50, the Court cannot take it into consideration, even if the opposite party in interest does not oppose its being considered.—Upon the supposition that such exclusion of oral evidence is not of public order, the renunciation of the party against whom the evidence is taken of the right to invoke art. 1233 can be inferred only from facts incompatible with the intention of objecting and leaving no doubt as to the consent of the party. *Gervais* v. *McCarthy*, 14 Que. K. B. 420.

Oral testimony — *Varying document—Improper admission at trial—Party adducing it complaining on appeal.*]—Oral evidence of false representations to contradict or change the terms of a writing validly executed, is inadmissible, but the party who adduces such evidence at the trial cannot be allowed to assert its nullity upon appeal. *Brownlee* v. *Hyde*, 15 Que. K. B. 221.

Parol evidence as to deed absolute in form being in fact only a mortgage. *Mathews* v. *Holmes* (1855), C. R. 2, A. C. 230; *Greenshields* v. *Barnhart* (1853), C. R. 2, A. C. 91.

Principal and agent—*Proof of agency—Mandate—Oral evidence—Admissibility.*]—The proof of the mandate in a commercial matter, where the sum demanded exceeds $50, may be made by the oral testimony of witnesses. Therefore, a plaintiff suing to recover payment of an account rendered by him as a commission merchant, to which the defendant sets up the defence that the plaintiff was the purchaser of the merchandise, is entitled to prove by witnesses the contract of mandate by virtue of which he accepted delivery. *Desrosiers* v. *Brown*, 17 Que. K. B. 55.

Proof of contract — *Oral testimony—Loss of written proof by unforeseen event—Procedure—Writing alleged and not expressly denied—Denial of the effect it may have.*]—A party who takes suit upon a private writing is bound to file it with the return of writ. It cannot be proved by oral testimony upon simple declaration of party that such writing is lost. To benefit by provisions of par. 6 of art. 1233 C. C. the party must prove, not only that such writing existed, but, in addition, the unforeseen event which caused its loss.—When defendant, without denying existence of contract alleged by plaintiff, pleads that the action taken (in present case, a seizure in revendication) does not arise from such contract, it then becomes necessary to establish the contract in order that the Court may be in a position to decide upon issues as joined. It is useless for plaintiff to rely upon art. 111 C. P., inasmuch as the denial of the right to action as taken is a denial of contract as alleged by plaintiff. *Mason & Risch Piano Co.* v. *Fournier* (1910), 38 Que. S. C. 242.

Proof of obligations and their extinction — *Private signature by mark — Denial under oath—Onus of proof—Parol testimony.*]—When a signature to a receipt, by affixing his mark in the presence of a witness, is denied under oath, as provided in Art. 208 C. P., by the party alleged to have subscribed it, the "onus" of proving the payment it refers to, is cast on the party who sets it up, and, if the sum exceeds fifty dollars, parol testimony, including that of the attesting witness to the receipt, is inadmissible for the purpose. *Legare* v. *Barbe* (1909), 38 Que. S. C. 27.

Trust.]—Among other claims in this action, the plaintiff asked to have it declared that the purchase made by the defendant of a lot of land was made to him as trustee and agent for the plaintiff, and that the plaintiff was entitled to the profits and an account. There was no writing evidencing the alleged trust.—*Held*, that the plaintiff was at liberty to prove by parol evidence (if he could do so) the existence of the alleged trust. The authorities are conflicting. *Bartlett* v. *Pickersgill*, 1 Cox 15, 1 Eden. 515, 4 East 577, *Heard* v. *Pilley*, L. R. 4 Ch. 548, *James* v. *Smith*, [1891] 1 Ch. at p. 387, and *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, discussed.—*Held*, however, that the evidence in this case failed to prove the trust. *Hull* v. *Allen*, 22 C. L. T. 158, 1 O. W. R. 151, 782.

Work done—*Request.*]—On a claim for repairs done by the lessee at the request of the lessor, and board of men, exceeding $50, the request cannot be proved by parol evidence. *Caron* v. *Gaudet*, 6 Que. P. R. 23.

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11. Secondary Evidence.

Books and documents — *Objections — Resemblance or identity of performances — Copyright.*] — Objections to secondary evidence of the contents of a written document must be distinctly stated when it is offered; and if not objected to it is received, and is entitled to its proper weight, and the weight to be attached to it will depend upon the circumstances of each case. Each programme of an entertainment is an original document, not a mere copy. The rule excluding oral testimony of a witness of the contents of a written document which he had read was not applicable to the present case (an action for infringement of a copyright by the performance of an opera). What was sought to be proved was not the contents of any book or document, but the resemblance or identity of two performances partly verbal, partly musical, and partly made up of dramatic action, gesture, and facial expression. Sufficiency and admissibility of evidence of resemblance or identity of the performance or of copy with original discussed. *Carte* v. *Dennis*, 5 T. L. R. 30.

Lost deed — *Secondary evidence — Oral testimony — Presumptions.*]—A party who relies upon a title deed which he asserts to have existed, but which he cannot find, may establish the existence, the tenor, and the destruction of it as well by oral evidence as by presumptions grave, precise, and sequential. *Bienvenu* v. *Lacaille*, Que. 17 K. B. 464.

Notice to produce — *Object of.*]—The only object of a notice to produce is to enable the party giving it to put in secondary evidence of the contents of a writing, if the original, being in the possession of the party to whom the notice is given, is not produced by him. If the party chooses to produce the original without notice, or if the party desiring to put in the original gets possession of it and puts it in, it is no objection that a notice to produce was not given. *Carte* v. *Dennis*, 21 C. L. T. 267, 5 T. L. R. 30.

Proof in writing—*Necessity for—Loss by unforeseen accident—Oral testimony.*] — Where the original of a notarial minute has disappeared without the fault of the parties, by some inexplicable circumstance, the case comes within art. 1233, par. 6 C. C., which provides that proof may be made by testi-

mony "in cases in which the proof in writing has been lost by unforeseen accident." *Filiatrault* v. *Feeny*, 20 Que. S. C. 11.

Voluntary destruction of document.] —A plaintiff who has voluntarily destroyed an instrument under seal evidencing an agreement with the defendant cannot be allowed to prove orally the contents of such document. *Coté* v. *Cantin*, Q. R. 21 S. C. 432.

Will — *Evidence Act — R. S. N. S. (1900), ch. 163, secs. 22 and 27—Secondary evidence—Ejectment — Mesne profits.*] —Section 27 of the Evidence Act of Nova Scotia (R. S. N. S. (1900), ch. 163), provides that "A copy of a notarial Act or instrument in writing made in Quebec before a notary public, filed, enrolled or enregistered by such notary and certified by a notary or prothonotary to be a true copy of the original, thereby certified to be in his possession as such notary or prothonotary, shall be received in evidence in any Court in place of the original, and shall have the same force and effect as the original would have if produced and proved."—And by the first two sub-sections of sec. 22, it is provided that:— "The probate of a will or a copy thereof certified under the hand of the registrar of probate or found to be a true copy of the original will, when such will has been recorded, shall be received as evidence of the original will, but the Court may, upon due cause shewn upon affidavit, order the original will to be produced in evidence, or may direct such other proof of the original will as under the circumstances appears necessary or reasonable for testing the authenticity of the alleged original will, and its unaltered condition and the correctness of the prepared copy. —2. This section shall apply to wills and the probate and copies of wills proved elsewhere than in this province, provided that the original wills have been deposited and the probate and copies granted in Courts having jurisdiction over the proof of wills and administration of intestate estates, or the custody of wills:"—*Held*, that a copy of a will executed before two notaries in the province of Quebec under the provisions of art. 843 C. C., certified by one of said notaries to be a true copy of the original in his possession, is admissible in evidence on the trial of an action of ejectment in Nova Scotia, as provided in sec. 27.—In an action of ejectment the plaintiff cannot recover *mesne* profits which accrued while the title was in his predecessor; and the defendant in possession by consent of the owner is not entitled to be paid for improvements or repaid disbursements made before the plaintiff obtained title.—Appeal dismissed with costs. *Musgrave* v. *Angle* (1910), 30 C. L. T. 691, 43 S. C. R. 484.

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12. WITNESSES.

Action to perpetuate testimony—Procedure—Order for examination of witnesses. *Atlas Loan Co.* v. *Honsinger*, 3 O. W. R. 917.

Admission of liability — *Burden of Proof — Positive and negative evidence.*]—Where in an action against the indorser of a promissory note, a defence of failure to present for payment and to give notice of dishonour is admitted, but the plaintiff relies on an alleged admission of liability by the defendant, the burden of proof is on the plaintiff; and the case is not one where the rule as to the adoption of the positive evidence of one witness against the negative evidence of another can be properly applied. *Hart* v. *Taylor*, 37 N. S. R. 155.

Alien — *Form of oath.*]—Upon a trial for murder, a Chinese witness, who was not a Christian, was interrogated as to the form of oath most binding, and was sworn by "the King's oath," or "chicken oath," a form deemed of greater solemnity than those ordinarily administered, the "paper" and "saucer" oaths. *Rex* v. *Ah Wooey*, 9 B. C. R. 569.

Appeal—Question of fact — Conflicting evidence. *Bent* v. *Morine*, 3 E. L. R. 108.

Bornage—*Right of defendant to call witnesses—Absence of plea.*]—In an action *en bornage*, a defendant, who has not filed a plea, has nevertheless a right to examine witnesses. *Johnsons Co.* v. *Wilson*, Q. R. 24 S. C. 131.

Competency — *Religious belief.*]—A person offered as a witness, upon being examined on the *voir dire* stated that he believed in God but did not believe in a future state of rewards and punishments dependent upon his conduct while on earth, whereupon he was rejected as incompetent:—*Held*, that he was properly so rejected. *Bell* v. *Bell*, 34 N. B. R. 615.

Conflicting evidence—*Duty of Court.*] —When several witnesses equally intelligent and credible, who appear to give their testimony in good faith, do not agree upon the existence of the fact, the Court should adopt the version of the majority, rather than that of the minority.—2. As between witnesses equally honest, the Court ought rather to believe those who would not be likely to be mistaken than those who are likely to misconceive the facts in question. *Guay* v. *Village of Malbaie*, 25 Que. S. C. 263.

Conflicting testimony — Appeal from Master's report—Forgery—Perjury—Prosecution—Solicitor—Law Society *Hall* v. *Berry*, 10 O. W. R. 954.

Conflicting testimony—Verdict. *City of Montreal* v. *Enright*, 3 E. L. R. 129.

Cross-examination on affidavit — Interlocutory motion — Original document — Production by witness. *Wilson* v. *Rannie* (Y.T.), 1 W. L. R. 397.

Cross-examination to credit — *Contradiction — Defamation.*]—The defendant in an action of defamation, to which he pleaded privilege, after himself stating in the witness box that one H. had informed him that the plaintiff was keeping the strippings from his cows, and making butter from them, contrary to his agreement with a cheese-making association, which was the alleged slander, called H. as a witness, and proved that H. had told him (the defendant) what he had stated. The plaintiff's counsel then in cross-examination asked H. his grounds

for making the statement, and H. said that he had seen the plaintiff's wife taking the strippings, and that she had not mixed them with the milk sent to the factory; that she told him that she always took the strippings from the cows and used them in the house. —The plaintiff proposed to call, in reply, a witness to contradict H.:—*Held*, that this evidence, if sufficiently tendered, was properly rejected, there being no plea of justification and the defendant not seeking to go into the truth of the charge. It was not competent for the plaintiff to make the evidence relevant by himself asking H., in effect, whether the charge was true or not, and then seeking to contradict him. The cross-examination of H. upon this point was proper, but only as a matter of credit, to rebut evidence brought out by himself upon a matter going only to credit. *Preston* v. *Thompson*, 21 C. L. T. 464.

Examination of plaintiff — Over 80 years of age—Required at home—Illness of wife—Motion to cross-examine plaintiff on affidavit at Toronto, instead of at Woodstock, his county town—Motion dismissed—Costs in the cause—Rules 444, 491, 492. *Hull* v. *Allen* (1910), 17 O. W. R. 487, 2 O. W. N. 260.

Examination of witness de bene esse. *Haskins* v. *May*, 2 O. W. R. 500.

Examination of witness de bene esse —Important witness—Necessity for examination in open Court — Refusal of motion. *Switzer* v. *Switzer*, 11 O. W. R. 311.

Examination of witness de bene esse —*Rule 638.*]—Summons to examine a witness *de bene esse*. The witness lived at Telegraph Creek, in Cassiar district, but at the time of the hearing of the summons he was in Victoria temporarily, and the application was for the purpose of getting his evidence before he went back to Telegraph Creek:—*Held*, that Rule 368 was applicable and order made as asked. *Hyland* v. *Canadian Development Co.*, 22 C. L. T. 170, 9 B. C. R. 32.

Finding based on positive evidence —*Appeal.*]—In an action for injury to land by flooding the trial Judge found, with some doubt, that the water had been delivered by means of a culvert constructed by the defendants, in spite of a mass of testimony going to shew that this was impossible:—*Held*, that the Court (Supreme Court *en banc*) would not interfere with the Judge's finding, there being positive evidence to sustain it, which he had chosen to believe, and it could not be said that he was clearly wrong. *Milton* v. *District of Surrey*, 10 B. C. R. 296

Judge in Chambers has no power to order *viva voce* examination of a witness *de bene esse*. *Hodgson* v. *Dawson* (1869), 1 P. E. I. R. 281.

Motion—Cross-examination of officers of company on affidavit — Injunction — Production of documents — Undertaking to produce — Questions—Relevancy—Sufficiency—Trade union—Details as to employer's business. *Gurney Foundry Co.* v. *Emmett*, 2 O. W. R. 938, 959, 1038, 3 O. W. R. 382, 554.

Motion — *Examination of witness on pending motion—Ex parte motion—Substituted service of process—Status of witness to move to set aside appointment and subpœna.*]—Motion by a person, not a party to the suit who was served by plaintiff with a subpœna and appointment for examination as a witness upon a pending motion, to set aside the subpœna and appointment. Several grounds were taken in the notice of motion. Those mainly relied on were: (1) that there is no motion pending before the Court, and so Rule 491 does not apply; (2) that an order for substituted service has already been made and acted on, and the witness, on whom service was made, has disclaimed any knowledge of defendant's residence, and (3) that the Rules do not provide for or permit the examination of witnesses upon an *ex parte* motion. It was argued that the witness has no status to move yet. This point was met by *Steele* v. *Savory*, 8 Times L. R. 94, which seems to overrule the objection. The substantial question was whether an *ex parte* motion is a "motion before the Court" within the meaning of Rule 491. The notes to this Rule in Holmested & Langton's Jud. Act, p. 673, and the cases cited, seem to shew that an *ex parte* motion is a motion in support of which evidence can be obtained:—*Held*, plaintiff was right in trying to obtain such information as would enable such an order to be made as would *prima facie* bind defendant on the question of service. When an order has been made, as here, which was plainly abortive, it does not seem reasonable to hold, in the absence of authority, that plaintiff's whole remedy is exhausted. The motion dismissed. *Dunlop*, v. *Dunlop*, 5 O. W. R. 258, 305, 9 O. L. R. 372.

Oral testimony — *Party to cause—Promissory notes — Possession of.*]—A party to a cause may be examined as a witness in order that he may be made to explain how he came into possession of certain promissory notes, and on what conditions they were accepted. *Sauvé* v. *Charlebois*, 7 Que. P. R. 442.

Party as witness — *Discrediting—Reputation—Opinion—Rejection of evidence—New trial.*]—At the trial of an action for negligence in non-repair of a way, the plaintiff testified in his own behalf. For the defence a neighbour of the plaintiff's was called who swore that the plaintiff's general reputation among his neighbours in the community was not good; the witness would not believe the plaintiff on his oath. He said he knew the individual opinions of the plaintiff's neighbours as to his character, and he was then asked by counsel for the plaintiff: "Whose opinion do you know?" This was not allowed:—*Held*, that this evidence should not have been rejected; but, as, even assuming the plaintiff's testimony to be true, the action was properly dismissed by the trial Judge, there was no substantial wrong or miscarriage within Order 37, Rule 6, and there should not be a new trial. *Messenger* v. *Town of Bridgetown*, 33 N. S. R. 291.

Party as witness—*Refusal to incriminate himself—Municipal councillor—Quo warranto.*]—The defendant was elected a member of the council of a village, the charter of which required that no one should occupy such office unless he could read and write.

The plaintiff proceeded against the defendant by *quo warranto* upon the ground that he could neither read nor write. Being examined by the plaintiff as a witness, the defendant refused to say whether he could read or write, and refused to read a paper presented to him:—*Held*, that he was not bound to incriminate himself, and his refusal was proper. *St. Arnaud* v. *Barrette*, 4 Que. P. R. 102.

Petition to correct deposition.]—A witness has the right to apply directly to the Court, by petition, to have his deposition corrected, when he states that it is not correct. *Nadon* v. *Richmond, Drummond, and Yamaska Ins. Co.*, 3 Que. P. R. 439.

Right to contradict witness—*Judge's Leave—Refusal of.*]—Where a witness, whether a party to the action or not, is called by the plaintiff to prove a case, and his evidence disproves the case, the plaintiff may yet establish his case by other witnesses called, not to discredit the first, but to contradict him on facts material to the issue; and the right to contradict by other evidence exists, though the trial Judge may not grant his permission. *Stanley Piano Co. of Toronto* v. *Thompson*, 21 C. L. T. 73, 32 O. R. 341.

Trial Judge—*Appellate Court.*]—When the credibility of a witness who has given his evidence before the trial Judge is questioned before an appellate Court, the Court should reverse the finding of the trial Judge as to the witness's evidence only if the evidence itself furnishes very strong grounds for doing so, and if the matter is in doubt the finding should be accepted. *Laflamme* v. *Fortier*, 27 Que. S. C. 96.

EXAMINATION.

See BANKRUPTCY AND INSOLVENCY—DISCOVERY — ELECTIONS—EXECUTION—JUDGMENT DEBTOR.

EXAMINATION IN ACTION.

See DISCOVERY—JUDGMENT DEBTOR.

EXAMINATION OF INSOLVENT.

See BANKRUPTCY AND INSOLVENCY — STATUTES.

EXAMINATION OF JUDGMENT DEBTOR.

See COURTS—JUDGMENT DEBTOR.

EXAMINATION OF PARTIES.

See DISCOVERY—ELECTIONS.

EXCEPTION.

See ACTION—AFFIDAVIT — APPEAL—BANKRUPTCY AND INSOLVENCY — BENEFICE D'INVENTAIRE — COMPANY — COSTS—COURTS — DISCOVERY — ELECTIONS — EXECUTION — EXECUTORS AND ADMINISTRATORS — HUSBAND AND WIFE—INFANT — JURISDICTION—PARTIES — PARTITION — PLEADING — SOLICITOR—STAY OF PROCEEDINGS—WRIT OF SUMMONS.

EXCHANGE OF GOODS.

See SALE OF GOODS.

EXCHANGE OF LANDS.

See VENDOR AND PURCHASER—FRAUDULENT CONVEYANCE—CONTRACT.

EXCHEQUER COURT OF CANADA.

Admiralty jurisdiction — *Action by ship-builders for price of ship—Counterclaim for moneys expended in repairs.* —The plaintiffs built a ship in Scotland for a company in Vancouver, B.C. On her way out certain repairs were made, which cost £3,638. The first instalment of the price of construction not being paid, this action was commenced in the Exchequer Court of Canada by seizure of the ship. The Vancouver company counterclaimed for the sum mentioned, the expenditure whereof, as they alleged, was rendered necessary by the defective work and material in her construction and equipment: —*Held*, on motion, that the counterclaim must be struck out, for it was not within the Admiralty jurisdiction of the Court. *Bow, McLachlan, & Co., Limited*, v. *The "Camosun,"* 12 B. C. R. 283, 4 W. L. R. 113.

Appeal — *Interlocutory order—Different motion on appeal — Rehearing.*] — Where a motion made on appeal was a different one from that made to the Court below, and the matter was one in which relief could still be given in the Court below, the Court on appeal refused to entertain the motion, although in such cases the appeal is by way of rehearing. *Bow, McLachlan & Co., Limited* v. *Union S. S. Co. of British Columbia*, 26 C. L. T. 779, 10 Ex. C. R. 333.

Ship—*Appeal—Interlocutory order—Different motion on appeal—Rehearing.*] — Where a motion made on appeal was a different one from that made to the Court below, and the matter was one in which relief could still be given in the Court below, the Court on appeal refused to entertain the motion, although in such cases the appeal is by way of rehearing. *Bow, McLachlan & Co., Limited* v. *Union S. S. Co. of British Columbia*, 26 C. L. T. 779.

See ADMIRALTY — APPEAL — CONSTITUTIONAL LAW—COURTS—CROWN — EVIDENCE — RAILWAYS AND RAILWAY COMPANIES — REVENUE—SHIP—TIME.

EXCISE.

See REVENUE.

EXECUTION.

1. ABSCONDING DEBTORS, 1747.
2. EQUITABLE EXECUTION, 1750.
3. EXEMPTIONS, 1752.
4. FOR COSTS, 1763.
5. PRACTICE AND PROCEDURE, 1764.
6. SEIZURE, 1777.
7. SALE UNDER, 1796.
8. STAY OF EXECUTION, 1805.
9. TIME FOR ISSUING, 1806.

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1. ABSCONDING DEBTORS.

Action for money demand — *Jurisdiction of Court — Cause of action—Foreigners —Domicile — Rules 201, 202 — Tort—Conversion of money abroad—Detention in Manitoba — Contract — Motion to set aside order of attachment — Service of statement of claim — Substituted service — Personal service on foreigners in jurisdiction—Affidavits —Defendants out of jurisdiction—Temporary residence.*]—Upon an application by the defendants to set aside an order allowing substituted service of the statement of claim and an application to set aside an order of attachment under which certain goods had been seized by the sheriff:—*Held*, per Mathers, J., (1) that the facts did not bring the case within Rule 201 of the King's Bench Act, R. S. M. 1902 c. 40, or any of its sub-rules, so that it was not a case in which the statement of claim could be served out of the jurisdiction.—(2) It could not be said that the defendants had committed a tort in Manitoba within the meaning of paragraph (*e*) of Rule 201. *Anderson* v. *Nobels Explosive Co.*, 12 O. L. R. 644, followed.—(3) A Court has no right to enforce a personal money claim against a person who is neither domiciled nor resident within its jurisdiction, unless he has appeared to the process or has expressly agreed to submit to the jurisdiction of such Court. *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A. C. 670, and *Emanuel* v. *Symon*, [1908] 1 K. B. 302; and, therefore, apart from Rule 202 of the King's Bench Act, the possession by the defendants of property in Manitoba gave the Court no jurisdiction over the defendants in an action *in personam*.—(4) If evidence had been given that the defendants were possessed of property in Manitoba to the value of $200, it would have been necessary to consider whether, under Rule 202, the statement of claim could be served out of the jurisdiction without previously obtaining leave to serve it: *Gullivan* v. *Cantelon*, 16 Man. L. R. 644; and also whether the plaintiff's cause of action against the defendants was upon a contract within the meaning of that Rule.—(5) The writ of attachment should be set aside with costs as having been issued without jurisdiction; but, as there was a possibility that the plaintiff might succeed in establishing a claim to the specific chattels seized, an order should be made for the detention of them by the sheriff until further order, on condition that the plaintiff should always keep the cost of detaining, storing, and insuring the goods paid in advance so as to protect the defendants against loss in case the plaintiff should fail to establish his claim, with leave to either party to apply at any time to vary or rescind the order.—(6) That substituted service of the statement of claim should not be allowed in a case like the present, when personal service out of the jurisdiction was not authorised. *Fry* v. *Moore*, 23 Q. B. D. 395, and *Wilding* v. *Bean*, [1891] 1 Q. B. 100, followed.—Upon appeals from the orders of Mathers, J. — *Held*, by Howell, C.J.A., and Perdue, J.A., that the evidence shewed that the defendants were not, at the time of the commencement of the action, domiciled or ordinarily resident within Manitoba, and the case was, therefore, not within paragraph (*c*) of Rule 201, and, not being within any of the other paragraphs of that Rule or Rule 202, the Court had no jurisdiction, and the appeals should be dismissed.—Per Richards and Phipps, JJ.A., that the defendants being shewn to have acquired a domicile in Manitoba, or to have been ordinarily resident here up to within about a month before the commencement of the action, and having described themselves as of Winnipeg only two weeks before, the onus was upon them to shew that they had ceased to be so ordinarily resident, and had, at the time of the commencement of the action, no intention of returning; and that they had not satisfied that onus.—The Court being equally divided, the appeals were dismissed without costs. *Emperor of Russia* v. *Proskouriakoff*, 7 W. L. R. 766, 8 W. L. R. 10, 461, 18 Man. L. R. 56.

Affidavit—Cause of action — Breach of promise of marriage — Jurisdiction — Unliquidated damages — Order XLVI., Rule 2 —Appraisement. *McKay* v. *McDonald*, 40 N. S. R. 614.

Application to set aside attachment —*Practice — Appearance — Evidence.*] — An application by the defendant to set aside an attachment against him, will be heard before the defendant appears.—The defendant came from the United States to Halifax, N.S., to work, in connection with certain gold mines, a valuable cyanide plant owned by him, and he carried on this work for 6 months in Halifax county, and then decided to remove the plant to another county in Nova Scotia in connection with another mine. Having made the necessary arrangements, he went to New York on the 14th December, to spend Christmas. There was no secrecy about his movements, and he left his horses and carriages and other property in Nova Scotia. There were no claims against him except the claim of the plaintiff, and a disputed claim:—*Held*, that attachment proceedings against him as an absent or absconding debtor should be set aside.—Notes relating to other cases of alleged absent or absconding debtors. *Getchell* v. *Stuyvesant*, 40 N. S. R. 359; see also *Matthews* v. *Metropolitan Contracting Co.*, *ib.* 361*n.*; *Ross* v. *Boston and Nova Scotia Coal Co.*, *ib.* 362*n.*

Company — Service of writ. *Halifax Hotel Co.* v. *Canadian Fire Engine Co.*, 2 E. L. R. 36.

County Courts Act, R. S. M. 1902 c. 38, ss. 200-206, 252, 253—*Construction of statutes—Meaning of words "trader" and "manufacturer" in s. 200.*]—1. The provisions of ss. 200 to 206 of the County Courts Act, R. S. M. 1902, c. 38, respecting the ratable distribution of the proceeds of the sale of the goods of a trader amongst all his execution creditors, do not repeal by implication the earlier legislation to be found in ss. 252 and 253 of the same Act, and do not apply to the case of the goods of an absconding debtor seized under a writ of attachment and afterwards sold under execution, so that in the latter case, although the debtor may be a trader, no creditor can share in the proceeds of the sale of the goods who has not sued out an attachment within the time allowed.—2. A general statute does not repeal an earlier special enactment by mere implication. *Bailey* v. *Vancouver*, 25 S. C. R. 62, followed:—*Quære*, whether a baker is a manufacturer within the meaning of s.-s. (*c*) of s. 200.—*Semble*, that a baker would not be deemed to be a trader within s. 200 (*a*) merely because, as incidental to his baking business, he bought and sold candies, cakes, and confectionery to a small extent. *Thomas* v. *Hall*, 6 P. R. 172, followed. *Robinson* v. *Graham* 3 W. L. R. 135, 16 Man. L. R. 69.

Defendant about to leave province—*Intent to defraud — Foreign defendant.*] — The mere fact of a person domiciled in a foreign country leaving the limits of this country does not indicate of itself an intention to defraud, even although he may own debts within this country. Attachment before judgment quashed. *Lemieux* v. *Le Cirque Sells & Downs*, 7 Que. P. R. 456.

Defendant out of the country—*Goods claimed by wife and offered for sale by her.*] —A right of conservatory attachment arises when the defendant insolvent has left the country, and his wife has offered his goods for sale and claims a title thereupon. *Lefebvre* v. *Picard*, 7 Que. P. R. 233.

Foreign company—*Agent "carrying on business."*]—The plaintiffs sued the defendants for an account incurred by P., who was engaged in negotiations for the sale of one of the defendants' engines to the city of H., and while so engaged incurred the account in question. P. left the province, leaving the account unpaid, and attachment proceedings were commenced against the defendants under the provisions of O. 47, r. 6:—*Held*, that, as the evidence shewed the agent to have been employed only for the one transaction, and no further or other business was contemplated, this did not constitute "carrying on business" within the province within the meaning of the Order, and the writ and attachment, with the service thereof, must be set aside. *Halifax Hotel Co.* v. *Canadian Fire Engine Co.*, 2 E. L. R. 36, 277, 41 N. S. R. 97.

Proceeds of sale — Distribution — Creditors entitled to share—County Courts Act, ss. 200-206—Application to attachment proceedings — Trader — County Court appeal —Final or interlocutory order. *Robinson* v. *Graham* (Man.), 3 W. L. R. 135.

Residence abroad — *Departure — Intent to defraud — Company — Departure of employees.*] — The departure, from the province of Quebec, of a person domiciled and resident in the United States, and who has contracted a debt in this province, does not, in the absence of evidence of special intention to defraud, constitute a departure with intent to defraud.—The departure from the province of the actors and travelling manager of a theatrical organization, with the scenery, etc., of the company, cannot be said to be a departure of the company. *Boulet* v. *Mittenthal Brothers Amusement Co.*, 8 Que. P. R. 286.

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2. EQUITABLE EXECUTION.

Action for—*Judgments Act — Lien on land — Equitable interest — Registration—Devolution of Estates Act — Manitoba Trustee Act — Interest of heir in lands of intestate — Realty or personalty — Parties to action.*]—Z., the owner of the lands in question, having died intestate, his widow, A., took out letters of administration of his estate. B., the only child of Z. and A., subsequently married the defendant, and then died childless and intestate. The plaintiff, having recovered judgment in the King's Bench against the defendant, registered in the proper land titles office a certificate of the judgment, and then brought this action for a sale of the defendant's interest in the lands to realize his judgment. A. had not disposed of the land in any way under her letters of administration, nor had letters of administration of the estate of B. been taken out:—*Held*, that the defendant had no interest in the land in question, which was bound by, or could be sold under, the registered judgment. —*Held*, also, that an administrator of the estate of the defendant's wife was a necessary party to any proceedings affecting her estate or the defendant's interest in it. *Re Shephard*, 43 Ch. D. 131, followed.—*Semble*, even if the estate of the defendant's wife had been represented in the action, it would have to be held that the defendant, while the land remained vested in the administrator, had no interest in it which would be bound by the judgment.—Section 3 of the Judgments Act, R. S. M. 1902 c. 91, with the interpretation of the word "land" given in s.-s. (*j*) of s. 2, refers to a present existing interest in land, and does not cover an interest which may come to a beneficiary as real estate, or may come to him as money, according to the actions of the administrator and the unknown exigencies of the administration. *McDougall* v. *Gagnon*, 3 W. L. R. 287, 4 W. L. R. 425, 16 Man. L. R. 232.

Application for order for sale *of land to satisfy judgment—Affidavits—Information and belief — Registration of certificate of judgment — Evidence of — Transfer of land by judgment debtor — Time of incurring debt — Property of debtor.*]—Upon an application under Rules 742 and 743 for an order for the sale of lands registered in the name of S. R. to satisfy a judgment against C. E. R.:—*Held*, that it was not an interlocu-

tory motion, and affidavits on information and belief could not be used: Rule 507.—*Gilbert* v. *Endean*, 9 Ch. D. 259, followed.—*Held*, also, that it was necessary to shew that there was a duly registered certificate of the judgment; and the only proper evidence of that was a certified copy of the document. *Massey* v. *Warener* 12 Man. L. R. 48, followed.—*Semble*, that, even if the material upon the application were sufficient, the applicant would not be entitled to the order, for the debt for which the judgment was recovered was incurred more than a year after the conveyance of the land by C. E. R. to S. R.; and the evidence did not shew that the land constituted the whole or even a substantial part of the property of which C. E. R. was possessed at the time. *Canada Suppy Co.* v. *Robb* (1910), 14 W. L. R. 306, 20 Man. L. R. 33.

Declaratory judgment—Foreign judgments — Appearance — Attornment to jurisdiction — Statute of Limitations — Absence from province. *Stewart* v. *Guibord*, 2 O. W. R. 168, 554, 6 O. L. R. 262.

Fi. fa. lands—*Equitable interest in lands —Assignment of — Priorities — Land Titles Act — Lien — "Instrument" — "Lands" —Filing writ of execution in land titles office.*] — The plaintiffs, being the registered owners of a quarter section of land, on the 24th December, 1903, agreed to sell it to the defendant G. S. in consideration of a price payable partly in cash and the balance in nine annual instalments, with interest, and agreed to transfer it to G. S. or his approved assignee, upon payment in full of the purchase-money and compliance by him with the further conditions set out in the agreement. On the 24th July, 1907, the defendant company caused to be filed in the land titles office a certified copy of a writ of execution, issued upon a judgment recovered by the company against G. S., directed to a sheriff, requiring him to levy the amount of the judgment out of the lands of G. S. The writ was dated the 3rd July, 1907, and was still in force at the time of this action. On the 31st December, 1908, G. S., by an indenture in writing, transferred and assigned to the defendant T. J. S. all his interest in the land under the agreement for sale in consideration of $600:—*Held*, that the interest of G. S. in the lands was purely an equitable one. By the writ of execution the sheriff is commanded to levy the amount of the execution out of the "lands" of the debtor; and, having regard to the provisions of the Land Titles Act, especially s. 129, s.-s. (2), (3) and (4) ss. 132, 136, and form V., "lands" does not include an equitable interest in lands and a writ of execution does not bind the equitable interest of a purchaser under an agreement of sale:—*Held*, also, that the execution does not give the execution creditor a lien on land realizable by equitable execution. *Bocz* v. *Spiller*, 1 W. L. R. 366, followed.—*Held*, also, that the word "instrument" in s.-s. 3 of s. 129 would not include the assignment by G. S. to T. J. S. of his interest in the land—the assignment was not a registrable document under the Act.—*Held*, therefore, that the execution of the defendant company was not binding upon the equitable interest which G. S. had in the land at the time of the filing of a copy of the writ in the land titles office. *Can. Pac. Ry. Co.* v. *Silzer* (1910), 14 W. L. R. 274, 3 Sask. L. R. 162.

Judgment debtor's interest in land —*County Court judgment—Lien—Sale under registered certificate—Cancellation of agreement for sale—Consideration — Crop-payments—Assignment — County Courts Act — Redemption.*]—The binding effect of the registration of a certificate of a County Court judgment against the lands of the judgment debtor, under s. 213 of the County Courts Act, R. S. M. 1902, c. 38, is not nearly so extensive as in the case of a registered judgment of the Court of King's Bench under the Judgments Act, R. S. M. 1902, c. 91; and, when the only interest or estate of the judgment debtor in the land in question is under an agreement of purchase providing for payment by delivery of one-half of each year's crop and in no other way, the judgment creditor, having only a registered County Court judgment, does not acquire all the rights or position of an assignee of the benefits of the agreement, and is not necessarily entitled to notice of a cancellation of the agreement by the vendor, in pursuance of a stipulation contained therein, or to insist on taking the place of the purchaser in all respects or to redeem the vendor, nor is he entitled to an order for the sale of the land after such cancellation. When the vendor in such a case declares the agreement forfeited and cancels the same by notice under one of its terms, whether or not the purchaser could get relief in equity against the forfeiture, the judgment creditor has no standing to claim such relief. *McGregor* v. *Withers*, 15 Man. L. R. 434, 1 W. L. R. 429, 24 C. L. T. 252.

Share in estate — Indebtedness to estate —Formation of company — Assignment of debtor's interest — Priority over creditors' claims. *Union Bank of Canada* v. *Brigham*, 2 O. W. R. 699.

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3. Exemptions.

Alimentary debt — *Property otherwise insaisissable.*] — Property the subject of a gift with a provision for *insaisissabilité* is exigible for an alimentary debt. *Patenaude* v. *Boissonneault*, 10 Que. P. R. 258.

Alimony—*Gift by onerous title — Non-seizability.*] — An alimentary allowance, created by an onerous deed of gift, is seizable. *Biron* v. *Biron* (1910), 16 R. L. n. s. 386, 16 R. de J. 418.

Alimony—*Lacombe Law, C. P. 1147a.*]—*Held*, an order for alimony is not subject to the provisions of the Lacombe law, and defendant's salary may be attached therefor. *Désormeau* v. *Legault & Peck Rolling Mills Co.* (1910), 11 Que. P. R. 328.

Amount exigible *by the father and mother of a deceased person from the author of the offence or of the quasi-offence which caused the death — Alimentary allowances granted by a Court — Exemption from seizure.*]—The amount which the party responsible for the death of another is condemned to pay to the latter's surviving father and

mother, by virtue of article 1056 C. C., is an alimentary allowance granted by a Court, within the meaning of art. 599 (4) C. P., and is exempt from seizure. *Laganiere* v. *Desjardins & Great Northern Rw. Co.* (1909), 37 Que. S. C. 513.

Attachment — *Action for tort — Criminal conversation—Rules 813-858 — Claim for damages—Right to attaching order.*] — In an action for $5,000 damages for enticing away the plaintiff's wife and for criminal conversation, the plaintiff obtained an order directing the attachment of certain property of the defendant. By the group of Rules governing attachment proceedings, Rules 813-858 of the King's Bench Act, the process is not declared to be available in every case where money is demanded. By Rule 815 property "may be attached for the payment of a debt or the satisfaction of a cause of action arising from legal liability:" and Rule 817 requires an affidavit stating, *inter alia*, that the defendant is legally liable to the plaintiff in damages in the sum claimed in the action, "after making all proper and just set-offs, allowances, and discounts:"—*Held*, that the procedure, if applicable at all to an action of tort, was not applicable to an action such as this, where the damages are not given merely by way of restitution, but may be of an exemplary or punitive nature; and the attaching order was set aside. *Hime* v. *Coulthard* (1910), 15 W. L. R. 288, 20 Man. L. R. 164.

Attachment after judgment — *Contestation — Agency — Attorney ad litem — Revocation — Disavowal—Exemption from seizure — Alimentary debt — Costs—Retroactive effect—C. P. 251, 599 (3), (4).*] — The plaintiff in the original action has as much right as the defendant to contest the declaration of the garnishee.—The mandate of an attorney *ad litem* cannot be revoked by a simple denial of it on the part of the opposite party, and it is only by means in disavowal, taken by the party himself and in the manner provided in Arts. 251 and following of the Code of Procedure, that the law will recognize as legal any such proceedings. —Immovables, sums of money or objects given upon the condition of their being exempt from seizure, as provided in par. 3 of Art. 599 C. P., may, nevertheless, be seized in satisfaction of an alimentary debt.—The costs and expenses attending a suit instituted by a universal usufructuary legatee but without calling into question either the possession, the enjoyment, the creation or the preservation of such usufruct, which is alleged to be exempt from seizure, do not create an alimentary debt because they were not useful either for the material existence of the object given or bequeathed, or of that of the person who received the gift of legacy. A legatee, upon whom a seizure is effected for costs of the nature of those stated, has a right to obtain a discharge from the attachment by garnishment under the provisions of pars. 3 and 4 of Art. 599 C. P.—*Quære*, do objects declared exempt from seizure by the donor become, at the donee's death, liable thereto, with retroactive effect in such a way that all of the donee's creditors acquire the right to seize them? *Drainville* v. *Savoie & Rouleau* (1910), 16 R. L., n. s. 505.

Attachment in revendication — *Deposit—Delivery—Third party*—C. C. 1810.— A person who receives certain effects on deposits has the right to retain them and to refuse to deliver them except upon the order of the depositor or of a Court. *Prince Co.* v. *Rochon & Lamontagne*, 16 R. L., n. s. 233.

"Books of a professional man."]— Plaintiffs recovered judgment against defendant and under their execution had seized certain law books of defendant. These books had been sold by plaintiff to defendant: — *Held*, that there was an entire account, that the books specifically paid for were exempt under Alta. Exemption Ord. s. 2, s.-s. 6, but the rest were liable to be seized under s. 4. *Canada Law Book Co.* v. *Fieldhouse* (1909), 12 W. L. R. 396.

Butcher's horse—*Art. 598, C. P. - Opposition.*] — A horse used by a butcher to deliver meat to his customers does not fall under the designation of "tools, instruments, or other effects," in cl. 10 of Art. 598, C. P. An opposition to have the animal withdrawn from a seizure of goods under execution, on the ground that the execution debtor used it in the exercise of his trade, should be dismissed upon motion, under Art. 651, C. P. *Lecavalier* v. *Brunelle*, 33 Que. S. C. 145, 9 Que. P. R. 209.

Clothing — *Retention for value of repairs — Clothing supplied by husband to wife.*] — A fur overcoat for a man of certain age and of a certain social position is an ordinary garment necessary and indispensable during the winter season, and therefore is exempt from seizure under Art. 589, C. P. C. 2. A right of retention claimed by one who has repaired such an overcoat does not authorise a creditor to seize it under execution. 3. A husband being obliged to clothe his wife, necessary articles of personal clothing given to a wife by her husband during marriage do not fall under the prohibition against gifts from husband to wife *inter vivos*, and such garments once given to the wife become her individual property, and therefore are not exigible for the debts of her husband. *Robertson* v. *Honan*, 24 Que. S. C. 510.

Contractor—*Animals used in business—Several callings.*]—A contractor who uses a horse in his business is not a carter, and cannot as such oppose the seizure of the horse in execution. 2. A debtor who follows several callings cannot claim exemption from seizure of tools used in his business, unless they are used in his principal calling. 3. The law does not allow the privilege of protection from seizure of two horses or two oxen except to a farmer, the cultivation of whose farm is his principal occupation. *McManamy* v. *Pelletier*, 24 Que. S. C. 127.

Cow—*Party not a farmer — C. P. 598.*] —Although the debtor was not a farmer, he had the right to claim that his cow, which had been seized, was exempt. *Seminary, etc.*, v. *Cabana* (1910), 11 Que. P. R. 315.

Damages awarded father for death of son.]—(1) All of the debtor's property is liable for the debtor's debts, save in so far

as it had been declared specially exempt from seizure.—(2) A judgment allowing damages to the father for the killing of his son is not in the nature of an alimentary allowance, and the amount of these damages can be seized, if they have not been declared exempt from seizure.—(3) A question put to the jury as to the said son being the sole support of his father is irrelevant and cannot affect the character of the condemnation. *Leroux* v. *James dit Carriere*, 11 Que. P. R. 13. *Sub nom. James* v. *Leroux and Valcen Portland Cement Co.*, 16 R. L. N. S. 20. (Reversing Davidson, J.)—A sum of money granted to the parents for the loss of their child is of the nature of an alimentary allowance granted by the Court and falls within the provisions of the law which forbids the seizure of such an allowance. *Carriere* v. *Leroux*, 11 Que. P. R. 158, 19 Que. K. B. 249.

Effects used in profession — *Opposition.*]—The allegation that the effects seized are all relating to and used by opposant in his profession, and as such are exempt from seizure, is sufficient, and this opposition will not be dismissed as frivolous and vexatious on a motion to that effect. *Thompson* v. *Buchan*, 8 Que. P. R. 246.

Execution against lands of homesteader — *Transfer of homestead to wife—Lien—Land Titles Act—Exemptions Ordinance.*]—F. was the owner of a quarter section of land, which was his homestead, he and his family residing thereon. While it was his homestead, he transferred it to his wife, the plaintiff. At the time of the transfer, the defendants had an execution against the lands of F. on file in the land titles office, and the Registrar put a memorandum on the certificate of title issued to the plaintiff that it was subject to the execution:—*Held*, having regard to the provisions of the Land Titles Act and the Exemptions Ordinance, that the execution was not a lien upon the land; that the plaintiff took the property free from any claim of the defendants under their execution; and the Registrar was directed to remove the memorandum from her certificate of title.—By s. 2 of the Exemption Ordinance a homestead of 160 acres is free from "seizure." By delivering a certified copy of the writ of *fi. fa.* to the registrar, the sheriff "seizes" all the lands of the judgment debtor, with the exceptions mentioned in the Exemption Ordinance; as he cannot seize the homestead, that land is not affected by the delivery, and the execution does not become a lien upon it.—*Boez* v. *Spiller*, 1 W. L. R. 366, and *Union Bank* v. *Jordan*, 8 W. L. R. 77, followed.—A debtor can do as he likes with his exempt property.—*Purdy* v. *Colton*, 7 W. L. R. 820, 823, followed.—Up to the time of the transfer to the plaintiff, the land was exempt from seizure. There was no time prior to the transfer when the execution could attach, and after the transfer the land ceased to be the debtor's property, so that the execution never did attach. *Fredericks* v. *North-West Thresher Co.* (1910), 15 W. L. R. 66, 3 Sask. L. R. 280.

Fi. fa. goods—*Overdue chattel mortgage—Equity of redemption—Bona fide sale before sei. ure—Interpleader.*]—Under R. S. O. 1897, c. 77, s. 17, as amended by 62 V. c. 7, s. 9, and 3 Edw. VII. c. 7, s. 18 (O.), a *fi. fa.* goods does not bind goods of the execution debtor, which at the time of the delivery of the writ to the sheriff are subject to an overdue chattel mortgage, until actual seizure under the writ, and a *bona fide* purchaser from the execution debtor, before seizure, will acquire his interest in the property free from the execution. *Allan* v. *Place*, 15 O. L. R. 476, 11 O. W. R. 238.

Fi. fa. goods — *Seizure of books of professional man — Exemption — Judgment in action for price of goods seized — Execution Act, ss. 29, 36.*]—Goods generally exempted from seizure under execution by virtue of s. 29, of the Execution Act, R. S. M. 1902, c. 58, but withdrawn from such exemption by s. 36 of the Act, when the purchase price of them is the subject of the judgment proceeded upon, are subject to seizure although the judgment has been recovered only upon a bill of exchange for the price accepted by the judgment debtor. *Canada Law Book Co.* v. *A. B.*, 7 W. L. R. 363, 17 Man. L. R. 345.

Fi. fa. goods — *Seizure of lien notes—Proceeds of exemptions sold by auction — Ejusdem generis—Saskatchewan Rule 353.*]—Defendant had sold his goods by auction, taking therefor lien notes. The sheriff seized these notes under plaintiff's execution, while they were in the hands of the auctioneer:—*Held*, that the notes were liable to seizure under *ejusdem generis* rule. Lien notes are securities of a nature similar to a chattel mortgage under above rule. *Jones* v. *Jesse*, 10 W. L. R. 627.

Goods given on condition of not being seized—*A thing of the same kind acquired by the proceeds of the insurance of the things not to be seized destroyed by fire.*]—A condition of inexigibility under which a thing is given cannot be extended to another thing, hence, a piano acquired with the proceeds of the insurance of a similar instrument destroyed in a fire and which had been given on condition of exemption from seizure is exigible. *Alexander Milling Co.* v. *Cloutier* (1909), 36 Que. S. C. 196.

Goods necessary in trade.]—When a horse, carriage, and harness are the only ones of their several kinds which the defendant, who is a carter, has for earning his livelihood, they will be exempt from attachment. *Butler* v. *Prévost*, 7 Que. P. R. 465.

Homestead — *Abandonment — Onus — Interpleader—Jurisdiction of Local Master—Title to land — Summary disposition — Consent.*]—Land being seized by the sheriff under execution, the execution debtor claimed exemption for it as his homestead. It appeared that in 1904 he made entry for the land as his homestead, and lived on it for 3 years, until the spring of 1907, when he obtained his patent; that in 1907 he removed to another farm, which he rented; and that he and his family resided continuously on the rented farm from 1907 until March, 1909, when, after learning that the land in question had been advertised for sale under execution, he returned to it, and had since resided upon it. He said that it had always been his real home, and that the reason he left it was that he had not the means to work it. In 1907, before leaving, he put in a crop, which he sold. In 1908 and 1909 no crop

was put in:—*Held*, that the land was not the homestead of the debtor, within the meaning of the Exemption Ordinance; his absence therefrom was not of a merely temporary character; the onus was upon him, and he had not satisfied it.—*John Abell Engine and Machine Works Co.* v. *Scott*, 6 W. L. R. 272, and *Purdy* v. *Colton*, 1 Sask. L. R. 288, 7 W. L. R. 820, followed:—*Held*, also, that a Local Master had jurisdiction, upon an interpleader application, to entertain and dispose of the question of the right of the debtor to the exemption claimed, although the title to land might come in question—the parties having consented to the summary disposition of the matter in Chambers. *Re Hetherington* (1910), 14 W. L. R. 529, 3 Sask. L. R. 232.

Homestead — Conveyance of homestead by husband to wife—Action to set aside—13 Eliz. c. 5—Consideration. *Meunier* v. *Doray*, (N. W. T.), 2 W. L. R. 231.

"**Homestead**"—*Exemption Ordinance, s. 2 (9)—Absence of actual occupation—Intention to occupy—Registration of execution in land titles office—Presumption of regularity of seizure—Notice of motion—Dies non — Leave of Judge—Practice.*]—To render land exempt as a "homestead," under s. 2 (9) of the Exemption Ordinance, from seizure under the execution, there must be actual occupation of it by the debtor and actual residence by him thereon, and there must be, on the land, a dwelling-house in which the debtor lives. It is of no avail that he has always considered the land his home, and that it has always been his intention to make his permanent residence thereon.—*John Abell Engine Co.* v. *Scott*, 6 W. L. R. 272, and *Purdy* v. *Coulton*, 7 W. L. R. 820, followed. —A motion by way of appeal from an order was made upon notice returnable upon a *dies non*, by leave of a Judge:—*Held*, valid.—The sheriff made a seizure of the defendant's land under the plaintiff's execution. It did not appear, upon an interpleader summons obtained by the sheriff (a claim of exemption having been made by the defendant), that the execution had been registered in the land titles office:—*Held*, that the seizure must be presumed to have been regularly made until the contrary was shewn; if the defendant desired to impeach the validity of the seizure, regular on its face, he must produce the evidence to establish the invalidity. *Imperial Elevator Co.* v. *Shere* (1910), 14 W. L. R. 32, 3 Sask. L. R. 197.

Homestead — *Judgments Act.*] — The plaintiff claimed a right to have two village lots owned by the defendant sold to satisfy a judgment of which he had registered a certificate. The defendant occupied as his dwelling the upper floor of a two-storey building on one of the lots, the ground floor having been built for use as a store. There was a stairway inside the building connecting the two floors, also a stairway from the outside to the dwelling. The two lots were occupied as one property and some use was made of the vacant store for storage of articles used in connection with the dwelling. The Judge at the trial found that the value of the property was $3,000, and that there was a mortgage upon it for an amount exceeding $2,000; —*Held*, that the defendant was *bona fide* using the whole premises as his residence and that, under s. 12 of the Judgments Act, R. S. M., c. 80, the property as a whole was free from sale under the judgment. *Codville* v. *Pearce*, 21 C. L. T. 318, 446, 13 Man. L. R. 468.

Homestead — *Sale of — Mortgage taken in part payment — Receiving order.*]—The Exemptions Ordinance, C. O. 1898, c. 27, s. 2, s.-s. 9, declares the following real property of an execution debtor and his family free from seizure by virtue of all writs of execution, namely:—(9) "The homestead, provided the same is not more than one hundred and sixty acres; and if it be more the surplus may be sold, subject to any lien or incumbrance thereon."—*Held*, that mortgage moneys, forming part of the proceeds of the sale of the defendant's homestead, do not come within this provision. This provision exempts the homestead only so long as it remains a homestead, and where the debtor has voluntarily disposed of it, the language of the Ordinance is not wide enough to extend the exemption to the proceeds, unless they are re-invested in other exempt property before a creditor has acquired a charge or lien upon them. Receiving order, as equitable execution, discharged. *Massey-Harris Co.* v. *Schram*, 5 Terr. L. R. 338.

Homestead — *Value — Notice.*]—*Held*, that the execution debtor was entitled, as an exemption under the Homestead Act, to $500 out of $1,000 realised by the sheriff on the sale of a steamship, the only exigible personalty of the debtor. *Vye* v. *McNeill*, 3 B. C. R. 4, approved:—*Semble*, that notice of a claim of exemption is necessary. *Yorkshire Guarantee and Securities Corporation* v. *Cooper*, 23 C. L. T. 302; 10 B. C. R. 65.

Homestead exemption — *Conveyance of homestead—Action to set aside—13 Eliz. c. 5—Fraudulent transfer.*]—*Held*, Scott, J., *dissentiente*, that a transfer of a homestead exempt from seizure under execution was not, by reason of the exemption, a fraudulent transfer of property under the statute 13 Eliz. c. 5.—*Semble*, the right to claim the benefit of an exemption is not confined to the execution debtor, but extends at least to members of his family. *Meunier* v. *Doray*, 6 Terr. L. R. 194, 2 W. L. R. 231.

Homestead exemption — *Proceeds of sale under mortgage—Practice—Originating summons.*]—An execution against lands does not bind the homestead of the execution debtor, and mortgagees of the land subsequent to the executions are entitled to sell it free from the executions.—Such a mortgagee may invoke the provisions of the Exemption Ordinance for the purpose of securing his priority.—The sale of a homestead under a mortgage is a compulsory sale, and consequently the proceeds after payment of the mortgages are exempt from seizure under execution to the same extent as the land.—The rights of the parties appearing to be interested in the land may be determined upon an originating summons for sale under a mortgage. *Bocz* v. *Spiller*, 6 Terr. L. R. 225, 1 W. L. R. 366, 2 W. L. R. 280.

Homestead exemption — *Residence of execution debtor — Advertisement of sale under execution — Suspension of publication of newspaper—Substantial compliance with Rule 354—Instituting proceedings to confirm*

sale—Intituling—Swearing affidavit of execution of transfer.]—A quarter section of land, although all the land owned by an execution debtor, is not his "homestead" within paragraph 9 of s. 22 of the Exemptions Ordinance, where he has not occupied it for nine years, and appears to have no *animus revertendi.*—Where the advertisement of a sale under an execution had been published in a weekly paper, and had appeared in every issue of the paper published during two months, but there had been no issue in two weeks of the period:—*Held*, that it not appearing that the sale of the property had been affected in any way, there had been a sufficient compliance with the provisions of Rule 364 of the Judicature Ordinance.—Proceedings to confirm a sale of lands under a writ of execution are proceedings under the Land Titles Act, 1894, not in the cause in which the writ issued; but that the proceedings are intituled in the cause, and not "In the matter of the Land Titles Act," is nevertheless no objection to them.—An affidavit of execution of a transfer upon a sale under a writ of execution, sworn before the clerk of the Court, is bad, but leave may be given to reswear it pending an application to confirm the sale. *John Abell Engine and Machine Works Co.* v. *Scott*, 6 W. L. R. 272, 6 Terr. L. R. 302.

Homestead exemption—*Right of mortgagee to claim—Effect of executions—Priorities.*]—The plaintiff applied for foreclosure or sale of a quarter-section of land against which a number of executions were registered in priority to the mortgage in question. The plaintiff contended that the land in question was, when the mortgage was given, the homestead, and still the homestead, of the debtor, and that the executions in question did not charge the land. The creditors, in addition to denying that the land was a homestead, also contended that only the debtor could avail himself of the exemption:—*Held*, that the execution in question never charged the land if it was a homestead, and that the mortgagee was in as good a position as the mortgagor, and could not invoke the provisions of the Exemption Ordinance to procure priority for his mortgage. *Baker* v. *Gillum*, 1 Sask. L. R. 498, 9 W. L. R. 436.

Homestead exemption — *Sale of homestead under mortgage—Rights of prior execution creditors.*]—Three quarters of a section of land were sold under a mortgage, and, after satisfying the mortgagee's claim, the balance was paid into Court. The title was subject, in addition to the first and second mortgages, to a number of executions and third and fourth mortgages. The mortgagor claimed one of the quarters sold as his homestead, and that the proceeds of the sale of such homestead were not available for the purpose of satisfying the executions, and the subsequent mortgagees contended that, as such moneys were not available for the purpose of satisfying the executions, they should be applied in payment of their respective mortgages:—*Held*, that, as the executions bound only the portions of the land not exempt, subject to incumbrances thereon, and it appearing that the amount realised for the portions not so exempt was not sufficient to satisfy the prior incumbrances, the money in Court must be held to be the proceeds of the homestead, and not available for the purposes of satisfying the executions.—That the fact that the mortgagor would not benefit by the allowance of the exemption, inasmuch as the subsequent mortgagees would secure the whole sum, did not cause such fund to lose its character of an exemption, inasmuch as the execution debtor had a right to mortgage or otherwise dispose of his exemption so long as he did not convert it into property which would not be exempt.—Judgment in *Purdy* v. *Colter*, 5 W. L. R. 439, 6 Terr. L. R. 294, reversed. *Purdy* v. *Colton*, 1 Sask. L. R. 288, 7 W. L. R. 820.

Horse and cart — *Trade or business.*]—The exemption from seizure of a horse and vehicle can be invoked only by a carter or one who uses the horse and vehicle to gain his living, and not by a carpenter, who is sometimes a contractor and sometimes a foreman, at the same time hiring out his horse and vehicle. *St. Lambert Lumber Co.* v. *Lambert*, 10 Que. P. R. 259.

Horse of a carter—*Opposition afin de distraire, C. P. 598, par. 8, p. 651.*]—An opposition to the seizure of a horse by the defendant on the ground "that he is the agent of a company dealing in gas fixtures, that he installs the same and that the said horse is necessary to him to carry on his business," will be dismissed, the opposant being neither a carter nor a coachman. *Rousseau* v. *Nadeau* (1909), 10 Q. P. R. 351.

Immovables exempt therefrom — *Clause prohibiting seizure — Judicial hypothecs arising from registration of judgments—Action to erase.*]—Clause prohibiting seizure in a deed of gift of an immovable property, although it cannot prevent sale of immovable, yet it is an obstacle to such property being charged with a judicial hypothec resulting from registration (with required notice) of judgment rendered against donee. Hence, by an action directed against creditor who registered such judgment, donee may have hypothec erased. Cf. *Germain* v. *Rousseau*, 37 Que. S. C. 189; *Latour* v. *Latour* (1909), 38 Que. S. C. 193.

Indian — *Sections 99 to 102 of Indian Act — Property exigible under execution against Indian — Attaching Indian's milk money.*]—The primary debtor, who was an Indian, a member of the St. Regis band of Indians, sent his milk out of his reserve to the factory of the garnishees. The garnishees were to manufacture the milk into cheese, sell the cheese, and after deducting charges of manufacture and sale, were to account to the Indian for the value of the milk. Primary creditor issued garnishing summons, attacking this milk money. Garnishees paid the money into Court, and primary debtor made application for payment out to him, claiming that the money was not exigible under execution:—*Held*, that the milk money in question was not personal property outside the reserve liable to taxation, and therefore was not exigible under the Indian Act, s. 102. Action dismissed; money to be paid over to primary debtor. *Simkevitz* v. *Thompson* (1910), 16 O. W. R. 865.

Instruments used in trade—*Boarding-house keeper—Furniture—Art. 598 (10), C. P. — Construction.*]—The word "*métier*" (trade), used in cl. 10 of art. 598, C. P., must not be taken in too literal a sense; it

applies to all manual work done with the object of making a living. Therefore, the effects which garnish the table and dining-room of a boarding-house keeper are instruments used in the exercise of her *métier*, and as such are exempt from seizure under execution. *Boily* v. *Guillot*, 9 Que. P. R. 336.

Notice of sale — *New proceedings.*] — Where goods of the plaintiff were seized under execution, and she filed an *opposition* alleging that the notices of sale and the advertisements of the seizure were irregular, and that certain of the goods seized were exempt, the execution creditors were granted an order declaring the opposition maintained, and allowing him to proceed to sell the goods seized other than those claimed as exempt, upon giving new and regular notices of sale. *Jean* v. *De Marchi*, 2 Que. P. R. 442.

Notice to quit — *Costs.*]—When an execution debtor declares he has no goods and the execution creditor does not contest this statement, the execution debtor has an absolute right to a replevin by the execution creditor; this replevin is equivalent to a pre-emption against execution; the execution creditor must pay the costs of the motion to protect it from the execution debtor. *Henri* v. *Beaucage* (1909), 10 Que. P. R. 409.

Opposition — *Horse used in business.*] The exemption from seizure under execution of a horse and harness, etc., can be invoked only by a carter or one who uses the horse to gain a living, and not by a butcher who keeps horses and uses them in his trade. *Lecavalier* v. *Brunelle*, 8 Que. P. R. 245.

Procedure — *Execution of judgments — Objects exempt from seizure — Alimentary allowance granted by the Courts — Damages allowed a father for the death of his son, his only support, and given by a Court of Justice in action for damages.*]—An indemnity granted to a father for the death of his son whom he alleges had been his only support, and allowed by a Court in a suit for damages taken by the father against the party responsible for his son's death, partakes of the nature of "alimentary allowances granted by a Court," under the provisions of Art. 599, C. P., and are, therefore, exempt from seizure. *Carriere* v. *Leroux* (1909), 19 Que. K. B. 249, 11 Que. P. R. 158.

Property of Indians on reserve — *Resistance—Contempt of Court.*]—By virtue of the Indian Act, 46 V. c. 43 (D.), and its amendments, the property and effects of Indians upon their Reserve are exempt from seizure under execution. The word "property," used alone in a statutory provision, includes both movables and immovables without distinction. A rule *nisi* to commit for contempt the defendant, an Indian, who resisted the seizure of his goods, without committing an assault upon the bailiff, was quashed. *Brussières* v. *Bastien*, 17 Que. S. C. 189.

Property subject to restraint on alienation — *Gift — Insaisissabilité.*] — Property which is the subject of a gift upon condition that the donee shall not alienate it is not exigible under execution or other process against the donee. *Roberts* v. *Bergevin*, 16 Que. K. B. 104.

Public officer—*Salary — Garnishee process served on provincial treasurer—Exemption from seizure—Privileges of deputy-registrar.*]—The salary of the deputy-registrar for the registration divisions of the counties of Hochelaga and Jacques cannot be garnished. He is as lucky in this respect as the registrar. *Garand* v. *Mancotel*, 6 E. L. R. 180.

Registration of attachment in mines office sufficient — Seizure by sheriff not essential—Unregistered equitable interest not an answer—Diligence a condition of setting aside proceedings. *Bank of Montreal* v. *Wallace*, 1 E. L. R. 228.

Sale of land by sheriff — Homestead exemption — Exemptions Ordinances — Dominion Lands Act—Land taken up by execution debtor and rented to stranger — Advertisement of sale — Publication — Sufficiency—Rule 364—Compliance with — Application to confirm sale—Intituling of proceedings—Land Titles Act—Transfer — Affidavit of subscribing witness taken by unauthorized person—Permission to reswear. *Abell Engine & Machine Works Co.* v. *Scott* (N.W.T.), 6 W. L. R. 272.

Seizure of crops grown on land transferred by execution debtor — *Labour and means of transferee—Ownership of crops—Interpleader.*]—The sheriff seized crops grown on property of the claimant, son of the defendant. Part of the property was the defendant's homestead transferred to the claimant, and part was the property of the defendant's wife, leased by him orally to the claimant, under authority from the wife. The claimant purchased the seed grain, hired and paid for the help, and paid for twine and harvesting. The defendant did a small amount of work on the farm:—*Held*, that the question of *bona fides* of the transfer from father to son did not materially affect the ownership of the crops; that on the evidence the claimant was entitled to the crops. —*Kilbride* v. *Cameron*, 17 C. P. 373, followed. *Massey-Harris Co.* v. *Moore*, 6 Terr. L. R. 75, 1 W. L. R. 215.

Tools and implements — *Selection — Right of creditor to make.*]—The privilege granted the debtor by Art. 598, C. C. P., paragraph 10, of selecting and withdrawing from seizure "tools and implements and other chattels ordinarily used in his profession, art, or trade, to the value of $200," only exists while the debtor is carrying on his profession, art, or trade. When he has ceased to do so, his right to make a selection is at an end, and, therefore, his creditor can have no right, under Art. 1031, C. C., to make such selection. In any case the right of the creditor, under the last mentioned article, is merely to bring back certain effects to the patrimony of the debtor, for the benefit of his creditors generally, and cannot be exercised for the exclusive benefit of the creditor seeking to avail himself of the provisions of the article. *Stephens* v. *Toback*, 26 Que. S. C. 41.

Tools of trade—*Costs of opposition.*]—A workman who demands the withdrawal from a seizure of his necessary tools, cannot claim costs against the execution creditor, because the bailiff making the seizure cannot

make the distinction between tools which the debtor may claim as exempt and his other tools. *Cunningham* v. *Guilbault*, 6 Que. P. R. 75.

Unregistered transfer before attachment. *Clish* v. *Baltimore-Nova Scotia Mining Co.*, 1 E. L. R. 235.

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4. For Costs.

Amount of debt — *Addition of costs of former writs.*]—The costs incurred upon a writ of execution against the movable property of the debtor and upon a seizure by garnishment may be added to the costs of suit for the purpose of justifying the issuing of a writ against immovable property. *Lamothe* v. *Wigney*, 19 Que. S. C. 201.

Conservatory attachment—*Hotel property—Claim for commission on sale.*] — A person claiming a commission on the sale of an hotel has no lien on the hotel property, or the purchase price of it; and a conservatory attachment based upon such a claim will be discharged. *Benoit* v. *Brouillet*, 9 Que. P. R. 352.

Declaration — *Clerical error—Costs.*]—It is not a ground for declaring a *saisie-revendication* irregular that the plaintiff has not conformed to Arts. 909, 948, C. P., when the irregularity has been rectified, and was the result of a clerical error; but the costs upon an exception thereto should be borne by the plaintiff. *Ruel* v. *Langlois*, 3 Que. P. R. 132.

Fi. fa. goods—Seizure under, by sheriff, after assignment by execution debtor for benefit of creditors and notice to sheriff — Executions Act, s. 11 — Assignments Act, s. 8—Right to seize for costs of action and execution. *Thordarson* v. *Jones*, 9 W. L. R. 233.

Judge's order — *Direction for set-off—Service of allocatur — Issue of execution — Production of order.*]—Where a Judge's order requires the defendant to pay interlocutory costs to the plaintiffs, and the Judge makes an oral direction that costs previously awarded to the defendant should be set off *pro tanto*, the deduction should be made before execution issues on the Judge's order. It is not necessary to serve the certificate of taxation of the costs awarded by an order, where the party to pay has been represented upon the taxation and has notice of the amount payable. When the execution is issued upon a Judge's order, the order itself or an office copy should be produced to the officer issuing it; a mere copy is not sufficient, unless such officer is the one who has official custody of the book in which the order is entered. *People's Building and Loan Assn.* v. *Stanley*, 22 C. L. T. 410, 4 O. L. R. 644, 1 O. W. R. 399, 469, 572, 592, 2 O. W. R. 122.

Judgment for debt and costs—*Payment of debt—Execution good for costs — Release — Seizure — Opposition — Payment.*]—A debtor ordered by a judgment to pay a sum for debt and costs who sends by post to his creditor a cheque for the amount of the debt, is not freed from the costs. A seizure under execution of the debtor's goods four days later, in the name of the creditor, is valid for the amount of the costs. A telegram from the creditor reading, "Have instructed solicitor to withdraw," is not a release of the costs, nor an engagement by him to pay them. Therefore, an opposition by the judgment debtor to the seizure, on the ground of payment, should be dismissed. *Canada Wood Specialty Co.* v. *Henry*, 33 Que. S. C. 140.

Motion for leave to appeal — *Court of Appeal—High Court.*]—An application to a Judge of the Court of Appeal for leave to appeal from an order of a Divisional Court having been dismissed with costs, the same were taxed and a certificate thereof issued, which, with the order of dismissal, was filed in the High Court, and a *fi. fa.* to levy the amount of such costs placed in the sheriff's hands for execution:—*Held*, that the order directing payment of costs was properly made under ss. 77 and 119 of the O. J. Act; and that execution was properly issued out of the High Court, under Rule 3, by analogy to the procedure under Rule 818. *People's Building and Loan Association* v. *Stanley*, 22 C. L. T. 300, 371, 4 O. L. R. 247, 377, 1 O. W. R. 399, 469, 572, 592, 2 O. W. R. 122.

Pending appeal to Privy Council—*Security.*]—In a case in which, by special leave, an appeal has been allowed to the Judicial Committee of the Privy Council, execution may issue, pending such appeal, for the costs incurred in the Courts appealed from, without, for that purpose, sending the record back to the Court of first instance, when no security for the costs incurred in the Courts below has been given with the appeal to the Judicial Committee. *Consolidated Car Heating Co.* v. *Came*, 5 Que. P. R. 48.

Seizure by bailiff — *Appointment of guardian — Cost of caretaking — Application by bailiff.*]—When a bailiff, after the seizure of certain animals, has appointed a guardian to take care of them, he cannot afterwards apply for moneys necessary for the safekeeping of these animals; he has no interest to justify this application, for his responsibility ceased when he appointed the guardian at the defendant's suggestion and without objection by the plaintiff. *Boulanger* v. *Martineau*, 9 Que. P. R. 405.

Seizure for costs already paid—*Bona fide mistake — Liability for damages.*]—A seizure in execution made under a judgment, in good faith and without malice, in order to levy costs, which, unknown to the creditor, had been paid to his deceased solicitor, does not make him liable for the damages which may result from it to the debtor. *Filiatrault* v. *Village of Coteau Landing*, 35 Que. S. C. 205.

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5. Practice and Procedure.

Affidavit — *Necessary statements.*]—To obtain a *saisie-conservatoire* it is sufficient to allege in the affidavit simply one of the

causes given in Art. 955, C. P., and it is not necessary to make any allegation of fraud or concealment, as in the case of an arrest, which cannot be likened to a *saisie-conservatoire*. *Bouchard* v. *Plamondon*, 16 Que. S. C. 483.

Affidavit — *Person to make.*]—An affidavit leading the issue of a conservatory attachment ought to be subscribed by one of the persons authorized to subscribe such an affidavit in case of an attachment before judgment. *Marchand* v. *Globensky*, 7 Que. P. R. 94.

Affidavit for writ — *Wife of plaintiff.*]—A writ of attachment had been issued upon the filing, with the fiat, of an affidavit of the wife (commune) of the plaintiff. Upon motion of the defendant to set aside the attachment, upon the ground that a wife in such position cannot testify on behalf of her husband:—*Held*, that the affidavit required to obtain the issue of a writ of attachment is not evidence in the action, and may be made by such wife. *Roberge* v. *Roberge*, 3 Que. P. R. 403.

Attachment — *Insufficient affidavit — Waiver — Appearance — Bond.*]—An application to set aside an attachment. The affidavit simply alleged "that the said defendant company are absent or absconding from the province of Nova Scotia:"—*Held*, that it should have contained statements bringing the defendants within Order 47, Rule 1 or Rule 6.—The defendants appeared to the action, and gave a bond to relieve the property under Order 46, Rule 20.—*Held*, that that Rule would apply if the case had been brought within Order 47, Rule 6. —There was no waiver by appearing and putting in this bond. A party must not, after an irregularity committed by his opponent, take a step or do anything which will lead his opponent to suppose that no advantage will be taken of the irregularity, and to proceed to incur expense on that supposition. The bond was given under the pressure of the plaintiff's irregular process, and giving a bond is provided for by the Rule in all cases. To require a person to remain in prison until an order to hold to bail is set aside for irregularity is not the practice, and where property is seized the rule should be the same. The person has no feasible alternative, owing to the plaintiff's action. *Matthews* v. *Metropolitan Contracting Co.*, 20 C. L. T. 354.

Attachment — *Motion to set aside—Absence from province — Costs.*]—The defendant had gone to work as a servant in the State of Maine, leaving his family in Nova Scotia. A writ of attachment was issued against him as an absent or absconding debtor. Upon a motion to set it aside, he swore that he had "before been employed in the same business and in the same place," but he did not say when or how long, or that to go there at a certain season and return at another was his well-known and regular course of business. Not long before leaving he had given a note to the plaintiffs and gone away without making any provision for it, and never communicated with the plaintiffs about it down to the time of the attachment:—*Held*, that the motion should be dismissed, but, as an appearance had been entered, costs should abide the event. *Shafner* v. *Bailey*, 20 C. L. T. 459.

Attachment after judgment — *Default taken by the defendant—C. C. P. 154, 678, 679.*]—The defendant is one of the parties to an attachment after judgment which is really a writ of summons; as a consequence, if the writ is not returned, the defendant has a right to take a default against the plaintiff. *Ouimet* v. *Fleury & Dominion Park Co.*, 11 Que. P. R. 81.

Attachment before judgment — *Affidavit — Requirements.*]—A writ of attachment before judgment will be quashed if the affidavit does not disclose, (1) that the indebtedness is personal, (2) that the acts complained of were committed with the intent to defraud the defendant's creditors in general and the plaintiff in particular, (3) that a demand of assignment was served upon the defendant, or that he refused to make such assignment—even if the affidavit sufficiently discloses the fact that the defendant is a trader. *Gagnon* v. *Penticost Lumber Co.*, 10 Que. P. R. 29.

Attachment before judgment — *Damages which are not liquidated—Mention on the back of the writ of the security given—Sufficiency of the allegations of the action — C. C. P. 904, 939.*]—When an attachment before judgment is issued with the permission of a Judge for non-liquidated damages, the amount of the security is fixed by law, and it is not necessary to mention it on the back of the writ.—The following allegations of an affidavit for the issue of a writ of attachment before judgment: — "I am credibly informed by a person worthy of belief and I really believe that the defendant is on the point of disposing of his property which he has sold to me and is transferring his lease of the house in which he is, to another person who has offered him a higher rental, the whole to my prejudice, and with the object of relieving himself of his obligations with respect to me." "I am credibly informed by a person worthy of belief and I really believe, because of what the defendant has himself said, that he has the intention, after selling his effects and goods and after transferring his rights in his lease, to leave the province, and I will be deprived of my recourse against him for the reasons above stated"—are insufficient, and an attachment before judgment based on such allegations will be quashed on motion. *Paquin* v. *Chalifoux*, 11 Que. P. R. 129.

Attachment before judgment — *Separation as to bed and board — Claim of wife under marriage contract — Support—C. P. 933.*]—A debt payable to his wife by a husband only at his death, is eventual, future and uncertain and cannot form the basis of the affidavit required by Art. 933 C. P. to obtain the issue of a writ of attachment before judgment.—The right of the wife, plaintiff in an action in separation, to recover for her support creates but a probable claim which is subject to future and uncertain conditions, and accordingly does not authorise her to cause the issue of the attachment before judgment until her claim has been judicially settled and liquidated. *Graham* v. *Ireland*, 11 Que. P. R. 185.

Attachment in revendication — *Perishable articles — Value — Res judicata—C. C. 1241; C. P. 634.*]—A judgment, in an attachment *in revendication*, ordering the defendant to return the things revendicated or pay their value is *res judicata* as to such value in a subsequent action taken to recover the difference between such sum and the price realised from the sale of the articles which were of a perishable nature. *Ship* v. *Gurberg*, 16 R. L. n. s. 225.

Attachment proceedings — *Temporary absence — Invalidity — Impeachment collaterally — Interest in estate — Interest in mortgage — Receiver — Equitable execution — Priorities.*]—The wife of the defendant by her will bequeathed to him one-half of her interest in the estate of her father, to which she would be entitled on the death of her mother, C. A., who was the executrix of the will of the father. Subsequently the wife of the defendant died. A mining company executed in favour of B. a mortgage to secure repayment of money advanced to the company, of which money the defendant personally advanced a considerable portion. The defendant, at a later date, being in financial difficulties, left the province suddenly, and proceedings against him were taken by several claimants, as an absent or absconding debtor, under O. 46, and C. A. and B. were summoned as agents. The plaintiff subsequently recovered judgment against the defendant, and obtained the appointment of a receiver by way of equitable execution:—*Held*, that as the defendant's absence was temporary and without intent to avoid legal process, he was not an absent or absconding debtor; (2) that the attachment proceedings were unjustifiable in law, and their validity could be impeached collaterally; (3) that the interest of the defendant in the estate of his wife's father and in the B. mortgage was not the subject of attachment, such interests not being included in any of the terms "goods," "credits," or "choses in action"; (4) that the plaintiff was entitled to priority over the attaching creditors in respect to the interests in question. *Hart* v. *Cunningham*, 40 N. S. R. 229.

Attachment proceedings against company—*Appointment of receiver by foreign Court — Property vested in receiver.*]—The defendant company were incorporated in New Jersey, and never carried on business in Nova Scotia by themselves or any agent. Proceedings were taken by the plaintiffs at Halifax under O. 46 against the defendants as absent or absconding debtors to recover for goods supplied in Halifax. The day before these proceedings were commenced, an order was made by the Chancery Court of New Jersey against the defendant company in a suit brought in that Court against the company, which order appointed receivers of the defendant company with full power to take possession of all the property of the company:—*Held*, that by the proceedings in the Court of New Jersey all the property of the company had become vested in the receivers, and could not thereafter be attached as the property of the company. Head-note in *Fraser* v. *Morrow*, 2 Thomson 232, corrected. *Pickford* v. *Atlantic Transportation Co.*, 40 N. S. R. 237.

Conservatory attachment — *Affidavit —Grounds of belief.*]—An affidavit to support a conservatory seizure which does not state the grounds of belief of the deponent is insufficient and cannot be supplemented by reference to the declaration. *Robinson* v. *Gore*, 9 Que. P. R. 344.

Conservatory attachment does not lie against insurance money in favour of a lien holder for work done on property destroyed by fire. *Isaac* v. *Tafler & Guardian Assce. Co.* (1910), 11 Que. P. R. 359.

Conservatory attachment — *Rights in or to specific movable property — Danger of loss.*]—A plaintiff who claims a right in, or to, specific movable property (*e.g.*, as one of several lawful heirs of the owner deceased), may cause it to be attached by conservatory process. He is not bound to disclose in his affidavit special or extraordinary circumstances, involving danger of loss. *Hoffman* v. *Baynes* (1910), 37 Que. S. C. 435.

Court took time to consider what course ought to be adopted towards an absent defendant who had property under attachment of sheriff. *Cockesley* v. *Bickley* (1817), Wakeham's Nfld. Ca. 25.

Creditor collocated on moneys levied —*Insolvency — Sub-opposition — Subcollocation.*]—*Held*, in review, affirming the disposition of the judgment in 23 Que. S. C. 45, but modifying the considérants, that art. 824 of the Code of Procedure which authorises a creditor of a person who is entitled to be collocated or who is collocated, upon moneys levied, to file a sub-opposition, does not confer any privilege on such creditor. If the person primarily entitled to be collocated is insolvent, the amount of the bollocation must be distributed among his creditors, according to law. The service of a writ of attachment, attaching such moneys in the hands of the sheriff does not give the sub-opposant any special right thereto. Art. 1981 C. C. *Marion* v. *Brien dit Desrochers*, 23 Que. S. C. 52.

Disbursements — *Scale of — Opposition —Costs—Scale of.*]—When a writ of execution is issued from the Superior Court, the disbursements must be according to the amount for which the writ is issued, but if the amount is less than $100, then it is the tariff of the fourth class of the Superior Court which must be applied; but when the execution of such writ is opposed by way of opposition *afin d'annuler*, alleging payment, which is sustained with costs, the fees of the attorney follow the amount claimed by the writ. *Morinville* v. *Baril*, 20 Que. S. C. 327.

Distribution — *Motion — Fees of prothonotary.*]—A motion demanding the distribution of the moneys made upon execution among a number of creditors indicated in the notice of motion will be dismissed: the result of the motion would be to deprive the prothonotary of his fees. *Evans* v. *Chaput*, 4 Que. P. R. 199.

Ex parte order of revivor — *Failure to serve orders on plaintiff — Practice.*] — An *ex parte* order of revivor was obtained substituting executrix for deceased defend-

ent, who had a judgment against the plaintiff and an *ex parte* order was obtained on same day allowing execution to issue. Neither order was served on the plaintiff or his solicitor. On application to set aside the execution plaintiff stated that the judgment was satisfied but offered no corroborative proof:—*Held*, that notwithstanding any irregularity in service the execution should remain in force. *Stone* v. *Goldstein*, 9 W. L. R. 365. Appeal from above dismissed, the Court being equally divided. *Ibid.* 11 W. L. R. 551.

Expiry — *Renewal* — *Limitations Act.*]—An execution against an existing interest in lands ceases to be a lien thereon in ten years from the time of its delivery to the sheriff, even though it has been duly renewed from time to time and kept in force continuously and sale proceedings cannot be taken under it after that time. *Neil* v. *Almond*, 29 O. R. 63, approved. *Re Woodall*, 24 C. L. T. 350, 8 O. L. R. 288, 4 O. W. R. 131.

Expiry — *Renewal—Time—Amendment of Ordinance — Registration by sheriff — Seizure of lands.*]—The Judicature Ordinance (No. 6 of 1893), s. 327, enacted: "Every writ of execution shall bear date the day of its issue, and shall remain in force for one year from its date (and no longer, if unexecuted, unless renewed), but such writ may, at any time before its expiration, and so on from time to time during the continuance of the renewed writ, be renewed by the party issuing it for one year from the date of such renewal," etc. This section was amended by Ordinance No. 5 of 1894, s. 12 (which came into effect 7th September, 1894), by substituting "two years" for "one year" in both instances:—*Held*, that the amendment could not be construed as reviving or enabling an execution to be revived which had expired before the amendment was passed, nor as continuing in force for two years an execution which had been renewed only for one year. The registration by the sheriff of a writ of execution against lands in the Land Titles Office under s. 94 of the Territories Real Property Act, as amended by s. 16 of 51 V. c. 20, cannot be construed as a seizure, and is not sufficient to continue the execution in force without renewal. An execution issued on the 20th October, 1893, was renewed on the 20th October, 1894.—*Held*, that the renewal was made in time, and the execution continued in force. *McDonald* v. *Dunlop* (No. 2), 2 Terr. L. R. 238.

Fi. fa. lands — *Sale by sheriff—Action to set aside—Purchase by execution creditor —Agreement for re-sale — Irregularities — Inadequacy of price — Sheriff — Negligence —Remedy.*]—A firm of solicitors, defendants in this action, recovered judgment against the plaintiff for $97, and placed in the hands of the sheriff a *fi. fa.* lands, under which the plaintiff's life estate in land said to be worth $3,500 was sold, subject to certain charges, for $70, to one of the solicitors who had previously made an arrangement with their co-defendant wife of the plaintiff, to allow her the benefit of the purchase. In an action to set aside the sale or to declare the defendants trustees for the plaintiff:—*Held*, that the execution creditor had the right to purchase, and was not affected by any irregularities or omissions on the sheriff's part; nor could a sale under process of law be successfully attacked for mere inadequacy of price, unless, perhaps, it was so grave and extreme as to compel a conclusion of fraud or malversation.—Where the conveyance has been executed by the sheriff, the fact that the purchaser has entered into a binding agreement to sell at an advance to another, does not afford ground for invalidating the deed.—*Semble*, that the sheriff (since deceased) might have been guilty of negligence in disposing of the property; and, if there were evidence to support an action against his estate or his sureties, such an action would not be barred by this action. *McNichol* v. *McPherson*, 15 O. L. R. 393, 10 O. W. R. 844.

Guardian of goods seized—*Removal of goods—Obligation to return.*]—Where the person appointed guardian of goods seized under execution removes them, he must, if the seizure is annulled, bring them back to the domicil of the execution debtor. *Adams* v. *Mulligan*, 20 Que. S. C. 203, 4 Que. P. R. 60.

Guardian of property seized — *Discharge — Lapse of time — Destruction of property seized.*]—A judicial guardian is not discharged from his guardianship by the expiration of a year from the day of the seizure, and a rule will issue against him to make him produce the goods intrusted to him if he does not prove that they have been destroyed without fault on his part. *Millar* v. *Gillespie*, 5 Que. P. R. 376.

How may it be contested? — *C. P. c. 645.*] — It is by an opposition to annul and not by petition to quash that defendant should seek to have an execution set aside. *Frank* v. *Paillard*, 11 Que. P. R. 221.

Interest in oil leases — *Seizure by sheriff as goods — Construction of leases — Interest in lands — Profit à prendre.*] — Interests in oil leases are interests in lands, and as such are not seizable as goods under execution, but must be sold as interests in lands. *McIntosh* v. *Leckie*, 13 O. L. R. 54, followed. *Can. Railway Accident Co.* v. *Williams* (1910), 16 O. W. R. 574, 21 O. L. R. 472, 1 O. W. N. 991.

Irregularity — Judgment — Amendment —Præcipe — Signature — Motion—Waiver. *Carbonneau* v. *Letourneau*, (Y.T.), 1 W. L. R. 273, 2 W. L. R. 113, 493.

Issue of writ — *Irregularity — Waiver.*]—Any irregularity in the issue of a writ of *saisie-conservatoire* was waived by the defendant having before moving to quash the writ, made a motion to fix the amount of bail by the giving of which the property attached might be relieved from seizure under the writ. *Bélanger* v. *Godbout*, 3 Que. P. R. 107.

Judgment for part of sum claimed—*Appeal to increase amount.*]—A plaintiff who has obtained judgment for less than the amount demanded, and appeals from that judgment to have the amount increased, cannot, in the meantime, obtain an execution in

satisfaction of the judgment so rendered. *Migneron* v. *Yon*, 5 Que. P. R. 60.

Motion by defendant *to set aside writ of attachment before appearance—Saskatchewan Rules* 87, 417.]—Defendant C. sought to set aside a writ of attachment against personal property under above Rule 417:—*Held*, that writ of attachment not a step in the cause, and that defendant could move before he entered an appearance to the summons. *Sawyer-Massey Co.* v. *Carter*, 9 W. L. R. 675.

Motion for a new statement of claim *—Arrangement between the plaintiff and the third party.*]—When a third party deposits a certain sum in Court, stating he deposits that sum in accordance with an arrangement made between the plaintiff and himself and plaintiff does not deny that arrangement, he can not force the third party to make a new statement; his only recourse is to join issue on the statement made by the third party. *McNally* v. *Harcourt* (1909), 10 Que. P. R. 434.

Motion for release — *Solicitor moving refusing to disclose address of his clients—Extension of time for service of statement of claim.*]—Defendants moved to have sheriff give up possession of all goods, etc., in his possession. Time for service of statement of claim had been extended for six months. As defendant's solicitor refused to disclose their whereabouts or accept service for them, motion refused; notice to extend time for service of statement of claim to be given defendant's solicitor. *Emperor of Russia* v. *Proskouriakoff*, 10 W. L. R. 1. See 18 Man. L. R. 143, 9 W. L. R. 207, 42 S. C. R. 226.

Motion to issue execution.]— Where the enforcement of a lien of a judgment creditor against unsold lands involves questions of value and deductions by reason of partial releases, it must be made the subject of an action, and, where the proper parties are not before the Court, it cannot be accomplished on motion for leave to issue execution. *Re Bank of Liverpool*, 6 E. L. R. 321; 43 N. S. R. 205.

Negotiable instruments — *Debts secured by notes not attachable.*] — Payment into Court by garnishee upon mere notice of the attachment without a Judge's order directing him to do so is not a bar to an action brought against him by his creditor; and money secured by bills of exchange or promissory notes is not attachable under attaching clauses of Common Law Procedure Act, 1873. *Rankin* v. *McFadyen* (1882), 2 P. E. I. R. 461.

Opposition to seizure — *Dismissal — Execution of judgment of Court of Review—Time for.*]—A motion for the dismissal of an opposition cannot be made before the original thereof is returned. 2. An opposition which raises the question whether a judgment of the Court of Review, in a summary matter, can be executed within eight days from the rendering theref, is not frivolous, and will not be dismissed on motion. *Kavanagh* v. *Quinn*, 5 Que. P. R. 166.

Opposition to seizure — *Insaisissabilité —Investment of moneys bequeathed—Declaration — Registration.*]—A declaration of investment, stating that a purchase of property has been made with moneys bequeathed to the purchaser on condition of *insaisissabilité*, may be set up in opposition to a seizure of such property by a creditor of the purchaser, although the declaration was not registered until after the creditor's claim had accrued. *Baird* v. *Morphy*, 23 Que. S. C. 497.

Opposition to seizure — *Security — Time for hypothecary creditor—Tenant.*]—An hypothecary creditor, whose claim has been registered before the registration of a lease of the immovable hypothecated, may require from the tenant, who files an opposition to a seizure by such creditor, asking that the immovable may be sold subject to his lease, security that the immovable will be sold for a price sufficient to assure him the amount which is due to him (art. 726, C. P. C.). 2. He may require such security as soon as the opposition is filed and without admitting the ground of the opposition. *Desaulniers* v. *Peyette*, 12 Que. K. B. 445.

Order of Court upon a party who was alleged to have suffered a considerable time to elapse without taking the prosecution of an appeal to shew cause why execution should not issue upon judgment given against him. *Evans* v. *Congdon* (1823), Wakeham's Nfld. Ca. 426.

Partial release of lands under execution.] — Where judgment debtor in his lifetime and his personal representatives after his death alienate portions of land found by a judgment, and the judgment creditor released a portion of the land sold, from any claim under the judgment, the full amount of the judgment cannot be enforced against owners of the unsold portions of the land, who are only liable to be called upon to pay *pro rata* according to the value of lands released. *Re Bank of Liverpool* (1908), 43 N. S. R. 205; 6 E. L. R. 321.

Possession of goods affected by bailor's privilege — *Disputing their declarations—Lack of proof of fraud—Conversion of the seizure into garnishee.*] — A bailor who causes goods to be seized in his hands affected by his privilege as bailor and contests their declaration of "*non indebitate*" for the reason that after their acquisition by sale from the execution creditor the latter was insolvent to his knowledge, is not permitted after the failure of his attempt to establish this fraud, to claim that the seizure having been attempted within the week he had possession of the goods was equivalent to a garnishee after which an order may be issued enjoining T. S. to re-deliver them or to pay the value thereof, especially when in exercising this resource the plaintiff acted as a personal creditor without relying on the pledge or the privilege he had as to the effects. *Bastien* v. *Richardson*, 35 Que. S. C. 481.

Priorities — *Chattel mortgage—Creditors' Relief Ordinance.*]—Executions against goods placed in the hands of a sheriff subsequently to the making of a chattel mortgage by the execution debtor, on the goods

seized, attach only on the equity of redemption, and are not entitled under the Creditors' Relief Ordinance, to share with executions placed in the hands of the sheriff prior to the giving of the mortgage. *Roach* v. *McLachlan* 19 A. R. 496, and *Breithaupt* v. *Marr*, 20 A. R. 689, followed. *Howard* v. *High River Trading Co.*, 4 Terr. L. R. 109.

Provisional execution of a judgment —*By whom can it be ordered?—C. C. P. 594, 596, 597.*]—The provisional execution of a judgment, which does not order it, when an inscription in review or appeal has been taken, cannot be pronounced by the Court which delivered the judgment, inasmuch as the case has passed beyond its jurisdiction. *Latour* v. *Guevremont*, 11 Que. P. R. 126.

Provisional execution of a judgment will be ordered, even during the long vacation, and notwithstanding an inscription in review, if the judgment is based upon a promissory note and defendant has not pleaded to the action. C. C. P. 594, 597. *Gauthier* v. *Strachan*, 11 Que. P. R. 51.

Reduction of amount of judgment —*Return.*]—A seizure made under a writ issued in execution of a judgment obtained *ex parte* for $500 damages ceased to be valid and binding as soon as this judgment is reformed upon opposition to judgment by a second judgment maintaining the opposition; and the defendant-opposant is only bound under the seizure to the sum to which the judgment is reduced, in this case, $50. Such a seizure having become *effete* cannot be continued upon the same writ for the latter sum; and the defendant may dispose of the immovable so seized notwithstanding the seizure after the judgment maintaining the opposition. 2. A writ of execution which has been returned by the sheriff to the Court upon service of certificate of the filing of an opposition to the judgment cannot be withdrawn from the record of which it forms part in order to be sent to the sheriff with instructions to continue proceedings, without the authorization of the Court or a Judge. *Demers* v. *Dufresne*, 5 Que. P. R. 465.

Return by bailiff — *Government duty.*] —A bailiff who has made a sale of movables is bound to make a return of the writ and the proceedings had thereon, and at least the duty due to the government, and he cannot make the payment of the government duty by the party asking for the return, a condition precedent thereto. *Dubuc* v. *Duclos*, 7 Que. P. R. 168.

Return by sheriff nullae terrae — *Same writ sent to another sheriff.*]—When a writ of execution *de terris* has been addressed to the sheriff of a district, and he has reported that he has found no property in his district to seize, the prothonotary may address the same writ to the sheriff of another district where the defendant has property. *Dillon* v. *Atlantic and Lake Superior R. W. Co.*, 19 Que. S. C. 533, 5 Que. P. R. 68.

Rule nisi against a guardian — *Does an opposition to judgment annul a writ of execution?—Removal of effects seized for the purpose of selling them—Option which should be allowed the guardian—Costs—C. P. 549, 657, 658.*]—Proceedings taken on a writ of execution before an opposition is filed, remain valid if the opposition is eventually dismissed.—The guardian is not obliged to remove the effects seized from the place they were in when they were seized, although the cost of so doing is tendered to him.—The guardian cannot be committed to prison if the rule *nisi* does not give him the option of paying the amount claimed by the seizing party or the value of the effects which cannot be found; the Court cannot amend the rule *nisi* by itself adding this option to it.—The guardian will not recover costs when he succeeds in having a rule *nisi* dismissed for a mere informality, if he does not offer to represent the missing effects in his contestation of the rule. *Bailey* v. *Fortin & Sevigny*, 11 Que. P. R. 167.

Rule to return — *Bailiff — Residence —Description — Service.*]—A motion for a rule *nisi* must be personally served on the opposite party. 2. The rule *nisi* must contain, or it will be void, the residence and description of the party against whom it is directed. 3. One who seeks to obtain an order against a bailiff charged with a writ of execution must prove that he has intrusted such writ to the bailiff. *Massey-Harris Co.* v. *Plourde*, 9 Que. P. R. 400.

Seizure and sale — *Opposition for payment — Bailiff's return — Default — Rule nisi.*]—A bailiff who has seized and sold a debtor's property both at his domicil and place of business, and has received an opposition for payment on the moneys levied at either of these places, must return into Court all the moneys levied at that place, and make a separate return of his proceedings at both places, in order that the Court may adjudicate; in default of his so doing, a rule may be issued against him. *Lacroix* v. *Proulx*, 5 Que. P. R. 309.

Seizure by way of security — *Service —Return — Declaration.*]—When a writ of *saisie-gagerie* is made returnable the second day after service, the declaration must be served at the same time as the writ. 2. When the service of the declaration is made at the office of the Court, there must be at least one clear day between the service and the return. *Dupuis* v. *Mathieu*, 5 Que. P. R. 414.

Seizure for preservation of property —*Declaration — Money in bank — Garnishment — Exception to form.*] — A writ of *saisie-conservatoire* must be accompanied by a declaration or contain a sufficient statement of the grounds of the demand. 2. If the articles to be seized are not in specie, but sums of money in the possession of a bank, the creditors must proceed by way of garnishment, and not by *saisie-conservatoire*. 3. A *saisie-conservatoire* with respect to sums of money, and not accompanied by a declaration, will be dismissed upon exception to the form. *Leith* v. *Hall*, 5 Que. P. R. 155.

Seizure of movable property—*Guardian's charges—Salary agreed upon between guardian and bailiff—Remedy against seizing party—Taxation of guardian's bill.*] — The guardian appointed to a seizure of movable property, for a fixed remuneration agreed

upon between him and the bailiff who executed the writ, has a right of action against the seizing party to recover such remuneration. The seizing party cannot set up in defence that the guardian's fees were taxed at a lower figure, as the prothonotary could only tax such sum as was payable under the terms of the judgment and not the sum due under a special agreement. *Fortin* v. *Simard* (1910), 37 Que. S. C. 470.

Setting aside — *Fraudulent intent — Non-disclosure — New evidence.*] — The plaintiff's affidavit, upon which an order for attachment of goods was granted, stated that he had good reason to believe and did believe that the defendant had disposed of her real estate with intent to defraud her creditors, and that she was about to dispose of her personal property with the same intent, and was about to leave Manitoba as soon as the goods should be disposed of (giving the source of his information). The defendant, on motion to set aside the order, by affidavit denied having had the intention to leave Manitoba permanently, and gave reasons for leaving temporarily. In reply the plaintiff swore to a chattel mortgage on the defendant's property, and a seizure thereunder:—*Held*, that the bare fact that the defendant had disposed of her real estate raised no inference of fraud; the affidavit of the plaintiff in reply disclosed facts on which his belief of intent to defraud was properly grounded; but these facts, being within the plaintiff's knowledge at the time of the original application, should then have been disclosed. The fact of the plaintiff's holding security should also have been stated. *Newton* v. *Bergman*, 21 C. L. T. 485, 13 Man. L. R. 563.

Setting aside — *Procedure—Grounds.*] —A defendant cannot set aside, upon petition, a *saisie-conservatoire*, except by attacking it on affidavit or establishing that the goods seized are exempt from seizure; other grounds should be taken by pleading to the merits. *Lefleur* v. *Beaudin*, 3 Que. P. R. 442.

Sheriff.]—It is not necessary to serve the opposition upon the sheriff; it may be served upon the bailiff charged by the sheriff with the execution of the writ of seizure, the sheriff having the power to have writs addressed to him. *Drainville* v. *Sovoie & Drainville* (1910), 11 Que. P. R. 437.

Sheriff — *Return — Reissue to another sheriff—Opposition — Sale of railway.*]—If the sheriff to whom a writ of execution is addressed makes a return of *nulla bona* and *nullæ terræ*, the prothonotary has no right to address the same writ to the sheriff of another district, by making an addition in the margin.—2. An opposition to the sale of a portion of a railway seized under a writ of execution will not be dismissed upon defence in law upon the ground that it is not formally alleged that the portion of the railway so seized does not constitute a section; that must be shewn by evidence. *Atlantic and Lake Superior Rw. Co.* v. *Dillon*, 5 Que. P. R. 191.

Substitutions — *Inalienability.*] — The institute has the use and enjoyment of the property until the substitution opens; as such, he has the right to take, and defend himself against, all suits relating to the property substituted.—The leasing of immovable property is an act of administration on the part of the institute.—In case of costs incurred by an institute in a suit respecting his administration of the property, the institute should bear the advances and disbursements, saving his recourse against the heirs. —A clause in a will creating a substitution whereby certain property is declared to be inalienable and exempt from seizure does not apply to the costs incurred by an institute respecting the leasing of the substituted property. C. C. 947, 959. *Desaulniers* v. *Jacobs & Belcourt & Archer*, 16 R. L. N. S. 130.

Summary inquiries in aid of — Ascertainment of interest of execution debtor under will—Mortgage. *Hill* v. *Rogers*, 2 O. W. R. 979.

Usufruct of fund — *Withdrawal from bank.*]—The fact that a person having the usufruct of a fund has withdrawn from the bank a sum of money part of the usufruct does not give occasion for a conservatory attachment against him. *Marchant* v. *Globensky*, 7 Que. P. R. 208.

Volunteer Bounty Act—*Land warranty or scrip — Attachment — Agreement for transfer—Invalidity.*]—A South African land warrant or scrip issued under the Volunteer Bounty Act, 7 & 8 Edw. VII. c. 67 (D.), entitling the holder to select a certain amount of land, is in the nature of a document of title to land, and, like a deed, is not seizable under execution or attachment. The Act does not contemplate trafficking in scrip, and expressly provides for one transfer only of the scrip or the rights under it, to one who shall perform the homestead duties; and an agreement by the defendant, the veteran entitled to the land under the scrip, to sell it to the plaintiff, not being a transaction permitted by the Act, was void. *Inter-Ocean Real Estate Co.* v. *White* (1910), 15 W. L. R. 351, Man. L. R.

Writ of attachment — *Application to set aside—Writ obtained upon false affidavits—No appearance by applicant — Locus standi—Step in the cause—Proceeding incidental to the cause.*]—Defendant moved to set aside a writ of attachment on the ground that it had been obtained on affidavits which were false. No appearance had been entered by the defendant, and it was objected that until an appearance had been entered he has no *locus standi*:—*Held*, that the issue of a writ of attachment is not a step in the cause, but is entirely incidental thereto, and a motion may be made to set it aside on the ground of irregularity before appearance. *Saucyer-Massey* v. *Carter* (1909), 2 Sask. L. R. 148, 9 W. L. R. 675.

Writ of possession — *Breaking house with violence—Conservatory seizure.*] — An action of conservatory seizure is subject to the same rules and delays as summary matters and attachments before judgment: Arts. 956, 939, 922, C. C. P.—2. A judgment maintaining a conservatory seizure and ordering that the plaintiff be put in possession of the effects seized "under the authority of this

Court," without fixing any delay for the delivery of the effects, is not executory until after the lapse of eight days from its date, and a writ of possession issued before the expiration of that time, without service of the judgment, and without a further order of the Court, is premature and illegal.—3. If the debtor be absent, or if there be no one to open the doors of the house, the seizing officer must draw up a minute of the fact, and obtain judicial authority to use all necessary force, but only in the presence of two witnesses.—4. It is a breaking in for an officer, by a false pretence, to procure a person within the house to open the door, and then, without permission to rush in with violence. He must notify the inmates of his business and demand admittance. *Kaufman* v. *Campeau*, 19 Que. S. C. 479

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6. SEIZURE.

Account book — *Assignment of debts.*] —A ledger or account book containing a list of debts which have been assigned in writing, and which are described in the writing as "all the debts in a certain ledger marked A," is a mere incident to the debts, and is no longer a chattel as it was before the entries were made in it. It is, therefore, not seizable in execution against judgment debtor, the former owner of the debts, as against the person to whom they have been so assigned by him. *Corticelli Silk Co.* v. *Balfour*, 5 Terr. L. R. 385.

Action against sheriff for trespass.] —Action for damages for trespass. The defendant bailiff in making a seizure under an execution broke open a store door, the plaintiff residing over the store, both being under one roof:—*Held*, that breaking open the door was unlawful, and small damages allowed. Some of the property seized was the plaintiff's; the remainder was liable to the execution. The plaintiff gave the sheriff a written statement of what he claimed. As plaintiff put in no claim to the remainder to the sheriff he cannot now claim damages for the unlawful seizure of it:—*Held*, further, that there was no unreasonable delay in selling and that a fair price was obtained. *Hudson* v. *Fletcher*, 12 W. L. R. 15.

Amendment—*Affidavit* — *Provisions of statute.*]—Article 647, C. P., does not prevent the amendment of an opposition to a seizure, but merely requires that such amendment shall be accompanied by a deposition on oath affirming that the facts alleged therein are true. 2. An affidavit is not required in support of an amendment which merely alleges a provision of a public statute, of which the Courts are bound to take notice without its being pleaded—in this case, the charter of the city of Montreal. *Larocque* v. *City of Montreal*, 5 Que. P. R. 34.

Amendment — *Title — Costs.*] — On motion to reject an opposition, and on motion by the opposant to amend:—*Held*, that a delay will be granted to the opposant to amend her opposition by setting up her title and the date thereof, upon her paying costs of both motions *au préalable*, and that in default by her of so doing within such delay, the opposition will stand dismissed. *Senecal* v. *Chappell*, 5 Que. P. R. 72.

Attachment before judgment — *Affidavit—Sufficiency.*] — The following statement in an affidavit: "That the said (defendant) said and declared to this deponent that he was going to sell everything and decamp from the country in order not to pay him (deponent); and the said deponent is, besides, credibly informed and believes that the said (defendant) is concealing and selling and is about to conceal and sell his property with the intention of defrauding his creditors, and particularly the said deponent, and the sources of my information are that one B., a milkman, affirms that the said (defendant) said and declared to him that he would sell all his property in order not to pay the deponent his said debt:"—*Held*, sufficient, and that a *saisie-arrêt* before judgment containing this allegation should not be quashed upon petition. *Lefebvre* v. *Rochon*, 5 Que. P. R. 443.

Attachment before judgment — *Defendants about to leave Province—Amount of claim only disputed.*]—An attachment before judgment may be issued when the defendant, a foreigner, intends to depart with all his effects without paying the plaintiff's claim, of which he disputes the amount only. *Lemieux* v. *Le Cirque Sells and Downs*, 7 Que. P. R. 273.

Attachment before judgment — *Petition to quash — Delay to present it—C. P. 922, 945.*]—A petition to quash a seizure before judgment *en mains tierces* founded on the falsity of the allegations of secretion, need not necessarily be made within the delays to plead. *Hardy* v. *McConnell* (1900), 10 Que. P. R. 382.

Attachment before judgment — *Sale of movables—Resale—Offer to cancel—Husband and wife—Authorisation of wife.*]—An attachment before judgment will not lie for the balance due on a sale of movables, because the defendant had resold these effects to a third party, if said resale was cancelled long before the taking of the writ of attachment, if the defendant has offered to cancel the purchase and to restore the effects to the plaintiff, and if the plaintiff, who is separated as to bed and board from her husband, has not been authorised for the purposes of said sale. *Tetreault* v. *Bazinet*, 9 Que. P. R. 293.

Bailiff's return — *Exemptions — Controverting return—Res judicata.*]—A defendant can, without inscribing *en faux* against the report of a bailiff seizing the defendant's goods, declaring that he has left to such defendant all the goods which he had the right to keep, prove that the bailiff has not left them. 2. A judgment declaring a *saisie-gagerie* good and valid, and ordering the sale of the property seized, constitutes *res judicata* upon an opposition *afin d'annuler* founded upon defects or irregularities in the seizure. *Adams* v. *Mulligan*, 20 Que. S. C. 251.

Bank notes — *Property passing.*] — A superannuated civil servant had presented his superannuation certificate at the wicket of a bank, which paid superannuation allowances for the Dominion Government. The teller counted out the amount coming to him, and placed the money on the edge of the teller's wicket. Before the payee had touched it, the

money was seized by a sheriff's bailiff under an execution against the payee:—*Held*, that the property in the money had passed to the payee as soon as it had been placed upon the ledge, and that the execution creditor was entitled to it. *Hall* v. *Hatch, Bank of Montreal* v. *Hatch*, 22 C. L. T. 58, 3 O. L. R. 147.

Barge — *"Stray" — Hull of vessel.*] — The seizure of a barge under the description of "stray" is of the disabled shell without rigging. *Boursier* v. *Bergevin*, 34 Que. S. C. 97.

Boat — *Lien.*]—Interpleader issue as to ownership of goods. There was a verbal agreement at time of sale of boat that title should remain in vendors until purchase price paid. On default vendors sold to plaintiffs:—*Held*, latter sale valid. The Statute of Frauds does not apply. The Conditional Sales Act is not for benefit of creditors. Debtors of plaintiffs gave to them a chattel mortgage on 99-100 undivided interest in their property. This chattel mortgage was not filed:—*Held*, invalid. *Bank of Hamilton* v. *Mervyn* (1909), 14 O. W. R. 132.

Book debts — Attachment of debts. *Jobin-Marrin Co.* v. *Betts* (N.W.T.), 1 W. L. R. 369.

Buildings on land — *Erection by purchaser à réméré—Seizure and sale.*]—Buildings placed upon land by a purchaser *à réméré* may be seized and sold separately from the soil. 2. A purchaser *à réméré* has no status to restrain the sale, as against him, of buildings placed upon the land of his vendor. *Quære*, whether such a seizure is of movables or immovables. *Lafontaine* v. *Bélanger*, 6 Que. P. R. 338.

Claim by assignee of chattel mortgage and lien note given by vendors of execution debtors — Extinguishment of claim—Interpleader — Equitable interest — Subrogation—Renewal of chattel mortgage. *Green* v. *Cornell*, 3 O. W. R. 872.

Claim by transferee — *Possession.*] — An opposition to a sale of movable effects, made by a third person, who has lent money to the debtor and has had transferred to him the effects seized as security for the loan, but has let them in possession of the debtor, will be dismissed upon motion as frivolous. *Pharand* v. *Emond*, 5 Que. P. R. 29.

Conservatory attachment — *Contestation—Assignment for creditors.*]—The plaintiff issue a writ of conservatory attachment against the defendant. After the execution of the writ, the defendant made an abandonment of her property, and a provisional guardian was appointed to her estate. The defendant contested the conservatory attachment by an exception to the form:—*Held*, that after the abandonment the defendant ceased to have any interest in prosecuting the exception to the form. *Lodoux* v. *Simpson*, 4 Que. P. R. 57.

Conservatory attachment — *Ordinary creditor—Lien—Master and servant — Claim for wrongful dismissal—Clerk in store—Affidavit.*]—A *saisie-conservatoire* can issue only at the suit of one who claims a right of property in or a special lien upon movable effects, and not at the suit of an ordinary creditor who has only the general lien resulting from Arts. 1980 and 1981. 2. A clerk has not, under Arts. 1994 and 2006, a lien upon the merchandise in the shop where he serves to secure the payment of damages for wrongful dismissal. 3. Such a claim being one for unliquidated damages, the affidavit made in order to obtain the writ of *saisie-conservatoire* should state the nature and the amount of damages claimed and the facts giving rise to the claim, and should be submitted to the Judge, without whose order the writ cannot be issued. *Poirier* v. *Ornstein*, 19 Que. S. C. 182, 3 Que. P. R. 487.

Conservatory attachment — *Sale of goods—Refusal to deliver.*]—The purchaser who has not yet received the goods sold to him, and on account of which he paid certain sums, cannot seize, by way of conservatory attachment, goods of the same nature and quality, owned by the defendant, and which the plaintiff alleges to be the defendant's only asset. 2. Conservatory attachment can only issue in virtue of an express provision of law. *Papin* v. *Long*, 4 Que. P. R. 140.

Contestation — *Notice of—Time.*]—It is not until after the return of the original opposition, that the notice of contestation prescribed by Art. 650, C. P., can be given. *Gravel* v. *Tétrault*, 3 Que. P. R. 176.

Contestation — *Notice of — Time — Original opposition.*]—It is not until after the production of the original of the opposition that the opposant can give notice of contesting; and an inscription for judgment *ex parte*, effected within the usual time after the production of a copy of the opposition, but less than twelve days after that of the original, will be struck out on motion. *Lindman* v. *Paradis*, 2 Que. P. R. 477.

Costs — *Taxation — Notice—Particulars —Several defendants — Contestation by one only—Apportionment of costs.*]—Pursuant to Art. 554, C. P., costs incurred in the Circuit Court must be taxed upon notice to the opposite party before an execution issues. 2. Where, upon a bill of costs, taxed, but not on notice to the opposite party, execution issued for a larger amount than was really due, an opposition demanding the annulment of the seizure for the whole amount, without mentioning the items of the bill of costs objected to, will not be allowed; but the oppositions or surcharge, notwithstanding that that is equivalent to a revision of the bill of costs; and if he succeeds in establishing that the amount of the writ of execution is larger than the amount due, the opposition will be allowed for the difference between these amounts, but without costs, seeing that both parties are in fault. 3. By virtue of item 37 of the Circuit Court tariff, or item 19 of the Superior Court tariff, when there are two defendants appearing by different attorneys, and one of the two files a plea, the attorney of the plaintiffs, if he succeeds in obtaining judgment upon every issue, will be entitled to the full amount of his costs against the defendant who contested the action, and to half the costs against the one who did not contest. *Descormiers* v. *Hyland*, 5 Que. P. R. 112.

County Courts Act — *Seizure by creditor—Ratification by bailiff—Abandonment*

—*Interpleader — Onus — Estoppel—Sale of Goods Act.*]—Under ss. 82 and 83 of the County Courts Act, R. S. M. 1902 c. 38, before the amendment of 1904, a seizure under execution made by the execution creditor himself was not unlawful or invalid. Where wood piles were seized under execution, and notices of the seizure attached to the different piles, and a person living near asked by the bailiff to look after them, and a week or two later placed by the bailiff in charge, it was held, that there was no abandonment. *Per* Dubuc, J.—The property in the wood never passed to the claimant, notwithstanding contract to buy and part payment, because it had not been measured: Rule 3 of s. 20, Sale of Goods Act, R. S. M. 1902, c. 152. The plaintiff was not estopped from enforcing his execution by the fact that he had attached any money that might be due from the claimant to the judgment debtor on a sale of the wood. *Per* Perdue, J.—Under s. 20 of the Act it was not open to the claimant, on the trial of the interpleader issue, to raise any objection to the validity of the seizure or as to its abandonment. The question was whether the goods seized were the property of the claimant as against the execution creditor, and the onus was on the claimant to prove his ownership. The claimant failed because the provisions of the Bills of Sale Act had not been complied with. Richards, J., dissented. *Hurtable* v. *Conn*, 24 C. L. T. 245, 14 Man. L. R. 713.

Crops — *Lease given as security—Validity of lease—Saskatchewan Bills of Sale Ordinance.*]—Lease for a term of one year given as security does not come within above ordinance. Before seizure at instance of defendants, execution creditors, the plaintiff had threshed the grain on premises mentioned in said lease and were removing same when seizure made. Order made for sale of grain, proceeds to be paid into Court. Reference to ascertain amount due plaintiffs, whose claim must be first paid out of proceeds. *Massey-Harris Co.* v. *Marchand* (Sask.), 10 W. L. R. 62.

Crops on land transferred by execution debtor — Labour and means of transferee—Ownership of crops — Interpleader. *Massey-Harris Co.* v. *Moore* (N.W.T.), 1 W. L. R. 215.

Customer's goods — *Opposition by depositary.*]—The defendant, a tanner, had in his possession a large number of skins which he had received from customers to be tanned. These were seized under a writ of *fi. fa.* goods issued against the defendant:—*Held*, that the defendant was entitled to maintain an opposition *à fin d'annuler;* the seizure being void because the tanner held the skins *à titre de dépositaire. Latouche* v. *Leclerc*, 17 Que. S. C. 181.

Disavowal — *Diligence.*]—One who disavows after judgment, and does not proceed with diligence to have his disavowal declared valid, cannot oppose the execution of the judgment, and the opposition, in these circumstances, will be dismissed on motion. *Sylvestre* v. *Struthers*, 3 Que. P. R. 146.

Dismissal — *Examination of opposant.*]—The Court may, upon a motion for the examination of the party opposing a seizure and for the dismissal of the opposition after such examination, order the examination of the opposant, saving the right to pronounce afterwards upon the part of the motion relating to the dismissal of the opposition. It is not necessary for the applicant to allege in his notice of motion that the opposition is untenable on its face. *Dupuis* v. *Beaudry*, 4 Que. P. R. 416.

Distribution — *Contestation.*]—The opposition of a third party cannot hinder a distribution of the moneys realized, and the rights and privileges of the parties will be determined by the scheme of distribution unless it is contested, contestation being the remedy of the third party. *Turgeon* v. *Shannon*, 4 Que. P. R. 156.

Exception — *Time for filing — Affidavit—Commissioner—Claim of exemption—Guardian to seizure—Solvency.*]—A plaintiff who wishes to make an exception to the form of an opposition made to a seizure has, under Art. 650, C. P., 12 days from the service of the notice required by this Article within which to file such exception.—An opposition to a seizure will not be set aside as irregular because the commissioner who took the affidavit signed it "L. P. Dupré, C. C. S. D. for the district of Montreal." — An opposition made by the defendant, based upon paragraphs 1 and 8 of Art. 598, C. P., which does not allege that the bailiff making the seizure has not left the defendant firing and food sufficient for himself and family for three months, and that he has not left hay and other fodder necessary for animals which by paragraph 8 of such Article are declared not to be seizable, but which alleges only that these goods are of the class which ought to be left to the defendant, at his option, in virtue of such paragraph, will be set aside, under Art. 651, C. P., as being made with the object of unjustly delaying the sale, provided that the person making the opposition does not allege damages.—The fact that the bailiff seizing has not stated in his report that he has required the defendant to furnish a solvent surety before naming a guardian, is not a reason for nullifying the seizure, if the defendant does not complain that the bailiff has refused to accept a solvent guardian. *Lachance* v. *Lachance*, 3 Que. P. R. 282.

Fi. fa. goods — *Seizure under, by sheriff, after assignment by execution debtor for benefit of creditors—Executions Act, s. 11—Assignments Act, s. 8 — Costs of action and execution—Lien.*]—The lien of an execution creditor for his costs given by s. 11 of the Executions Act, R. S. M. 1902 c. 58, when the writ of *fieri facias* is placed in the sheriff's hands, is not taken away by s. 8 of the Assignments Act, R. S. M. 1902 c. 8, upon the making of an assignment for the benefit of creditors under said Act; but, on the contrary, such lien is expressly recognised in both ss. 8 and 9 of the Act.—The assignee, therefore, has no right to demand possession of property seized by the sheriff, without payment to him of his own and the execution creditor's costs. *Gillard* v. *Milligan*, 28 O. R. 645, and *Ryan* v. *Clarkson*, 17 S. C. R. 251, followed. *Thordarson* v. *Jones*, 18 Man. L. R. 223, 9 W. L. R. 233.

Fi. fa. goods in sheriff's hands — *County Court execution—Interpleader—Ap-*

plication of proceeds of sale by bailiff.]—Under a County Court execution the bailiff seized an automobile, and was proceeding to sell it, when the sheriff notified him that he held prior writs against the defendant, and told the bailiff that he would allow him to go on and sell, if he afterwards paid the money to the sheriff. Upon an interpleader issue in the County Court between the plaintiff and sheriff:—*Held*, that the bailiff, in making the sale, was really acting for the sheriff who thereupon became entitled to the proceeds in the same manner as if he had seized. *Maw* v. *Moxam*, 18 Man. L. R. 412, 9 W. L. R. 705.

Fi. fa. lands — *Payment by subsequent purchaser—Satisfaction—Other executions — Creditors' Relief Ordinance — Sheriff — Absence of "levy"—Money not made out of property of debtor.*]—On the 11th March, 1909, the registered owners of land mortgaged it to the plaintiffs, and the plaintiffs, desiring to have their mortgage a first incumbrance, tendered to the sheriff of the district in which the land lay the amount of an execution by E. against the goods and lands of L. placed in the sheriff's hands in December, 1907, when L. was the registered owner of the land. The sheriff refused to accept the money and certify that the execution, as against the land mortgaged to the plaintiffs, was satisfied, for the reason that there were then in his hands two other executions against the goods of L. and one other execution against the lands of L., the latter having come to the sheriff's hands after the land had been transferred by L., and that, if he received the amount of the execution, he would be obliged, under the Creditors' Relief Ordinance, to distribute the money *pro rata* among all the execution creditors, and none of them would be paid in full:—*Held*, that the amount tendered by the plaintiffs, if accepted by the sheriff, could not be said to be moneys "levied" by the sheriff under the execution, nor money made out of the property of the execution debtor. Without a seizure there can be no levy. And the sections of the Creditors' Relief Ordinance which require moneys levied upon an execution against the property of the debtor to be distributed *pro rata* among the creditors would not apply. As to the executions subsequent to the transfer of the land by L., they could only affect such interest as he had in the land at the time they were delivered. The sheriff, not having made a levy, was at liberty to receive the money and apply it in satisfaction of the E. execution. *Trust and Loan Co.* v. *Cook* (1910), 15 W. L. R. 727.

Filing documents — *Deposition—Service—Stay of sale.*]—The failure to file, with an opposition, the documents alleged in it, is not a ground for dismissing it upon a simple motion, in accordance with Art. 651, C. P.; and Rule 62 of the Rules of Practice is not imperative. 2. The sheriff is bound to receive an opposition accompanied by a deposition such as is mentioned in Arts. 647 and 727, C. P., and the service of such opposition stays the sale, pursuant to Art. 729, C. P. *Morinville* v. *Basil*, 18 Que. S. C. 397.

Goods in possession of third person —*Will—Insaisibilité—Alimentary debt.*] — When a third party declares that he has in his possession goods belonging to the judgment debtor, and an order made upon this declaration has directed the sale of these goods, pursuant to Art. 695, C. P. C., it is not necessary that a writ of execution should be issued to authorise their seizure and sale.—In spite of the fact that the donor or testator has stipulated that articles given or bequeathed shall not be seized upon any account whatever, such articles may be seized for an alimentary debt. *Préfontaine* v. *Valois*, 16 Que. S. C. 613.

Goods of stranger — *Right of revendication.*]—The owner of effects seized under a writ of *saisie-arrêt* before judgment, as belonging to a third person, has the right to recover them by means of a *saisie-revendication* in the hands of the first execution creditor or of the bailiff or guardian to the seizure. *Corriveau* v. *Boright*, 6 Que. P. R. 136.

Grain — *Bona fide sale — Actual and continued change of possession.*]—Claimant sold certain property to G. to be paid for by the delivery at elevator of 1907 crops and one-half of each year's crops till purchase price paid. Subsequently it was agreed that claimant should get all of 1908 crop delivered at elevator. G. was to have possession of property:—*Held*, that crop did not pass until actual delivery or the execution of a valid legal mortgage, and execution creditor entitled to crop under execution. *Re Godkin*, 9 W. L. R. 430.

Grain — Claim by purchaser — Sale for valuable consideration—Absence of notice or knowledge of execution—Actual and continued change of possession—What amounts to. *McCormick* v. *Anderson*, *Beach* v. *Anderson* (N.W.T.), 5 W. L. R. 76.

Guardian — *Discharge—Sale.*]—A guardian appointed to a seizure under execution is discharged as soon as he has handed over the effects seized to the bailiff charged with the sale of them, and if the latter does not sell them all, the guardian is not responsible for those which are not sold. *Gingras* v. *Parent*, 25 Que. S. C. 271.

Guardian — *Duties of—Delivery of goods —Discharge—Mistake — Costs.*] — A voluntary guardian, upon an attachment of goods claimed pending litigation of claim, is in the wrong if he does not notify the execution creditor that the goods intrusted to him are upon the point of being sold at the instance of another creditor; and his omission to do so may expose him to an action for damages, but not to arrest.—2. The service upon the guardian of a copy of a judgment declaring the plaintiff the owner of goods which have been seized is not sufficient to put the defendants and the guardian in default for not delivering the goods; it is necessary, in addition, to send to the defendant's abode an officer authorised to take delivery of the goods.—3. The guardian is in law discharged after one year reckoned from his nomination, the ordinance of 1657 (tit. 19, Art. 22) being still in force in this country.—4. If the guardian makes a mistake, and the applicant for the rule has proceeded irregularly upon that, the rule will be dismissed without costs. *Hochelaga Bank* v. *McConnell*, 2 Que. P. R. 470.

Guardian — *Non-appointment of — Debtor left in possession.*]—An opposition to a seizure made by the execution debtor upon

the ground of the non-appointment of a guardian to the effects seized will be dismissed on motion where it appears that the defendant himself was left in possession of the effects seized. *Globensky* v. *Sanguinet*, 2 Que. P. R. 493, 16 Que. S. C. 503.

Guardian — *Several execution creditors —Different guardian — Rights of.*] — The second execution creditor seizing is not obliged to name the same guardian as in the case where the debtor has been dispossessed of the goods seized. 2. The two guardians named at the time of different seizures, who have allowed the debtor to remain in possession of the goods seized, may each or either take them from him at any time before the sale. 3. If the two guardians wish to have possession of the goods seized, the Court, upon petition, will determine their respective rights, awarding, however, possession, in default of sufficient reasons against his demand, to the guardian named in the cause in which the sale of the goods seized should first take place. *Couture* v. *McManamy*, 24 Que. S. C. 356.

Guardian — *Volunteer.*] — The voluntary guardian in respect of a seizure of goods has no status to oppose the seizure and sale of these goods in another cause in which he has not been appointed guardian. *Joly* v. *Younie*, 3 Que. P. R. 190.

Hull of ship — *Conditional sale — Price payable before delivery — Title to goods—Rescission of sale—Attachment—Possession by judgment debtor—Ownership—Procedure by bailiff—Guardian to second seizure—Sale super non domino et non possedente — Adjudication upon invalid seizure.*]—The hull of a steamer sunk in a canal had been attached under judicial process, and, while standing on the bank at a distance from which he could not see or touch the materials, a bailiff assumed to make a second seizure, gave no notice of his proceedings to those on board the hull, and appointed a guardian other than the one placed in charge of the hull at the time of the first seizure. The execution debtor, named in the second writ, had made a bargain for the purchase of the hull, subject to the price being paid before delivery, but had not paid the price, nor had the property been delivered into his possession. Subsequently the bailiff adjudicated the hull to the appellant by judicial sale at auction:—*Held*, that there had been no valid seizure under the second writ; that the purchaser acquired no title to the property by the adjudication, and the sale to him should be rescinded; that, under the circumstances, there could be no application of the maxim "*en fait de meubles possession vaut titre*," and that the maxim "*main de justice ne dessaisit pas*" must be taken subject to the qualification that a seizure under judicial process places the goods seized beyond the control of an execution debtor. *Connecticut and Passumpsic Rivers Railroad Co.* v. *Morris*, 14 S. C. R. 319, distinguished. Judgments in 32 Que. S. C. 142 and 17 Que. K. B. 193 affirmed. *Brook* v. *Booker*, 41 S. C. R. 331, 6 E. L. R. 435.

Inoperative assignment — *Sale of lands.*]—*Held*, affirming the decision in 13 Que. S. C. 125, that an assignment of effects, incomplete in that it does not contain a sworn list of creditors and that it has not been followed by the requisite notices, cannot be set up by way of opposition to a seizure of the property of the debtor.—2. The modes of execution which the Code of Procedure (old text) prescribes as to realty included in an assignment of property do not exclude the ordinary remedy which a creditor has by virtue of his judgment of proceeding by writ against lands to the seizure and sale of the real estate of his debtor. *St. Jorre* v. *Morin*, 10 L. N. 14, approved. *Birks* v. *Lewis*, 8 Que. Q. B. 517.

Inscription — *Filing of contract.*] — A person who makes an opposition to a seizure based upon a marriage contract, cannot set the opposition down for judgment without filing the contract, and if he does so, the inscription will be set aside on motion. *Ward* v. *McGarry*, 3 Que. P. R. 380.

Interest of partner in grain — Possession. *Clemens* v. *Bartlett*, 1 O. W. R. 342.

Irregularity — *Residence — Waiver — Appeal—Delay —Motion to dismiss opposition.*]—A defendant cannot set up, as a ground for setting aside a seizure, an erroneous description of his domicil, if it is described in the writ of execution and the *procès-verbal* as it is in the writ of summons, and he has not objected to the irregularity during the time allowed for delivering an *exception à la forme* (Art. 176, C. P.).—2. The setting down of an appeal from a judgment after the time allowed therefor cannot delay the execution of such judgment.—3. An opposition based upon these facts will be dismissed on motion. *Atkinson* v. *Ryan*, 3 Que. P. R. 94; 18 Que. S. C. 427.

Irregularity — *Status of claimant to attack.*]—The claimant of goods seized cannot attack the seizure for irregularity. *Germain* v. *Lamoureux*, 16 Que. S. C. 404.

Joint opposition.]—Two or more persons, each one of whom is sole owner of one of the articles seized, cannot, by a joint opposition, each claim the article which belongs to him, especially if their titles are not of the same nature. *Hill* v. *Howley*, 20 Que. S. C. 269, 4 Que. P. R. 176, 353.

Joint seizure — *Grounds of opposition —Frivolity.*] — The Court will dismiss as frivolous, on motion, an opposition *à fin d'annuler* made by joint defendants on the following grounds:—1. That a *requête civile* is pending to annul the judgment, no order to suspend proceedings having been given by the Judge.—2. That the seizure is made upon defendants jointly without stating which owned the effects seized, the seizure being made in the joint domicil of the defendants. —3. That the notices of sale are irregular, no detail of such irregularity being given. *Nash* v. *Honan*, 2 Que. P. R. 452.

Landlord's privilege —*Sale and lease.*] —When goods are under seizure, the execution debtor cannot, by selling these goods, with the land on which they are, to a third person, and by taking from this third person a lease of such land and the goods seized, confer upon the third person a landlord's

privilege capable of being set up as against the execution creditor, upon distribution of the moneys arising from the sale of these goods, made at the suit of another creditor. *Dagenais* v. *Honan*, 17 Que. S. C. 478.

Lessor of goods seized.]—A third party, the lessor of the goods seized, who has reserved to himself the right to re-take them if the lessee should not pay the instalments regularly, may exercise such right by way of opposition to the seizure of the goods by a creditor of the lessee. *Farand* v. *Emond*, 5 Que. P. R. 58.

License under Liquor License Act.]—See *Walsh* v. *Walper*, 22 C. L. T. 49, 3 O. L. R. 158.

Mining lease — *Prospector's license — Machinery—Annexation to freehold — Trade fixtures—Fi. fa. de bonis—Sale.*]—The licensees of a mining arear in Nova Scotia erected a stamp mill on wild lands of the Crown, for the purpose of testing ores. All the various parts of the mill were placed temporarily in position, either resting by their own weight on the soil or steadied by bolts, and the whole installation could be removed without injury to the freehold:—*Held*, that the mill was a chattel, or at any rate a trade fixture, removable by the licensees during the tenure of their lease or license, and, consequently, it was subject to seizure and sale under an execution against goods. Judgment in 36 N. S. Reps. 395, affirmed, but for different reasons. *Liscombe Falls Gold Mining Co.* v. *Bishop*, 25 C. L. T. 78, 35 S. C. R. 539.

Motion to dismiss opposition — *Grounds.*]—A plaintiff cannot, by a motion made under the provisions of Art. 651, C. P., demand the dismissal of an opposition because it is made after the delivery of a former opposition which has been dismissed, and at a time when all the notices following upon the seizure have been given, and without the authorization of a Judge, and because it does not invoke grounds subsequent to the proceedings which have caused the suspension of the sale in the first place; such grounds having only the force of an *exception a là forme* to the opposition; and Art. 651 applying only when it appears by the opposition itself, or by the proceedings on the record, that it is made with the object of unjustly delaying the sale. *Le Comptoir d'Escompte* v. *Gaudet*, 3 Que. P. R. 97.

Movables — *Can the bailiff be the guardian—Seizure in revendication by the guardian—C. P. 621, 624.*]—A bailiff who executes a seizure of movable property, may, upon the party upon whom the seizure is made refusing to furnish a guardian, appoint himself guardian of the effects seized.—The guardian of the effects seized may, by seizure in revendication, recover possession of the effects of which he has been deprived. *Beaufort* v. *Hetu* (1910), 11 Que. P. R. 306.

Movables — *Liability of guardian—Discharge.*]—A guardian to a seizure of movables is discharged only by the judicial sale consequent upon the seizure, by the consent of all the seizing parties, or by a judicial order. Lapse of time no longer affords relief from liability for the things in his custody. *Howard* v. *Heffernan and Howard*, 34 Que. S. C. 524.

Movables and immovables — *Opposition as to movables—Sale of immovables—Sheriff — Return.*] — The plaintiff having caused to be seized at the same time movables and immovables in the possession of the defendant, and a third party having by opposition claimed the movables as his, the plaintiff may afterwards proceed to a sale of the immovables without waiting for the result of the opposition, for he is not bound to go further with the contest as to the movables. —2. The sheriff, having, before making a return of the writ, his proceedings, and the opposition, taken a copy of the writ and of the *procès verbal* of the seizure of the immovables, may, without other authority, and without waiting for judgment upon the opposition as to the movables, proceed to advertise and sell the immovables. *Gaudeau* v. *Tetu*, 20 Que. S. C. 402.

Notice — *Exemption — Telephone.*]—A seizure of goods under an execution and a notice that goods 20 miles away in the same bailiwick belonging to the same execution debtor are under seizure do not operate as a seizure of the latter goods. *Quære*, whether a debtor's right of exemption is absolute or a privilege to be exercised within two days. *Schl* v. *Humphrey*, 1 B. C. (pt. 2) 257, and *In re Ley*, 7 B. C. R. 94, questioned in this regard. *Semble*, goods cannot be seized by telephone. *Dickinson* v. *Robertson*, 11 B. C. R. 155, 1 W. L. R. 142.

Opposition — *Attack on judgment — Jurisdiction.*]—A judgment, in execution of which a seizure has been made, cannot be attacked by an opposition *à fin d'annuler*, on the ground that the Superior Court had no jurisdiction to pronounce the judgment. *Coté* v. *Bernatchez*, 25 Que. S. C. 219.

Opposition — *Default of contestation — Time — Leave to contest — Consolidation of actions.*]—Where an execution creditor has made default in contesting an opposition to his seizure within the time allowed, he will not be allowed after the time has expired to file his contestation and to join his cause to another cause in which he has seized the same goods. *Archibald* v. *Spenard*, 6 Que. P. R. 124.

Opposition —*Examination of opposant.*]—An opposant, who claims property, stating that he has been doing business for "some time" previous to the seizure, under the same firm name under which the debtor was condemned, will be ordered to appear for examination on the opposition. *Ford* v. *Payette*, 6 Que. P. R. 57.

Opposition— *Examination of opposant.*]—The examination of an opposant will not be ordered unless the creditor seizing establishes, or there appears on the face of the record some reason leading the Court to believe that the opposition is made to unjustly retard the sale, or is unfounded, or would be shewn to be so by the opposant's examination. *Demers* v. *Bergevin*, 6 Que. P. R. 47.

Opposition — *Insaisissabilité — Investment of moneys bequeathed — Declaration — Registration.*]—A declaration that a purchase of property has been made with moneys derived by the purchaser, under a condition of "*insaisissabilité*" can be set up against a creditor of the purchaser, although not registered until after the creditor had acquired his status as such. The following clause in a will, "My intention in making the bequests aforesaid being that the said property or that by which it shall be represented shall be insaisissable, the same being given to secure a provision for the support of the said beneficiaries," is not contrary to the provisions of Art. 599, C. P. C., clauses 3 and 4, the law empowering a donor or testator to declare "*insaisissables*" not only immovables so disposed of by the will, but also such as might be acquired in place of such immovables. Judgment in *Baird* v. *Morphy*, 23 Que. S. C. 497, affirmed. *Baird* v. *Ferrier*, 13 Que. K. B. 317.

Opposition — *Judgment — Reduction of amount — New writ.* — A judgment pronounced upon an opposition to a judgment has the effect of causing the execution issued and based upon a judgment obtained by default to lapse; and the party who has thus obtained judgment by default and has executed it, may not, after the sustaining in whole or in part of an opposition to the judgment, proceed with his execution, but must be content to reduce the amount to be levied upon his original writ to that fixed by the judgment upon the opposition.—2. The judgment sustaining an opposition, but granting to the plaintiff a part of his demand, should be executed by a new writ. *Demers* v. *Dufresne*, 24 Que. S. C. 141.

Partnership property — *Ownership of goods seized—Transfer to continuing partner — Sheriff — Proceeds of sale — Liability to execution creditor—Damages—Depreciation.*] —A partnership existing between C. and S. was dissolved, C. taking all the assets and assuming all the liabilities of the firm:—*Held*, that, in the absence of fraud, the goods of the firm were effectually transferred to C., and were subject to an execution placed in the hands of the defendant sheriff with instructions to levy upon and sell the goods of C. The defendant, after having levied upon the goods under the plaintiff's execution, sold the goods under two executions placed in his hands subsequently, and paid over the proceeds to the creditors at whose instance such executions were issued.—*Held*, that he was liable to the plaintiff in damages for so doing; but was not liable for depreciation resulting from delay in selling occasioned by the act of the Court. The case was not one for punitive damages, or for other damage than the actual value of the goods at the time of the sale. *Crowe* v. *Buchanan*, 36 N. S. R. 1.

Patent for invention.] — A patent for invention granted by the Dominion Government may be seized in execution. *Farand* v. *Emond*, 23 Que. S. C. 2.

Patent for invention.] — *Quære*, whether a patent for invention can be seized under execution. *Walker* v. *Lamoureux*, 21 Que. S. C. 492.

Patent of invention — *Exigible property.*]—A patent of invention is seizable, and an opposition based upon its alleged *insaisissabilité* will be dismissed upon motion. *Farand* v. *Emond*, 5 Que. P. R. 63.

Possession of goods — *Joint ownership.*]—A creditor can seize under ordinary execution only goods which are in possession of the debtor.—2. A third party, owner of an undivided interest in goods seized under execution against his co-owner, may prevent the sale of the goods as regards his own rights. *Turner* v. *Bradshaw*, 6 Que. P. R. 184.

Prior seizure.]—An opposition for the purpose of setting aside a seizure under execution is well-founded in law if, among other grounds, it invokes a prior seizure under execution of the same goods, even if it is not alleged that the sheriff is proceeding under the prior seizure. *Samson* v. *Beauregard*, 3 Que. P. R. 256.

Product of timber — *Permit to execution debtor to cut and remove from Crown lands—Partnership—Purchasers — Claimants —Interpleader—Interest of partner.*]—E. F. Kendall, an execution debtor, was the holder of a permit entitling him to cut and remove from certain lands of the Crown a quantity of railway ties. He entered into a contract with the Canadian Pacific R. W. Co. to furnish them with 30,000 ties on certain terms as to delivery and payment. To enable him to carry out the contract, he applied to the Bank of Ottawa for advances, which the bank agreed to make, on receiving an assignment of the moneys payable under the contract and other securities. E. F. Kendall and Thomas Robinson entered into partnership in the business of tie manufacturers, to be carried on upon lands comprised in the permit, and to include the carrying out of the contract with the Canadian Pacific Rw. Co. The agreement of partnership was at first oral, but, later, it was, at the instance of the Bank of Ottawa, reduced to writing and signed by the parties, and a certificate of the partnership was duly registered. The partners proceeded to the lands, and Robinson was left in control, in accordance with the partnership agreement. He established the camp and commenced to cut the ties, and got them out on the ice on an arm of the Lake of the Woods. In the spring they were boomed and finally towed to Norman's Bay, where they were seized by the sheriff. The boom timber and logs were cut by the partnership for the purposes of rafting the ties, and were properly taken for that purpose: —*Held*, the claim of the execution creditors could not take effect so as to deprive the partner Robinson of his rights, or prevent him from enforcing them in the name and on behalf of the partnership. The property in the ties was shewn to be in Kendall & Robinson and the Canadian Pacific Rw. Co., as purchasers from them, and the property in the boom timber and logs to be in Kendall & Robinson. A sale of Kendall's interest in the partnership would not pass the property to the purchaser, but would give to him a right to an account of the partnership transactions with a view to ascertaining and realising the interest of the execution debtor. But there were no means by which such a proceeding could be taken in this matter. The money in Court stood as security for the ties, boom, timber, and logs seized by the sheriff. It was not possible to determine in this proceeding

whether Kendall was entitled to any, and, if so, how much of it. The materials for such an inquiry were not before the Court. Defendants' remedy, if any, was in some proceeding in which all questions between the partnership and the execution debtor could be properly inquired into and adjusted. Appeal dismissed. *Can. Pac. Ry. Co.* v. *Rat Portage Lumber Co.*, 5 O. W. R. 473, 10 O. L. R. 273.

Property already under seizure — *Duty of sheriff — Seizure upon seizure.*]—A sheriff, having a judgment against the defendant, issued a *fi. fa.* addressed to the coroner (Arts. 35, 36, C. P.), and the latter seized the immovables of the defendant. The defendant having lodged an opposition, the coroner returned the writ, the opposition, and all his proceedings. Subsequently the plaintiffs, having a judgment against the defendant, issued a *fi. fa.* addressed to the sheriff, and he seized thereunder the same immovables:—*Held*, that the old maxim "seizure upon seizure is invalid" exists no longer except as modified by the Code of Procedure; that the sheriff had not to note this second writ upon that addressed to the coroner; that art. 711, C. P., did not apply to this case: that the sheriff, upon receiving the second writ, had nothing to do but seize, since he had not then the first writ, and that writ had not been addressed to him. *Richer* v. *Michaud*, 20 Que. S. C. 442.

Property declared by will insaisissable — *Seizure for debt of testator.*]—P. M. devised his property to L. M., without reserve, constituting him his universal legatee from the day of his death, upon the express condition that L. M. was to dispose of the property in favour of his children, in equal or unequal parts, as he should judge fit when making partition of his other property. L. M. accepted the devise. Then, by his will, he bequeathed his property (other than that which he had from P. M.) to his son J. B. M., the present defendant, on the express condition that he should preserve the property for his children and divide it among them equally or unequally. And, moreover, L. M., desiring to discharge the trusts mentioned in the will of P. M., made choice of his said son J. B. M. to receive the property left by P. M., and he gave him all such property, and added that he (L. M.) wished and intended that the property belonging to the testamentary succession of P. M. should be preserved in the same manner as the property devised by L. M., and he concluded his will as follows: "I wish and intend that the enjoyment of the property above devised to my son J. B. M. shall be *insaisissable* and I declare that I gave him this legacy *à titre d'aliments*." L. M. dying J. B. M. accepted the will. The plaintiffs, having obtained judgment against J. B. M., as universal legatee, for a debt contracted by L. M., caused to be seized the immovables coming from P. M. J. B. M. lodged an opposition, setting up that the property was subject to a substitution in favour of his children, and invoking also the *insaisissabilité* clause:—*Held*, that the substitution provided by the will of L. M., as regards the property which came from P. M., in favour of the children of J. B. M., was valid, but that the decree did not purge the substitution; that the defendant, who was the *grevé*, could not set up the substitution by his opposition; that the *insaisissabilité* clause as regards the property coming from P. M., imposed by the will of L. M., was valid and within the powers of L. M., but it could not be invoked against the debts left by L. M., and the defendant, as his universal legatee, was bound to pay. *Richer* v. *Michaud*, 20 Que. S. C. 442.

Removal of goods — *Obligation to return.*]—Where the person appointed guardian of goods seized under execution removes them, he must, if the seizure is annulled, bring them back to the domicil of the execution debtor, who has a remedy by way of rule *nisi*. *Adams* v. *Mulligan*, 4 Que. P. R. 90.

Repeated seizures—*Damages* — *Bailiff —Execution creditor.*]—A bailiff holding a writ of execution against a debtor, instead of at first seizing all the chattels which were to be found at the house of the debtor, seized only a part, and, upon the debtor and his wife filing an opposition, returned a second and a third time and seized goods which he might have included in the first seizure:—*Held*, that he was liable to the debtor for the damages and annoyance which these repeated seizures had caused.—2. It was the duty of the bailiff, under the circumstances, after the first seizure, to abstain from proceeding upon the writ of execution until after judgment upon the opposition.—3. The party for whom the bailiff acted, in spite of the fact that he was not aware of these repeated seizures, was liable jointly with the bailiff and severally for the damages suffered by the debtor, where by defending the action he had adopted the acts of the bailiff. *Bédard* v. *Bachand*, 16 Que. S. C. 348.

Right of debtor to withdraw effects.]—An opposition to a seizure, based on the fact that some of the effects seized could have been withdrawn and selected by the debtor, must shew that he was not allowed to select and withdraw them; otherwise it will be dismissed on motion. *Beaubien Produce and Milling Co.* v. *Lecuyer*, 5 Que. P. R. 71.

Rule nisi—*Option.*]—A rule *nisi*, against a guardian to effects seized under execution, which (besides giving him the option of paying the amount due the seizing creditor) gives him the option of producing the effects, or of paying the value thereof, without the value being mentioned or ascertained, is illegal, and will be set aside. *Simard* v. *Crevier*, 19 Que. S. C. 133.

Salary — *Lacombe law — Judgment in the Superior Court — C. P. 1147a.*]—Art. 1147*a* of the Code of Civil Procedure being contained in that part thereof which applies to the Circuit Court, is limited to cases in that Court, and does not stay the proceedings under a writ of garnishment of wages issued out of the Superior Court. *Lemieux* v. *St. Laurent* (1909), 11 Que. P. R. 281.

Salary — *Lacombe law — Judgment in the Superior Court—Notice by defendant to creditors.*]—(1) Although Article 1147*a* of the Code of Civil Procedure is contained in that part thereof which applies to the Circuit Court, it is not limited to cases in that Court, said article being general in its prohibition of any *saisie arrêt* against defendant.—(2) The clerk of the Circuit Court being bound to keep a list of the parties who comply with the dispositions of Article 1147*a* C. P., the debtor

is not bound to give notice to his creditors that his name appears on that list. *Neven* v. *Allard*, 11 Que. P. R. 107.

Section of railway.] — A section of a railway may be seized and sold separately; it is not necessary that the seizure should apply to the whole line. *Dillon* v. *Atlantic and Lake Superior Rw. Co.*, 19 Que. S. C. 533, 5 Que. P. R. 68.

Separate claim for costs.]—If the opposition to an execution which has been issued at the request of the attorney separately, and of the party whom he represents, is ill founded with respect to the attorney, he can demand the dismissal as to him. *Laramée* v. *Hubert*, 3 Que. P. R. 167.

Sheriff—*Notice—Custodia legis — Security.*]—Goods were seized under execution by the sheriff, who left them in possession of the judgment debtor's wife, who claimed to be the owner, upon her agreeing to hold them for him. Some months later the sheriff, under the same writ, took the goods, which were then in the possession of the claimants, who claimed to have bought from one H., who claimed to have bought from the wife after the original seizures:—*Held*, in view of the Administration of Civil Justice Ordinance, 1884, s. 83, that there was no abandonment by the sheriff; that he was right in resuming actual possession; and that, therefore, the execution prevailed over the claimants' title. *Brittlebank* v. *Gray-Jones*, 1 Terr. L. R. 75.

Ship seized by sheriff under fi. fa. —*Connivance to bring ship from foreign waters into sheriff's bailiwick—Declaration that ship was not exigible—Public policy—International law—Ashburton Treaty Act*, 7 —*Costs.*]—This was an issue in which plaintiffs affirmed and defendant denied that the ship "Houghton," seized or taken on or about 19th April, 1910, by sheriff of Essex, under an execution issued in *May* v. *Houghton*, was improperly brought by defendant or with his connivance, or by others, into the bailiwick of the sheriff of Essex ,or came within the bailiwick of the sheriff of Essex, under such circumstances that the ship was not exigible in execution, and that the said seizure was an abuse of the process of the Courts and should be released. Defendant in this issue recovered $10,000 for damages for a collision between a vessel of plaintiff's and defendant, and seized this vessel, which broke away or was released from her moorings on the American side and drifted to the Canadian side at night in a storm.—Clute, J., *held*, that plaintiff was entitled to a declaration as asked, and that plaintiffs were entitled to costs of the interpleader order and incident thereto and the extra costs occasioned by the postponement of the sale and of the trial of the issue and judgment. Thirty days' stay. *Houghton* v. *May* (1910), 17 O. W. R. 750, 2 O. W. N. 376, O. L R

Stay — *Appeal—Irregular notice—Costs —Undertaking by advocate to repay—Costs of levy.*]—The defendants, having served notice of motion to the Court *en banc* for a rule to shew cause why the verdict for the plaintiff should not be set aside, or for a nonsuit or a new trial, applied to the trial Judge, under J. O. Ord. 512, after seizure under execution issued upon the judgment for a stay of proceedings, upon the ground of irreparable loss and inability of the plaintiff to repay the amount levied in case the appeal should be successful:—*Held*, that there was jurisdiction to entertain the application, although the notice of motion was perhaps irregular in form.—(2) That the fact that the plaintiff would not be able to repay the amount levied in case of an adverse decision on appeal is sufficient ground for granting stay. Stay ordered on security being given.—(3) That execution for costs should be stayed unless the advocates give personal undertaking to repay them in case appeal succeeded.—(4) That the defendant, having delayed making application until after issue of execution and seizure, should pay the costs and expenses incurred by reason of the delivery to the sheriff of the execution.—(5) The costs of application must be paid forthwith by party applying. *Merry* v. *Nickalls*, L. R. 8 Ch. 205, and *Cooper* v. *Cooper*, 2 Ch. D. 492, followed. *Patton* v. *Alberta Coal Co.*, 2 Terr. L. R. 294.

Stay — *Motion to dismiss—Exception.*]—An opposition to a seizure under execution will not be dismissed upon motion because no order for a stay has been made by a Judge; the sheriff having suspended proceedings and made a return to that effect, the opposition is regularly before the Court for adjudication.—2. Such a motion, not attacking the merits of the opposition, is in the nature of an exception *à la forme*, and cannot be entertained except in so far as it attacks the opposition as futile and is based upon prejudice caused by the irregularities complained of. *Ville de St. Jean* v. *Lefebvre*, 3 Que. P. R. 23.

Stay — *Second opposition — Former one dismissed—Reservation.*]—Where an opposition *à fin de charge* was dismissed, by a judgment which reserved to the opposant the right to take the proper proceedings to protect his interests, no order to stay the proceedings upon the execution pending a new opposition will be granted to the opposant now setting up a different claim base upon reasons existing before the former opposition was made. *Thompson* v. *Caldwell*, 2 Que. P. R. 428.

Substitution — *Interest of institute.*]—1. The property held under a substitution, which has not been declared to be exempt from seizure, can be seized for the debts of the institute. The interest of the institute in a substituted property can be seized, but the sale does not affect the rights of the substitutes unless the sale has been made for a claim either prior or preferable to the substitution itself. *Desjardins* v. *Michald*, 8 Que. Q. B. 494.

Sufficiency.]—An opposition to a seizure alleging that the opposant is the owner of the animals seized, on account of having himself bought them and paid for them out of his own money, supported by an affidavit following the provisions of Art. 647, C. P., is sufficient in law, and will not be rejected on motion. *Perron* v. *Marquis*, 4 Que. P. R. 174.

Sufficiency of seizure— *Sale—Adjournments — Notice — Expiry of writ.*]—The defendants contended that the bailiff executing a writ of *fi. fa.* did not make a seizure, as

required by law, of certain buildings, or that, if he did legally seize, he abandoned the seizure; that he did not give due notice of the sale, or at any rate of the adjournment; that the buildings were sold for an inadequate price; and that the writ had expired before the sale. The bailiff found the buildings locked. He did not enter them, or put a man in possession, but put up written notices on the buildings stating that he had seized them, and mentioning the date when and the place where he intended to sell:—*Held*, reasonably sufficient to constitute a seizure as against defendants, whether it would, or would not, have held the property as against a subsequent *bona fide* purchaser from the owner for value, without notice. No notices of the several adjournments of the sale were made public by the sheriff, but the debtor must be presumed to have known of the day fixed for the sale, as a solicitor, at the sale, on the defendant's behalf, gave the bailiff a notice forbidding the sale. The seizure was made while the writ of execution was in force, and the sale then advertised was adjourned from time to time till the buildings were actually sold. The fact that the writ expired before the actual sale was, therefore, unimportant. *Dixon* v. *Mackay*, 22 C. L. T. 374.

Territories Real Property Act—*Creditors' Relief Ordinance—Expiry — Renewal —Priorities — Seizure — Sheriff's sale — Advertisement — Postponement — Appeal — Admission of point of law.*]—No question of the effect of the Creditors' Relief Ordinance being raised, the priorities of several executions against land depend not upon the date of their delivery to the sheriff, but upon the date of the deposit with the registrar of certified copies of the executions, accompanied by memoranda of the lands sought to be charged.—2. The sheriff's advertisement of sale of land is a seizure of the land.—3. The effect of s. 94 of the Territories Real Property Act is to provide that neither the delivery of the execution to the sheriff nor his seizure of the land binds the land, but only the deposit with the registrar of the copy-execution and accompanying memorandum. —4. Any seizure by the sheriff enures to the benefit of all execution creditors whose executions are then in his hands, and this notwithstanding that, in case the seizure is by way of advertisement, the advertisement mentions only one or some of such executions; and *semble*, also, notwithstanding that some of such executions were not in the sheriff's hands for a sufficient time to authorize an advertisement for sale under them alone.—5. The sheriff's advertisement of the sale of lands may properly run prior to the expiration of the year, during which he cannot actually sell; and *semble*, even if the date fixed for the sale fall short of the year, but the sale is adjourned to a date subsequent to the lapse of the year, the sale would not be bad on that account.—6. A sheriff having seized lands under an execution before it has expired can proceed with the sale of such lands after the lapse of the time for the renewal of unexecuted executions:—*Held*, on appeal to the Court *en banc*, that the priorities of several executions against lands is not affected by the provisions of s. 94 of the T. R. P. Act, and that therefore such priorities are not determined by the order in which copies-execution and accompanying memoranda are deposited with the registrar, but by the dates of delivery to the sheriff.—2. The distribution of the proceeds of the sale is governed by the provisions of the Creditors' Relief Ordinance.—3. Although no question was raised before the Judge of first instance, as to the effect of the Creditors' Relief Ordinance, and it was there conceded that the respective execution creditors had the right to have the proceeds of the sale applied on the executions in the order of their legal priority, this could not be construed as a consent on the part of the claimants to the fund that it should be disposed of in the same manner as if the Ordinance were not in force, but merely as a contention on their part that the whole fund should be applied on their executions, and in the absence of consent on the part of the sheriff and all the parties interested in the fund, the provisions of the Ordinance must govern its disposal. *Limoges* v. *Campbell*, 2 Terr. L. R. 356.

Title — *Necessity to allege.*]—An opposition which merely sets forth that the opposant is proprietor of the effects seized, without mentioning any title thereto, is futile, and will be dismissed on motion. *Desroches* v. *Drapeau*, 3 Que. P. R. 230.

Writ of possession — *Opposition — Stay of proceedings.*]—An opposition to a writ of possession which alleges that, since the judgment rendered against the defendant, he has obtained from one of the attorneys of the plaintiff leave to occupy for a certain time the room let by the plaintiff, and which is accompanied by an order for a stay made by a Judge of the Superior Court, will not be dismissed on motion. *Hart* v. *Dubreuil*, 3 Que. P. R. 291.

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7. Sale Under.

Conveyance — *Mistake — Title — Rescission of sale.*] — When an immovable is advertised to be sold by the sheriff, and an order of the Court is made to withdraw a portion of it from the sale, and the latter takes place in conformity with such order, the delivery to the purchaser of a title deed drawn by mistake as if the whole property originally advertised had been sold, confers no right to the same upon the purchaser. If, therefore, the document so drawn in error is returned to the sheriff for any purpose, he is justified in retaining it, and will not be compelled by action to return it or to issue another in the same form, nor do such facts afford grounds for the rescission of the sale. *Walker* v. *Thibaudeau*, 29 Que. S. C. 452.

Ejectment—*Sheriff's deed under 11 Vict. ch. 7—Want of notice cured by s. 22—Deed void if land not described by metes and bounds at sale.*]—The 7th s. of 11 Vict. c. 7, enacts that before proceeding to sell land taken in execution under that Act the sheriff shall at the sale publicly declare the metes and bounds thereof. Sec. 5 enacts that no omission of any direction relative to notice or forms shall render a sale invalid. The locus was sold by the sheriff and bought by Y. for a trifling sum. It appeared that notice of sale had not been duly given by the sheriff, and also that the land was not described at the sale by metes and bounds. Y. brought ejectment and obtained a verdict. In the argument on

a rule to set the verdict aside and for a new trial two questions were raised.—1. That plaintiff must prove due notice of sale.—2. That the land had not been described at the sale by metes and bounds and the sale was, therefore, void:—*Held*, Peters, J., that the want of notice being in a proceeding previous to the sale was cured by s. 22 of the Act. That the want of description by metes and bounds at the sale was a defect, which was not cured by s. 22, and rendered the sale invalid. *Yeo* v. *Betts* (1856), 1 P. E. I. R. 116.

Equity of redemption — *Unassigned dower in—Share in—Equitable execution.*]—A right of dower in an equity of redemption before assignment is not exigible under a writ of *fi. fa.*, nor is the share of one of several tenants in common of an equity of redemption. Where a person dies possessed of lands mortgaged by him, his widow, before assignment of dower, though entitled to redeem, has no estate in the land, and is therefore not an "assign" of her husband, nor a "person having the equity of redemption" within s. 29 of the Execution Act, R. S. O. 1897, c. 77, and her interest does not come within s. 30 of that Act, and therefore is not saleable under it nor under s. 33. In such a case an execution creditor seeking equitable execution should proceed under Rules 1016-1018, and not by action. *Canadian Bank of Commerce* v. *Rolston*, 22 C. L. T. 252, 4 O. L. R. 106, 1 O. W. R. 351.

Estoppel—*Admission of evidence—Ejectment.*]—Defendant whose lands have been sold under statute execution, issued upon a judgment entered upon a warrant of attorney signed by himself, is estopped as against a purchaser at sheriff's sale from setting up title in a third party. *Connelly* v. *McLeod* (1881), 2 P. E. I. R. 373.

Fixtures — *Opposition—Appeal — Title of purchaser.*]—The appellants, a company having their place of business in the Province of Ontario, had sold certain machines to K. Bros. of Joliette, with a reservation of right of property. The mill in which these machines were installed having been seized with the machines at the suit of the curator under an assignment of K. Bros. for the benefit of creditors, and of a creditor of one of the insolvents, the appellants filed an opposition, which the respondent contested, and which the Superior Court dismissed. The appellants, nearly four months after the judgment of the Superior Court, appealed to the Court of Queen's Bench, which maintained the opposition; and this judgment was affirmed by the Superior Court of Canada. However, in the interval between the judgment dismissing the opposition and the institution of the appeal, the creditor obtained from the prothonotary a writ of *ven. ex.*, and, through the agency of a person named by the respondent, the curator obtained from a Judge an order for the sale of the mill and the machines. The sale took place after the appeal, but the appellants knew nothing of it until after they had obtained the judgment of the Supreme Court, and at that sale the respondent became the purchaser of the mill and the machines, and subsequently disposed of them:—*Held*, that the respondent, whom the appellants had informed of their right of property in the machines and the nullity of the seizure which had been made of them, could not, by instigating the order and becoming the purchaser at the sale, obtain a title which would be good against the appellants, and that in disposing of the machines as things belonging to him, the respondent had made himself responsible to the appellants for their value. *Waterous Engine Works Co.* v. *Bank of Hochelaga*, 12 Que. K. B. 258.

Goods — *Opposition to sale—Notice — Parties—Debtor.*]—An opposition to the sale of movables will not be maintained unless notice of contestation has been given to the parties, including the debtor. *Valiquette* v. *Guilbault*, 5 Que. P. R. 163.

Goods — *Place of sale — Residence of debtor.*]—An execution debtor has the right to say that goods of his seized under the execution shall not be sold at the place of his residence at the time of sale, if such goods were not seized there and have not been taken there by him, but are in the control of the creditor, who proposes to remove them to the actual residence of the debtor. *Adams* v. *Mulligan*, 19 Que. S. C. 398.

Goods not seized — *Irregular sale—Acquiescence — Purchase in good faith.*]—A portion of a debtor's stock-in-trade having been seized under a writ of execution, the bailiff, on the day fixed for the sale, added other goods of the debtor to the list of those seized, and, at the request of the debtor, who was desirous of repurchasing his stock-in-trade, sold the entire stock *en bloc*. The proceeds of the sale were distributed among the creditors in due course of law. The debtor having shortly afterwards, made an abandonment of his effects, his curator, by the present action against the purchaser at the bailiff's sale, sought to have the sale annulled as irregular and void, and the goods returned, or their value paid to the plaintiff:—*Held*, that, although the sale was irregular, and improperly included goods which had not been seized or advertised for sale, yet the purchaser having acted in good faith and even offered to re-transfer the goods, the price being a reasonable one, and the proceeds distributed according to law, and the creditors, moreover, having suffered no injustice in consequence of the irregularity of the proceedings, the sale should not be annulled. *Bernier* v. *Depocas*, 24 Que. S. C. 70.

Hay seized and sold by sheriff.]—Defendant, a sheriff, seized a quantity of hay which he sold under N. S. Jud. Act, Order 46, Rule 5. Plaintiff brought action to recover damages for wrongfully depriving him of the hay. Plaintiff claimed the hay as proceeds of a lot of land of which he holds title as assignee of a mortgage. Macgillivray, Co. C.J., *held*, that plaintiff had failed to prove that he was in possession of the land at the time the hay was made or that he acquired title to the hay before the levy and dismissed action with costs. *Macdonald* v. *Doucette* (1910), 8 E. L. R. 529.

Interest in land — Action by execution debtor to set aside—Purchase by execution creditor — Irregularities — Advertising—Inadequacy of price—Resale by purchaser to wife of plaintiff—Charge on land—Declaration—Costs. *McNichol* v. *McPherson*, 16 O. W. R. 844.

Irregularity—Death of original defendant—*Ex parte* order of revivor—Order for leave to issue execution in name of defendant by revivor—Failure to serve orders on plaintiff — Rule 348 — Practice — Satisfaction of judgment. *Stone* v *Goldstein*, 9 W. L. R. 366.

Land — *Formalities—Minutes of seizure —Place of sale.*]—The formalities prescribed by Arts. 706, 741 and 743, C. C. P., for the sale of immovables by the sheriff, are imperative, and the omission in the *procès-verbal* or minutes of seizure of the name of the street in which the immovables are situated is a fatal defect which annuls the sale.—2. Where the exceptions mentioned in Art. 741, C. C. P., do not apply, a sale of an immovable commenced at the registry office and terminated at the sheriff's office, instead of being made at the door of the parish church of the locality where it is situated, is null. *Sawyer* v. *Rioux*, 18 Que. S. C. 173.

Land — *Irregularities — Division Court judgment — Transcript — Advertisement — Return—Inadequacy of price — New trial—Affidavits.*]—*Held*, that it was not an objection to the sheriff's sale that no execution was issued from the Division Court in which the judgment was recovered before the issue of the transcript to the County Court in 1893. According to *Jones* v. *Paxton*, 19 A. R. 163, *Burgess* v. *Tully*, 24 C. P. 549, is no longer applicable. — 2. That although the execution was issued against two defendants, while the transcript shewed a judgment against only one, and although the execution recited the wrong date for the judgment, these were mere irregularities which did not vitiate the sale.—3. That it was not necessary to the validity of the sheriff's deed that there should be an advertisement in the *Gazette*. The absence of an advertisement was a mere irregularity. — 4. That the fact that there was no return to the *fi. fa.* goods did not invalidate the sale, but was a mere irregularity. *Ross* v. *Malone*, 7 O. R. 397, followed.—5. That the inadequacy of the price for which the lands were sold to the plaintiff might have been a ground for declaring that the deed should stand merely as security for the amount paid, but in this case there were other circumstances, and the trial Judge had made a finding of fact, viz., that the defendants authorised the sale, which made it impossible to so declare, there being evidence to support such finding.—6. That the affidavits filed for the purpose of obtaining a new trial did not make out a case which would justify the Court in exercising its discretion to grant a new trial. *Staunton* v. *McLean*, 21 C. L. T. 587.

Land — *Usufructuary — Executrix — Title—Right of purchaser.*]—A sale of lands in an action against a widow, formerly *commune en biens*, as well personally as in the capacity of testamentary executrix of her husband and usufructuary, gives a perfect title to the purchaser, and he is bound to pay the purchase price. *Desrochers* v. *Mallette*, 3 Que. P. R. 493.

Lands — *Advertisement—Distribution — Costs of execution creditor — Creditor — Creditor's Relief Act.*]—Where two writs of execution against lands were placed in the sheriff's hands on the same day, and, no further steps being taken by the first execution creditor, the second execution creditor directed the sheriff to advertise and sell the lands, which he did under the second execution creditor's writ:—*Held*, that the advertisement was in law the seizure of the lands under the second execution creditor's writ; and, there being no seizure or sale under that of the first, the second was entitled, under s. 26 of the Creditor's Relief Act, R. S. O. 1897 c. 78, to payment in full of his taxed costs and the costs of his execution, which exceeded the amount of the residue of the proceeds of the sale after payment of the sheriff's fees. *McGuinness* v. *McGuinness*, 22 C. L. T. 54, 3 O. L. R. 78.

Lands—*Collocation of hypothecary creditor—Right of execution debtor to contest—Conditional debt.*]—At the time of a sheriff's sale the judgment debtor has a right to contest the collocation of an hypothecary creditor, whose debt is conditional, and who is collocated as a simple creditor, inasmuch as if the condition is not realised, the creditor will have received the money, and, not having furnished the security required from a conditional creditor, he will perhaps not be in a position to repay the amount which he has received. *Benoit* v. *Ste. Marie*, 5 Que. P. R. 222.

Lands — *Diligence — Creditors—Priorities.*]—In order that a first seizure of an immovable shall prevent a second one, it is necessary that at the moment when it is desired to proceed with the second, there shall be nothing to hinder the sale of the immovable under the first seizure. Therefore, if the creditor making the first seizure has suspended the sale of the immovables, he cannot oppose a seizure made by another creditor. *Garand* v. *Roussin*, 19 Que. S. C. 566.

Lands — *Ejectment—Defence—Adverse Possession—Evidence—Admission of death—Deed — Certified copy—Affidavit — Judgment —Registry of—Statute of Limitations.*]—In an action brought by the plaintiffs, trustees under the will of D., to recover possession of land bought by them at a sheriff's sale under execution on a judgment recovered by D. against M., the defendant relied upon his adverse possession of the land at the time of the sale:—*Held*, that the defence was not applicable to the case of a sheriff selling under execution. The objection was also taken that at the trial the plaintiffs failed to give evidence of the death of D.—*Held*, that the objection was one which under Order 21, Rule 5 must be specifically taken; and the deception in evidence, without objection, of a certified copy of the will of D. was an implied admission of his death. At the trial the plaintiffs put in evidence a certified copy of the deed to M., the judgment debtor, without shewing that the original was not in the plaintiff's possession.—*Held*, that this was a matter as to which the plaintiffs should be permitted to amend by filing the usual statutory affidavit. *Per* McDonald, C.J., that the registry of the judgment obtained by D. had the same effect, so far as his title was concerned, as if he held a mortgage.—*Held*, also, the judgment being registered, and securing the title, that the Statute of Limitations would not begin to run until after the date of the recovery of the judgment. *Doull* v. *Keefe*, 34 N. S. R. 15.

Lands — *Opposition—Contestation—Appeal—Sale under ven. ex.* — *Rights of purchaser.*] — The intervenant, the holder of a judgment against one V., having made a seizure under execution of an immovable of which V. was in possession, the plaintiff asserted an opposition *à fin d'annuler* against this seizure, alleging that she was the owner of the immovable by virtue of a sale made by V. to her, and her opposition was contested by the intervenant, who alleged that the sale by V. to her was fraudulent. The opposition was maintained by the Superior Court, but that judgment was reversed by the Court of Review, which dismissed the opposition, maintained the seizure, and ordered a sale of the immovables under writ of *ven. ex.* By virtue of this last judgment the intervenant advertised the sale of the immovable upon *ven. ex.*, and the sale took place and one C. became the purchaser. He sold to the defendant. After the sale under the *ven. ex.*, but before the time for appeal had expired, the plaintiff appealed from the judgment of the Court of Review to the Court of Queen's Bench, and, not wishing to give security for the costs of the appeal, signed the declaration required by Art. 1214, C. P. C., consenting to execution upon the judgment against her. The Court of Queen's Bench reversed the judgment of the Court of Review and restored that of the Superior Court. The plaintiff then brought the present action to recover the immovable sold, and the intervenant (the judgment creditor) intervened in this action, and contested it:—*Held*, that the seizure having been made against one in possession *animo domini*, the sale, having taken place after the fulfilment of all the formalities required by law, and before the appeal of the plaintiff, was valid, and had wiped out the right of the plaintiff to the immovable itself, and left her only a claim upon the purchase money. *Renaud* v. *Denis*, 23 Que. S. C. 16.

Lands—*Priorities — Intervening transfer — Sale — Distribution of proceeds — Creditors' Relief Ordinance — Ultra vires.*] — There having been lodged with the registrar a copy of *fi. fa.* lands in two several actions, with memoranda of the same land to be charged; the land standing in the defendant's name at the time of the lodging of the first *fi. fa.*, but having been transferred to and standing in the name of a purchaser from the defendant at the time of the lodging of the second execution, and the lands having been sold under the first *fi. fa.*:—*Held*, following *Roach* v. *McLachlin*, 19 A. R. 496, and *Briethaupt* v. *Marr*, 20 A. R. 689, that the first execution creditor was entitled to the whole proceeds of the sale. The members of the Court were divided in opinion as to whether the Creditors' Relief Ordinance was *ultra vires* so far as it purported to affect executions against lands, as being inconsistent with the Territories Real Property Act. *Massey Manufacturing Co.* v. *Hunt*, *McCormick Harvesting Machine Co.* v. *Hunt*, 2 T. L. R. 84.

Movables — *Hour of sale — Number of bidders—C. P. 655, 662.*]—The fact that a sale of movables under authority of justice was held only at a quarter to eleven when it had been announced for ten o'clock, and the further fact that there was but one bidder present who made but one bid are not sufficient reasons in law to upset the sale. *Frank* v. *Donohue* (1910), 11 Que. P. R. 235.

Movables — *Revendication — Pleading.*] —A plaintiff who revendicates movable property may set forth, in answer to a defence alleging that the defendant bought the property at a judicial sale in virtue of a writ of execution prior to that upon which the goods were sold, that the second sale was simulated and only effected by the defendant forcing the locks of the house where the goods were deposited. *Belfrey* v. *Frank*, 4 Que. P. R. 337.

Patent for invention — Irregularities at sale—Want of proper notice—Advertising—Setting aside sale—Action — Parties—Costs. *McLaughlin Automatic Air Brake Co.* v. *Allan*, 4 O. W. R. 67.

Perishable goods under seizure—*Who can ask for it?—C. C. P. 634.*]—The guardian alone can be authorised to sell perishable goods under seizure. *Charbonneau* v. *Gosselin*, 11 Que. P. R. 106.

Purchase by person who has acquired rights of execution creditor — Irregularities — *Lis pendens* — Advertisement—Description of land—Sale at undervalue—No interference in conduct of sale—Ratification of sale by execution debtor—Participation in proceeds. *Steen* v. *Steen*, 9 O. W. R. 65, 10 O. W. R. 720.

Re-sale — *Liability of bidder—Garnishee—Contempt of Court.*]—When a judicial adjudication of movables is not followed by immediate payment of the price of adjudication, the bailiff may immediately resell the said movables.—2. But this does not release the bidder from his liability. The moment a person bids at a judicial sale, he incurs liability for the amount of his bid, and is bound to make the same good if the subsequent sale does not realise an equal amount.—3. In this case the garnishee, having after the sale paid the amount of the adjudication to him of the books seized both by him and the plaintiff, was discharged of his obligations as garnishee.—4. He was not subject to coercive imprisonment for contempt in not delivering the books to be sold again at the suit of the plaintiff, who had also seized them. *Duchesne* v. *Collins*, 16 Que. S. C. 277.

Reversal of decree for error — *Restitution.*]—Where goods were sold under an execution upon a decree reversed on appeal for error, it was held that restitution should be of the amount of the sale and not of the real value of the goods. *Robertson* v. *Miller*, 25 C. L. T. 76, 3 N. B. Eq. 78.

Sale of equity of redemption — *Purchase by execution creditor — Subsequent conveyance to debtor—Covenants — Incumbrances—Release.*]—Under a writ of *fi. fa.* against the lands of the original defendant (the mortgagor) the sheriff sold the equity of redemption in mortgaged land, and conveyed it to the purchaser in 1896. The purchaser was at the time the assignee of the judgment upon which the *fi. fa.* was founded. After holding the interest acquired by his purchase for a year, he sold it to the mortgagor,

and made him the usual short form conveyance under R. S. O. 1897, c. 124. The moneys realised under sale were not sufficient to satisfy the judgment, and the writ was returned by the sheriff for renewal on 2nd August, 1899, but was not then renewed. In 1902 the purchaser assigned the judgment (so paid in part) to one S., and thereafter an alias writ of *fi. fa.* lands was issued and placed in the hands of the sheriff, and in respect of that execution S. was made a party in the Master's office to an action brought upon the mortgage:—*Held*, that the land was not affected by the judgment and execution while the purchaser retained his interest, but the effect of his sale and conveyance to the mortgagor was to invest the latter with a new interest in the land, and that interest fell under the operation of the *fi. fa.*, and the statutory covenants, No. 4 as to incumbrances, and No. 8 as to the release of all claims, contained in the conveyance by the purchaser to the mortgagor, did not operate to release the judgment or the execution; and the latter was, therefore, a subsisting incumbrance. *Chittick* v. *Lowery*, 24 C. L. T. 15, 6 O. L. R. 547, 2 O. W. R. 957.

Sale of land — *Charges — Insufficient description in advertisement—Opposition.*]—When an immovable seized in execution is advertised for sale, subject to charges which are not sufficiently described—in this case the sale was announced subject to charges created by an act, the date of which and the name of the notary were given without other description of the nature of the charges—the execution debtor may oppose the sale by way of opposition *à fin d'annuler*. *Corbeil* v. *Dagenais*, 13 Que. K. B. 205.

Sale of land by sheriff — *Effect of — Extinguishment of rights.*]—In the province of Quebec a sheriff's sale, accompanied by legal formalities, gives a complete and absolute title to the purchaser of the property sold, and extinguishes all the rights charged upon such property, with the exception of a lien resulting from the commutation of seignorial rents, of a lease for a term of years, of substitutions not open, and of customary dower not open. The decree extinguishes all the other rights: Art. 711, C. P. C. (old code). *King* v. *Nadeau*, 17 Que. S. C. 342.

Sale of land under — Assignment for benefit of creditors — Priorities — Costs. *Elliott* v. *Hamilton*, 4 O. L. R. 585, 1 O. W. R. 705, 2 O. W. R. 141.

Sale of property en bloc—*Discretion of sheriff—Oppression — Equitable relief—Remedy at law — Innocent purchaser — Fixtures — Abandonment of action against one defendant—Effect on others.*]—A quantity of gold mining machinery, consisting of boilers, engine stamps, etc., was sold by the sheriff *en bloc*, under execution, against the plaintiff company: — *Held*, that the method of sale, whether *en bloc* or otherwise, is a matter in the sound discretion of the sheriff, to be determined in each case by the particular facts, and that the question whether, in view of the particular facts, he has acted oppressively, must be determined in an action against him:—*Held*, also, that the equitable rule that where there is an adequate remedy at law, the Court will not exercise its equitable powers, was applicable to the state of affairs in this case. *Quære*, whether, even where the action of the sheriff is oppressive, the sale can be set aside as against an innocent purchaser, as irregular and void. Part of the property sold consisted of machinery ordinarily used in connection with a gold mining mill. The evidence shewed that the boiler could only be lifted out of its place by pulling off the top of the wall and that portion of the wall over the lugs of the boiler; also, that the mortar was connected to a foundation of cement and timber extending down to bed rock by a number of iron bolts 30 inches in length:—*Held*, that the mill was a fixture and a part of the real estate, and therefore not liable to be levied upon and sold by the sheriff as personal property. —*Held*, also, that the effect of the abandonment of their action as against the sheriff, by the plaintiffs, was not to release their action against remaining defendants. *Lacomb Falls Mining Co.* v. *Bishop*, 36 N. S. R. 395.

Sheriff's sale — Auction—Land knocked down to highest bidder—Sheriff reopening biddings—Property again put up and highest bidder declared purchaser—Refusal to confirm second sale. *Re Hind*, 7 W. L. R. 808.

Sheriff's sale — *Notice of sale—Misdescription of property—Rights of execution debtor—Action to set aside sale.*]—A party has no right to have a sheriff's sale set aside for the reason that the notices of sale were for the whole lot, whereas the party whose property was sold was the owner of but one-half of the lot; the buyer being the only one who could complain. *Orr* v. *Barry*, 10 Que. P. R. 34.

Sheriff's sale — *Opposition—Security—Default—Chose jugée—Appeal.*]—In proceedings for the sale of lands under execution, the appellants filed an opposition to secure a charge thereon, and under the provisions of Art. 726, C. P. Q., a Judge of the Superior Court ordered that the opposants should, within a time limited, furnish security that the lands, if sold subject to the charge, should realise sufficient to satisfy the claim of the execution creditor. On failure to give the security as required, the opposition was dismissed, and, on appeal to the Supreme Court of Canada, the judgment dismissing the opposition was affirmed; 35 S. C. R. I. Subsequently the proceedings in execution were continued, and, on the eve of the date advertised for the sale by the sheriff, the opposants filed another opposition to secure the same charge, offered to furnish the necessary security, and obtained an order staying the sale:—*Held*, that the judgment dismissing the opposition on default to furnish the required security was *chose jugée* against the appellants, and deprived them of any right to give such security or take further proceedings to secure their alleged charge on the lands under seizure.—*Per* Taschereau, C.J.—In a case like the present an appeal to this Court might be quashed as being taken in bad faith. *Fontaine* v. *Payette*, 25 C. L. T. 138, 36 S. C. R. 613.

Sheriff's sale super non domino — *Setting aside—Petition in nullity—Exception*

to form.]—When a party wishes to have the seizure, sale, adjudication, and sheriff's title of an immovable set aside and declared null as having been made *super non domino*, he must proceed by a petition in nullity of sale; an exception to the form alleging that the plaintiff should have made an opposition to the seizure, will be dismissed. *Foster* v. *Vineberg*, 9 Que. P. R. 425.

Statute execution—Sale of land under —Notice required—Excessive levy—Interest on debt after maturity. *McWade* v. *McEachern* (P.E.I.) (1910), 9 E. L. R. 115.

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8. STAY OF EXECUTION.

Appeal to Divisional Court perfected —Fiat to sheriff—Terms—Payment of costs —Undertaking of solicitor — Payment into Court of amount of verdict and interest— Expediting appeal. *Rossiter* v. *Toronto Ry. Co.*, 11 O. W. R. 189.

Death of defendant — *Delay before acceptance of succession.*]—An heir-at-law has three months and forty days to make an inventory and deliberate upon the acceptance of the succession, and any execution against the property of the defendant issued after his decease may be suspended by means of a dilatory exception. *Garand* v. *Malo*, 4 Que. P. R. 228.

Garnishment proceedings.]—Where a creditor of the plaintiff, before execution against the defendant, causes a writ of garnishment to be served on the defendant, such writ does not suspend the proceedings under the execution, unless the defendant deposits in Court the amount of the judgment, with interest and costs. *Montambault* v. *Niquette*, 4 Que. P. R. 411.

Judgment affirmed by Court of Appeal — *Proposed appeal to Supreme Court of Canada—Necessity for leave—Powers of Master in Chambers and Judge of High Court —Grounds for exercise.*] — After a verdict for judgment for the plaintiff, affirmed by the Court of Appeal, the Master in Chambers, on the application of the defendants, made an order staying proceedings till such time as leave to appeal to the Supreme Court of Canada could be moved for, unless the solicitor for the plaintiff would undertake to return, if now paid, the amount of the damages and costs awarded to the plaintiff, in the event of the judgment of the Court of Appeal being reversed:—*Held*, that the Master had no jurisdiction to make such an order: Rule 42, clause 17 (d). If a Judge of the High Court in Chambers has the power to make an order —and, *semble*, he has—this was not a proper case for the exercise of ... The judgment being for only $400 damages and costs, there was no appeal to the Supreme Court without leave, and there was no doubtful question of law of such general importance as to call for extraordinary interference. *Quære*, whether the stay of execution in such a case rests with the High Court or the Court of Appeal. *Tabb* v. *Grand Trunk Ry. Co.*, 24 C. L. T. 400, 8 O. L. R. 514, 4 O. W. R. 135. See, also, S. C., 8 O L. R. 281, 3 O. W. R. 885, 4 O. W. R. 116.

Pending appeal to Divisional Court Rule 827—"Judge of Court appealed to"—Trial Judge — High Court — Counterclaim —Grounds of appeal—Removal of stay as to part—Costs. *Mullin* v. *Provincial Construction Co.*, 10 O. W. R. 1116.

Pending appeal to Divisional Court —*Rule 827—"Judge of Court appealed to" —Trial Judge — Jurisdiction — High Court —Removal of stay.*]—By s. 70 (2) of the Ontario Judicature Act, R. S. O. 1897, c. 51, a Judge is disabled from sitting as a member of a Divisional Court hearing an appeal from a judgment or order made by himself, and he has, therefore, no jurisdiction, after the setting down of an appeal from his judgment, to make an order that execution shall not be stayed.—In an action for goods sold and delivered the defendant counterclaimed for trespass. The plaintiff recovered judgment at the trial of his claim, and the trial of the counterclaim was adjourned. The defendant appealed to a Divisional Court, on the ground that the amount for which the plaintiff had recovered judgment should be reduced by $214.50 as damages for breach of warranty:—*Held*, that the trial Judge had no jurisdiction to make an order, on application to him under Rule 827 (2), that execution should not be stayed notwithstanding that an appeal to a Divisional Court had been set down; but, that, as the order was a proper one on the merits, execution should not be stayed save as to the $214.50, as the counterclaim was not one which should have been joined with the action, and it was not shewn that if a verdict were obtained on the counterclaim, there would be any danger of the amount not being recoverable from the plaintiff; and that, as to the $214.50, it was proper to stay execution, notwithstanding affidavits on behalf of the plaintiff of his belief that the defendant's appeal was merely for delay, and as to his uncertainty in respect to the defendant's financial ability to pay the claim, there being no suggestion or evidence that by staying the execution to this extent the plaintiff would probably lose his claim. *Mullin* v. *Provincial Construction Co.*, 16 O. L. R. 241, 10 O. W. R. 1116, 11 O. W. R. 362.

Removal of stay.—Motion under Ont. Rule 827 (2) to remove in part the stay of execution consequent upon defendant having given security for costs of appeal to Court of Appeal:—*Held*, that above rule only applies where special circumstances could be shewn. Motion refused with costs. *Singlehurst* v. *Wills* (1910), 1 O. W. R. 417.

Stay.—Where plaintiff obtained judgment for $3,311.48, and defendants appealed as to $2,453.92, but admitted balance $857.56, plaintiff was granted order removing stay of execution as to the $857.56. *Gledhill* v. *Telegram Printing Co.* (1909), 14 O. W. R. 1. See S. C. 957.

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9. TIME FOR ISSUING.

Fi. fa. — *Issue of—Regularity — Judgment — Time — Rule 843.*]—Under Con. Rule (1897), No. 843, a judgment creditor is entitled to sue out a writ of *fi. fa.* in-

stanter on judgment being signed, and without waiting until it is duly entered. For purposes of execution a judgment under which a sum of money is payable is complete when it is signed. *Rossiter* v. *Toronto R. W. Co.*, 10 O. W. R. 923, 15 O. L. R. 257.

Fi. fa. — *Life of—Issue of new writ — Seizure under — Invalidity.*]—When a writ of *fi. fa. de bonis et de terris* has been issued in execution of a judgment, it remains in force until it is satisfied, and is a bar to the issue of a new writ. Therefore, a seizure of land made under a second writ issued before the first is exhausted is void. *Owens* v. *Conway*, 30 Que. S. C. 325.

Judgment — *Appeal.*]—When a judgment is inscribed in review and confirmed by the Court of Review, the judgment of the latter Court takes the place of the original judgment, and the delay for execution runs from the reception by the prothonotary of the judgment of the Court of Review. Even assuming that this were not so, the delay for execution in any event ceases to run from the date of the deposit and inscription in review, and only recommences to run from the date of the judgment rendered by the Court of Review. *O'Dell* v. *Bell*, 17 Que. S. C. 373.

Lien — *Prosecution of action—Diligence —Judgment — Delay in issuing execution.*]—The lien effected by attachment proceedings is only temporary, and expires if the creditor does not prosecute his suit to judgment and execution with all due diligence.—Where certain creditors, after entering judgment, allowed six days to elapse before registering the judgment and issuing execution:—*Held*, though with a good deal of doubt, that this delay had not affected the liens obtained under the attachments. *Evans* v. *Nova Scotia Gold Mines Limited*, 40 N. S. R. 119.

EXECUTION CREDITORS.

See COSTS — CREDITORS' RELIEF ACT — MORTGAGE.

EXECUTION OF WILL.

See WILL.

EXECUTIVE GOVERNMENT.

See CROWN.

EXECUTORS AND ADMINISTRATORS.

Account — *Action — Petition.*]—An account can only be demanded from a testamentary executor by action at law, instituted by means of a writ of summons, and not by petition. *O'Borne* v. *Lemay*, 7 Que. P. R. 333.

Account — *Judgment — Maladministration — Loss of assets — Pleading—Amendment.*]—Neglect to have an inventory made with due diligence, failure to sell movable property and allowing it to deteriorate and depreciate in value, carrying on an unprofitable business instead of winding it up, neglect to collect moneys due, and, generally, negligence and maladministration resulting in the loss or shrinkage of the assets of an estate, are legal grounds of contestation of an account rendered by executors of their executorship, pursuant to a judgment in an action to account.—When the conclusions of a contestation of an account are that the accounting party be condemned to pay the contestant a sum stated to be the balance of the account, the Court, at the final hearing, has power, on motion of the contestant, to allow him to amend them by adding thereto a prayer that the judgment declare the account illegal and false, that no substitution exists of the movable property, and that its proceeds should be distributed, and that the accounting party was guilty of negligence and maladministration causing loss to a stated amount, which should be refunded to the interested parties. Such an amendment does not change the nature of the demand, and does not, therefore, come within the prohibition of art. 522, C. C. P. *Blackwood* v. *Mussen*, 28 Que. S. C. 170.

Account — *Predecessors — Acceptance—Action — Pleading.*]—A testamentary executor has the right to refuse to accept the account of his predecessors, if he believes it to be erroneous, and that even where his co-executor has accepted it. 2. But an executor cannot, without the concurrence of his co-executor, in answer to an action by their predecessors to compel acceptance of the account and discharge, set up a claim for the reformation of the account, and ask to have the plaintiffs condemned to pay a larger sum than that which appears by their account. *Desjardins* v. *Masson*, 3 Que. P. R. 538.

Account — *Surrogate Court—Estoppel.*]—The Surrogate Courts of Ontario are invested with the authority and jurisdiction over executors and administrators and the rendering by them of inventories and accounts conferred in England on the ordinary under 21 Hen. VIII. c. 5, the effect of Rule 19 of the Surrogate Court Rules of 1892, as limited by s. 73 of the Surrogate Courts Act, R. S. O. 1897 c. 59, being to bring the practice back to that in force under the ancient statute. It is not only the duty of an executor or administrator to file an inventory and render an account when duly called upon to do so, but it is his privilege to do so voluntarily in any case in which he is liable to be called upon, and this privilege in case of his death extends to his personal representative, though not at the same time the representative of the original testator, and even though there is a surviving representative of the original testator. Where, therefore, the executors of an executor brought into the proper Surrogate Court an account of the dealings of their testator with the assets of the estate of the original testator, treating in the account as cash received by the accounting executor certain promissory notes, and the account was audited and

approved after due notice to the surviving executor of the original testator, it was *held*, in an issue in the High Court between the surviving executor of the original testator and the executors of the deceased executor, upon pleadings so framed as to raise not only the question of the property in this note, but also the question of the right to the proceeds thereof, that the audit and approval of the account were a binding adjudication as against the surviving executor that the proceeds of the notes were payable to the estate of his deceased co-executor. *Cunnington* v. *Cunnington*, 21 C. L. T. 352, 2 O. L. R. 511.

Account of executor — Assets—Sale of property — Disbursements — Auctioneer's fees — Vouchers — Declaration of indebtedness — Security — Advertisement for creditors. *Re Lilly* (N.W.T.), 1 W. L. R. 117.

Accounting—*At what intervals should accounts be rendered?—C. C. 913.*]—Testamentary executors are not bound to render accounts at short intervals; thus, an action for an accounting within four months after a preceding accounting will be dismissed. *Lapierre* v. *St. John*, 11 Que. P. R. 225.

Accounts — Disbursements—Payment for stock-taking — Advertising — Commission on collection of accounts — Costs of litigation. *Re Hart Estate*, 3 O. W. R. 785.

Action — Revivor — Cause of action — Criminal conversation — Indorsement on order of revivor — Case in Court of Appeal —Order of High Court. *Milloy* v. *Wellington*, 3 O. W. R. 37, 561, 4 O. W. R. 82, 6 O. W. R. 437, 10 O. L. R. 641.

Action against—*By pecuniary legatee—Paid in full—No status to maintain—Con. Rules 261, 616.*]—Latchford, J., *held*, that a pecuniary legatee, having no interest in the estate beyond what she had admittedly received, had no status to maintain an action against an executor. *Kennedy* v. *Kennedy* (1911), 18 O. W. R. 442, 2 O. W. N. 625.

Action against—*Claim against estate of father by son — Wages—Note—Forgery — Statute of Frauds—Statute of Limitations—Absence of corroboration—Implication from circumstances.*] — Plaintiff brought action against defendants, as executors of the will of plaintiff's father, to recover: (1) for payment of $200 a year, or in the alternative the farm pursuant to agreement with his father in consideration of plaintiff's remaining at home after he became of age and working upon the farm for deceased; (2) for $210 loaned deceased on his promissory note; (3) for pasturing stock for deceased, and (4) for work with his team for deceased.—Britton, J., *held*, that the Statute of Frauds, the Statute of Limitations, and the lack of corroboration of plaintiff's evidence, as well as other circumstances, were a bar to plaintiff's action. Action dismissed with costs. *McPhail* v. *McKinnon* (1910), 17 O. W. R. 1072, 2 O. W. N. 474.

Action against administrator — *Saisie-conservatoire — Saisie-arrêt before judgment.*]—A writ of *saisie-conservatoire* can be issued only in the three cases mentioned in art. 955 C. P. 2. In an action against the administrator of an estate there can be seized only the effects on which there is a lien, that is to say, the property of the estate, and not that of the defendant. 3. A writ of *saisie-arrêt* before judgment cannot be issued where the defendant conceals or withdraws not his own property, but that of the estate which he has administered, even where the property of the defendant is for the most part if not entirely the property of the estate. *Turcotte* v. *Dumoulin*, 5 Que. P. R. 206.

Action against executor — *Stay of proceedings — Inventory.*] — An action against executors to recover the amount of a promissory note made by the testator was stayed until the time allowed to the executors *pour faire inventaire et délibérer* should have expired. *Bank of Montreal* v. *Killoran*, 3 Que. P. R. 204.

Action against executors — Claim by son against father's estate — Wages — Contract — Evidence — Corroboration — Statute of Limitations — Promise to pay when able. *Collins* v. *Collins*, 6 O. W. R. 71.

Action against executors — *Domicil —Jurisdiction — Service of process—Secretary — Office.*]—The expression "persons having the capacity of testamentary executors," etc., in art. 143, C. P. C., refers to persons who have their domicil abroad.—Service of process upon testamentary executors domiciled in Quebec, made at an office which they have opened, by leaving a copy of the writ and declaration with their secretary, is irregular and void. *Pattle* v. *Horsfall*, 27 Que. S. C. 427.

Action against to recover rose-point fichu.] — Derocher, Co.C.J., *held*, that the action should not have been brought against executor personally; that it was not necessary to decide what was meant by "piece of my rose-point lace." Action dismissed with costs. *Curlette* v. *Vermilyea*, 17 O. W. R. 258.

Action by administratrix — *Death of railway servant — Negligence — Plea of "not guilty by statute" — Denial of representative character of plaintiff — Infant — Motion for judgment on findings of jury.*]—The plea of "not guilty by statute" is not a specific denial of the representative character of the plaintiff alleged in the statement of claim.—Where, therefore, a plaintiff, as administratrix of her deceased husband, sued a railway company for damages for causing his death by negligence, and the company pleaded "not guilty by statute," but did not specifically deny the representative character of the plaintiff:—*Held*, that, although the evidence shewed that the plaintiff was an infant at the time letters of administration were granted, this fact was no answer to a motion for judgment on the verdict of the jury in favour of the plaintiff, no amendment having been asked for at the trial, and the case having been left to the jury on the pleadings as they stood. *Toll* v. *Can. Pac. Rw. Co.*, 8 W. L. R. 795, 1 Alta. L. R. 244, 8 Can. Ry. Cas. 294.

Action by executor for account of documents and property of testator—Right of action — Evidence — Fiduciary relationship — Trover. *Bartram* v. *Wagner*, 9 O. W. R. 448, 10 O. W. R. 41.

Action by executors for debt due to testator—Onus—Corroboration. *Thompson* v. *Coulter*, 1 O. W. R. 205, 2 O. W. R. 356, 3 O. W. R. 82.

Action by heir-at-law to set aside transfer — *Locus standi.*]—The only living issue and heir-at-law of an intestate brought this action to set aside, on the ground of undue influence, a transfer of property made by the intestate to the defendant; and now applied for an order under Rule 194 or 195, appointing him administrator or administrator *ad litem* of the deceased:—*Held*, that the order could not be made under Rule 194, for the reasons given in *Hughes* v. *Hughes*, 6 A. R. 373, 380, nor under Rule 195, which was not applicable to a case of a plaintiff who without right or title has commenced an action, and then seeks to legalize his illegal act by an order of the Court. *Fairfield* v. *Ross*, 22 C. L. T. 413, 4 O. L. R. 534, 1 O. W. R. 631.

Action by old executors — *Account* — *Contestation by one of several new executors.*]—Although several testamentary executors, appointed jointly and having the same powers, ought to act together, one of them may when they are sued by the executors whom they have replaced for acceptance of an account rendered by the old executors and a declaration that the latter have transferred the property of the succession to the new executors—contest such action alone with the object of opposing the approval of the account and the declaration that the new executors have received from the old executors all the property of the succession, but he may not demand the reformation of the account nor a judgment against the old executors for the benefit of the succession. *Desjardins* v. *Masson*, 11 Que. S. C. 195.

Action by physician against executrix of deceased patient — Remuneration for professional services — Account — Evidence — Corroboration — Costs. *Wilson* v. *Bedson*, 8 O. W. R. 446.

Action for administration brought by creditor within 12 months of testator's death — Special grounds — Necessary rights of executrix. *Barrett* v. *Harper*, 2 E. L. R. 89.

Action for board of and services to testator—Evidence — Costs. *Stoddart* v. *Allan*, 7 O. W. R. 750.

Action for criminal conversation — *Death of plaintiff — Revivor — Trustee Act, s. 10—Appeal to Court of Appeal — Issue of order from High Court — Indorsement—Rule 399.*]—The provisions of s. 10 of the Trustee Act, R. S. O. 1897 c. 129, apply to an action for criminal conversation; and where the plaintiff dies *pendente lite* the action may be continued in the name of his personal representative.—Where at the time of the abatement an appeal to the Court of Appeal is pending, an order of revivor may, nevertheless, issue from the High Court of Justice.—The absence of the indorsement on the order of revivor required by Con. Rule 399, notifying the opposite party of the time within which to apply to discharge the order, will not be regarded as a ground for setting aside the order upon a motion for that purpose made within the proper time. *C. v. D.*, 10 O. L. R. 641; S. C., *sub nom. Milloy* v. *Wellington*, 6 O. W. R. 437.

Action under Fatal Accidents Act—*Status of infant widow as plaintiff—Grant of letters of administration valid until revoked—Infant suing without next friend — Irregularity — Waiver.*]—If an infant sues, without naming a next friend, it is a mere irregularity, and may be waived by an unconditional appearance of the defendant. But quite independently of waiver there must in every case be some stage at which it is too late to take advantage of a mere irregularity. In any case, the Judge can deal with it under Rule 538.—Letters of administration granted to an infant are not void, but voidable; and *semble*, until revoked, the infant can sue, *qua* administrator, and need not be represented, when so suing, by a next friend.—Judgment of Stuart, J., 1 Alta. L. R. 244, 8 W. L. R. 755, affirmed. *Toll* v. *Can. Pac. Rw. Co.*, 8 W. L. R. 795, 1 Alta. L. R. 318, 8 Can. Ry. Cas. 244.

Action under Fatal Injuries Act — *Status of administrator—Person having no interest in estate — Action begun before grant of administration — Fiat — Judicial Act — Fraction of day.*]—Action by the administrator of the estate of Augustino Fancelli, deceased, against Fauquier Brothers, to recover damages under Lord Campbell's Act for having negligently caused the death of deceased. Defendants, besides denying any negligence, pleaded that plaintiff was not at the time of the commencement of the action the administrator of the deceased. The damages were claimed in the statement of claim for Egidio and Creusa Fancelli, the father and mother of the deceased, both of whom were alleged to be living near Pisa, in Italy. It appeared at the trial that plaintiff had applied to the Surrogate Court of the district of Algoma, some time before the issue of the writ, for a grant to him of letters of administration, alleging himself to be authorized for the purpose by the father of the deceased, and that on 23rd January, 1903, an order was made by the Judge of that Court for the issue to the plaintiff of letters of administration, but that the letters of administration were not actually issued by the registrar until 26th January, 1903. The writ of summons in the present action was issued on 23rd January, 1903:—*Held*, letters of administration taken out after action and before the trial, when the plaintiff brings his action as administrator, are sufficient to support the action. The Judge of the proper Surrogate Court had on the day the writ was issued ordered that letters of administration should be issued to the plaintiff, which was a judicial act and must be treated as taking precedence in point of time over the issue of the writ, which was not a judicial act. *Converse* v. *Michie*, 16 C. P. 167; *Clark* v. *Bradlaugh*, 8 Que. B. D. 62. The existence of

an order for their issue before the commencement of the action was at all events such a declaration of his right to obtain them as would make them when issued relate back to the date of the order. The judgment of Idington, J., 24 C. L. T. 294, 3 O. W. R. 786, dismissing the action, should be set aside with costs of the present motion, and that judgment should be entered for the plaintiff with the costs of the action. *Dini* v. *Fauquier*, 4 O. W. R. 295, 25 C. L. T. 11, 8 O. L. R. 712.

Administration—*Cash on deposit—Rate of interest.*] — Executors found a sum of money belonging to the testator in the hands of a loan company upon savings bank account, and allowed it to remain there at 3½ per cent. per annum, for more than two years after obtaining probate of the will. In January, 1902, they closed the savings bank account, and invested the money at 4 per cent. in a debenture, but 20 days later, fearing that they would be called on to distribute the money, they took over the debenture themselves as from its date, and put the money into a chartered bank at 3 per cent. The trusts of the will, so far as the property not specifically devised was concerned, were to provide for annuities and to divide the surplus amongst the residuary legatees: —*Held*, that the executors would not have been justified in making long or permanent investments of the money which came into their hands; in strictness they should have deposited it from the beginning in a chartered bank, where it would have earned only 3 per cent.; and, in accounting, they should not be charged with more interest than they actually received, that is, 3½ per cent. while the money was on deposit with the loan company, 4 per cent. for the 20 days during which it was invested in a debenture, and 3 per cent. thereafter until distributed. *Inglis* v. *Beaty*, 2 A. R. 453, and *Spratt* v. *Wilson*, 19 O. R. 28, distinguished. *Re McIntyre, McIntyre* v. *London & Western Trusts Co.*, 24 C. L. T. 268, 7 O. L. R. 548, 1 O. W. R. 56, 3 O. W. R. 258.

Administration de bonis non — *Contest as to grant — Evidence — Domicil — Next in kin.*]—In a contest for administration *de bonis non* between the next of kin of the deceased administrator, the husband of the intestate, and the next of kin of the intestate, whose status as a petitioner depended on the domicil of the intestate, the Judge of Probate disregarded the fact that letters of administration had been issued out of his Court to the estate of the intestate as domiciled in New Brunswick, the petition upon which the letters were granted not having been put in evidence or the statements therein relied upon, and he refused to consider as evidence a statement in the unsworn petition of a trust company applying for administration as the representative of the next of kin of the deceased administrator, that at the time of her death the intestate was domiciled in New Brunswick:—*Held*, on appeal, that the decision was right, and that administration was properly granted to the representative of the next of kin of the intestate. *Re Forester*, 37 N. B. R. 209.

Administration of estate — *Agreement between widow and creditors — Confirmed by Court—Reference by Local Master to himself.*]—A Local Master assumed to sanction an arrangement between testator's widow and the creditors, by which the widow released her dower in her husband's lands in consideration of the creditors agreeing not to attack as fraudulent against them the transfers which her husband had made to her of part of his property. He also ordered that all balances, which might be found due from plaintiff or defendants, to the estate of deceased, should be forthwith after they had been ascertained paid into Court to the credit of the cause, subject to further order, to dispense with payment into Court:—*Held*, that in both cases he acted without authority, and his action in order to have effect must be confirmed by the Court. Order made confirming these provisions and the report directing distribution according to its provisions, and allowing the parties the commission and disbursements that were allowed; that the practice of the Local Master making an administration order with a reference to himself is not satisfactory, and it would be much better in such cases that the order were made by a Judge of the High Court. *Re Clark; Toronto Gen. Trusts* v. *Bank of Montreal* (1910), 15 O. W. R. 862.

Administration of estate—Payment of voluntary debts — Bond — Consideration—Assignment of securities — Value. *Re Summers*, 1 O. W. R. 523.

Administration order — Application for — Status of applicant — Creditor — Funeral expenses — Judgment. *Re Atchison, Atchison* v. *Hunter*, 2 O. W. R. 856, 1145.

Administration order — *Discretion to refuse.*]—There is now a discretion, under Rules 946 and 954, in dealing with applications for administration orders, and the Judge or officer is not obliged to grant a summary order unless it appears that some good result will follow.—Order refused where the widow of an intestate was clearly entitled to a fund which was the only matter in dispute. *In re Ryan*, 20 Occ. N. 426, 32 O. R. 224.

Administration order — *Insolvent estate — Distribution — Debts and liabilities incurred by executors carrying on testator's business — Priorities — Secured and unsecured creditors.*]—Application to vary an order for administration of the estate of deceased. Executors tried to sell hotel as a going concern, but unsuccessfully. The liabilities of the estate exceed the assets. The executors are entitled to indemnity against the general creditors. They also have priority over the company holding a mortgage on the property to the extent of any payments made to that company upon their mortgage out of the receipts of the business. They also have priority over the bank's claim, the latter, however, to have the right to enquire into the propriety of particular expenditures. *Wright* v. *Beatty*, 10 W. L. R. 598.

Administration order.]—Small estate—Expensive proceedings—Reasons for not proceeding under Devolution of Estates Act—Order for distribution. *Artress* v. *Thompson*, 7 O. W. R. 31.

Administration order.]—Summary application—Status of applicant—Assignee for creditors of person interested under will—Issue as to lease made by executors—Direction to bring action. *Re Hunter, Moore* v. *Hunter*, 7 O. W. R. 74.

Administrator — *Renunciation after grant — Necessity for order — Execution issued by next of kin on judgment recovered by intestate — Costs.*]—Letters of administration to the estate of H. N. K. were granted to his widow S. K., and to his two children, E. R. and R. K. S. K., by deed, assigned all her interest in the personal property to E. R. and R. K., and, by the same deed, purported to renounce all her right, authority, and power as administratrix of the estate. E. R. and R. K. obtained from the Judge of a County Court an order permitting them to issue execution on a judgment obtained by H. N. K. in his lifetime against defendant:—*Held*, following *Jost* v. *McNeil*, 20 N. S. R. 156, that S. K., having accepted letters of administration, could not renounce without the order of the Court of Probate, and that the order made on the application, and in the names of E. R. and R. K. only, was bad and must be set aside. The order was bad, further, for want of jurisdiction, because it permitted execution to issue on the judgment "for the benefit of the said R. R. and R. K.," instead of requiring any sum realized to be applied according to law under the direction of the Court of Probate. As the appellant had failed on the merits, a larger amount appearing to be due on the judgment than was claimed, there should be no costs to either party, either in this Court or in the Court below. *Kaulbach* v. *Mader*, 35 N. S. R. 219.

Administrator pendente lite — Application for appointment of—Action to set aside will and mortgage and bill of sale made by testator — Necessity for appointment—Estate in jeopardy—Limited grant. *Tellier* v. *Schilemans* (Man.), 5 W. L. R. 467.

Administrator pendente lite — *Jurisdiction to appoint—Surrogate Courts Act—King's Bench Act, s. 23, and Rules 27, 449—Referee in Chambers, jurisdiction of.*]—When a suit is pending in the Court of King's Bench to set aside a will, that Court has exclusive power, under s. 23 of the King's Bench Act and ss. 18 and 39 of the Surrogate Courts Act, R. S. M. 1902, c. 41, to appoint an administrator *pendente lite*, and such power may, under Rule 449 of the King's Bench Act, be exercised by a Judge in Chambers.—Notwithstanding the generality of the language used in Rule 27 of the King's Bench Act, the Referee in Chambers has no jurisdiction to make such an appointment. *Tellier* v. *Schilemans*, 5 W. L. R. 261, 16 Man. L. R. 430.

Administrator pendente lite—*Necessity for appointment — Limited grant.*]—To entitle a suitor to have an administrator *pendente lite* of an estate appointed, a case of necessity must be made out. — *Horrell* v. *Witts*, L. R. 1 P. & D. 103, followed.—If such case of necessity is shewn as to a portion of the estate only, an appointment limited to such portion should be made. *Tellier* v. *Schilemans*, 5 W. L. R. 467, 17 Man. L. R 303.

Administrator pendente lite — Powers of High Court and Surrogate Court as to appointment of — Removal of cause from Surrogate Court into High Court. *Re Gooderham*, 8 O. W. R. 685.

Administrator's bond—*Breach of condition — Liability of sureties.*]—The defendant applied for and obtained administration of his father's estate upon giving the statutory bond (R. S. N. S. 1900 c. 158, p. 565) to administer according to law. Subsequently he applied to the Court of Probate for the settlement and distribution of the estate, and obtained a decree for payment of the balance of the estate to himself as next of kin, without disclosing the fact that the estate was indebted to the estate of C., of which he and his father were executors and trustees, for moneys of that estate received and not accounted for: — *Held*, Graham, E.J., dissenting, that there had been a breach of the condition, for which the sureties were liable in an action on the bond. *Colford* v. *Compton*, 39 N. S. R. 247.

Administrator's compensation — *Particular fund—Will.*]—A testatrix by her will, after the bequest of certain legacies, directed that the residue of her estate should be divided into four equal shares, three of which she directly disposed of, and the fourth share she devised to her son, not to be payable to him until ten years after her death, and in the meantime he was to be entitled to the income. The son died shortly after the mother, having made a will and appointed executors. On his death an order was made directing the administrators, with the will annexed, of the testatrix's estate, to pass their accounts relative to the son's share, and to hand it over to his executors. On a question being raised as to the compensation payable to such administrators:—*Held*, that such compensation should be paid out of the son's estate, and not that of the testatrix. *Re Church Estate — Athole Church Trust*, 12 O. L. R. 18, 8 O. W. R. 983.

Administrators pendente lite — *Investment of moneys — Trustee Act — Trustee Investment Act.*] — The administrators *pendente lite* of an estate asked for an order declaring that they were empowered to invest moneys in their hands during the pendency of litigation concerning the will of the deceased, in securities authorized by the Trustee Investment Act. An action was pending in the High Court, in which the validity of the will was to be tried, and in the meantime the Surrogate Court appointed the executors administrators *pendente lite*. They had received a large amount of money, which they wished to invest at higher rates of interest than could be obtained from chartered banks, as the litigation was liable to be somewhat prolonged:—*Held*, that this was a proper case in which to apply for a direction under the Trustee Act, and that there was no difference in principle between the position of the applicants with regard to the money in their hands, and that of an executor or trustee under the Trustee In-

vestment Act; and the order asked for was made. *Re Mackey*, 23 C. L. T. 115, 2 O. W. R. 230, 689.

Application by executor for discharge—Executorship merged into trusteeship—Liability of executor as trustee—Application refused—Costs.] — *Re Thomson* (N.B.) (1910), 9 E. L. R. 147.

Application by foreign executors for ancillary probate of will — Proof of letters testamentary granted in foreign Court —Saskatchewan Evidence Act, 1907, s. 15— Certificate of clerk of Court — Seal. *Re Wolf* (Sask.), 8 W. L. R. 690.

Application for letters of administration *to estate of deceased person domiciled in foreign country — Evidence as to estate and next of kin — Foreign law — Widow's right to administration—Saskatchewan Surrogate Courts Act.*]—On appeal, letters of administration of the estate of deceased were refused to appellant, his widow. Deceased died in Minnesota, having his place of abode in North Dakota. Part of the estate was land situated in Saskatchewan. The *locus in quo* of the rest of the estate was not disclosed, nor was there evidence as to whether or not letters of administration had been granted to the estate of the intestate in the United States, nor any proof of next of kin in North Dakota, or who would be entitled to administer there, or that letters of administration would be granted to applicant there. *Re Cook*, 11 W. L. R. 70.

Application for letters of administration by stranger — *Public administrator.*]—In the absence of an application by a person entitled by reason of relationship to the deceased, it is necessary, in order to justify the grant of letters of administration to a creditor or a person without interest, to shew by special circumstances that such grant is in the interests of the estate; otherwise the grant should be made to the public administrator for the district. *Re Morton*, 5 Terr. L. R. 469.

Application for order — *Account—Affidavit verifying — Application to cross-examine — Practice.*]—Upon an application for administration an order was made under English O. 55, R. 10a, that the application stand over for six weeks, and that the defendant within one month render to the plaintiff a proper statement of his accounts and dealings with the estate, which was duly furnished and verified by affidavit. The plaintiff did not appear on the further hearing of the application, and some months had elapsed when this application was made to cross-examine the defendant on the affidavit: —*Held*, that, as the affidavit was not filed when notice of the application was served, but only (if at all) by the plaintiff himself on the return, the application must be refused.—*Quære*, whether the Rule authorizes a direction that such accounts be verified under oath, and whether such an affidavit is an affidavit "used or to be used on any proceeding in the cause or matter." (J. O. 1893, s. 261, now Rule 282, J. O. 1898). The proper practice in order to obtain explanations of any of the items of accounts so furnished seems to be to formulate objections on the further hearing, and have the disputed items adjudicated upon in Chambers. *Allan* v. *Kennedy*, 2 Terr. L. R. 285.

Application for order — Will—Direction to executors to sell — Failure to sell real estate — Legatee — Payment of sum on account of legacy. *Re Ghent, Ghent* v. *Ghent*, 5 O. W. R. 148.

Appointment of new executor — *Intervention of the Courts — Exception to the form.*]—The Courts ought only to intervene in the appointment of executors and administrators under a will, and in that of trustees, when it is impossible to make new appointments in accordance with the conditions of the will or with the document creating the trust; the will of the devisor is the supreme law. *Re Williams & McCallum* (1908), 10 Que. P. R. 356.

Assets — *Exemptions — Widow—Will—Election — Devolution of Estates Act—Gift of another's property — Insurance moneys —Charge on.*]—The goods of a deceased husband, exempt from seizure, under the Execution Act, are not, except as to funeral and testamentary expenses, assets in the hands of the husband's executors for the payment of debts, the effect of s. 4 of that Act being to give his wife a parliamentary title thereto. The fact of the wife being residuary devisee under the husband's will does not put her to her election as to taking these goods, either under statutory title or under the gift of the residue, for, though such goods, apart from the statute, would pass under the residuary devise, it was otherwise here, for the husband would not, under the circumstances, be presumed to be dealing with such goods; nor would any such presumption arise from the fact that, under the terms of the will, the provision made for her should be in lieu of dower; nor did s. 4 of the Devolution of Estates Act affect her right, for that section must be read as being subject to s. 4 of the Execution Act. A piano belonging to the wife was dealt with by the husband under his will, as part of his estate, by giving it to his son:—*Held*, that the wife must elect either to allow the son to retain it, under the gift to him, or to take it herself, making good to the son the value thereof, out of the provisions made for her in the will. A policy of insurance for $2,000 was by the husband's will made payable to and for the benefit of his wife and son, and he apportioned the proceeds by giving the son $500 and his wife the residue thereof. The policy was charged with payment of a loan procured by the testator from the company.—*Held*, that the amount of the loan was payable by the wife and son *pro rata* out of their respective shares of such moneys, the gifts to them being specific. *In re Tatham*, 21 C. L. T. 530, 2 O. L. R. 343.

Bill of costs — Service to testator — Proceeding for taxation — Application by residuary legatee — Assets — Indemnity. *Foley* v. *Trusts and Guarantee Co.*, 1 O. W. R. 526.

Bills of exchange — *Drawn in Canada on New York—Taken by deceased to California, where he died without cashing them*

—*Con. Rule 1114.*]—Deceased purchased two bills of exchange in Canada on New York, carried them to California, where he died without having cashed them. Plaintiff was appointed administrator in California and defendant was appointed administrator in Ontario. The bank in Canada, where the drafts had been purchased, stopped payment in New York. Question in action was, which administrator was entitled to the money?:—*Held*, on principle, that the plaintiff would be, under Con. Rule 1114, but as the defendant was the sole heir of deceased, and the plaintiff would not require all the money to pay debts, it would not be advisable to pay money out of Court to a foreign administrator who would repay some of it to a person in Ontario (the defendant). Defendant was given option of a reference to the Master to determine amount which should be sent to plaintiff or to have the money paid to plaintiff. Costs to all parties to come out of the fund. *Young* v. *Cashion* (1909), 14 O. W. R. 717, 1 O. W. N. 67, 19 O. L. R. 491.

Bond—Liability of sureties for administration—Money in hands of administrator—Dual capacity — Guardian of infants—Termination of period of administration—Passing accounts before Surrogate Judge—Estoppel. *Reid* v. *Snobelen*, 3 O. W. R. 656, 4 O. W. R. 485.

Business carried on for benefit of estate under will—*Liability of executor—Estoppel — Statute of Limitations.*] — An estate of a deceased was being administered in this action commenced in May, 1892, and V. brought into the Master's office in 1901 a claim for goods supplied to the executor, between July, 1890, and March, 1892, for use in carrying on the hotel business of deceased under authority conferred by his will. V. had, in May, 1893, sued the executor in a County Court for the price of the goods in question, but the County Court Judge dismissed the action, on the ground urged by the defendant that he was not personally liable, but that the claim should be against the estate. The executor claimed in the administration proceedings that the estate was insolvent, but in April, 1894, an order was made by consent for the transfer of all the assets to him personally, upon his undertaking to pay or settle with all the creditors of the estate and paying $1,200 into the hands of the trustees for the benefit of the children of the deceased and certain costs, and this order was carried out on both sides. The order contained provisions that the Master should forthwith adjudicate upon and settle all claims against the estate, that the executor should indemnify and save harmless the estate from all such claims, and that he should carry out and perform all the terms and provisions of the settlement: — *Held*, that a person supplying goods to an executor under such circumstances has no right against the estate, but he may sue the person who incurred the debt, and he also has a right to be subrogated to any right of indemnity which the executor has against the estate in respect of the liability so incurred. *In re Frith*, [1892] 1 Ch. 342; *Dowse* v. *Gorton*, [1891] A. C. at p. 199.—2. That the executor was estopped from disputing the claim against the estate.—3. That the claim was not barred by the Limitations Act. *In re Braun, Braun* v. *Braun*, 23 C. L. T. 96, 14 Man. L. R. 346.

Character of defendant — *Executor—Costs.*]—A plaintiff was allowed to amend the writ of summons and declaration in an action against a legatee, who was also the executor of the will of the original debtor, by charging the defendant as executor as well as personally, his character of executor being already alleged in the declaration. The amendment was allowed on payment to the defendant of the costs of the motion, the additional costs which might result from the amendment being reserved to be disposed of with the merits. *Longpré* v. *Brien*, 2 Que. P. R. 446.

Charging administratrix with loss of estate — Contract for sale of land — Reasonable price—Statute of Frauds—Chattels. *Re Donaldson, Gibson* v. *Donaldson*, 2 O. W. R. 810, 3 O. W. R. 290, 4 O. W. R. 368.

Chattels found on person of intestate — Action to recover possession — Proof of ownership — Corroboration — Declaration of trust as to land—Resulting trust—Illegal and immoral purpose—Bawdy house. *Bakewell* v. *Mackenzie* (N.W.T.), 1 W. L. R. 68.

Claim against estate — Running count—Entries in books—Corroboration—Statute of Limitations. *Re Jelly, Union Trust Co.* v. *Gamon*, 6 O. L. R. 481, 2 O. W. R. 966.

Claim against estate of deceased person—*Corroboration — Resulting trust—Immoral purpose.*]—Although there is no corroboration, effect may be given to a claim against the estate of a deceased person if the uncorroborated testimony of the claimant is completely convincing.—Where a transfer of property has been taken in the name of a third person for the purpose of effecting an immoral or illegal purpose, the Court will not lend any assistance to the actual purchaser in recovering from the transferee the evidences of ownership, at least when the illegal or immoral purpose has been carried out. *Bakewell* v. *Mackenzie*, 1 W. L. R. 68, 6 Terr. L. R. 257.

Claim by executor against estate — *Matters occurring before death of deceased—Corroboration—Devise to executor—Whether in lieu of compensation—Negligent mismanagement—Compensation.*]—The executor of a deceased person's estate was also the executor of an estate in which the deceased was beneficially interested. In passing his accounts in respect to the last named estate, after the deceased's death, the executor credited himself with having received for the deceased on account of her share in such last named estate a specified sum of money. On subsequently passing his accounts in respect to the deceased's estate, and being charged with this sum, as having been received by him for the deceased, he alleged that he had not then received it, but had in fact paid it out in small sums to the deceased during her lifetime:—*Held*, that this was not a matter occurring before the death of the deceased, and therefore, the evidence of the executor to establish his contention did not require to be

corroborated under s. 10 of the Evidence Act, R. S. O. 1897 c. 61. A testatrix by her will devised to her brother certain lands free from incumbrances, with a direction for the payment out of general personal estate of any incumbrance thereon, and she appointed him her executor:—*Held*, that the devise was not given to him in his capacity of executor, but in his personal capacity, and therefore did not preclude him from claiming compensation for his services to the estate. *Compton* v. *Bloxham*, 2 Coll. 201, distinguished. Where an executor has been guilty of negligence, mismanagement, and breach of trust in his management of the estate, but there has been nothing of a dishonest or fraudulent character, and the losses resulting are capable of being compensated for, and made good in money, the executor is not to be deprived of compensation. *McClenaghan* v. *Perkins*, 23 C. L. T. 84, 5 O. L. R. 129, 1 O. W. R. 191, 752.

Claim of widow of intestate to share in estate—Notice disputing—Action by widow to establish marriage—Declaratory judgment—Administration. *Fendal* v. *Wilson*, 8 O. W. R. 920.

Claims of creditors — Promissory note —Interest—Corroboration—Open account — Statute of Limitations—Work and labour—Release of claim. *Halliday* v. *Rutherford*, 1 O. W. R. 816.

Compensation — *Quantum of allowance —Cost of passing accounts—Items not covered by tariff—Surrogate Courts Act, s. 86, Rule 71.*]—The surrogate registrar in fixing costs of passing accounts in this estate certified he had, owing to special circumstances, allowed "items not covered by the tariff." Taxation set aside and bill referred to registrar for taxation. *Re Morrison*, 13 O. W. R. 767.

Compensation for services.] — Jurisdiction of Territorial Court—Rules of Court —Passing of accounts—Payments to solicitors—Moderation of costs — Payments to agent for services. *Re Phiscator* (Y.T.), 8 W. L. R. 716.

Compensation of executors—*Distribution of corpus—Collection of interest — Management of estate.*]—An estate was not a simple one to deal with, owing to conflicting interpretations of the rights of the beneficiaries under the will, the nature of the trusts, their number and complication, and, to a more limited extent, the character of a portion of the assets. The executors took over about $60,000 worth of the property in cash, mortgages, notes, farm property, and furniture. Of this they distributed a little less than half, and set apart the remainder for payment of annuities, legacies not matured, etc. They collected about $16,500 of interest. They managed the estate for a period of a little more than four years down to the date of a report providing for their remuneration:—*Held*, that they were not entitled to an allowance upon taking over the estate, but should be allowed 2½ per cent. upon such portion of the corpus of the estate as they had taken over and distributed, and when the remainder of the corpus taken over should be distributed, they should have a like allowance upon the portions distributed from time to time; they should be allowed 5 per cent. on the interest collected, and to be collected; and $100 a year in addition, for the first two years, and $75 a year for the last two years, for management of the estate and services not covered by the other charges, including the care and preservation of the corpus. *Re McIntyre, McIntyre* v. *London and Western Trusts Co.*, 24 C. L. T. 268, 7 O. L. R. 548, 1 O. W. R. 56, 3 O. W. R. 258.

Compensation of executors and trustees — *Nature of services — Percentage — Allowance.*]—In fixing the amount of compensation to trustees, there should be taken into consideration: (1) the magnitude of the trust; (2) the care and responsibility springing therefrom; (3) the time occupied in performing its duties; (4) the skill and ability displayed; (5) the success which has attended its administration. Such compensation, while fair and just, must be reasonable, but not necessarily liberal.—The duties of the executors in this case were to realise on the real estate of the testator in Manitoba and transmit the proceeds to the Ontario executors. It took nine years to complete the work, and it appeared that the executors had carried out their duties with great faithfulness and unusual success, assisted by the great advance in the values of real estate during that period, and that the total amount of money realised was over $300,000, also that R., who had the chief management of the work, had already received under orders of the Court $19,500 on account:—*Held*, that an additional compensation to R. of two per cent. of the gross amount realised would be fair and reasonable, and that the other two executors should together have two per cent. of the same.—*Held*, also, that R. was not entitled to commission as a real estate agent on sales of lands to purchasers secured by him personally, although he might have employed another person at the expense of the estate to perform such services: Am. & Eng. Encyc. of Law, vol. 11, p. 1306. *Re Sanford Estate*, 18 Man. L. R. 413, 10 W. L. R. 82.

Contract — *Publication of newspaper — Terms—Probate Court—Claim filed against estate—Right to amend claim—Evidence—Corroboration.*]—Appeal from the judgment of Chesley, Probate Judge for Lunenberg county, ordering the executors of the estate of C. E. Kaulbach, deceased, to pay claimant the amount of his amended claim, with costs. *Re Kaulbach* (N.S.) (1910), 9 E. L. R. 226.

Conversion — Evidence. *Ferguson* v. *McDonald, Ferguson* v. *Garden, Ferguson* v. *Moxon*, 1 E. L. R. 496, 497, 498.

Conveyance of land by devisees — *Restriction by will—Quit-claim by cha*rgee*—Action by executors to set aside.*]—Testator devised land to his 3 children, desiring them to support his widow as long as she remained unmarried, and directing that no sale should be made of the land until a sufficient sum should be deposited in a chartered bank to support the widow. He appointed the widow and L. executors. One of the children died unmarried and intestate; the other two conveyed part of the land devised to the defendant, and the widow executed a quit-claim deed in favour of the defendant. L. did not join in any conveyance.—An action brought by the widow and L., as executors, to set

aside the deeds to the defendant, was dismissed. *Chaboyer* v. *Desrochers* (1910), 15 W. L. R. 24.

Corroborative evidence — *Advance of money—Claim for interest—Promissory note—Action for consideration.*]—The plaintiff sued the surviving member of a firm, together with the representatives of a deceased member of the firm, for $1,000 lent by him, in the lifetime of the deceased, to the firm, for the purposes of the firm. He also claimed interest, alleging that this was spoken of at the time the money was borrowed, and that the deceased member of the firm had asked him what the interest would be, and he told her five per cent.; the surviving member of the firm denied all recollection of interest having been mentioned:—*Held*, that, inasmuch as there was corroboration as to the main fact, namely, the borrowing by the firm of $1,000, this was sufficient to entitle the plaintiff to recover the interest claimed. When a promissory note is taken from a borrower as collateral security for money lent to him, and not in payment, an action can be brought for the money lent, notwithstanding that, owing to the form of the note, an action thereon could not be maintained. *Secor* v. *Gray*, 22 C. L. T. 27, 3 O. L. R. 34.

Costs of unsuccessful action — *Personal estate — Real estate.*]—An executor, without direct authority or obtaining indemnity, brought an action to recover a sum of money alleged to belong to the testator, and this action was dismissed with costs, the personal estate being insufficient to pay the costs of the opposite party:—*Held*, that, though the general rule is that an executor acting in good faith is entitled to be recouped his costs of an unsuccessful action, this rule would not justify the executor resorting for this purpose to specifically devised real estate. *Re Champagne, St. Jean* v. *Sinaard*, 24 C. L. T. 234, 7 O. L. R. 537, 3 O. W. R. 515.

Creditor's action against executors —*Stay pending administration suit.*]—A motion by the defendants, executors, to stay a creditor's action against them, on the ground that an administration action by a legatee was pending, in which an administration order had been granted, was opposed on the ground of inconvenience to the plaintiff and generally as to the right to grant a stay in such cases: — *Held*, that actions should be stayed against the estate, unless a fair consideration of the claim cannot be had by the referee. The affidavits of the plaintiff disclosed that it would be a hardship if compelled to come to Halifax to establish the claim before the referee; but it was stated that the referee would go to Sydney to inquire into the claim. The order to stay proceedings was continued until the referee should have an opportunity of considering the claim. *Brown* v. *McDonald*, 25 C. L. T. 131.

Creditor's claim—Leave to prove after dividend paid to other creditors. *Millichamp* v. *Toronto General Trusts Corporation*, 3 O. W. R. 375.

Damages recovered by administratrix for benefit of herself as widow and of her children under Fatal Accidents Act—Judgment recovered against her as administratrix—Garnishment — Different rights. *McEwan* v. *Spekt* (N.W.T.), 4 W. L. R. 325.

Demurrer—*Suit against an heir—Allegation that the estate has sufficient assets wherein to pay the debts—C. P. 191.*]—In an action directed against an heir, it is illegal to allege that he has received sufficient from the estate to pay the amount claimed; because the heir who accepts a succession is legally bound to pay its debts, whether the estate have assets or not. *Corp. of the Parish of Sault au Recollet* v. *Dagenais* (1910), 11 Que. P. R. 385.

Determination of questions — Summary application—Domicil of intestate—Distribution of estate—Evidence — Administration order. *Re Englehardt*, 2 O. W. R. 627.

Distribution of estate — *Unpaid legatee—Contribution by others—Limitation of actions.*]—Legatees entitled to a share of the residue of an estate are not bound by the accounts and proceedings in an administration action instituted by other residuary legatees in which they have not been added as parties, and of which they have received no notice. The judgment in such an action, however, enures to their benefit, and makes a fresh starting point in their favour as against the defence of the Statute of Limitations.—In the absence of reasonable efforts by the executors of an estate to discover the whereabouts of persons entitled to share in the residue, other persons who have received a share of the residue must refund, for the benefit of the persons whose claims have been ignored, the amount received in excess of the sum payable if the division had been properly made. *Uffner* v. *Lewis—Boys' Home of Hamilton* v. *Lewis*, 20 C. L. T. 296, 27 A. R. 242.

Distribution of estates—*Absentee next of kin — Advertisement for creditors and others —Publication in newspaper—Failure of absentee to make claim—R. S. O. 1897 c. 129—Bar to future claim.*]—The administrators of the estate of an intestate, who died in 1906, inserted three times in a newspaper published at the place in Ontario where the intestate was residing at the time of his death an advertisement headed "Notice to Creditors," given pursuant to R. S. O. 1897 c. 129, calling upon "all creditors and others having claims against the estate" of the deceased to send them in to the solicitor for the administrators by a named date, and stating that after such date they would not be liable to any person of whose claim notice should not have been received. One of the next of kin, who would, if alive, have been entitled to a distributive share of the estate, had left Canada in 1876, and no communication had since been received from him or information about him, except that soon after his departure a sister of his heard that he was in Oregon, and in 1895 an aunt heard that he was dead. Diligent inquiry was made for him in 1882, but he was not then found. No one had even heard of his marrying. No claim was made on his behalf upon the estate:—*Held*, that the advertisement was sufficient; that it covered next of kin; and that the absentee would be barred if he were hereafter to make any claim; and therefore the administrators should divide the assets amongst

those entitled as though the absentee were assuredly dead without ever having had issue. *Re Ashman*, 10 O. W. R. 250, 15 O. L. R. 42.

Distribution of estates — Claims of creditors—Sale of household furniture — Liability for proceeds—Exemptions Ordinance—Payment to manager of estate—Remuneration of administratrix—Notice to creditors—Claims sent in late—Insolvent estate—*Pro rata* distribution. *Re Nugent* (N.W.T.), 5 W. L. R. 87.

Distribution of estates — *Intestate estate of person domiciled in Alberta—Right of child adopted in foreign state to share in estate—Law of country where status originated—Private international law.*]—Deceased adopted a child while living in Iowa, where she would have been entitled to the same rights as his legitimate child. He removed to Alberta where he died intestate:—*Held*, that this child is entitled to share in his estate. *Re Throssel*, 12 W. L. R. 683.

Distribution of fund — Ascertainment of class—Vesting order—Costs—Unnecessary litigation. *Valentine* v. *Jacob*, 2 O. W. R. 167.

Distribution of surplus of personal estate—Application to determine whether a grandchild was entitled to participate in—Case not one to be determined on originating summons—Concurrent jurisdiction of Chancery Division of Supreme Court of N. B. with Probate Courts—Construction of Con. Statutes of N. B. (1903), c. 161, s. 2—No order made—The matter to drop—No order as to costs. *Kennedy* v. *Slater* (N.B.) (1910), 9 E. L. R. 34.

Estate of deceased—Moneys in hands of son—Gift—Corroboration — Limitation of actions—Request or direction—Trustee—Reference—Report—Judgment—Irregularity — Execution—Costs. *Wendover* v. *Nicholson*, 2 O. W. R. 1108, 4 O. W. R. 475, 5 O. W. R. 654, 6 O. W. R. 529.

Evidence — *Corroboration.*] — Upon a claim in an administration action by a tenant against the estate of his deceased landlord for a balance due to him in respect of alleged advances, and for goods supplied, the books of the tenant, in which the transactions were set out, and cheques made by him in favour of the landlord, were held to be sufficient corroboration of his evidence, although the cheques did not shew on their face whether they had been given on account of rent or in respect of advances. *Re Jelly, Union Trust Co.* v. *Gamon*, 23 C. L. T. 327, 6 O. L. R. 481, 2 O. W. R. 966.

Executor de son tort—Distribution of deceased's property among creditors. *Green* v. *Clark*, 3 E. L. R. 349.

Executor's accounts — *Compromise — Confirmation.*]—An executor's accounts were taken by a Referee. The residuary legatee made an application to have this report confirmed. On the day set for hearing an agent of the legatee and the executor made a compromise agreement. The Judge, therefore, has no power to confirm the report. On appeal an order was made declaring that the compromise agreement should be specifically performed. *Re Wilson*, 8 W. L. R. 607; 9 W. L. R. 271.

Executors and trustees' accounts — *Surrogate Court—Approval by Judge—Fraud or mistake—Items of overcharge — Application to re-open accounts—Re-opening limited to items proved — Surrogate Courts Act — Jurisdiction — Costs.*]—A petition by the *cestui que trust* to the Judge of a Surrogate Court to set aside an order made by him upon the passing of the accounts of the trustees and to re-open the accounts, was dismissed with costs, subject to the petitioner being allowed to surcharge the accounts of the trustees upon two items, viz., premiums paid by the trustees for fire insurance, from which they should have deducted rebates or commissions allowed to them by the insurance companies, and an overcharge of one cent a share upon a purchase of 3,000 shares of mining stock by former trustees:—*Held*, affirming the judgment of the Judge of the Surrogate Court (York), that he had properly refused to open up the accounts in regard to the purchase of the mining stock referred to, in regard to an alleged overcharge of interest, in regard to the sale of a property without notice to the petitioner, in regard to certain mortgage accounts, and in regard to other matters.—It was contended for the petitioner that the non-disclosure of the fact that the rebates had been allowed amounted to fraud on the part of the trustees entitling the petitioner to have the accounts re-opened and taken *de novo*, and that, at all events, coupled with the overcharge as to the mining stock, she was so entitled. The accounts approved by the Judge were brought before him under the provisions of s. 72 of the Surrogate Courts Act, as amended by 2 Edw. VII. c. 12, s. 11, and 5 Edw. VII. c. 14, s. 1:—*Held*, that, under that section, it is only *so far as* mistake or fraud is shewn, that the binding effect of the approval is taken away; and the language of the section plainly indicates that it was not intended that the whole account should be opened up, but that the account should be opened up so as to remove from it anything which, owing to fraud or mistake, had not been charged or had been allowed to the accounting party. The principle applicable to the opening of an ordinary stated account, and the consequences of such an account being opened, do not apply to an account taken by the Court in the presence of the parties, where the persons to whom the accounting is being made are brought before the Court for the purpose of enabling them to challenge, if they will, the correctness of the account.—While the failure to credit the rebates was not due to a mere accidental omission of them from the account, the intentional retention of the small sum not credited, apparently under the mistaken idea that the trustees were entitled to it, did not amount to fraud, or at all events not to such fraud as would entitle the petitioner to the relief which she claimed or to any further relief than that given to her by the order of the Judge.—The petitioner should not have been ordered to pay all the costs of the trustees in the Court below, as she had succeeded to a trifling extent. No costs of the appeal were allowed to either party, but without prejudice to the trustees' right to claim their costs as proper disbursements in accounting thereafter to the petitioner. *Re Wilson and Toronto General Trusts Corporation*, 15 O. L. R. 596, 11 O. W. R. 214.

Executors continuing testator's business.]—Where executors continue the business of the testator after his death only temporarily and for the mere purpose of effecting sale of the business as a going concern, they are entitled to indemnity out of the estate in respect to liabilities properly incurred by them in the management of the business. *Dowse* v. *Gorton*, [1891] A. C. 190, 60 L. J. Ch. 745, 64 L. T. 809, followed. As a general rule the indemnity will only be ordered as against unsecured creditors, except where the assent of the secured creditors is given to the continuation of the business, and where such consent is given there will be no distinction made between secured and unsecured creditors, except, however, that the executors must look first to the property on which there is no security before they can look to the property covered by the security. To prove the assent of secured creditors something more than knowledge and acquiescence on the part of the creditors must be shewn: *Dowse* v. *Gorton* followed. *Brooke* v. *Brooke*, [1894] 2 Ch. 600, 64 L. J. Ch. 21, 71 L. T. 398, disapproved and not followed.—Where, however, the circumstances are such that it would be unjust to the executor to strictly enforce the rule that secured creditors have priority over the executors' claim for indemnity, that rule will be relaxed.—Where, therefore, executors carried on an hotel business temporarily, after the testator's death, for the purpose of keeping the hotel business as a going concern and preventing lapse of the liquor license in connection with the hotel, and the secured creditors, with knowledge, acquiesced in the continuation of the business:—*Held*, that to the extent of any money paid to the secured creditors whose security was on the hotel premises, by the executors out of moneys received by them from the management of the business, the executors were entitled to indemnity as against those secured creditors:—*Held*, also, that, where one of the secured creditors whose security was upon the hotel premises and whose security was not obtained for actual present advance in money, but as security for a past debt had not only acquiesced in the continuation of the business but intervened and obtained a change of receivers in order to further carry on the business, the executors were entitled to indemnity in priority to such secured creditor:—*Held*, however, that the executors were not entitled to indemnity as against a secured creditor whose security was not upon the premises in which the business was carried on, but was upon other property. —The action having been first commenced against the next-of-kin of the testator and the secured creditors only, upon the application of the plaintiffs one unsecured creditor was added a party-defendant to represent generally the unsecured creditors. *Wright* v. *Beatty*, 2 Alta. L. R. 89.

Fatal Accidents Act—*Conflicting claims —Consolidation of actions—Negligence.*]—A woman, claiming to be the widow of a man killed owing as alleged to the negligence of the defendants, brought an action against them, with her two children as co-plaintiffs, to recover damages. Subsequently another action was brought by another woman, also claiming to be the deceased's widow, to recover damages for the benefit of herself and her child, her marriage having taken place after an alleged divorce of the first plaintiff: —*Held*, that only one action would lie under the Act; that that action would be for the benefit of the persons in fact entitled: and that, there being no doubt as to the right of the children in the first action, the first action should be allowed to proceed and the rights of all parties worked out in it, the plaintiff in the second action to be represented by counsel at the trial if desired. Order of Falconbridge, C.J., 3 O. W. R. 640, 704, reversed. *Morton* v. *Grand Trunk Rw. Co.*, 24 C. L. T. 351, 8 O. L. R. 372, 4 O. W. R. 126.

Fatal Accidents Act — *Damages—Funeral expenses.*]—In an action under the Fatal Accidents Act, and the Workmen's Compensation Act for the death of the defendants' servant by their negligence, as alleged, the plaintiff has no right to claim for funeral expenses. *Makarsky* v. *Can. Pac. Rw. Co.*, 15 Man. L. R. 53.

Fatal Accidents Act — *Death of beneficiary—Survival of action.*]—Upon the death of the beneficiary on whose behalf an administrator is bringing an action under the Fatal Accidents Act, R. S. O., 1897 c. 166, the action comes to an end. It cannot be continued for the benefit of the beneficiary's estate, nor can a new action be brought by the beneficiary's personal representative. Judgment of Ferguson, J., 32 O. R. 234, 29 C. L. T. 437, reversed. *McHugh* v. *Grand Trunk Rw. Co.*, 21 C. L. T. 581, 2 O. L. R. 600.

Fatal Accidents Act — *Right of action —Action before grant of administration — Fiat of Surrogate Court Judge.*]—This action was brought by the plaintiff as administrator of a workman who died in the service of the defendants, in consequence, as alleged, of their negligence. It appeared that the fiat of the Surrogate Court Judge directing letters to issue to the plaintiff was signed on the same day that the writ of summons in this action issued, but that letters were not actually issued until two days later. The plaintiff never had any personal right or interest in the subject-matter of the litigation:—*Held*, that the action must be dismissed, but without prejudice to the plaintiff bringing another action. *Dini* v. *Fauquier*, 24 C. L. T. 294, 3 O. W. R. 786. (Reversed 4 O. W. R. 295.)

Fatal Accidents Act—*Rights of administrator—Rights of relatives—Time limit — Stay of proceedings.*] — An unmarried man having come to his death by reason of injuries inflicted by the defendants, two actions were brought to recover damages occasioned by his death. The first in point of time was brought by the paternal grandfather and grandmother of the deceased, and the second by his mother, who had obtained letters of administration to his estate after the bringing of the first action. Upon a motion by the defendants to stay one or other of the actions:—*Held*, that, while the grandfather and grandmother could legally proceed with their action under R. S. O. 1897 c. 166, although brought within six months of the death, so long as there was no executor or administrator, yet an administratrix having been appointed and an action brought by her within the six months, she was entitled to proceed with it; and the first action was the one to be stayed. *Lampman* v. *Township of Gainsborough*, 17 O. R. 191, and *Holleran* v.

Bagnell, 4 L. R. Ir. 740, explained and followed:—*Held*, also, that the administratrix would have the right in her action to claim damages sustained by the personal estate of the deceased. *Leggott* v. *Great Northern Rw. Co.*, 1 Q. B. D. 599, followed. *Mummery* v. *Grand Trunk Rw. Co.*, *Whalls* v. *Grand Trunk Rw. Co.*, 21 C. L. T. 343, 1 O. L. R. 622.

Fatal Accidents Act—*Status of widow—Grant of administration pendente lite—Workmen's Compensation Act—Negligence—Release of cause of action—Rights of mother—Expectation of benefit—Discovery of fresh evidence—Damages—New trial.*]—An action was brought to recover damages for the death of a workman employed by the defendants, owing to their alleged negligence. The plaintiff alleged that she was the widow of the deceased, but this was denied. She obtained as widow, *pendente lite*, letters of administration to the estate of the deceased, and amendments were made by which she claimed as administratrix for her own benefit as widow and for the benefit of the mother of the deceased. The defendants denied negligence, denied the plaintiff's status as widow and administratrix, and also set up a release of the cause of action. The trial Judge found against the plaintiff's status, but the jury found negligence, and assessed the damages at $1,500, apportioning that sum equally between the plaintiff and the mother:—*Held*, that there was evidence upon which the jury were justified in finding that the man's death arose from the negligence of the defendants without blame on his part; and therefore that there should not be a nonsuit or a new trial upon this branch of the case; Meredith, J., dissenting, and being of opinion that there should be a new trial. 2. That the release given by the plaintiff should not, on the evidence, be held binding on her: Anglin, J., hesitating. 3. That on the evidence the mother had no sufficient interest in her son's life or expectation from him to give her a right of action in respect of his death; and there should be a new assessment of damages unless the plaintiff was content to accept $750. 4. That there should be a new trial upon the question of the plaintiff's right as widow and administratrix, evidence having been discovered since the trial going to shew that the plaintiff was the true widow. 5. That if the letters of administration were rightly granted to the plaintiff as widow, they related back so as to validate the action. *Trice* v. *Robinson*, 16 O. R. 433, and *Murphy* v. *Grand Trunk Rw. Co.*, unreported decision of a Divisional Court, 27th May, 1889, applied and followed. Judgment in 7 O. L. R. 747 reversed. *Doyle* v. *Diamond Flint Glass Co.*, 24 C. L. T. 368, 8 O. L. R. 499, 3 O. W. R. 320, 356 415, 510, 921.

Foreign will — *Action to set aside — Powers of provisional administrator appointed by French Court.*]—The widow of W. C. H. died at London, England, leaving property in Great Britain, France, and Canada. By her last will she appointed "La Société Charitable de l'Asile de nuit à Paris" her universal legatee, and a French Court appointed L., a notary, provisional administrator of the succession. Subsequently the heirs of W. C. H. brought an action to have the will set aside, and afterwards the Court at Paris confirmed the appointment of L. for such time as might be necessary. L. then asked for an account from Mrs. H.'s former agent in Montreal, and obtained from the French Court an order allowing him to delegate his powers as provisional administrator to a designated person, with power to sue the former agent at Montreal for an account respecting the property in Canada. In the meantime, however, the Superior Court of Quebec had appointed M., a notary, judicial sequestrator of the property. L. brought the present action to obtain possession of the property from M., and relied on the facts above set forth:—*Held*, that the judicial sequestrator appointed by a Court of this province was the proper person to be in possession of the property in this province. *Lavoignat* v. *Mackay*, 21 C. L. T. 129.

Foreigner appointed executor by will —Letters of administration with will annexed granted to trust company—Surrogate Court —Powers of. *Re Kehoe*, 7 O. W. R. 825.

Grant of letters of administration—*Deceased domiciled ex juris—Grant to widow—Law of domicil — Evidence of law, as to grant.*] — Deceased died domiciled in the United States, leaving property in the judicial district of Cannington. On application by the widow to the Surrogate Court Judge for administration of the estate, the application was refused, on the ground that there was no evidence that the widow was by the law of the domicil of deceased entitled to administration. On appeal to a Judge of the Supreme Court:—*Held*, that the Surrogate Court is not governed by the law of domicil in granting administration, and, while the Court, if a grant of administration is made by the Court of domicil, will follow that grant, yet in the absence of such grant the Court is governed by the law of *situs*. *Re Mikkelson*, 1 Sask. L. R. 513, 9 W. L. R. 608.

Judgment against executors — *Evidence of debt—Endorsement of note—Devolution of Estates Act — Caution — Estate.*]—A judgment against executors is only *prima facie* evidence of its being for a debt due by the testator, and the parties interested in the real estate are at liberty to disprove it. In an action by a judgment creditor on a judgment recovered on a promissory note discounted by him, which note was received by the executors for the sale of personal property of the testator, and endorsed "without recourse" to the plaintiff:—*Held*, that the endorsement of the note by the executors would not make it a debt of the testator in the hands of the endorsee.—*Held*, also, that the effect of the Devolution of Estates Act and amendments, acted upon by the registration of a caution under the sanction of a County Court Judge, after the twelve months had expired, was to place lands of a testator again under the power of his executors so that they could sell them to satisfy debts; and that the expression "in the hands" of executors, as applied to property of the testator, is satisfied if it is under their control and saleable at their instance; and that the operation of a devise of lands is only postponed for the purposes of administration, and the estate does not pass through the medium of the executors, but by the operation of the devise. *Janson* v. *Clyde*, 20 C. L. T. 116, 31 O. R. 579.

Lease of hotel by administratrix for seven years with option of purchase—*Assignment — Registration—Breach of trust —Notice to lessee—Effect of registration — Expenditure by lessee — Compensation — Administration order.*]—Plaintiff, one of the next-of-kin, sued to have an option to purchase clause in a lease made by the defendant administratrix declared to be null and void. Declaration made as asked, ss. 76 and 135 of Alta. Land Titles Act, being no defence. It is immaterial that defendant has made improvements under the lease. *St. Germain* v. *Renecault* (1909), 12 W. L. R. 169.

Legacy — Inoperative direction to invest principal—Action for legacy — Costs—Confinement to costs of summary application—Executors relying on advice of solicitor — Personal liability of executors—No recourse against estate. *Willison* v. *Gourlay*, 10 O. W. R. 853.

Legacy — *Judgment for—Provisional execution.*]—There may be a provisional execution of a judgment ordering an executor to hand over a devise or bequest to the devisee. *Massue* v. *Resther*, 3 Que. P. R. 499.

Letters of administration — *Quebec will — Notarial form.*]—Where a will is in notarial form and in the custody of a notary in the province of Quebec, letters of administration will be granted on proof by affidavit of the death and domicil of the testator, of the law of Quebec, and of the original will being executed in accordance therewith; that the original will is in the custody of a notary in that province; and that the executors named in the will are acting thereunder. *Re Robertson*, 22 C. L. T. 211.

Letters of administration — *Surrogate Court — Jurisdiction — Validity until revocation.*]—Where letters probate or of administration have issued out of a Court from which they could not properly issue under the Surrogate Courts Act, R. S. O. 1897, c. 59, s. 19, they are nevertheless valid unless and until revoked. *London & Western Trusts Co.* v. *Traders Bank of Canada*, 16 O. L. R. 382, 11 O. W. R. 977.

Liability of administrator *for interest of deceased in land under contract for purchase—Burden of proof — Evidence—Incomplete agreement—Application of money paid by deceased on debt due to vendor—Arrangement between administratrix and vendor — Attack by creditor—Bona fides.*]—The plaintiff, who was a creditor of a deceased person, sought to fix the defendant, as administratrix of the estate of the deceased, with liability for a margin of value said to have existed in the dwelling-house property occupied by the deceased at his death—the plaintiff alleging that the deceased held the property under an agreement of sale from a company, the owners of it, and that, by the defendant's wilful default or by conversion to her own use, the benefit of that margin was lost to the estate. In fact, on the 12th April, 1904, the deceased paid the company $500 on account of a proposed purchase of the dwelling-house property at $4,000, which was the true value of the property; the $500 was paid in pursuance of an arrangement not reduced to writing. The deceased was, however, at the time, indebted to the company in the sum of $500. An agreement embodying the terms of the proposed sale and purchase was drawn up in duplicate dated the 15th April, 1904, and signed by the company, but not by the deceased, and the two instruments were found among the deceased's papers when he died, about 4 months later. Several of the special provisions appearing in the instrument were not discussed at the time of the oral negotiations or at any other time, but were presented to the mind of the deceased for the first time when the company sent him the duplicate instruments, 4 months before his death:—*Held*, that the oral negotiations between the deceased and the company resulted in an incomplete agreement, the detailed terms of which, it was contemplated, should be expressed in a formal agreement, to be drawn up at the instance of the company and submitted to the deceased; that the signing of the formal agreement was contemplated as a condition precedent to the final transaction by which the parties were to be bound; and that, therefore, until that event, there was no contract; and that, inasmuch as the instruments signed by the company did not contemplate signature under seal, the proposal of the company (regarding these instruments as a proposal) might have been accepted orally by the deceased; yet, as a matter of fact, it never was so accepted.—*Held*, also, that, in any case, the burden of establishing that there was an interest in the property in question, the benefit of which the estate failed to receive through the fault or default of the defendant, was on the plaintiff; and he had failed to discharge that burden.—After the death, the defendant said to the company that she could not carry out the proposed agreement, and asked to have the $500 repaid to the estate. She was then told that the deceased owed the company $500, which was the fact, and the defendant accepted that statement, and did not press for the $500:—*Held, per* Beck, J., that the estate, by the defendant's acceptance of the position taken by the company, got the benefit of the whole margin in the property, that is, $500. Had the agreement been recognised as a concluded agreement, the margin of $500 would have formed an asset of the estate, but there would have been a corresponding liability to the company for the same amount; and, although the company would not have had their claim paid in full, but would have received only a dividend *pro rata* with the other creditors, and the plaintiff would have received a slightly increased dividend, yet, in the absence of intentional discrimination between creditors, of which there was no evidence, this could not be made the ground of liability on the part of the defendant, who acted in good faith and reasonably. *Lavis* v. *Braden* (1910), 15 W. L. R. 645, Alta. L. R.

Liability of estate for work done for administrator.]—An estate in the hands of an administrator is not liable for work done or services performed at the request of the administrator, although the estate gets the benefit of the work and services, but the administrator is liable in his personal capacity in such a case. *Farhall* v. *Farhall*, L. R. 7 Ch. 123, followed. *Dean* v. *Lehberg*, 6 W. L. R. 214, 17 Man. L. R. 64.

Maintenance—Infant — Custody — Advice. *Re Cornell*, 1 O. W. R. 56.

Moneys collected by executors — *Partnership — Trust — Agreement — Estoppel.*]—An agreement was entered into between two creditors of a partnership concern and the executors of a deceased partner, that on the recovery of a certain sum of money due the partnership, it should be divided, two-thirds to the said creditors and one-third to the daughter of the partner. In an action by another partner:—*Held*, that the plaintiff was entitled to the one-third retained by the executors for the benefit of the daughter. *Oppenheimer* v. *Succency*, 6 W. L. R. 305, 13 B. C. R. 117.

Mortgage — *Purchaser of equity — Indemnity — Death — Release — Insolvent estate — Administrator.*] — The administrators of the insolvent estate of a deceased mortgagor are not liable in damages to his mortgagee as upon a devastavit, because they release the purchaser of the equity of redemption in the mortgaged property from his liability to indemnify the mortgagor in respect of the mortgage.—Judgment in 30 O. R. 684, 19 C. L. T. 280, affirmed. *Higgins* v. *Trusts Corporation of Ontario*, 20 C. L. T. 347, 27 A. R. 432.

Negligence — *Agent's fraud—Limitation of actions—Trustee Limitation Act.*]—The Trustee Limitation Act, R. S. O. c. 129, s. 32, protects executors where, relying in good faith on the statement of their testator's solicitor that he has in his hands securities sufficient to answer a fund they are directed by the will to invest for an annuitant, they distribute the estate, and it is afterwards found that before the testator's death the solicitor had misappropriated the money given to him by the testator to invest, and had in fact at the time of the representation no securities or money in his hands. Payments made from time to time by the solicitor to the annuitant, ostensibly as of interest received by him from the fund, do not keep alive the right of action against the executors. Judgment of Street, J., 30 O. R. 532, 19 C. L. T. 174, reversed. *Clark* v. *Bellamy*, 20 C. L. T. 350, 27 A. R. 435.

Notice to claimants — *Limitation of actions—Trustee Limitation Act — Trustee Relief Act.*]—A notice by executors that "all parties indebted to the estate of the late (testator) are required to settle their indebtedness" by a named date, and that "parties having claims against said estate are also required to file same by said date," is not a sufficient notice within s. 38 of R. S. O. c. 129 to protect the executors from liability for claims not brought to their knowledge until after the estate has been distributed by them. Their liability in this respect extends to claims against their testator for money lost owing to a breach of duty by him as trustee. Persons having a reversionary interest in a trust fund may bring an action to compel the trustee to make good money lost owing to his negligence, and the Trustee Limitation Act does not run against them from the time of the loss, but only from the time their reversionary interest becomes an interest in possession. After judgment had been given in the Court below (30 O. R. 110, 18 C. L. T. 407), against the executors in this case, the Act for the Relief of Trustees, 62 V. c. 15 (O.), was passed.—*Held*, that, assuming the Act to apply to such a case, it did not relieve the executors, for they could not be held to have acted reasonably when they failed to follow the plain statutory directions as to notice to creditors and claimants. *Stewart* v. *Snyder*, 20 C. L. T. 351, 27 A. R. 423.

Official administrator — *Heirs out of jurisdiction — Letters of administration.*]—The official administrator is not allowed to take out letters of administration in opposition to the heirs of the deceased, such heirs being resident out of the jurisdiction, but having an attorney-in-fact within the province to manage the estate, and there being no evidence that the deceased had any debts or any substantial personal property, although he died possessed of real estate within the province subject to a mortgage. *In re Lalaire*, 9 B. C. R. 429.

Official administrator — Power to sell land of intestate—No necessity for order—Official Administrators Act — Amending Act, 1900 — Intestates' Estates Act. *Re Neilson* (B.C.), 8 W. L. R. 400.

Order—Summary application for—Insolvent estate—Creditors—Conduct of proceedings—Discretion of Court. *Re Yocum, Honsinger* v. *Hopkins*, 1 O. W. R. 85.

Order of party to produce an account, upon oath, of property in his lands belonging to an intestate estate. *Re Endercott* (1817), Wakeham's Nfld. Ca. 54.

Order to an administrator, *ad colligendum bona defuncti*, to pay wages due servants of deceased, and to dispose of by public sale, such part of the goods of deceased as were *bona peritura*. *Re Leigh* (1823), Wakeham's Nfld. Ca. 405.

Order to executors to render an account of their administration of testator's estate to Probate Court by a given day. *Re Meade's Estate* (1817), Wakeham's Nfld. Ca. 24.

Order upon executors to shew cause why a party claiming an interest in the testator's estate should not receive the same. *Re Stuckless* (1823), Wakeham's Nfld. Ca. 410.

Passing accounts—*Corroboration—Payment of claims—Statutory declarations.*] — A Judge sitting on the probate side of the Court passing accounts is not bound by the rule of procedure requiring claimants against the estate to give corroborative proof of their claims. This rule of procedure is applicable only when the claim comes to be contested in Court.—*Semble*, a Judge sitting without a jury is not bound any more than is a jury to apply it under all circumstances. The responsibility of paying claims falls upon the administrator; he must use care and judgment in considering them, and if he does so fairly and honestly, and in the interest of the estate, he will on passing his accounts be allowed such as he has thought fit to pay.

Remarks on the usual form of statutory declaration proving claims. *Re Blank Estate*, 5 T. L. R. 230.

Passing accounts of administratrix —Carrying on business of deceased—Liability for loss—Liability for goods destroyed—Neglect to sell—Negligence—Goods claimed by administratrix in her own right—Gift—Inventory—Mistake—Delivery—Land standing in name of administratrix—Jurisdiction of Probate Court—Payment to manager of estate. *Re Nugent* (N.W.T.), 2 W. L. R. 3.

Passing administrator's accounts before Judge of probate — Reference to clerk—Exceptions to report—Right of administrator to retain moneys to answer claim against estate—Agreement with intestate—Parent and child—Work done and materials supplied—Statute of Limitations—Claim of daughter-in-law for services to intestate. *Re Easton* (N.W.T.), 4 W. L. R. 23.

Passing of accounts—Application for an order for payment of costs of the Proctor for the bondsmen who appeared at the return of the citation to pass accounts—Con. St. N.B. (1903), c. 118, s. 52—"Persons interested" — Intention of legislature. *Re Riley* (1910), 8 E. L. R. 593.

Passing of accounts — *High Court — Reference to take accounts in Master's office —Prior account in Surrogate Court—Effect of — Consent judgment — Trustees.*]—By s. 72 of the Surrogate Courts Act, R. S. O. 1897, c. 59, "Where an executor or administrator has filed in the proper Surrogate Court an account of his dealings with the estate of which he is executor or administrator, and the Judge has approved thereof in whole or in part, if the executor or administrator is subsequently required to pass his accounts in the High Court, such approval, except in so far as fraud or mistake is shewn, shall be binding upon any person who was notified of the proceeding taken before the Surrogate Judge, or who was present or represented therein, and upon every one claiming under such person."—The defendant, an executor, brought into the proper Surrogate Court the accounts of certain estates of which he was the executor, which were passed by the Judge in the presence of the solicitor for the plaintiff, a beneficiary. Subsequently the plaintiff brought an action in the High Court, and, without any pleadings being delivered, an order was made, by consent, for the removal of the executor and the appointment of a trust company in his place, and for the passing of the accounts, adopting the common form of the order for such purpose:—*Held*, that on the taking of the accounts in the Master's office the account taken and passed by the Surrogate Court Judge was, under s. 72, no mistake or fraud having been shewn, binding on the plaintiff, for, notwithstanding such consent, the judgment must be construed as if made *in invitum*, and the usual rules of law and procedure, statutory and otherwise, applied thereto.—63 V. c. 17, s. 18 (O.), 5 Edw. VII. c. 14 (O.), and Con. Rules 666 and 667, referred to as to the powers and duties of the Master in taking accounts, s. 72 applying to trustees as well as executors. *Gibson* v. *Gardner*, 7 O. W. R. 474, 8 O. W. R. 526, 13 O. L. R. 521.

Payment of debts — *Authorisation of Court—Consent of heir or unreasonable refusal to consent.*]—The Court cannot authorise the testamentary executors to pay a debt of the testator unless it is ascertained and undisputed by the heirs, or the payment of it is unjustly refused by the heir, or where the heir cannot give a consent to such a payment, as in cases of unsound mind or absence, or where the heir has refused the bequest, or there is no heir or legatee. This entirely discretionary authorisation will not be accorded if the debt is disputed or disputable by the heir upon apparently reasonable grounds. *Ex p. Clark*, 10 Que. P. R. 291.

Penalty—*Statement of property not made in time — Action — Plea — Difficulty — Delay.*]—An executor against whom an action is brought for a penalty for having neglected to make within the proper time the declaration required by law of the property left by the testator, cannot plead that he has done what he can to prepare a statement of the affairs of the estate, but has not succeeded by reason of numerous difficulties, and that he has asked for time; these allegations will be struck out on inscription in law. *Rainville* v. *Coutlée*, 10 Que. P. R. 187.

Personal action — *Abatement of—Trespass by testator — Suggestion of death — Liability of executors—Amendment—Money had and received.*]—Where one converts to his own use and sells the goods of the plaintiff, and dies after writ issued, but before declaration, the action may be continued against his executors, and they are liable on a count for money had and received.—In the above case the declaration was in trespass and for conversion, and upon the argument of the motion for a new trial, application was made to add a count for money had and received:—*Held, per* Hanington, Landry and Gregory, JJ., that, as the only fact in dispute, namely, the existence of a tenancy between the parties, had been passed upon by the jury in favour of the plaintiff, and as no possible injustice could be done to the defendant, the amendment should be allowed. —*Per* Barker and McLeod, JJ., that, as the proposed amendment introduced a new form of action, to which there were on the record no suitable pleas, and upon which there was no issue joined or damages assessed, the amendment proposed was improper and should not be allowed at that stage of the case. *Frederick* v. *Gibson*, 37 N. B. R. 126.

Personal liability — *Promissory note — Debt of estate — Renewal—Consideration — Statute of Frauds—Amendment.*]—Action on a promissory note payable on demand, signed by the defendant, as "executor of an estate," but not expressly restricted to payment out of the estate:—*Held*, that the defendant was personally liable. The note was given in renewal of a former one (similarly signed) which was not a demand note, but payable at a definite time, the debt being originally the testator's:—*Held*, that there was a good consideration for the former note, if not for the demand note, namely, forbearance on the part of the plaintiffs, and the defendant was liable thereon; and his antecedent liability was a valuable consideration for the demand note; s. 27, Bills of Exchange Act. Upon

appeal from an order for judgment on the pleadings leave to amend by setting up the Statute of Frauds was refused. *Union Bank of Canada* v. *McRae*, 21 C. L. T. 409, 496.

Petition of executor for discharge—*Service on each of the legatees—Practice—Order for meeting of legatees to choose successor—Service of.*]—A petition to the Court by the testamentary executor of a succession left to universal legatees, subject to a substitution, for permission to resign his office, must be served on each of the legatees on pain of nullity. It is the same for an order of a Judge calling a meeting of the legatees to pronounce upon the choice of a successor to the executor. Default of service of the petition and order upon any one of the legatees, invalidates the order which gives the authorisation and that which names the successor. *Rodier* v. *Rodier*, 18 Que. K. B. 1.

Power to sell lands—*Charge of legacies — Trustee Act — Devolution of Estates Act.*]—P. died on the 11th September, 1886, leaving a will in which he appointed executors and gave all his estate, real and personal, to his wife for life subject to certain bequests, and should his brother survive the wife he was to have the life use of the residue of the property, which was afterwards to go to the brother's children. In several places in the will (which was not skilfully drawn), the testator used the expressions "from the time Humewood is sold," "after the sale of Humewood," and "so soon as Humewood is sold," but there was no devise to the executors in trust, and no express power of sale. The lands in question which were a portion of what was called "Humewood" in the will, were sold and conveyed by the executors, and the vendors made title under such conveyance. The sale was not made in any way under the Devolution of Estates Act, and was not for the payment of debts. The question was whether the executors had power to sell. The Devolution of Estates Act, 1886, came into force on the 1st July, 1886, shortly before the death of the testator:—*Held*, that under what is now s. 18 of the Trustee Act, R. S. O. 1897 c. 129, the executors had power to sell, the testator having created such a charge as is described in s. 16, and not having devised the real estate to the executors in trust; that s. 16 of the Devolution of Estates Act, as found in R. S. O. 1897, c. 127 (which first became law in 1891), did not oblige the executors to sell under the Devolution of Estates Act, for by s.-s. (2) that section is not to derogate from any right possessed by an executor or administrator independently of the Act; that if the testator had devised the land to the executors upon trust, the machinery of the Devolution of Estates Act was not to be applied. *Re Booth's Estate*, 16 O. R. 429; and no more should it where the executors have a statutory power of sale to satisfy a charge. *Re Moore and Langmuir*, 21 C. L. T. 562.

Power to sell lands after expiration of two years after testator's death—*Direction in will.*]—Meredith, C.J.C.P., *held*, that executors had power to sell lands after the expiration of two years from the testator's death, notwithstanding his direction contained in his will to the effect that his lands should be sold within two years from his death. *Re Walton & Bailey* (1910), 17 O. W. R. 700, 2 O. W. N. 428.

Powers of executors—*Sale of land — Payment of debts — Devises in fee—Executory devises over — Devolution of Estates Act—Trustee Act.*]—A testatrix gave to her daughter some personal effects and $4,000 to be paid by her son, charged on property devised to the son; all the rest of her property she gave to her son, charged with $4,000. She then directed that in case of the death of either the son or daughter without issue, the whole of the property was to go to the survivor, and in case of the death of both without issue, to brothers and sisters of the testatrix. The executors contracted to sell a part of the real estate to the appellant, the daughter being alive and having three children, the son alive and unmarried, and brothers and sisters being also in existence. The land was incumbered and there were other debts:—*Held*, that the executors, even without the concurrence of the son and daughter, and *a fortiori* with their concurrence, could make a good title, either under the Devolution of Estates Act, R. S. O. 1897, c. 127, ss. 4, 9, 16, or under the Trustees Act, R. S. O. c. 129, s. 18. Section 9 of the former Act enables executors to sell for the payment of debts, and the power to sell is not qualified by s. 16. That section was intended to make it clear that executors had power to sell for the purposes of distribution where there were no debts as well as where there were debts; and the consent of the official guardian, on behalf of infants, lunatics, and non-concurring heirs or devisees, is only necessary when the sale is for purposes of distribution only. The power of sale given to executors by s. 18 of the Trustee Act was exercisable in this case, notwithstanding the last clause of s. 20; "a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest," does not mean a devise of a life estate to one or more persons, and a remainder or several remainders to one or more others, either jointly or successively, and with, it may be, executory devises over to still other persons, so that his whole fee simple, or less estate, whatever it may be, is disposed of; but it means a devise of his whole interest, whatever it may be, whether it be an estate in fee simple or any less interest, to the same person or persons, either as joint tenants or tenants in common. *In re Wilson, Pennington* v. *Payne*, 54 L. T. N. S. 600, 2 Times L. R. 443, approved. *Re Ross & Davies*, 24 C. L. T. 213, 7 O. L. R. 433, 3 O. W. R. 215.

Powers of executors—*Time for exercising — Extension.*] — An extension of the powers of an executor beyond a year and a day may result from previous wills, and from the combination of different testamentary dispositions relative to the appointment of the executor. *Brunet* v. *Marien*, 4 Que. P. R. 330.

Proof of character—*Action — Inscription.*]—A plaintiff who sues in the character of executor upon a lease made by him in that character to the defendant is not bound to produce documents proving his capacity as such before inscribing for hearing *ex parte*. *Leclaire* v. *Huot*, 3 Que. P. R. 389.

Property willed to inmate of an asylum — *"May" be handed over if pronounced permanently cured — Construction of will.*]—Testator gave property to executors for the benefit of an adopted daughter, in an asylum, and directed that should she be dismissed from the asylum as "permanently cured," "the entire amount 'may' be placed at once at her possession." She was dismissed as "cured." On motion for administration of the estate, it was *held*, that the word "may" did not necessarily mean "must;" the power conferred was discretionary, and in this case it would be in the best interest of the beneficiary that the money should remain in the hands of the executors for investment and payment over as they deem advisable, not only the interest, but such additional amounts as may be necessary for the maintenance and comfort of the beneficiary. *Re Bennett, Bennett* v. *Philip* (1909), 14 O. W. R. 1076, 1 O. W. N. 213.

Registration—*Power of appointment — Exception.*]—If the will does not provide for the replacing of executors, a person who has been named as executor, in place of one who has resigned, is not qualified to act as such, and an intervention made by the co-executors will, upon exception to the form, be dismissed as regards the executor thus irregularly named in place of another. *Lavoignat* v. *McKay*, 2 Que. P. R. 493.

Removal of executor—*Action for—Personal capacity.*]—An action for the removal of a legal mandatory, in this case an executor, on the ground of his mal-administration and of fraudulent acts of which he is accused, should be brought against him personally and not as executor. *Mercier* v. *Gosselin*, 5 Que. P. R. 80.

Removal of executor — Insolvency — Misconduct — Administration order—Undertaking—Costs. *Godbold* v. *Godbold*, 1 O. W. R. 233, 357.

Removal of executor from province —Release from office of executor and trustee —Moneys in hands of executor—Administration order — Assignment of mortgage—Unauthorised signature — Finding of fact — Costs. *Scott* v. *Millican*, 9 O. W. R. 954.

Removal of executor—*Account—Pleading — Exception to form.*] — A demand for the removal of testamentary executors and a demand for *reddition de compte* are not incompatible.—2. The fact that the defendants have already rendered an account, and therefore the plaintiff has only an action for reformation of the account, is not a ground for an exception to the form. *Donohue* v. *Donohue*, 4 Que. P. R. 300.

Renunciation by two out of three executors named in will—Grant of probate to third executor—Subsequent retractation of renunciation—New grant of probate. *Re Phipps*, 9 O. W. R. 982.

Renunciation of executorship — *No jurisdiction of High Court to set aside renunciation—Surrogate Courts Act—Judicature Act.*]—Teetzel, J., *held*, that all jurisdiction and authority in testamentary matters is by the Surrogate Courts Act, R. S. O. (1897), c. 59, ss. 17 and 18, now 10 Edw. VII. c. 31, ss. 19 and 20, vested in the Surrogate Courts, subject to provisions of the Judicature Act.—That neither the Judicature Act nor the Surrogate Courts Act gave the High Court jurisdiction to adjudicate upon a claim to set aside a renunciation of probate, or to allow a retraction by a plaintiff, who was named in the will as executor and who had filed a renunciation, therefore plaintiff must seek redress in the Surrogate Court in which the renunciation was filed and out of which probate issued. *Foxwell* v. *Kennedy* (1911), 18 O. W. R. 782, 2 O. W. N. 821. O. L. R.

Renunciation of probate — Previous intermeddling — Action on promissory note signed by defendant as executor—Personal liability—Leave to enter conditional appearance. *Harcourt* v. *Burns*, 10 O. W. R. 786.

Resignation of executor—*Acceptance by Judge—Provisions of will—Appointment of successor—Arts. 911, 924, C. C.—Notice to persons interested—Absent legatee—Mode of service—Failure to serve—Right of appeal against orders.*]—The following clause in a will: "My wish is that there shall constantly be two testamentary executors and administrators of my estate, and that in case of the death of one or other of my two testamentary executors and administrators . . or in the case of the refusal of one or other of them to exercise or continue to exercise the said charge of testamentary executor and administrator, proceedings shall be taken to appoint another testamentary executor and administrator to replace the one who has just died or refused to act any longer, and so that there shall always be two testamentary executors and administrators of my will . . ." does not exempt a testamentary executor who wishes to be discharged from the necessity of having his discharge accepted by a Judge, the parties mentioned in Art. 911, C. C., being present or duly notified.—2. The testator by directing that the successor of a retiring executor shall be chosen "*en justice*," upon the advice of a family council, has not intended to derogate and has not derogated from Arts. 911 and 924, C. C.—3. A universal legatee with usufruct, absent from the county at the time of proceedings, taken by an executor to have some one appointed in his stead, has nevertheless a right to be notified and regularly served, and the rules of procedure provide a special mode for service of notice in such a case.—4. An absent legatee who has not received notice (*semble*, by publication in newspapers) may move against the orders accepting the resignation of the executor, and appointing his successor, by way of appeal, and is not obliged to have recourse to *tierce-opposition*. *Rodier* v. *Rodier*, 9 Que. P. R. 429.

Resignation of executor — *Order of Court appointing new executor — Appeal — Provisional execution of order.*]—A testamentary executor appointed by a judgment to replace an executor who has resigned has a strict right to demand the provisional execution of the judgment appointing him, in spite of an appeal from that judgment. Nevertheless, such provisional execution will not be ordered if the retiring executor declares him-

self ready to exercise his office until the rendering of judgment upon the projected appeal. *Rodier* v. *Rodier*, 10 Que. P. R. 12.

Resignation of executors in foreign country — *Administration de bonis non there—Ancillary probate in Ontario.*] — A testator who died domiciled in Michigan, U.S., leaving property there and in this province, appointed certain persons executors, making them also trustees of four-sixths of his estate, and the proper Probate Court in Michigan granted probate to them in 1900. In 1903 they tendered to that Court their resignation as executors, though not as trustees, and requested and obtained the appointment of a trust company as administrators *de bonis non* with the will annexed in their place. In 1904, however, they resumed an application, which had remained suspended since 1900, to the Surrogate Court of the county of Essex for ancillary probate, which was opposed by the beneficiaries of the estate in Ontario, who asked for administration *de bonis non* to be granted to the trust company or its nominee:—*Held*, that the Court here ought to follow the Michigan grant to the trust company, and could not look into any of the circumstances which led up to it. *Re Medbury, Lothrop* v. *Medbury*, 11 O. L. R. 429, 7 O. W. R. 890.

Sale of land — Collusion — Fraud — Account. *Munro* v. *Gillie* (B.C.), 7 W. L. R. 253.

Sale of land of intestate by public administrator at undervalue — Employment of expert valuers—Duty of administrators as trustees. *Re McKay* (N.W.T.), 5 W. L. R. 79.

Sale of lands—No power to sell in will—Purchaser made permanent improvements—Then discovered his title imperfect—Action for improvements and damages—Latchford, J., allowed purchaser a lien on lands for permanent improvements under R. S. O. (1897), c. 119, s. 36—Damages not allowed — Defendants given offset for occupation rent.—*Bain* v. *Fothergill*, L. R. 7 H. L. 158, followed. *Rose* v. *Parent* (1911), 18 O. W. R. 745, 2 O. W. N. 783.

Security "judicatum solvi" — *Foreigner inheriting — Administrator residing out of the province.*]—When a plaintiff proceeds in any character whatever, it is the domicil of the person represented and not that of the representative, that ought to be taken into consideration in deciding whether there should be security "*judicatum solvi*." Consequently the administrator of an estate appointed outside the province of Quebec, ought to furnish such security even if he resides in Quebec. *Re Gagné* v. *Superior* (1909), 10 Que. P. R. 401.

Seisin of movable property — *Rents of immovable property—Agreement with tenants.*]—The seisin of movable property of successions by testamentary executors, under Art. 918, C. C., carries with it the right to collect, during the year and a day of its duration, the revenues of the immovable property. Hence, in an action for rent and damages, under a lease by the legatees of the lessor against the lessee, the latter may lawfully plead matter of agreement respecting such rent and damages between himself and the testamentary executors of the lessor, during the period of seisin of the latter. *Saint-Aubin* v. *Crevier*, 28 Que. S. C. 392.

Settlement of estate — *Unreasonable delay—Allowance of interest to beneficiary —Void will—Payments made under.*]—The executor named in a will is not entitled to delay payment of legacies for the period of eighteen months from the decease of the testator, where it appears that there were ample funds in his hands to enable him to have paid the same at least twelve months, and in the absence of evidence to shew the existence of debts, claims, or difficulties calling for eighteen months to dispose of them.—Where it appears that there has been unreasonable delay, and a decree has been made allowing the beneficiary interest, after the expiration of the period of twelve months, such decree will not be disturbed.—The executor under a will which has been set aside as void, will be entitled, in taking the accounts, to credit for an amount paid out *bona fide* under the probate of the void will, but such payment is no answer to parties claiming under the terms of a previous will, subsequently admitted to probate, to have the terms of such will carried out. *Cullen* v. *McNeil*, 42 N. S. R. 346.

Specific legacy — Realisation—Set-off—Debt barred by statute—Retainer. *Holt* v. *Perry*, 2 O. W. R. 424.

Substitution—*Power to sell property and reinvest — Mortgage by grevé — Creditors —Attachment of debts.*]—The testator left his property to the defendant, subject to a substitution in favour of the children of the defendant, with a stipulation of *insaisissabilité*. The will, however, permitted the executors, of whom the defendant was one, to sell the property on condition of employing the moneys arising from the sale in the purchase of property of the same value as the property sold, the property so acquired to represent that sold. The defendant in 1869 sold one of the immovables of the estate, and in 1873 he bought in his own name a lot upon which he built a house. In 1895 he charged and hypothecated this land in favour of his children to the amount of $10,440, which was the cost price, to serve and be instead of, as the deed said, a reinvestment for the children in accordance with the provisions of the will, up to the amount of the price so paid. The deed of hypothecation reserved to the defendant the right to remove the hypothec, and invest elsewhere, whether in purchasing new porperties or upon other sufficient securities: — *Held*, that the deed of hypothec did not constitute a valid reinvestment of the moneys arising from the sale of the property of the estate, and that the revenues of the immovable acquired by the defendant in his own name could be attached by his creditors. *De Serres* v. *Leclaire*, 23 Que. S. C. 454.

Successions — *Acceptance — Surviving consort — Accounting — Expenses of mourning and of last illness — Burial — C. C. 638, 639, 645, 650, 651, 736, 1198, 1368, 2002, 2003; C. P. 105, 113.*]—1. The acceptance of a succession is valid only when

the party accepting has been called to it.—2. The heir has the choice of three courses: pure and simple acceptance, acceptance under benefit of inventory, renunciation.—3. The heir who is sued, and who sets up in his plea his title and quality of heir, is deemed to have accepted the succession.—4. Except for reasons of fraud, violence or lesion, a person cannot impugn his acceptance of a succession.—5. The surviving consort is not responsible for the expenses of mourning, of last illness or of burial, because such consort is not the reputed heir and such expenses are not liabilities arising from the marriage.—6. In the absence of conclusions asking for an accounting, the legal heirs, sued by the surviving consort, cannot set up the plaintiff's default to render an account of her interference in the affairs of the succession.—7. In any event, an accounting may be legally made by direct action. *Vaudry* v. *Belanger* (1910), 16 Que. R. L., n. s. 294.

Supposed death of intestate — Evidence of death — Application by public administrator for letters of administration. *Re Tjerstrom* (Y.T.), 1 W. L. R. 385.

Surrogate Courts — *Grant of Administration—Nominee of next of kin in Ontario—Discretion — Revocation — Fraud.*] — Only one of the next of kin, the sister, of an intestate, resided in Ontario, and, upon the consent of the sister and her children, letters of administration were granted by a Surrogate Court to the defendant, the husband of the sister's daughter. A brother of the intestate, resident in the United States, brought this action to revoke the grant. It was stated in the defendant's petition that all of the next of kin had renounced in his favour, but it was plain from the renunciation, which was filed, that this statement was intended to refer only to the next of kin resident in Ontario:—*Held*, that the Surrogate Court had before it all those who were required by s. 41 of the Surrogate Courts Act., R. S. O. 1897, c. 59, to be cited or summoned, and the consent and request of all of them that the defendant should be appointed administrator, and, having regard to the nature of the property of the deceased, and the age and illiteracy of his sister, that the Judge had not exercised his discretion improperly in directing the grant to be made to the defendants.—*Semble*, that, even if the discretion had been improperly exercised, the grant would not have been revoked. The practice of the Surrogate Courts in this Province is to apply the provisions of s. 59 of the Act more liberally than do the English Courts the corresponding provision of the English Probate Act.—*Held*, also, affirming the finding of the Surrogate Court, that the defendant had not made false suggestions nor concealed material facts for the purpose of obtaining the grant. *Carr* v. *O'Rourke*, 22 C. L. T. 207, 3 O. L. R. 632, 1 O. W. R. 331.

Surrogate Courts — *Passing accounts—Res judicata.*]—An action by administrator with will annexed to recover a certain amount of money from defendant was dismissed on merits. *Union* v. *Bensley*, 12 O. W. R. 1069.

Survival of action — *Tort—Power to appoint administrator ad litem.*]—R. S. O. 1897 c. 129, s. 11, providing that in case any deceased person has committed a wrong to another in respect to his person or his real or personal property, the person so wronged may maintain an action against the administrators or executors of the person who committed the wrong, does not give authority to maintain an action against one who is an administrator *ad litem* merely, but only against an administrator in the ordinary sense of the term, that is, a general administrator clothed with full power to collect the assets, pay the debts, and divide the estate. Therefore, for this reason, apart from others, the appointment of an administrator *ad litem* should be refused in this action, which was brought against five persons for malicious prosecution, one of whom had died pending the action, and whose widow and children refused to administer to the estate. *Hunter* v. *Boyd*, 22 C. L. T. 50, 3 O. L. R. 183, 1 O. W. R. 79, 2 O. W. R. 724, 1055.

Taking possession of estate — *Debtor opposing claim for account—Period of year and a day — Commencement of—Cessation of executor's functions.*]—The fact that a debtor of an estate resists an action *en reddition de compte* brought against him by an executor, alleging that he is not accountable to the estate, does not prevent the executor from taking possession of the estate: nor is he prevented from doing so because the debtor, having been ordered to render an account to the executor, renders an account in which he brings himself out free of debt to the estate, so long as the executor contests such account. 2. In consequence, the period of a year and a day commences to run from the date of the death of the testator, the executor being presumed to have known the will from that date. 3. If the year and a day from the death have elapsed during the pendency of the contest as to the account, then there is plainly a cessation of the functions of the executor, and the proceeding is suspended until the legatee or heir takes up the conduct of it in place of the executor. *Francœur* v. *Paradis*, 20 Que. S. C. 246.

Technical breaches of trust — *Relief from — Limitation of actions — Trustee Acts.*]—Where it was held that the appointment of executors to carry out the alternative provisions of the will never took effect, it was also held that the persons named as executors, having applied for and obtained probate, became trustees for the persons entitled upon an intestacy; payments made by them to those who would have been beneficially entitled if the alternative provisions had taken effect were breaches of trust; but the Statute of Limitations was a bar to a recovery in respect of any of those breaches which occurred more than six years before the action was brought: R. S. O. 1897 c. 129, s. 32:—*Held*, moreover, that the executors were entitled to be relieved from personal liability for all breaches of trust committed by them under 62 V., 2nd sess., c. 15, they having acted honestly and reasonably, in view of the facts that the construction of the will was doubtful; the trial Judge took the same view of its effect as they did, and for eleven years everybody interested in the estate acquiesced in that view. *Henning* v. *Maclean*, 21 C. L. T. 434, 2 O. L. R. 169.

Title to land — *Ejectment—Costs.*]—P. L. died, owning land in fee simple; letters of administration of his estate were granted to J. L.; J. L. died, and letters of administration of her estate were granted to the plaintiffs, who sought by this action to recover possession of the land of P. L., upon the title thus set forth:—*Held*, that the legal estate passed to J. L. as administratrix of the estate of P. L., but was vested in her solely for the purposes of administration; and, there being no evidence to indicate that J. L. had, in the course of her administration, conveyed the land to herself for her own benefit, the plaintiffs had no title.—The objection to the plaintiffs' title being apparent upon the pleadings, while the action should be dismissed, the defendant's costs should be limited to the amount he would have received had he raised the point of law and had the action disposed of in that way, instead of going to trial. *National Trust Co.* v. *Prouse* (1910), 15 W. L. R. 349, 20 Man. L. R. 137.

Tort of testator—*Action against testator—Death pending action — Recovery against estate — Time limit.*]—Under R. S. N. S. 1900 c. 177, s. 2, dealing with actions against executors for injuries done by deceased, although the action is brought in the lifetime of the deceased, if he dies before judgment there can be no recovery against the estate, if six months have elapsed between the acts complained of and the death. —Reasons for not allowing costs. *McDonald* v. *Dickson*, 40 N. S. R. 560.

Transfer of debt to executors—*Pleading — Reply — Departure.*] — Executors have a status to recover a balance due upon a debt transferred to them in their capacity of executors.—If, in reply to an exception to the form, they set up and produce documents which confer upon them more extended powers than those which are given to them by the law alone, such part of the reply will not be struck out on motion, as setting up a new ground of action. *Francis* v. *Rhine*, 3 Que. P. R. 320.

Trespass to land—*Survival of action — Continuing cause of action — Revivor.*]—In an action for trespass to land, brought in 1895, the statement of claim included a claim for erecting and maintaining fences and depasturing cattle. The plaintiff died in July, 1897, and his executrix was made a party in April, 1898:—*Held*, that R. S. N. S. c. 113, s. 21, in relation to the maintenance of actions of trespass by executors and administrators, applied. It appearing also that trespasses had been going on since the action was brought, and that a fence thrown down as a trespass had been rebuilt and continued.—*Held*, that the claim was for a continuing cause of action within the meaning of O. 34, R. 46. *Grant* v. *Wolfe*, 32 N. S. R. 443.

Trust — Breaches of — Negligence—Claim by executor against estate—Corroboration—Payment in lifetime of testator—Admission —Compensation—Devise in lieu of — Construction of will. *McClenaghan* v. *Perkins*, 1 O. W. R. 191, 752.

EXEMPTION.

See ASSESSMENT AND TAXES—EXECUTIONS.

EXHIBITION ASSOCIATION.

See COMPANY—NEGLIGENCE.

EXHIBITS.

Filing—*Letter — Original or copy.*] — A party who seeks to adduce in evidence a letter written by himself will not be ordered to file the original, that being in possession of the addressee. *Chaput* v. *Charland*, 6 Que. P. R. 33.

Production after return — *Leave to inscribe ex parte.*]—An inscription for hearing *ex parte* will be struck out with costs, where the plaintiff, who has filed his exhibits after the return of his action, has not obtained leave of the Judge to foreclose the defendant. *Maclean* v. *Meloche*, 4 Que. P. R. 294.

Production after return — *Leave to inscribe ex parte — Notice — Costs.*]—A plaintiff who has filed his exhibits after the return of his action, will be allowed, on motion, to obtain the foreclosure of the defendant from pleading, if a sufficient delay has elapsed since notice of the filing of the exhibits was given to the defendant, but such motion will be granted without costs. *Trenholme* v. *Provost*, 4 Que. P. R. 316.

See OPPOSITION—PARTITION.

EXONERETUR.

See ARREST.

EXPENDITURE.

See MORTGAGE — MUNICIPAL CORPORATIONS.

EXPERT WITNESSES.

See DISTRIBUTION OF ESTATES—INTERDICT—PATENT SOLICITOR.

EXPLOSIVES.

See MASTER AND SERVANT — MUNICIPAL CORPORATIONS—NEGLIGENCE.

EXPORT OF TIMBER.

See STATUTES.

EXPRESS COMPANY.

See ASSESSMENT AND TAXES—BAILMENT—CARRIERS.

EXPRESS ORDERS.

See MISTAKE.

EXPROPRIATION.

Beach lots—*Special adaptability for shipping purposes — Compensation claimed for stone in disused wharf.*]—In valuing beach lands being expropriated by the Crown special adaptability will not be taken into account. *Rex* v. *Inverness*, 7 E. L. R. 291; 12 Ex. C. R. 383.

"Buildings and erections" — *Assessment of damages.*]—See 38 N. B. R. 542. On the new trial in construing "buildings and erections" the trial Judge held that all filling in as well as the piling was covered by "erections." The Court holds that in addition to the piling only such filling in is covered as forms part of the foundations of the buildings. *Sleeth* v. *St. John, Gordon* v. *St. John*, 6 E. L. R. 129.

Compensation—*Value to be ascertained by justices of the peace and specially summoned jury—Jury not qualified to assess value without expert evidence—Acquiescence or waiver as to jurisdiction of Court.*]—By the Canadian Act, 14th and 15th Vict., c. 128, s. 66, the corporation of Montreal are authorised to purchase and acquire, or to take lands for the purpose of public improvements in that city, the value whereof, if disputed, is by section 68, to be ascertained at a session held by the justices of the peace and determined by a jury specially summoned for that purpose:—*Held* (reversing the judgment of the Court of Queen's Bench for Lower Canada), that the jury were not of themselves qualified to assess the value, without evidence of experts, and that a party claiming compensation for land taken by the corporation was entitled to produce witnesses as to the value; there being no express words in the Act, or necessary implication, to take away the right to have witnesses sworn and examined, and that the justices of the peace were wrong in refusing to take such evidence.—*Held*, further, that the justices being under the Act competent to swear a jury, were competent to swear witnesses on the claimant's behalf. In order to constitute acquiescence, or waiver, it must be shewn that the party said or did something to give the Court a jurisdiction it did not possess. Mere respectful acquiescence, or submission to the ruling of a Court, will not amount to a waiver of a right to complain of an illegal decision. *Beaudry* v. *Montreal* (1858), C. R. 2, A. C. 342.

Foreshore—*Title—Special adaptability of property for wharf purposes — Value — Compensation.*] — The suppliants claimed damages for value of certain lands expropriated by the Crown to form the shore end of a wharf:—*Held*, (1) that the suppliants have proved their title to the lands; (2) that special adaptability for wharf purposes will not be considered in estimating the proper value. *Gillespie* v. *Rex*, 7 E. L. R. 299; 12 Ex. C. R. 406.

Lands covered with water — *Special adaptability for harbour purposes.*]—Natural adaptability for harbour purposes will not be construed in arriving at the value of land being expropriated by the Crown. It is the market value which must be considered. *Rex* v. *McDonald*, 7 E. L. R. 290.

Money paid into Court — *Ejectment action against mortgagor — Foreclosure — Assignment of judgment — Prescription.*]—A mortgage was made by B. to C., who subsequently commenced an action of ejectment and asking possession, foreclosure, and sale. Ejectment only was obtained and judgment registered. Nothing further was done under it. The judgment was assigned to D. but he never took possession:—*Held*, that D. is not entitled to the fund in Court, the proceeds of the property covered by the mortgage. *Re James Ling*, 6 E. L. R. 204.

Of lands—*Que. Imp. Co. v. Que. Bridge & Rw. Co.*, C. R. [1908] A. C. 212, digested under ARBITRATION AND AWARD.

Railway — Expropriation — Arbitration —Award — Principal and agent — Agency generally — Liabilities of principal and agent — Delegation of authority. *Quebec & Richmond Rw. Co.* v. *Quinn*, (1858), C. R. 2, A. C. 431. Digested under PRINCIPAL AND AGENT, and RAILWAY.

Water lots — *Contingent value — Crown grant — Statutory authority.*] — Land in Halifax, N.S., including a lot extending into the harbour, was expropriated, for purposes of the Intercolonial Railway. This lot could be made very valuable by the erection of wharves and piers for which, however, it would be necessary to obtain a license from the government of Canada as they would obstruct navigation. The title to the water lot was originally by grant from the government of Nova Scotia, but no statutory authority for making such grant was produced. $10,000 was offered by the government for all the lands and allowed by the Exchequer Court. The owners appealed, claiming a much larger amount: — *Held*, Duff, J., dissenting, that the owners were not entitled to compensation on the basis of the water lot being utilized for wharves and piers and if they were the amount tendered was sufficient.—*Quære*, can a Crown grant of lands be made without statutory authority?—Judgment of the Exchequer Court (12 Ex. C. R. 414), affirmed.—Appeal dismissed with costs. *Cunard* v. *R.* (1910), 30 C. L. T. 527, 43 S. C. R. 88.

See ARBITRATION AND AWARD — COMPANY—CROWN — CONSTITUTIONAL LAW — DAMAGES — LICENSE — MUNICIPAL CORPORATIONS — NOVA SCOTIA PROVINCIAL EXHIBITION — RAILWAY—SCHOOLS —TRESPASS TO LAND — WATER AND WATERCOURSES.

EXTINGUISHMENT.

See PEREMPTION.

EXTORTION.

See CRIMINAL LAW.

EXTRA-PROVINCIAL CORPORATIONS.

See COMPANY—CONSTITUTIONAL LAW.

EXTRADITION.

Abortion — *Accessory.*]—Where accused was charged with having procured an unlawful operation upon a woman, the depositions did not shew that the operation which was performed was the operation for which accused took the woman to have performed, and there being no evidence to connect accused with the unlawful operation he was discharged. *In re McCready* (1909), 2 Sask. L. R. 46; 10 W. L. R. 132; 14 Can. Cr. Cas. 481.

Appointment of extradition commissioners—*Federal parliament — Extradition Act — Constitutionality — Prohibition — Notice to adverse party — Excess of jurisdiction.*]—Upon presentation of a petition for the issuance of a writ of prohibition, the Judge may require notice to be given to the parties having an adverse interest in the proceedings. 2. The Judge to whom the application is presented, in view of the effect of the issuing of the writ, which would be to tie up the inferior jurisdiction for an indefinite time, will go fully into the reasons urged on the merits of the application. 3. The writ of prohibition lies whenever a court of inferior jurisdiction exceeds its jurisdiction, if there is no other remedy equally convenient, beneficial, and effectual, and it may also be used to restrain any body of persons or officers assuming to exercise judicial or quasi-judicial powers, although not strictly or technically a court. 4. The writ should not be granted except in a substantially clear case of want of jurisdiction and where there is an imminent danger of failure of justice. 5. The Extradition Act, R. S. C. c. 142, in so far as it enacts that the Governor-General in council may appoint Extradition Commissioners other than members of a court already constituted and organized by the provincial authorities, is constitutional and within the powers of the federal parliament. 6. Doubted, that a writ of prohibition is the proper means of bringing before the Court the question of the constitutionality of a statute under which a court or an officer pretends to act. *Re Gaynor*, 7 Que. P. R. 115.

Arrest and remand of accused—*Writs of habeas corpus — Jurisdiction — Procedure.*]—The respondents, having been arrested in Montreal by an order of an extradition commissioner for an alleged extradition offence committed in the State of Georgia, were remanded by him for the purpose of affording the prosecution an opportunity of proving its case. Thereafter one Judge in Quebec issued, on their application, and then quashed, writs of habeas corpus, while another Judge afterwards issued similar writs and discharged the respondents from custody, on the ground that no extradition offence had been disclosed against them in the proceedings before him: — *Held*, that this was the question which the Extradition Commissioner had jurisdiction to investigate on the remand which he had ordered; that his remand warrant could not be treated as a nullity; that the respondents were in lawful custody; and that in consequence, the Judge had no jurisdiction to order their release. *United States of America* v. *Gaynor*, [1905] A. C. 128.

Arrest on telegram—*Information based on — Sufficiency — Release and re-arrest on warrant — Habeas corpus — Affidavit — Crown Rule 150 — Forum — Warrant of extradition — Statement of crime — Two offences.*] — The prisoner was arrested at Halifax upon a request by telegram from the Russian Consul-General at Montreal, and without warrant. A writ of *habeas corpus* having been granted, a warrant to apprehend, issued under the Extradition Act, R. S. C. 1906 c. 155, was returned as the cause of the detention. It was admitted that the prisoner had been momentarily released and then re-arrested on the extradition warrant. The *habeas corpus* was granted before but not served until after the second arrest: —*Held*, that it was not necessary that the affidavit on which the *habeas corpus* was obtained should be made by the prisoner, he being a foreigner unable to speak or understand English; it was sufficient if made by his solicitor or any one acting on his behalf. —2. That Crown Rule 150 did not apply, the writ having been granted when there was no warrant of extradition in existence, and the full Court not being in session at the time.—3. That the warrant of extradition, setting out that the prisoner was "accused of the crimes of theft and embezzlement within the jurisdiction of the Russian Empire," following the form prescribed by the Act, was sufficient; and it was no objection that two offences, of a cognate character, were stated. —4. That the information in extradition might properly be based upon a telegram.—5. That the second arrest was lawful, although the accused was only nominally set at liberty, and was re-arrested without liberty to depart. *Rex* v. *Rutland, Ex p. Kalke* (N.S.), 14 Can. Crim. Cas. 22.

Assault with intent to murder — *Treaty — Evidence on inquiry.*]—Where a fugitive offender from the United States is charged with an assault with intent to murder, in an information laid under the Extradition Act, R. S. C. c. 142, the evidence must sufficiently establish the existence of the intent. *Re Kelly*, 22 C. L. T. 262.

Bail pending appeal—*Habeas corpus—Powers of Judge of Court of Appeal.*]—An application to a Judge of the Court of Appeal to admit to bail a person committed for extradition, pending an appeal to that Court from an order of a Judge of the High Court refusing, upon *habeas corpus*, to discharge the applicant, was refused on the grounds, (1) that it did not appear that the applicant was in actual custody, and (2) that it was doubtful whether a Judge of the Court of Appeal had power to make the order, a matter of bail not being incidental to the appeal (Jud. Act, s. 54).—*Quære*, as to the propriety of granting bail in extradition proceedings otherwise than *de die in diem*, pending the hearing of a motion for *habeas corpus* on an appeal. *In re Watts*, 22 C. L. T. 130, 3 O. L. R. 279, 1 O. W. R. 129, 5 Can. Cr. Cas. 538.

Bribery—*Retroactive legislation—Treaty —Foreign law — Criminal Code.*] — The prisoner, who was the assistant city engineer of a city in the State of Ohio, U.S., with the supervision over certain of the streets, which were being improved by a firm of contractors, accepted from the firm the sum of $50 for the purpose of influencing him in his work of supervision:—*Held*, that the offence did not amount to bribery at common law, where it could only be predicated of a reward given to a Judge or other person concerned in the public administration of justice; but that it constituted bribery under the laws of the State of Ohio, as well as under s.-s. (c) of s. 161 of the Criminal Code, R. S. C. 1906 c. 146.—The crime of bribery was not included in the list of offences contained in the extradition treaty of 1889, nor in that of 1890, but by art. 1 of the treaty of 1907 it was added to such list, and was by art. 2 to be considered as an integral part thereof, and as if the original list of crimes had comprised the additional crimes specified in art. 1.—The offence here was committed before the coming into force of the treaty of 1907. —*Held*, that art. 2 had a retroactive effect, and, notwithstanding that the offence was committed before the coming into force of the treaty of 1907, the offence of bribery was to be treated as if originally in the list of offences contained in the treaty of 1889, and therefore came within the treaty; and that the prisoner was extraditable. *Re Cannon*, 12 O. W. R. 171, 17 O. L. R. 352; 14 Can. Cr. Cas. 186.

Child-stealing — *Contempt of foreign court — Parent stealing his own child — Foreign law — Criminal Code.*]—The prisoner and his wife were absolutely divorced in the State of Illinois, where they were domiciled, by a decree which gave the custody of their child, five years old, to the wife, with permission to the prisoner to take it out with him in the day time, but to return it the same day. The prisoner, having thus obtained the child, brought it to Canada:—*Held*, following *In re Murphy*, 26 O. R. 163, 23 A. R. 386, that "child stealing" being mentioned in the existing Extradition Treaty between the United States and Great Britain, as one of the extradition crimes, the Court should, in the absence of any evidence to the contrary, assume the crimes to be identical in the two countries, and the onus did not rest upon the prosecutor of proving what the foreign law was. The evidence taken before the extradition commissioner shewed a case of child stealing, under s. 284 of the Criminal Code, and, in the absence of evidence of the foreign law, that was sufficient. Section 284 of the Criminal Code does not exclude the case of father and child. Though what was done was a contempt of Court, yet if a man has committed a crime it does not become the less a crime because it also happens to be a contempt. As to the prisoner's contention that he had acted in good faith because he had been advised that the decree of divorce having been obtained collusively, was a nullity, this was a matter which might properly be set up as a defence by the prisoner upon his trial, but could not be dealt with by the magistrate, who had before him the decree of the foreign Court and the oath of the wife that she did not collude. *Rex* v. *Watts*, 22 C. L. T. 166, 3 O. L. R. 368, 1 O. W. R. 133; 5 Can. Cr. Cas. 246.

Conspiracy to defraud — *Extraditable crime—Evidence.*]—The offence or crime of conspiracy to defraud is not an extraditable crime under the extradition treaty between Great Britain and the United States:—Evidence of a conviction in the United States of conspiracy to defraud, consisting of copies of an indictment for that offence, of a verdict of guilty, and of the sentence to fine and imprisonment in consequence, affords no grounds for a committal for extradition on a charge of fraud by an agent, even though overt acts of fraud by the prisoner as an agent be set out in the indictment, in conformity with the rules of criminal procedure in the United States. *Ex parte Browne*, 16 Que. K. B. 10; 11 Can. Cr. Cas. 161.

Discharge of prisoner — New information and warrant — Re-arrest of prisoner — *Habeas corpus*—Rule *nisi*. *Re Harsha*, 7 O. W. R. 155.

Embezzlement — *Hearsay evidence—Removal of goods—Master and servant—Larceny.*]—The prisoner was remanded for extradition for the crime of embezzlement committed in Texas. The facts relied on were set forth in the deposition of the owner of the property alleged to have been embezzled. He stated that twenty thousand sheep and other property were placed by him under the charge of the prisoner, as foreman, on a ranch 350 miles distant from the owner's place of residence, in the State of Texas; and that the property was removed without his knowledge from the ranch. There was no evidence except that of the owner as to the removal or as to the receipt by the prisoner of the proceeds of sale, and the owner's evidence as to those matters was merely hearsay:—*Held*, that the evidence did not shew embezzlement nor larceny, and the prisoner must be discharged. *Re Piaget*, 21 C. L. T. 536.

Embezzlement — Identity of accused — Extraditable offence—Evidence of offence — Admissions — Business books — *Prima facie* case. *Re Latimer* (N.W.T.), 3 W. L. R. 81; 10 Can. Cr. Cas. 244.

Evidence — *Extradition commissioner — Discretion—Review—Habeas corpus — Practice—Marking writ—Ex parte affidavits — "Fraud by an agent"—Extradition treaty.*] —The omission to mark a writ of *habeas corpus* in the manner prescribed in s. 3 of c. 95, C. S. L. C., is not a ground of objection that can be taken by the party prosecuting the prisoner or opposing his discharge, more particularly after the merits of the cause of detention have been inquired into. The formality is one required for the instruction of the sheriff, gaoler, or officer detaining the prisoner.—Affidavits taken *ex parte* in the manner provided in s. 10 of the Extradition Act, R. S. C. c. 142, are admissible as evidence in support of the charge for which the extradition of a fugitive is sought.—The sufficiency of such evidence is a matter for the judicial discretion of the extradition commissioner, and his decision thereon is not subject to review in *habeas corpus* proceedings.—The expression "fraud by an agent" in c. 4 of Art. 1 of the Extradition Treaty between Great Britain and the United States (con-

vention of 1889-90) is not confined to agents who misapply trust moneys, but is of general purport and extends to servants or employees of the government, such as appraisers of imported goods subject to customs duties. *Browne* v. *United States of America*, 30 Que. S. C. 363.

Extradition Act, s. 13 — *Preliminary hearing of indictable offence—Criminal Code, ss. 682-686 — Practice when evidence taken in shorthand—Habeas corpus.*]—Under s. 13 of the Extradition Act, R. S. C. 1906 c. 155, which provides that the Judge before whom the fugitive is brought should hear the case in the same manner as nearly as may be as if the fugitive was brought before a justice charged with an indictable offence, the proceedings are regulated by ss. 682-686 of the Criminal Code, and under s. 693, if the evidence is taken in shorthand, it is imperative that the transcript be signed by the Judge and be accompanied by an affidavit of the stenographer that it is a true report of the evidence before there can be a committal of the accused for extradition, and, if these be lacking, the prisoner is entitled to his discharge on *habeas corpus*, although there would be nothing to prevent fresh proceedings being taken against him. *In re Stanbro*, 1 Man. L. R. 325, and *Dale's Case*, 6 Q. B. D. 376, followed. *Re Royston*, 18 Man. L. R. 539, 10 W. L. R. 513, 15 Can. Cr. Cas. 96.

False pretences — *Production of document—Evidence.*]—The basis of a charge being false pretence, and that false pretence being obtained in a written document, unless a foundation be laid by secondary evidence to make out a *prima facie* case, the document itself must be produced upon application for a warrant for extradition. *Re Johnston*, 13 B. C. R. 209.

Foreign warrant—*Proof of—Return — Discharge.*]—A warrant under the Extradition Act, R. S. C. c. 142, s. 6, for the apprehension of a fugitive was issued upon duly authenticated copies (1) of an indictment found by a grand jury in a foreign country charging the accused with an extraditable offence, (2) of a bench warrant issued upon the said indictment, accompanied by a copy of a return thereto by the sheriff dated 10th April to the effect that he could not find the accused and believed that he was without the jurisdiction, and (3) of depositions of witnesses tending to shew that the accused was guilty of the offence charged. On the hearing, the proceedings above mentioned were put in as evidence subject to objection, and the sheriff gave evidence that the accused whom he identified, had been in custody from about the 1st May until the sittings of the Court at which he was indicted, and that he was at that sittings discharged from his custody:—*Held*, that, in order to give jurisdiction to a Judge to issue such a warrant, either a foreign warrant of arrest must be proved or an information or complaint must be laid before the Judge at or before the time of the issue of the warrant. That, in case of a foreign warrant, it must be shewn to be outstanding and in full force, and that the evidence failed to establish this. *Semble*, that in case of a foreign warrant, the original must be produced. The accused was therefore discharged. *Re Bongard*, 5 Terr. L. R. 10, 6 Can. Cr. Cas. 74.

Forgery — *Evidence of commission of offence—Identification of document—Irregularities in proceedings before extradition Judge—Discharge of prisoner — Fresh proceedings—Proof of foreign law.*]—The prisoner was committed by a Judge for extradition to a foreign state for the offence of forging tickets of admission to an entertainment. The evidence before the Judge consisted of a certified copy of the indictment of the prisoner in the foreign state, the information of a police detective taken before the Judge himself, and five depositions or affidavits sworn in the foreign state, consisting in great part merely of hearsay statements made by other persons to the deponents, not in the presence of the prisoner. These depositions proved some relevant facts, and raised a strong suspicion against the prisoner of having forged something, of having committed an offence which, if committed in Canada, would be forgery at common law, as well as under the Criminal Code, ss. 419, 421, 423; but neither a genuine ticket nor one of those with the forging of which the prisoner was charged was produced with any of the depositions, nor produced or identified before the extradition Judge:—*Held*, Meredith, J.A., dissenting, that there was no proper evidence of the commission of the alleged offence; and the prisoner was entitled to his discharge upon *habeas corpus*. Decision of Tretzel, J., reversed.—*Semble, per* Osler, J.A., that there were grave irregularities in the proceedings before the extradition Judge; his warrant for the apprehension of the accused was issued without any information or complaint taken in this country, or a foreign warrant duly authenticated, having been before him; the prisoner was arrested on the strength of a telegram, and the depositions on which he was committed were not forthcoming pending their authentication until the day upon which the order was made remanding him for extradition; and s. 6 (2) of the Extradition Act could not have been complied with.—*Semble*, also, that, in the present state of the authorities, an Extradition Judge should require proof that the crime is an extradition crime as well by the laws of the demanding state as by our own. *Re Harsha*, 11 O. L. R. 494, 7 O. W. R. 97, 11 Can. Cr. Cas. 62.

Affirmed by P. C. Will be reported in C. R. A. C. later.

Forgery—*Uttering forged document—Intent.*]—There was evidence that the prisoner handed to a young woman in charge of a telegraph office a letter purporting to be signed by a vice-president of the telegraph company, in these words: "To any employé. Western Union Telegraph Company. This will introduce Mr. J. O. Goelet, a personal friend of the management of this company. Any favours shewn him will be duly appreciated by the corporation and myself." The vice-president whose name was used did not himself sign it, nor authorise any one else to sign it for him, nor was he aware of it. There was evidence that the prisoner shortly afterwards gained the affections of the young woman, and proposed, under the name of J. O. Goelet, to marry her, although he had a wife living. There was no evidence that any person named J. O. Goelet existed. There was no evidence to shew that the prisoner had himself written any part of the document:—*Held*, that the facts were sufficient to make

out a *prima facie* case that the prisoner presented the document with the intention that the young woman should believe and act upon it as genuine, to her own prejudice, within the meaning of s. 422 of the Criminal Code; and therefore a *prima facie* case of uttering a forged document, within the meaning of s. 424; and an order for extradition was right. The language used in s. 422 is intended to extend to cases which would not have come within any former common law or statutory definition of forgery in force in Canada. *Re Abeel*, 24 C. L. T. 231, 7 O. L. R. 327, 3 O. W. R. 85, 8 Can. Cr. Cas. 189.

"Grand larceny" — *Procedure before extradition commission — Criminal Code, s. 686—Witnesses for defence—Technical objection — Evidence—Extradition Act, s. 16 — Affidavits—Reception of—Limitation to such as state facts—Consideration of affidavits and oral evidence—Insufficiency to shew truth of charge—Discharge of accused.*]—Upon an application, on the return of a *habeas corpus*, for the discharge of a prisoner who has been committed for extradition to the State of Washington to answer a charge of having in that State committed the crime of "grand larceny":—*Held*, that it must be assumed that "grand larceny" is included in the term "larceny," and is a particular kind of larceny specified by the use of the word "grand."—2. It was objected that the accused was not asked by the Extradition Commission if he had any witnesses to call, as prescribed by s. 686 of the Criminal Code:—*Held*, that, the accused being represented by counsel, who were called upon for their defence, and who proceeded with their argument without making any objection, and it not being shewn that the accused had, or desired to call, any witnesses, no injustice had been done to the accused, the statute had been substantially complied with, and no effect should be given to so highly technical an objection. —3. Under s. 16 of the Extradition Act, affidavits may be received by the Extradition Commissioner, if he so desires, and such weight may be given to them as he thinks proper.—4. While, for the purposes of convenience, the introduction of depositions and affidavits may be allowed, they ought to be limited, in the case of depositions, to such as set forth the question and answer, and, in the case of affidavits, to such as state facts, and which disclose that no injustice is being done to the accused by their admission. — 5. Certain oral evidence was taken before the Commissioner in this case, and the affidavits of the complainant and another were filed:—*Held*, upon consideration of them, that they were not sufficient to establish a *prima facie* case against the accused; and his discharge was ordered. *Re Moore* (1910), 13 W. L. R. 503, 20 Man. L. R. 41; 16 Can. Cr. Cas. 264.

Habeas corpus—*Desistment — New trial —Res judicata—Certiorari—Extradition commissioner — Jurisdiction — Warrant — Description of offence—Extradition treaties.*]—A writ of *habeas corpus*, in an extradition matter, issued upon the order of a Judge, then discharged by the same Judge, does not prevent the issue of another writ and does not constitute *res judicata*, when: (*a*) there are new allegations in the petition upon which the second writ is issued; (*b*) the petitioner has desisted from his first writ before judgment and alleges this desistment in his second petition; (*c*) the second writ is not addressed to the same gaoler and is executed in a different district. 2. The petitioner may validly desist from a writ of *habeas corpus* at any time before judgment, and if, in spite of the desistment, judgment is rendered, it does not constitute *res judicata*, and cannot be set up against the second writ. 3. After the issue of a writ of *habeas corpus*, in an extradition matter, the Judge seised of the writ may issue a writ of *certiorari* in aid, addressed to the extradition commissioner who has issued the warrant, to return the whole of the proceedings before him, including the information or complaint and the documents relating to it. 4. In order to form an opinion upon the merits, the Judge after the return of the proceedings under the *certiorari*, is not confined to the warrant of arrest, to see if the extradition commissioner had jurisdiction, but he may go behind the warrant and see what it is founded on. 5. An extradition commissioner has no jurisdiction to proceed to extradition, unless his warrant, as well as the documents upon which it issues, is legal and contains a legal description of an offence mentioned in the treaties. 6. In an extradition matter, the date of committing the offence is an essential element in the description of the offence, and if it is not in the warrant, the warrant is illegal. 7. The warrant, the complaint, and the documents relating to it, must shew clearly that the offence is within the treaties. 8. The extradition commissioner cannot in his warrant change the offence stated in the complaint so as to bring it within the treaty. *Ex p. Gaynor & Greene*, 22 Que. S. C. 109.

See *Re Gaynor & Greene*, 9 Can. Cr. Cas. 205, 240, 255, 486, 496, and 10 Can. Cr. Cas. 21.

Habeas corpus—Motion for discharge—Escape of prisoner from custody of sheriff while motion being heard — High contempt and crime—Motion retained pending re-arrest and proceedings against prisoner for escape. *Re Bartels*, 10 O. W. R. 379.

Habeas corpus — *Re-arrest for same offence after discharge—Res judicata—Affidavit on information and belief.*]—An application was made for a *habeas corpus* in an extradition matter, on the grounds: (1) that the prisoner was arrested a second time for the same offence after his release on a *habeas corpus*; (2) that the matter was *res judicata*; (3) that the complaint against him was on information and belief only; (4) that no evidence was received by the Judge; and (5) that neither information and complaint nor the warrant was transmitted to the Minister of Justice:—*Held*, that, although the prisoner had been discharged from custody on the ground that there was no proper evidence of the commission of the alleged offence or identifying the alleged forged document, he could be re-arrested when further and new evidence had been discovered and was forthcoming to supply the deficiencies; and that the doctrine of *res judicata* or of former jeopardy or of *autrefois acquit* was inapplicable to such an inquiry.—The *Habeas Corpus Act*, 31 Car. II. c. 2, s. 6, does not apply to extradition proceedings:—*Held*, also, that an affidavit upon which the arrest was made, being on information and belief, was sufficient.—*Held*, further, that the other objections should

not be investigated on appeal, as the inquiry was still pending and was to be prosecuted before the extradition Judge. — *Quære*, whether the Divisional Court would have acted as on an appeal if objection had been taken to its jurisdiction. *Re Harsha*, 11 O. L. R. 457, 7 O. W. R. 293, 10 Can. Cr. Cas. 433.

Kidnapping or child-stealing — *Extradition crime—Possession of child — One parent taking child from the other.*]—When the custody of a child has been assigned by competent judicial authority to one of its parents, to the exclusion of the other, the latter is guilty of the crime of kidnapping or child-stealing in taking it away from the control and possession of such parent.—2. The crime of kidnapping or child-stealing is committed by one who takes and removes a child under the age of 14 years, so as to keep or conceal it from the person to whom the lawful charge of it is judicially assigned, even though such person has not, nor has had, the actual possession of it.—3. The offence of kidnapping or child-stealing, as above described, is an extraditable crime under the extradition treaty between Great Britain and the United States. *Ex p. Lorenz*, 14 Que. K. B. 273, 7 Que. P. R. 101.

Larceny — *False pretences — Form of warrant.*]—"Obtaining money or property by false pretences" is an extradition crime within the meaning of the Extradition Act, and the extradition arrangement between Great Britain and the United States of America. A warrant of committal under the Extradition Act, which recited the Judge's determination that the prisoner should be surrendered in pursuance of the Act, "on the ground of his being accused of grand larceny in the second degree within the jurisdiction of the State of Minnesota," was held sufficient. *Re Martin (No. 2)*, 2 Terr. L. R. 304, 8 Can. Cr. Cas. 326.

Larceny — *Law of Canada—Extradition crime.*]—In extradition proceedings the Judge is to find: (1) whether there is *prima facie* evidence of the commission by the accused of an offence which, if committed in Canada, would be an indictable offence by the law of Canada, and, if it be so found, then (2) whether there is *prima facie* evidence that the offence is one of the crimes described in the extradition arrangement with the foreign country seeking extradition. "Grand larceny in the second degree" is an extradition crime under the extradition arrangement between Great Britain and the United States of 1889-90. *Re Martin (No. 1)*, 2 Terr. L. R. 301, 8 Can. Cr. Cas. 326.

Locus standi in Court of foreign state—*Commissioner of extradition—Jurisdiction—Interference by Judge—Habeas corpus—Committal—Territorial jurisdiction — Judge seised of case — Exclusion of other Judges.*]—Foreign sovereigns and States have the right to appear and intervene in cases before the Court of the province of Quebec. 2. A commissioner of extradition acting under the authority of the Extradition Act, has equal authority with a Judge of the Superior Court; and it is only when, assuming to act as a commissioner, he does something which is *ultra vires* or otherwise acts illegally, that Superior Courts, or Judges thereof, become seised with revisory, amendatory, or appellate powers over his acts. 3. When a prisoner, whose extradition is sought, has been brought before a Judge of the Superior Court on a writ of *habeas corpus* issued before the committal of the accused and before the conclusion of the inquiry before the commissioner, the powers of the Judge are limited to determining whether the commissioner has jurisdiction to make the inquiry, *i.e.*, whether he is legally seised of the case; when, however, the writ of *habeas corpus* was issued after the committal of the accused, the Judge has the power to review the case against him. 4. The jurisdiction of an extradition Judge or commissioner extends over the whole province for which he has been appointed; he may therefore order a prisoner to be brought before him from any part of the province in which he has been arrested. 5. A Judge of the Superior Court before whom a prisoner whose extradition is sought, has been brought on a writ of *habeas corpus*, has absolute control over him until he has passed from the hands of such Judge; and until then no other Judge has the right to interfere in the matter by *habeas corpus* or otherwise. *Re Greene & Gaynor*, 22 Que. S. C. 91.

Order of committal—*Form — Extradition commissioner—Duty of — Extraditable crimes—Evidence — Copies of depositions—Habeas corpus—Powers of Judge—Review of evidence.*]—The order of committal for the extradition of fugitives is sufficient, if made in the form given in the schedule to the Extradition Act, s. 20 of which declares expressly that a committal so made is to be deemed valid. As a consequence, it need not state that the charges laid have been inquired into, that they relate to extradition crimes, that *prima facie* proof of guilt has been made, nor provide specifically for the discharge or surrender of the prisoner.—2. The commissioner for extradition, in dealing with the information and evidence in the case, is governed by the same rules as the magistrate before whom a preliminary investigation in respect of an indictable offence is held; he issues his warrant for committal upon evidence that would justify the magistrate in committing for trial, and, as the latter may commit for an offence or offences different from those for which the accused was arrested, so also a variance between the charge in the information and the crime or crimes (whether one or more is of no consequence) stated in the committal as the ground for extradition, provided they are extraditable, is immaterial.—3. Participation in fraud by an agent, participation in embezzlement, and the receiving of moneys knowing the same to have been fraudulently obtained, are extraditable crimes.—4. Copies of the depositions of witnesses taken by means of stenography in the Courts of New York, duly certified and authenticated by the competent officers of such Courts, though not read over to nor signed by the witnesses, constitute legal evidence of the facts therein.—5. The Judge to whom application is made for *habeas corpus* on behalf of the fugitive committed for surrender, has no power to review the decision of the extradition commissioner as to the sufficiency of the evidence adduced before him. *Greene v. Vallée*, 14 Que. K. B. 261.

See *Re Gaynor & Greene*, 9 Can. Cr. Cas. 205 (P.C.).

Perjury—*Formalities of oath—Warrant of committal—Form of — Extradition com-*

missioner—Criminal procedure—Extradition crime—Laws of foreign state.]—(1) Perjury is an extradition crime within the meaning of the Treaty and the Act.—(2) Where the alleged crime is perjury, it is sufficient if the oath was administered in compliance with the formalities of the demanding country.—(3) A warrant of committal remanding a prisoner for extradition is sufficient if it states the offence for which he is committed.—(4) Such warrant, issued by an extradition commissioner, under the authority conferred by the Extradition Act, is valid if issued in the form prescribed by the Act.—(5) The ordinary technicalities of criminal procedure are applicable to proceedings in extradition to only a limited extent.—(6) Where the proceeding is manifestly taken in good faith, a technical non-compliance with some formality of criminal procedure should not be allowed to stand in the way.—(7) Where the demanding country is one of the States of the United States of America, it is sufficient if the imputed crime be a crime according to the law of that State, although not an offence against the general laws of the United States. *In re Windsor*, 6 B. & S. 522, commented upon.—(8) One test of determining whether the evidence is such as would justify committal of the accused for trial if the crime had been committed in Canada, is to conceive the accused pursuing the conduct in question in this country, and then to transplant along with him his environment, including, so far as relevant, the local institutions of the demanding country, the laws affecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always excepting the law supplying the definition of the crime which is charged. *Re Collins*, 11 B. C. R. 436, 2 W. L. R. 164.

See 10 Can. Cr. Cas. 70, 73, 80.

Prisoner discharged on habeas corpus —*Bar to second trial—Evidence—Crime.*]—1. The question whether a proceeding subsequent to an adjudication on *habeas corpus* is barred by such adjudication, is to be determined by the identity or non-identity of the question before the Court or magistrate with the question adjudicated upon on *habeas corpus*. A prisoner who has been liberated upon the merits of the charge laid against him, when the conviction or order of detention founded on the charge is set aside as unfounded in law, cannot be lawfully arrested and imprisoned again for the same offence, upon the same state of facts; but when he is discharged merely by reason of a defect in the commitment or in consequence of the want or excess of jurisdiction in the committing Court or magistrate, he can be again arrested and tried for the same cause before a competent Court or magistrate. 2. A prisoner who has been discharged upon *habeas corpus* because the extradition commissioner had no jurisdiction to act judicially on the complaint laid before him, may be again arrested and tried before a commissioner having jurisdiction over the complaint. For an extradition commissioner to decline to exercise his jurisdiction, the fraudulent device by which the prisoner was brought within the jurisdiction must be chargeable to the adverse party. 3. Documents authenticated by the seal of the Grand Ducal Superior Court of Baden, and also by the signature of the Judge of Instruction of such Court, are legal evidence. 4. Where a crime for which extradition can be demanded has been established by evidence and experts as existing under the law of the country demanding extradition, and the extradition commissioner is aware from his own knowledge that the same facts establish an extradition crime in this country, although it bears a different name, the commitment is valid. *Ex p. Seitz*, 8 Que. Q. B. 392.

Prohibition — *Extradition commissioner —Appeal—Inferior tribunal—Power of Federal Government to appoint.*]—An appeal lies to the Court of King's Bench from a decision refusing to grant a writ of prohibition. An extradition commissioner is not an inferior tribunal within the meaning of Art. 1003, C. P. The federal government has power to appoint extradition commissioners. *Gaynor & Greene* v. *Lafontaine*, 7 Que. P. R. 240, 14 Que. K. B. 99.

See also 36 S. C. R. 247.

Receiving stolen property — *Evidence —Inferences—"Money, valuable security, or other property"—Ejusdem generis.*]—Upon a motion for the discharge of a prisoner committed for extradition, no evidence can be considered except that upon which the prisoner stands committed, and into the weight of that evidence, or even its sufficiency to sustain the charge, no inquiry can be made. The fact of the silence of a person accused of receiving stolen property, upon hearing statements made as to his alleged guilt by the person who stole the property, is admissible in evidence as leading to the inference of his guilty knowledge. Having regard to the interpretation clauses of the Extradition Act, R. S. C. 1886 c. 142, crimes referred to in the "extradition arrangement" of 1890 between Great Britain and the United States, come within the Act. The words "other property" used in that arrangement as to the crime of "receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained," must be construed as relating only to things of the same type as "money" or "valuable security;" and a prisoner accused of receiving a stolen pair of shoes was discharged from custody. *Re Cohen*, 24 C. L. T. 359, 8 O. L. R. 143, 4 O. W. R. 103, 8 Can. Cr. Cas. 251.

Remand of accused—*Delay of prosecutor—Abortion — Evidence — Depositions — Failure to commit accused with unlawful acts committed abroad—Discharge of accused.*]—Application for warrant of extradition of M. to Minnesota. Where application had been standing at request of prosecutor from 12th December to 1st of February no further remedy allowed. Prisoner was charged with committing abortion:—*Held*, that there was no evidence of an unlawful operation, or to connect the prisoner with the same. Prisoner discharged. *Re McCready*, 10 W. L. R. 132, 14 Can. Cr. Cas. 481, 2 Sask. L. R. 47.

Warrant — Form — Persons to whom addressed — Forgery — Statement of offence in warrant — Intent to defraud—Proof that offence charged is a crime in foreign country —Complaint—Information and belief. *Re Harsha*, 7 O. W. R. 398, 471.

Warrant—Refusal of demanding state to act under — Discharge of prisoner. *Re Lawmer* (N.W.T.), 3 W. L. R. 485, 10 Can. Cr. Cas. 244.

See CONSTITUTIONAL LAW—CRIMINAL LAW.

EXTRA-JUDICIAL CORPORATION.

See COMPANY.

EXTRA-PROVINCIAL CORPORATION.

See BANKRUPTCY AND INSOLVENCY—GUARANTY—JUDGMENT.

EXTRAS.

See CONTRACT—SET-OFF.

FACTOR.

See PRINCIPAL AND AGENT.

FACTORIES.

See MUNICIPAL CORPORATIONS—NUISANCE.

FACTORIES ACT.

Privies — "*Factory*" — "*Owner*" — "*Employed.*"]—*Held*, that a store occupied by merchant tailors, the rear part being used as a tailoring department and the front as a retail sale department, 14 persons being employed in the former, was a "factory" as defined by s. 2, s.-s. *i.* (*c*), of the Ontario Factories Act, R. S. O. 1897 c. 256, and the amendments thereto. — Under s. 15, as amended by 4 Edw. VII. c. 26, s. 3 (O.), which provides that the "owner" of every factory shall provide a sufficient number of privies, etc., the owner of the building is plainly intended, who may or may not be also the employer. *Rex* v. *Ferguson*, 8 O. W. R. 957; *Rex ex rel. Burke* v. *Ferguson*, 13 O. L. R. 479.

See MASTER AND SERVANT — SALE OF GOODS.

FACTORY.

See MUNICIPAL CORPORATIONS — LANDLORD AND TENANT—MASTER AND SERVANT — NEGLIGENCE—NUISANCE.

FAIR COMMENT.

See DEFAMATION.

FAITS ET ARTICLES.

Order for—*Terms.*]—An order for *faits et articles* must contain the full name, description, and residence of the defendant. *Valiquette* v. *Kennedy*, 7 Que. P. R. 409.

See DAMAGES—DISCOVERY.

FALSE ARREST.

Absence of malice—*Arrest not justified—Aggravation by pleading—Liability for arrest.*]—In this case, acting without malice, the defendant caused the arrest of the plaintiff for obtaining money by false pretences, without first demanding from the plaintiff the proof of his title to certain land which the plaintiff offered as security for the loan of $300, and in an action for the arrest made allegations which he could not support:—*Held*, that he was liable in damages under Art. 1053, C. C. Under the circumstances he was ordered to pay $25 damages and the costs of an action of the fourth class. *Laliberté* v. *Gingras*, 21 Que. S. C. 466.

Absence of malice — *Probable cause — Burden of proof.*]—In an action for damages for false arrest the onus is on the plaintiff to prove that there was not probable cause for the arrest and that the defendant was actuated by malice. Malice alone is not sufficient; there must be absence of probable cause. The theory of probable cause according to English law does not prevail in Quebec; the rule of the French law must be applied. *Gigucre* v. *Jacob*, 10 Que. K. B. 501.

Action — *Pleading—Reasonable and probable cause.*]—A plaintiff may sue for damages for false arrest, alleging that the information, trial, and conviction were irregular, null, arbitrary, malicious, *ultra vires*, that the conviction was quashed as such upon *certiorari*, and that the plaintiff has suffered damage owing to the fault, negligence, and imprudence of the defendants, and their employees, such allegations being, in effect, sufficient charges of want of probable and reasonable cause. *Leonard* v. *Delorme*, 6 Que. P. R. 349.

Alleged crime — Justification — Reasonable and probable cause—Damages. *Deslauriers* v. *Jasmin*, 5 E. L. R. 243.

Arrest without warrant — *Oral charge —Probable cause—Liability of officer making arrest and of municipal corporation.*]—A constable or peace officer, in a case of homicide is justified, upon the verbal charge of the daughter of the deceased, in arresting, without a warrant, a person found in his bed, at his home, a short distance away, whose blood-stained hands and clothes lend colour to the charge.—2. The officer, and the city, in whose police service he is employed, incur no liability for false imprisonment, through the arrest and detention of the party as aforesaid. *Hubbard* v. *City of Montreal*, 28 Que. S. C. 221.

Compulsion and restraint amounting to arrest and imprisonment—Evidence —Not guilty by statute—Want of notice of action—Reasonable grounds of belief that plaintiff harbouring criminal — Absence of malice—Peace officer — Damages — Costs. *Mack Sing* v. *Smith*, 9 W. L. R. 28.

Constable arresting without warrant —Offence not committed in constable's presence—Municipal by-law—Criminal Code, s. 32. *Desjardins* v. *Montreal*, 4 E. L. R. 329.

Malice—*Want of reasonable and probable cause—Functions of Judge and jury—Appreciation of evidence — Misdirection.*]—In an action for damages for false arrest, the function of the jury is only to find whether the evidence adduced establishes facts from which good faith and reasonable and probable cause, or malice and want of reasonable and probable cause, can be deduced; the inferences of good or bad faith, reasonable and probable cause, or the absence thereof, to be drawn from such facts, is a question of law to be determined by the Court alone; and the jury ought to be guided on questions of law by the Court. In this case the evidence did not establish that the arrest of the defendant had been made in good faith and with probable cause on the part of the defendant; and therefore the verdict of the jury, rendered under the erroneous direction of the Judge, as regards the effect of the evidence upon this point, should be set aside. *Bélanger* v. *Larocque*, 25 Que. S. C. 403.

Termination of criminal prosecution.]—In an action for damages for false arrest it is not necessary to allege that the prosecution has been terminated, or that the plaintiff has been acquitted. *McDowell* v. *United States Thread Co.*, 7 Que. P. R. 325.

Want of reasonable and probable cause — Functions of Judge and jury — Malice—Misdirection — Non-direction — Improper relation of evidence — Character of plaintiff — Damages. *Sinclair* v. *Ruddell* (Man.), 3 W. L. R. 532.

See MALICIOUS PROSECUTION AND ARREST.

FALSE BIDDING.

See LICITATION—VENDOR AND PURCHASER.

FALSE DECLARATION.

See CRIMINAL LAW.

FALSE EVIDENCE.

See CRIMINAL LAW.

FALSE IMPRISONMENT.

See MALICIOUS PROSECUTION AND ARREST

FALSE PRETENCES.

See CRIMINAL LAW—EXTRADITION.

FALSE REPRESENTATIONS.

See AUCTION—BILLS AND NOTES—COMPANY—DAMAGES—DEED—FRAUD AND MISREPRESENTATION — HIRE OF CHATTELS—HUSBAND AND WIFE — INSURANCE — PATENT FOR INVENTION—SALE OF GOODS—TRADE MARK AND TRADE NAME—VENDOR AND PURCHASER.

FALSE RETURN.

See BANKS AND BANKING—CRIMINAL LAW.

FALSE STATEMENTS.

See BANKS AND BANKING—FRAUD AND MISREPRESENTATION.

FALSE SWEARING.

See CRIMINAL LAW.

FALSE TRADE DESCRIPTION.

See CRIMINAL LAW.

FAMILIES COMPENSATION ACT, B.C.

See STATUTES.

FAMILY ARRANGEMENT.

Agreement for division of estate of intestate — *Consideration — Absence of fraud.*]—J. H. died intestate possessed of property worth about $40,000, and survived by his widow, two sons, and three daughters. Part of his property consisted of lumber lands worth $21,000, which it had been his intention, known to all the members of the family, to give to the sons, who were associated with him in his business as a lumberman. A few days before his death, in discussing with his solicitor the terms of a will he intended to make, he stated that he wanted his lumber lands and mill property to go to the sons, who should continue his business and pay his debts, and that he did not intend making any provision for the daughters. At a meeting of the family held after his death, they were informed of these wishes; that performance of an outstanding contract by the deceased for the delivery of a quantity of lumber was being pressed, and that his liabilities were $15,000 or $20,000, though in fact they were $22,000. It was agreed for the purpose of giving effect to the deceased's intentions that the sons should assume the debts; that the daughters should convey all their interest in the estate to the sons; that the sons should pay to the plaintiff $500, to another daughter $600, and should join in a conveyance to the third of land given to her by her father, but unconveyed by him. At the time the exact condition of the estate was unknown. Before the deed to the sons was executed, the solicitor of the deceased present at the meeting explained to the daughters their legal rights and the effect of the deed. On the true condition

of the estate being subsequently ascertained, the plaintiff sought to have the conveyance set aside:—*Held*, that the agreement as a family arrangement, entered into for the purpose of giving effect to the intentions of the deceased, without fraud or misrepresentation, should be upheld. *Sears* v. *Hicks*, 3 N. B. Eq. 281, 1 E. L. R. 451.

See LIMITATION OF ACTIONS.

FAMILY BURIAL GROUND.

See CEMETERY.

FAMILY COUNCIL.

Decision of prothonotary — *Appeal—Direct action—Art. 1310, C. P.*]—The revision of the decision of the prothonotary, as provided by Art. 1310, C. P., can only be based on the record on which his judgment was founded; if collateral or supplementary evidence is needed to shew that the proceedings were null, a direct action should be instituted. *Charette* v. *Rousseau*, 9 Que. P. R. 395.

See APPEAL—CURATOR—DISTRIBUTION OF ESTATES — HUSBAND AND WIFE—INFANT—INTERDICTION—LUNATIC—TUTOR—WILL.

FARM CROSSING.

See RAILWAYS AND RAILWAY COMPANY.

FARMERS' SONS.

See SCHOOLS.

FATAL ACCIDENTS ACT.

Action for death of husband and father—*Bar — Renunciation in lifetime.*]—The renunciation of a workman of his right of action against his employer for possible tort or negligence causing him injury, is not an answer to an action to recover damages for his death, brought by his widow and children under Art. 1056 C. C.—the cause of action being a different one. *Laplante* v. *Grand Trunk Rw. Co.*, 27 Que. S. C. 456.

Indemnity to parents and children —*Only one action—Second action barred.*]—In case of death caused by a tort, no more than one action can be brought against the *tort-feasor* in behalf of those entitled to indemnity, and such an action brought by one of them, even though the judgment rendered therein does not determine the proportion of the indemnity which the others are to receive, is a bar to a subsequent action brought by one of the latter. *Bouthillier* v. *Central Vermont Rw. Co.*, 28 Que. S. C. 472.

Right of action — *Persons entitled to sue.*]—By the terms of Art. 1056, C. C., the only persons who have a right of action for the death of a person resulting from a *quasi delict*, are his consort, and ascendant or descendant relatives; the brothers and sisters have no such right of action. *Cohier* v. *Allan*, 8 Que. P. R. 129.

See CROWN—DAMAGES—EXECUTORS AND ADMINISTRATORS—MASTER AND SERVANT—NEGLIGENCE.

FEDERAL COURT.

See CONSTITUTIONAL LAW.

FEES.

See ARBITRATION AND AWARD—ARCHITECT—BAILIFF COURTS—REFERENCE AND REPORT.

FEES OF OFFICE.

See PORTWARDENS.

FEES OF SURVEYOR.

See SURVEYOR.

FELONY.

See CRIMINAL LAW.

FENCES.

Boundary between farms — "Snake fence" — Relaying — Encroachment. *Armstrong* v. *Annett*, 2 O. W. R. 692.

Division fence—*Boundary—Cost of construction — Compliance with statute.*]—The plaintiff sued under the provisions of R. S. N. S. 1900 c. 93, s. 6, s.-s. 3, to recover double the expense of making a boundary or division fence between the properties of the defendant and an adjoining owner. The only defence offered was that the fence constructed was not of the height of four and one-half feet, as required by the statute. The trial Judge having found that the fence was built to the proper height as required by the statute:—*Held*, that his judgment on this point should not be disturbed. *Cross* v. *Legay*, 3 E. L. R. 107, 41 N. S. R. 419.

Division wall—*Cost — Contribution.*] — *Held*, affirming the judgment in 14 Que. S. C. 140, that one who in building upon his own land erects a wall which separates his land from his neighbour's cannot afterwards recover from his neighbour one-half the cost of the wall. *Bernard* v. *Pauzé*, 16 Que. S. C. 406.

Line fence — *Mitoyen — Ownership — Petitory action.*]—Where a line fence is

"mitoyen," that is to say, made and kept up by the neighbouring owners, at their joint expense, it is generally divided into equal parts between the neighbours, each one being the sole owner and responsible for his part. 2. In such a case one neighbour has the right to bring a petitory action against the other, where the latter has taken possession of the part of the fence belonging to the other. *Proulx* v. *Renaud*, 23 Que. S. C. 511.

See ANIMALS—CROWN—FIXTURES—LIMITATION OF ACTIONS — MUNICIPAL CORPORATIONS — NEGLIGENCE — NUISANCE — RAILWAYS—TRESPASS TO LAND — VENDOR AND PURCHASER—WAY.

FERRY.

Breach of grant — *Subsequent lease — Damages — Crown.*] — The Crown, having granted to the suppliant certain ferry rights over a river between two cities, subsequently leased certain property to two railway companies to be used for the construction of a bridge across the river between the cities, and also gave permission or license to a railway company to extend its track over certain property belonging to the Dominion Government on one side of the river, to enable the company to make closer connection with an electric company:—*Held*, that the granting of the leases and license did not constitute a breach of any contract arising out of the grant of the ferry; and that the Crown was not liable to the suppliant in damages in respect of the matters complained of in his petition. *Semble*, that, if the leases and licenses prejudiced the rights acquired by the suppliant under his ferry grant, he would be entitled to a writ of *scire facias* to repeal them. *Brigham* v. *The Queen*, 20 C. L. T. 423, 6 C. R. 414, 30 S. C. R. 620.

Public carrier — *Negligence of private carrier.*]—The defendant was the proprietor of a small ferry across the Ottawa river. He was engaged in other occupations, and the boat made no regular trips; but whenever anyone came asking that he and his property should be taken across, the defendant and his employees left their other work, rowed them across, and charged for doing so. The plaintiff and his companion were being rowed across, and had two horses aboard, which they themselves had embarked, acting under instructions given by the defendant. In the middle of the stream the boat veered suddenly, one of the horses became frightened, and (there being no railings or other protection) jumped into the water and was drowned:—*Held*, that the defendant was not a common carrier.—*Held*, further, that the defendant being under no obligation to provide a safer boat, and the plaintiff electing to take the risk and to remain in charge of his own animals while crossing, the defendant was not liable for negligence as a private carrier. *Nugent* v. *Smith*, 45 L. J. Ex. 707, *Blower* v. *Great Western Rw.* Co., L. R. 7 C. P. 655, and *Kendall* v. *London and South Western Rw. Co.*, L. R. 7 Ex. 373, followed. *Roussel* v. *Aumais*, 20 C. L. T. 445.

See BILLS OF SALE AND CHATTEL MORTGAGES—CARRIERS.

FERRY COMMISSION.

See MASTER AND SERVANT.

FIDELITY BOND.

See GUARANTY—INSURANCE.

FIDUCIARY RELATIONSHIP.

See GIFT—LIMITATION OF ACTIONS—TRUSTS AND TRUSTEES.

FIEF.

See FISHERIES.

FIERI FACIAS.

See EXECUTION.

FILIATION ORDER.

See INFANT.

FINAL JUDGMENT.

See APPEAL—BILLS OF EXCHANGE AND PROMISSORY NOTES—JUDGMENT.

FINAL ORDER.

See APPEAL—COMPANY.

FINES.

Imposition by Court — *Remission by municipal council—Rights of Crown.*]—The petitioner was convicted of the offence of personation at a municipal election in the city of Montreal, and was sentenced by the Recorder to an imprisonment of one month, and to the payment of a fine of $500, and, in default of payment, to a further imprisonment of six months. After the expiration of his term of imprisonment, the city council remitted the fine, and the Recorder's Court having refused to issue the necessary order to the keeper of the common gaol for the petitioner's discharge from custody, he sought to obtain his liberation under a writ of *habeas corpus*:—*Held*, that, although by s. 517 of the charter of the city of Montreal, 62 V. c. 58, it is provided that all fines sued for and recovered in the Recorder's Court shall belong to the city, and by the same statute, s. 518, it is provided that to the council alone appertains the right to remit the whole or part of any fine belonging to the city, yet under 63 V. (Q.) c. 7, which provides that the Crown's right

to fines is not affected by provisions of municipal charters, the fine in question did not belong to the city of Montreal, but to the Crown (there being no private prosecutor), and therefore, even if s. 518 of 62 V. c. 58 were constitutional (a question which did not require to be decided in the present case), the city council had no right to remit the fine, and the petitioner was not entitled to be liberated. *Ex p. Armitage*, 11 Que. K. B. 163.

See CRIMINAL LAW — INTOXICATING LIQUORS — REVENUE — VOLUNTARY ASSOCIATION.

FIRE.

Accidental starting on defendant's land—*Escape to plaintiff's land adjoining—Negligence—Prairie Fires Ordinance, s. 2, s-s. v; ss. 4, 9—"Letting"—"Permitting"—Liability — Damages.*]—Action for damages for injuries to plaintiff's property by fire spreading from that of defendant:—*Held*, that defendant's dropping a lighted cigar on the prairie grass, thereby starting the fire on his property, was gross negligence. Judgment for plaintiff. *Moseley* v. *Ketchum*, 12 W. L. R. 721, 3 Sask. L. R. 29.

Damage by — *Action against person at fault—Interest of plaintiff — Compensation by insurance—Pleading.*]—A defendant sued for damages alleged to have been suffered by the plaintiffs from a fire alleged to have been caused by the defendants' fault, cannot plead want of interest of the plaintiffs, because they have been compensated for their loss by insurance moneys received by them. *Burritt* v. *Pillow and Hersey Manufacturing Co.*, 7 Que. P. R. 461.

Damage to property by fire spreading from neighbour's land — *Cause of fire—Burden of proof—Failure of plaintiffs to satisfy—Findings of trial Judge—Prairie Fires Ordinance — Negligence.*]—In actions for damages for the destruction of the plaintiffs' property by fire spreading from the adjoining land of the defendant:—*Held*, that it was not necessary for the defendant to explain the cause of the fire; the burden was on the plaintiffs of shewing that it was caused by the defendant; and, as the plaintiffs not merely did not furnish any direct evidence, or any evidence from which a reasonable inference could be drawn, that this was the case, but even did not supply any facts from which a reasonable surmise as against the defendant could be made, the plaintiffs failed in the initial step of the case; and the judgment of Beck, J., at the trial, 2 Alta. L. R. 101, 9 W. L. R. 657, should be affirmed.—*Per* Stuart, J. (dissenting) that it was a proper inference from the facts as found by the trial Judge that the fire originated from the embers of a fire set out by the defendant, and that s. 4 of the Prairie Fires Ordinance had not been complied with. *Clark* v. *Ward, Kirstein* v. *Ward* (1910), 13 W. L. R. 83.

Damages by—*Electric wires—Responsibility of electric company—Evidence.*] — A company who furnish electric lighting for a town and conduct electricity by wires in a primary current of 2,000 volts from their works to their transformers, where it is lowered to a secondary current of 110 volts before passing over branches installed in houses by their owners, are not responsible for a fire started in one of the houses by the electric current, unless the fire has been caused by the fault of the company. Therefore, an action against the company for damages, the evidence wherein shews that the disaster might have been caused in two ways, one of which is imputable to the fault of the company, and the other to that of the owner of the house, without affording to the Court the necessary facts to lead to a decision between the two, must be dismissed. *Quebec Railway Light and Power Co.* v. *Union Assurance Society*, 15 Que. K. B. 440.

Damages to property by fire started by sparks from railway locomotive—*Evidence of cause of fire—Joinder of plaintiffs having separate causes of action arising out of same event—King's Bench Act, Rule 218—Costs.*]—If it appears from the evidence that there was no other possible cause for the starting of a prairie fire near a railway track than sparks from a passing locomotive, the proper conclusion to be drawn is that the railway company are liable, notwithstanding that the sparks must have carried the fire an unusual distance, and that no evidence was given as to the condition of the smoke-stack and netting at the time. A number of plaintiffs joined in the Tait case presenting separate claims for losses by the same fire, which plainly appeared by the statement of claim, to which the defendants filed a statement of defence without having moved to strike out any of the claims:—*Held*, without deciding whether Rule 218 of the King's Bench Act justified the joinder of plaintiffs in this case, that it was too late to take the objection of misjoinder at the trial.—A deduction was ordered to be made from the plaintiffs' counsel fees for the trial, because considerable time was taken up in proving title to the property destroyed, which the defendants had not been asked to admit, and which would be presumed from mere possession as against tort-feasors. *Tait* v. *Can. Pac. Rw. Co., Bain* v. *Can. Pac. Rw. Co., Kellett* v. *Can. Pac. Rw. Co.*, 3 W. L. R. 452, 16 Man. L. R. 391.

Damages to property by prairie fire—*Origin — Evidence—Damages—Negligence.*] The defendant, who was very shortsighted, while examining a fence on his land, observed on the prairie near him a pile of ashes and some fragments of partly burned willow roots. Imagining he saw smoke, he moved the ashes with his foot to ascertain whether or not there was fire. As he did so, the wind, then blowing very strongly, carried the burning embers into the long grass adjoining, which at once took fire. He then started to beat the fire out, and, as the burning grass was in a measure isolated by a strip of burned-over ground on one side and by short grass on the other, he succeeded, as he believed, in preventing the fire spreading and in finally extinguishing it:—*Held*, that, even if the fire which, on the same day, destroyed the plaintiff's property was caused by the fire which the defendant started, as to which there was grave doubt, the defend-

ant had not been guilty of negligence, and was not liable to the plaintiff for damages. *Owens* v. *Burgess*, 11 Man. L. R. 75, and *Chaz* v. *Les Cistercienns Reformes*, 12 Man. L. R. 330, followed. *Holliday* v. *Bussian*, 4 W. L. R. 577, 16 Man. L. R. 437.

Destruction of warehouse — *Sparks from railway engine—Negligence—Contributory negligence.*]—In an action for damages for loss of warehouse and contents alleged to have been set on fire by sparks from one of defendants' engines, the jury found plaintiff was negligent in piling baled hay near defendants' tracks, the sparks having fallen on the hay, from which it spread to the warehouse. The hay was on plaintiff's property. Action dismissed. *Cairns* v. *Canadian*, 10 W. L. R. 39.

Destruction of work in progress — *Incidence of loss — Owner or contractor.*]—The hot water furnace in a house of the defendant having been damaged by frost, the defendant requested the plaintiff, a plumber, to make the necessary repairs. The latter not wishing to do the work for a fixed price, unless it were the price of a new outfit, it was agreed that the plaintiff should make the repairs, furnish the materials, at an advance of 12 to 15 per cent. upon the price which he himself should pay, and should charge 35 cents per hour for the time of his men. During the night which preceded the day which would have seen the completion of the work, the house was destroyed by a fire, which was an accidental one:—*Held*, that, under these circumstances, the plaintiff not having undertaken the work in furnishing the materials and in charging himself with doing all the work and to render it perfect for a fixed price (Art. 1684, C. C.), the loss did not fall upon him, and that he could claim for the time of his men and the price of his materials, such materials being regarded as sold to the defendant according as they were placed in his house. *Jean* v. *Papineau*, 19 Que. S. C. 438. (See *Murphy* v. *Forget*, *ib.* 135.)

Injury to property — *Cause of fire — Railway—Sparks from engine—Conjecture.*]—The British Columbia Full Court dismissed an appeal from judgment at trial dismissing action brought for damages for injury to plaintiff's property from fire alleged to have originated from sparks emitted from engine of defendants. The evidence did not sufficiently shew that fire originated on defendants' right of way or if thereon that they knew of it. *Laidlaw* v. *Crow's Nest*, 10 W. L. R. 17.

"Let" — *"Permit"—"Allow"*]—Under Alta. Prairie Fires Ordinance (1898), c. 87, liability is negatived if the person kindling the fire has not been guilty of negligence, and each of the words "let," "permit" and "allow," occurring in s.-ss. a, b and c, respectively, of s. 2, involve the inference that the person alleged to "let," permit or "allow," had the power to prevent. *Clark* v. *Ward*, and *Kirstein* v. *Ward*, 2 Alta. L. R. 101, 9 W. L. R. 657.

Affirmed 13 W. L. R. 83.

Negligence in setting out—Destruction of neighbour's property—Cause—Admissions—Laches — Costs. *Sutherland-Innes Co.* v. *Shaver*, 2 O. W. R. 237.

Negligence in setting out — *Injury to land — Destruction of timber and fences—Damages—Valuation.*]—Action for damages for negligently setting out fire which spread and ran into plaintiff's land and fences. No by-law had been passed by township council regulating the setting out of fires for burning brush, etc. Negligence was admitted. The sole question, therefore, was ascertainment of damages. *Davis* v. *Rowsome*, 13 O. W. R. 869.

Prairie Fire Ordinance — *Railway engine—Escape of fire—Conviction.*] — An ordinance of the Territories prohibited the kindling and placing of fire "in the open air in any part of the Territories," except for certain purposes. The defendants, who were respectively fireman and engine driver of a freight train, were severally convicted of a breach of the ordinance upon evidence to the effect that sparks from the fire which they had kindled in the locomotive engine had kindled a fire on the adjacent prairie, there being, as the magistrate found, no evidence of improper construction of the engine, or of negligence on the part of the defendants:—*Held*, that these facts afforded no evidence of the defendants kindling a fire "in the open air." *Regina* v. *Clive*, *Regina* v. *Holdsworth*, 1 Terr. L. R. 170.

Precautionary measure — *Destruction of house — Municipal corporation — Liability.*]—A fire threatened to assume large proportions and to destroy a considerable part of a city. It was considered proper, in order to arrest the progress of the fire, to pull down the respondent's house. The circumstances justified such demolition as a measure of prudence and of public safety in respect to that part of the city. But it turned out that the fire was extinguished before it reached the site of the respondent's house:—*Held*, that the demolition of the house was lawful.—2. That the city corporation was bound to indemnify the respondent. *City of Quebec* v. *Mahoney*, 10 Que. K. B. 378.

Protection of forests—R. S. N. S. c. 91, s. 2—Starting fire—Carelessness of camping party—Individual and collective liability therefor—Penalty. *Rex* v. *Saunders*, 4 E. L. R. 149.

Railways—*Negligence — Onus of proof.*]—In an action against a railway company, carrying on business under legislative sanction, to recover damages resulting from a fire alleged to have been caused by a spark from an engine, the plaintiff must, in addition to giving evidence from which it may reasonably be inferred that the fire was caused as alleged, also give some evidence of negligence on the part of the defendants, *e.g.*, in the construction or management or want of repair of the engine, and the onus is not upon the defendants to prove that they have adopted and used with due care reasonable contrivances to avoid the danger of fire. *Oatman* v. *Michigan Central Rw. Co.*, 21 C. L. T. 107, 1 O. L. R. 145.

Setting out—*Adjoining owners—Escape of fire — Maintaining of dangerous thing—*

Liability for—Negligence—Costs.] — Action for damages. The plaintiff and defendant were adjoining land owners, and a fire, started in brush and fallen timber by the defendant for the purpose of clearing his land, spread on to the plaintiff's lands:—*Held*, applying the principle of *Rylands* v. *Fletcher*, L. R. 3 H. L. 330, that the defendant maintained the fire at his own risk, and was responsible for the damage caused by it. Judgment for the plaintiff for $300. Costs on County Court scale only allowed, as the action should have been brought in a County Court. *Crewe* v. *Mottershaw*, 22 C. L. T. 422, 9 B. C. R. 246.

Setting out—Injury to adjacent property—Prairie Fires Ordinance (N.W.T.)—"Let" or "permit"—Abstaining from action. *Macartney* v. *Miller* (N.W.T.), 2 W. L. R. 87.

Setting out—*Municipal by-law—Notice—Negligence — Onus — Contributory negligence.*]—A person who sets out fire upon his own land in a township without giving the notice to the owner or occupant of the adjoining property required by a township by-law, passed pursuant to R. S. O. c. 223, s. 542, s.-s. 16, and imposing a penalty upon any person contravening the by-law, pursuant to s. 702, s.-s. 1 (*b*), is not, by reason of the omission of such notice, liable for damage done to the adjoining property, without proof of negligence; but the failure to give notice is *prima facie* evidence of negligence, and puts the onus upon the defendant of the proof of no negligence:—*Held*, upon the evidence in this case, that the defendant had satisfied that onus as regards the property of the plaintiff first destroyed, the cause of which was the sudden rising of a high wind, which the defendant was not bound to anticipate, and which caused the smouldering fire to suddenly blaze up. As to the property of the plaintiff subsequently destroyed, there was negligence on the part of the defendant, for he might have taken measures to control the fire after the destruction of the first property; but there was contributory negligence on the part of the plaintiff in not making any effort to remove his property from danger; and he could not, therefore, recover. *Tait* v. *Jackson*, 20 C. L. T. 234.

Setting out fire on defendant's land—*Spreading to plaintiff's property—Prairie Fires Ordinance—Fireguard—Negligence.*]—Action for damages for injury to plaintiff's property by fire, alleged to have spread from a fire kindled by defendant on his land. Defendant had burned a 40-foot fireguard around his straw stack before burning it, and four days thereafter the fire spread to plaintiff's property. Defendant having failed to prevent its escape, is liable. Plaintiff held his property under a sale agreement:—*Held*, sufficient evidence of title. *Roberts* v. *Morrow*, 10 W. L. R. 32, 2 Sask. L. R. 15.

See CONTRACT — CROPS — CROWN—EVIDENCE—HIRE OF CHATTELS—LANDLORD AND TENANT—LIMITATION OF ACTIONS—MASTER AND SERVANT—MUNICIPAL CORPORATION—NEGLIGENCE — NUISANCE — ORDINANCE — PRAIRIE FIRE—PLEADING — RAILWAY—SALE OF GOODS—STATUTE—TIMBER.

FIRE BRIGADE.

See MUNICIPAL CORPORATIONS.

FIRE DEPARTMENT.

See MUNICIPAL CORPORATIONS.

FIRE ESCAPE.

See WAY.

FIRE ESCAPE ACT, B.C.

See INNKEEPER.

FIREGUARD.

See RAILWAY.

FIRE INSURANCE.

See INSURANCE.

FISH AND GAME CLUB.

See CLUB.

FISHERIES.

British Columbia foreshore lease — Powers of chief commissioner of lands and works — Non-exclusive right — Injunction. *Capital City Canning and Packing Co.* v. *Anglo-British Columbia Packing Co.* (B.C.), 2 W. L. R. 53.

Crown grant — *Claim of grantee to exclusive right to fish from foreshore — Construction.*]—The appellant, as grantee of the lands in suit from the French King, "with all the fishing and hunting and other rights and privileges which the vendor had or might have as seignior, or along its frontage on the seashore," claimed the exclusive right to fish salmon from the foreshore along their boundary:—*Held*, that, on the true construction of the grant, the claim could not be sustained. The above was ineffectual to pass the exclusive use of the foreshore so far as the fishing is concerned.—Judgment in *Cabot* v. *Carbery*, 15 Que. K. B. 124, affirmed. *Cabot* v. *Atty.-Gen. for Que.*, 16 Que. K. B. 468, [1907] A. C. 511.

Crown grant—*Fief — Exclusive rights.*]—The grant *à titre de fief* of a "tract of land situate on the Baie des Chaleurs of a league and a half in front by two in depth, to be reckoned from the seigneurie du Grand Pabos belonging to the Sieur Réné Hubert, proceeding from the coast of Cape Espoir towards Percée Island, with right of hunting, fishing, and treaty with the savages in the

whole tract granted," does not give to the grantee and his assigns the exclusive right of fishing in the Gulf of St. Lawrence opposite the *fief*. Therefore, the owner of this *fief* has no right of action against persons who spread nets at the place mentioned to restrain them from so doing or for damages. *Cabot* v. *Carbery*, 15 Que. K. B. 124.

Crown grant—*Shell fish—Natural beds in tidal waters between high and low water marks — Private ownership of soil — Public right — Exclusive user.*]—In their counterclaim the defendants averred that clams were dug out of flats which were in front of the defendants' farm, and were included down to low water mark in a grant from the Crown to the defendants' predecessors in title, 70 years ago. The grant also professed to convey a right of fishing:—*Held*, that the grant from the Crown of such a right of fishing would be invalid as against other subjects, whatever its force might be as against the Crown. Two elements essential to the establishment of such exclusive right were: (1) proof shewing a user of or a dealing with the right of fishery to the exclusion of others, as a right of property, separate and distinct in itself; (2) the absence of anything to shew that its origin was modern.—Unless a several fishery in tidal waters was in being before Magna Charta, it cannot be created by subsequent grant. In view of the date of the settlement of the province, there could be no appropriation of a several fishery in tidal waters by the Crown or by a private person so as to admit of an effectual grant thereof by the Crown. In that respect there is no distinction between taking swimming fish and shell fish covered by the soil. The right of the public to fish on the sea-shore between high and low water mark includes the right to take shell fish. *Donnelly* v. *Vroom*, 40 N. S. R. 585, 2 E. L. R. 358.

Fisheries Act—Summary conviction — Right of appeal — Jurisdiction of County Court—Recognizance—Fish illegally caught —Innocent purchaser—Offence of having fish in possession. *Rex* v. *Butterfield* (B.C.), 4 W. L. R. 537.

Fishery bounty — *Regulations—Time of service on ship.*]—To entitle a fishing vessel to bounty under the regulations of the 10th December, 1897, the fishermen employed on board of her must serve the full time of three months on such vessel during the season; service for such time partly on one vessel and partly on another will not suffice. *Snow* v. *Rex*, 11 Ex. C. R. 164.

Fishery reserves—*Construction of term "high water mark on the coast" in township grants.*]—The original grants of townships reserved to the Crown five hundred feet from "high water mark on the coast" for the purposes of the fisheries. Under this reservation the Crown claimed 69 acres fronting on St. Peter's Bay, and 69 acres on the Morell River, in which the tide ebbs and flows. A verdict for the Crown was found for the whole. A rule *nisi* for a new trial was granted on the ground, amongst others, that the reservation clause only applied to land fronting on the open sea, and not to that fronting on tidal rivers. It was contended that the employment of the word "coast" limited the reservation to land fronting on the open sea; also that in construing the grant regard must be had to the purpose for which the reserve was made, and as it would be of no use for the purpose intended in a tidal river, it could not have been meant to apply to such river:—*Held*, Peters, J., that the clause only applied to land fronting on the open sea. *R.* v. *Cox* (1858), 1 P. E. I. R. 170.

Foreign fishing vessel — *Three-mile limit—Seizure — Jurisdiction of Dominion and provinces over fisheries — Constitutional law.*] — The American schooner "North" was discovered by the fisheries protection cruiser "Kestrel" fishing for halibut in Quatsino Sound, Vancouver Island, within the three-mile limit, having all her boats out. On observing the "Kestrel" the schooner picked up two of her boats and stood out to sea. The "Kestrel" picked up one of the schooner's boats within the three-mile limit and then overhauled the schooner and seized her about a mile and three-quarters outside of the three-mile limit. There were freshly caught halibut on the schooner at the time of the seizure:—*Held*, that the seizure was lawful, the pursuit having commenced within the three-mile limit and having been continuous. — Observations on jurisdiction of Dominion and provinces over fisheries. *Rex* v. *The "North,"* 11 Ex. C. R. 141.

Foreign fishing vessel — Violation of Customs Fisheries Protection Act—Evidence —Position of vessel—Accuracy of observations—Finding of fact—Forfeiture. *Rex* v. *The "Francis Cutting,"* 9 W. L. R. 402.

Foreign fishing vessel — *Violation of customs fisheries—Protection Act—Position of vessel—Accuracy of observations.*]—Action for the confiscation of the steam fishing vessel "Francis Cutting," of Seattle, for fishing in Canadian waters. The sextant observations made by the captain of the Canadian Government cruiser in locating the "Francis Cutting" being doubtful, but the compass bearings of the first officer not being successfully attacked, it was held that the fishing vessel was a trespasser and was condemned and declared forfeited. *Rex* v. *"Francis Cutting,"* 9 W. L. R. 402.

License — *Renewal — Exclusion of co-licensee—Tenants in common—Use and possession—Profits—Account.*] — A Dominion Government fishery license for one year, without right of renewal, was taken out a number of consecutive years by the plaintiff and the defendants until 1899, in which year and in the year following, the license was taken out and the fishing thereunder was carried on by the defendants. The plaintiff and defendants owned as tenants in common fishing gear used in fishing under the license. They were not partners in respect of the license, and each catch of fish was divided at the time it was made among such of the licensees as assisted in it. The expense of repairing the fishing gear was proportionately borne by the plaintiff and defendants up to the years 1899 and 1900, when it was borne by the defendants. In the years 1899 and 1900 the fishing gear was possessed and used exclusively by the defendants in fishing under the license:—*Held*, that the plaintiff was not en-

titled to a declaration of interest in the license, nor to a share of the earnings thereunder for the years 1899 and 1900, and that the defendants were not liable to account to him for profits from the use by them of the fishing gear in those years. *Guptill* v. *Ingersoll*, 21 C. L. T. 414, 2 N. B. Eq. 252.

Public right — *Ownership between high and low water mark—Digging clams.*]—The plaintiff claimed damages from the defendants for the conversion of a dory, its oars, and a quantity of clams. The defendants paid a sum of money into Court in respect to the dory and oars, but counterclaimed for the clams, which they alleged were dug upon flats of which they were the owners from high to low water mark:—*Held*, affirming the judgment of Meagher, J., 40 N. S. R. 585, 2 E. L. R. 358, that the digging of the clams in question was done in the exercise of a public right of fishery, and that the defendants' ownership of the flats was subject to such right. *Donnelly* v. *Vroom*, 42 N. S. R. 327, 4 E. L. R. 306.

Regulations — *Foreigners — Order in Council — "Temporarily domiciled."*]—The defendants resided in Pennsylvania; they came to the county of Yarmouth in three successive years for the express purpose of trout-fishing in the inland waters of the county, employing Canadian boats and boatmen; they erected a substantial fishing camp on Crown land at the fishing grounds, in which they lived while engaged in fishing, and where their accoutrements remained from season to season. Each of the defendants was convicted of a violation of certain regulations made under s. 16 of the Fisheries Act:—*Held*, that an appeal lay to the County Court from these convictions. 2. That the defendants were not "temporarily domiciled in Canada," within the meaning of an order in council providing that foreigners when so domiciled should be exempt from the regulations requiring permits. 3. That they were properly convicted. *Rex* v. *Townshend*, 21 C. L. T. 569.

Territorial waters — *Lease—Powers of Chief Commissioner.*]—The provisions of s. 41 of the Land Act, as enacted in 1901, do not confer on the Chief Commissioner of Lands and Works authority to grant leases of the bed of the sea in territorial waters. *Capital City Canning & Packing Co.* v. *Anglo-B. C. Packing Co.*, 11 B. C. R. 333, 2 W. L. R. 59.

Unlawful canning of lobsters — Imprisonment in default of payment of fine—No prior distress—Costs of conveyance to gaol — Evidence of unreasonableness of amount. *Rex* v. *Berrigan*, 2 E. L. R. 88.

See CONSTITUTIONAL LAW — CRIMINAL LAW — CROWN LANDS—EASEMENT—NEGLIGENCE — REVENUE — SHIP—WATER AND WATERCOURSES.

FIXTURES.

Buildings—*Crown — Intention.*] — The plaintiff sued for the delivery by the defendants of certain buildings erected by M. upon land the title to which was, at the time of such erection, and continued to be, in the Crown. The plaintiff claimed title through a sale made to her under an execution issued from the County Court of Selkirk, on an alleged judgment recovered by the plaintiff's husband against the defendants, under which execution the bailiff purported to sell the buildings as chattels of M., who erected them about 19 years before action, and lived in them till about 1896; he did not actually reside in them at the time of the seizure under execution, but he took possession again before this action was brought. The buildings were not so affixed to the freehold as to require that anything should be broken or separated by force in order to remove them. M. did not own the land:—*Held*, that the presumption was that it was not intended that the buildings should become part of the freehold; the onus was on M. to shew that it was so intended. If the buildings became part of the freehold, they became the property of the Crown, the owner of the freehold. But the evidence shewed that M. tried to sell the buildings to the Crown, his actions in so doing being those of an owner, and not of one seeking compensation for the buildings as a matter of grace. *Dixon* v. *Mackay*, 22 C. L. T. 394. Reversed, 24 C. L. T. 28.

Chattel affixed to railway — *Lien of vendor for price — Extinction — Sale of railway — Following purchase money — Acts of purchaser—Fraud.*]—The lien of the vendor for the price of a chattel is extinguished by the affixing of the chattel to an immovable (in this case a railway), which renders it immovable by destination. This is so especially where the immovable, including the article so affixed, is seized and sold; the lien cannot attach upon the purchase money placed in readiness for distribution.—The acts of the purchaser, even in fraud of the rights of the vendor, and the diversion of receipts to his prejudice for other purposes, are not grounds for reviving the lien which may be set up against the hypothecary creditors of the undertaking. *Ahearn & Soper Limited* v. *New York Trust Co.*, 18 Que. K. B. 82.

Field stones — *Lumber—Roof of "lean-to" — Fence rails — Machinery — Annexation of, to freehold — Detachable part.*]—*Held*, without deciding whether field stones which lie imbedded in or upon the surface of the soil are part of the soil, that their character is at all events changed when they are taken from the place where they are found and piled up in another place. The stones by the act of severance ceased to be a natural deposit and became chattels; and the supposed intention of the deceased to use them for building purposes did not again change their character. *Lewis* v. *Gordon*, 15 O. R. 252, specially referred to. *Tucker* v. *Linger*, 21 Ch. D. 18, distinguished:—*Held*, upon the evidence, that, although lumber had at one time formed part of the roof of a "lean-to," it had been taken apart by the intestate before his death and divided up into boards, and so had become chattels:—*Held*, that, although a fence is part of the realty, and although it might be that material placed along the line of a contemplated fence, but not used because the fence is not completed,

also belongs to the freehold, yet the rails in question here did not become fixtures, because, so far as the evidence shewed, there was an entire absence of contemplation to erect them into a fence, and they were, therefore, chattels which the defendant had the right to sell. A hay-fork was part of a plant consisting of a track, a truck, pulleys, a rope, and the fork. The track was fastened with bolts or screws to the barn roof. Without the track, the truck would be useless; in fact, each of the articles was a joint in the whole, and the whole would be useless without its parts, or without any one of them:—*Held*, following *Gooderham* v. *Denholm*, 18 U. C. R. 214, that the hay-fork in question was a fixture, and the circumstance that it could be used again in connection with another track, truck, pulleys, and rope, of similar kind and dimensions, did not deprive it of its character. *McCarthy* v. *McCarthy*, 20 C. L. T. 211.

Furnace purchased on an agreement that the property in it should remain in the vendor until paid for, ceases to be a chattel when the purchaser annexes it to the freehold. Such an agreement merely confers a license on the vendor to enter and sever from the freehold what is no longer a chattel so as to again make it a chattel. A purchaser of the realty without notice of the agreement is not bound by it, nor can the vendor recover possession of the chattel or damages for its conversion from the purchaser. *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, and *Reynolds* v. *Ashby*, [1904] A. C. 466, followed. *Waterous* v. *Henry* (1884), 2 Man. L. R. 169, and *Vulcan Iron* v. *Rapid City* (1894), 9 Man. L. R. 577, overruled. *Andrews* v. *Brown* (1909), 19 Man. L. R. 4, 11 W. L. R. 149.

Hypothecation as attached to land—*Separation and sale—Rights of hypothecary creditor — Preferential claim.*]—An hypothecary creditor has a right to be paid in preference to ordinary creditors, according to the order of his hypothec, out of the proceeds of sale of movable articles, immovable by destination and hypothecated as such, sold at a judicial sale as movables separated from the property to which they were attached, subject to his hypothec. *McCaskill* v. *Richmond Industrial Co.*, 23 Que. S. C. 381.

Machinery — Annexation to freehold — Intention — Evidence — Interpleader—Costs. *Wilson* v. *Pittsburg and Ohio Mining Co.*, 11 O. W. R. 578.

Machinery — *Annexation to freehold — Right of vendor under hiring and purchase agreement—Right of owner of land, subject to agreement with vendee of machinery — Bona fide purchaser for value.*]—Action for detention of machinery:—*Held*, that defendant was not a *bona fide* purchaser for value, and that windmill in question was a permanent improvement, enhancing the value of the premises, and the permanent improvement thereof, and affixed as it was became part of the realty. This finding includes the saw and shafting. Judgment for plaintiff. *Cockshutt* v. *McLoughry*, 11 W. L. R. 90.

Machinery — Annexation to freehold — Rights of mortgagees against true owner of machinery—Lease of machinery by owner to mortgagor—Hiring without right of purchase —Degree and object of annexation. *Sceley* v. *Caldwell*, 12 O. W. R. 1245.

Machinery — *Conditional sale—Lien of manufacturer—Rights of mortgagee—Priorities — Statute — Retroactivity.*]—A woollen company purchased from the plaintiffs, on the instalment plan, a steam engine under an agreement in writing which provided that it should not become the property of the vendee until the payment of all the instalments, and should be removable by the vendor on failure of the vendee to pay as agreed. The engine was affixed to the freehold of the vendee by bolts and screws to iron plates embedded in concrete to prevent it from rocking and shifting, and might have been removed at any time without injury to the freehold. It was used for driving the machinery in the factory of the vendee. Default having been made in the payment of the instalments, the engine was claimed by the vendor and also by the defendant, a mortgagee of the land on which the mills were situate and all the mill plant, engines, etc., who took his mortgage after the engine had been installed and without notice of the plaintiff's claim. The mortgage was foreclosed by the defendant, and the mortgaged property was bought in by him under a sale in equity, for an amount less than the mortgage debt. The plaintiffs were not parties to the foreclosure proceedings, but were aware of the pendency of the same. No report of the sale or motion to confirm was made:—*Held*, that the engine was sufficiently annexed to the land to become part of the freehold, and passed to the defendant under his mortgage. By the mortgage to the defendant the engine passed as part of the realty, and on his taking possession, if not by virtue of the mortgage alone, all right in the plaintiffs to retake it was put an end to. The Act 62 V. c. 12, s. 8, s.-s. 2, which provides that where goods or chattels are sold on the instalment or hire and purchase system, and the property is not to pass until payment, the right of the owner shall not be affected by such goods or chattels being affixed to the realty, does not apply to past transactions where the goods had been affixed to and become part of the realty before the passing of the Act. *Goldie and McCulloch Co.* v. *Hewson*, 35 N. B. R. 349.

Machinery in factory—Rights of mortgagee—Intention. *Schiedell* v. *Burrows*, 1 O. W. R. 558, 793.

Machinery leased to company — *Annexation to freehold—Rights of lessor against mortgagee of company's lands.*]—Certain articles of machinery were leased by the plaintiff for one year to a manufacturing company, and placed upon the company's premises. There was no agreement for purchase. Previous to this the company had mortgaged to the plaintiff their lands, including these premises, with all the plant and machinery thereon, or which should be brought thereon during the continuance of the mortgage. The plaintiff's articles of machinery were in some degree attached to the buildings in which they were placed, but all could be detached at a trifling cost, without doing substantial damage to the inheritance:—*Held*, upon the evidence, that the articles were so annexed to the freehold as *prima facie* to constitute them as between the company and the defendant, fixtures; and, the defendant not being a party to the agreement between the plaintiff and the company, that agreement, though it was merely one of hiring, and not the usual

hire-purchase agreement, afforded no evidence to alter the *prima facie* character of the annexed property; and the plaintiff was not entitled to the articles as against the defendant. *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, and *Reynolds* v. *Ashby*, [1903] 1 K. B. 87, [1904] A. C. 466, applied and followed. *Seeley* v. *Caldwell* (1908), 18 O. L. R. 472, 12 O. W. R. 1245.

Mill and machinery—*Mortgage of realty—Fi. fa. goods — Bills of Sale Act—Interpleader.*]—A mill built on mud sills laid on piles and spiked to the piles and mill-machinery and plant therein were held to be attached to the freehold and to pass to the plaintiff by mortgages of the land and premises together with all buildings, fixtures and appurtenances, and not to be exigible under the defendants' execution against the goods of the mortgagor; and *held*, that the plaintiff's mortgages were not assurances of personal chattels, so as to require registration under the Bills of Sale Act. *Reynolds* v. *Ashby*, 73 L. J. K. B. 946, and *In re Yates, Batcheldor* v. *Yates*, 57 L. J. Ch. 697, followed. *Small* v. *National Provincial Bank of England*, 63 L. J. Ch. 270, distinguished. *Kilpatrick* v. *Stone* (1910), 13 W. L. R. 634, 15 B. C. R. 158.

Mortgage — *Plant — Temporary absence from factory.*]—A mortgage of an electro-plating factory, "together with all the plant and machinery at present in use in the factory," does not cover patterns used in the business, sent from time to time from the factory to foundries to have mouldings made, and not in the factory at the time of the making of the mortgage. Judgment of Ferguson, J., 1 O. L. R. 229, 21 C. L. T. 186, reversed. *McCosh* v. *Burton*, 21 C. L. T. 371, 2 O. L. R. 77.

Ownership of buildings — *Sale under private writing—Mortgage effected by the proprietor of the land and registered against both land and buildings — Remedy of the proprietor of the buildings — Against whom should action be brought?*]—Buildings may be acquired, by private writing, as a right of ownership distinct from the land upon which they are erected. Hence, if a mortgage is effected upon a cadastral lot, without excepting the buildings erected upon it, by the proprietor of the land, the owner of the buildings, who acquired them in virtue of a sale under private writing and not registered, may take an action to have the hypothec erased as against the creditor who has registered his title. — A building erected upon ground belonging to another is the property of the builder, under the suspensive condition that the proprietor of the land will not claim it later as accretion.—The action to have the hypothec erased should be directed against the creditor or those who are qualified to effect it, without calling the debtor who created the hypothec into the case. *Reed* v. *Belavance* (1910), 19 Que. K. B. 369.

Property in building separate from soil—*Land belonging to substitution—Building erected by grevé—Seizure by creditors.*]—The property in a building may be in a person other than the owner of the soil upon which it is built. Article 415, C. C., establishes a different rule from that of the Roman law, *ædificium solo cedit*, which is no longer in force. Therefore a house built by a *grevé de substitution* upon land belonging to the *substitution* and declared *insaisissable*, belongs to him and may be seized and sold at the suit of creditors. *Lacombe* v. *Brunet*, 14 Que. K. B. 465.

Safe built into house — *Landlord and tenant — Agreement — Change of ownership — Removal of safe.*]—The plaintiffs rented a building into which they moved a safe for the purposes of their banking business. The landlords, at the request of the plaintiffs, built around the safe a brick vault. After occupying the building about a year, the plaintiffs moved into premises of their own, and the building and safe were used by succeeding tenants until the sale of the property to the defendants, who knew nothing of an alleged agreement between the plaintiffs and their landlords as to the right to remove the safe after the plaintiffs had left the premises. During the interim between the removal of the plaintiffs and the sale, certain improvements were effected in the building, one of which was the pulling down of the vault and the construction of a mezzanine floor, which was partly supported by the safe:—*Held*, on appeal (Martin, J., dissenting), reversing the judgment of Henderson, Co.C.J. (who decided that the safe was a chattel and had been bricked or built in merely for the purposes of its more convenient use as a chattel), that, although the safe when enclosed in the vault, became a fixture, and although it could have been removed with the consent of the original owners of the building, yet the right of removal was lost when the defendants bought the premises. *Canadian Bank of Commerce* v. *Lewis*, 5 W. L. R. 194, 12 B. C. R. 398.

Small building not attached to freehold—Consent of owner of freehold to sale of building—Right of purchaser to remove building — License. *Thompson* v. *Thompson*, 2 E. L. R. 401.

Structure—*Right to remove.*]—A lessee who has a right under a covenant in his lease, to remove, at the expiration thereof, a structure added by him to the leased premises, and fails to protect his right by an opposition to withdraw, or otherwise, when the latter are sold by licitation during his tenancy, is entitled to recover from the lessor or his representatives not the full value of the structure as attached to the premises, but only what would be the value of it after severance and removal. *Goudet* v. *Marsan*, 36 Que. S. C. 537.

Suspensive conditional sale—*Replevin—Title — Registration.*] — In order that movable property placed on real property for a permanency and incorporated therewith, should become immovable by destination, one ownership as well of the movable as the immovable upon which the former is placed, must be vested in the same person. 2. Movable property which, had it been owned by the proprietor of the real estate upon which it was placed, would have become immovable by destination, may, even

after a sheriff's sale of the immovable while the movable property was so attached to it, be revendicated by its owner. 3. The title to such movable property preserved under a suspensive conditional sale providing that the ownership shall not pass until full and final payment of the price, and that the property shall not become immovable until that time, and with a stipulation that any money paid on account shall be imputed as rent, is, without registration, a valid and sufficient title. *Leonard* v. *Willard*, 23 Que. S. C. 482.

Vendor and purchaser — *Claim for price of electric fittings and storm sashes as not included in sale of house—Contract—Oral evidence.*]—In ar action to recover a balance alleged to be due in connection with the sale of a house and lot of land, it appeared that the balance sought to be recovered referred to certain electric light fittings, and storm sashes which the plaintiff asserted were to be paid for as extras, and which the defendant contended were fixtures and passed with the house. The evidence of the estate agent through whom the sale was effected was to the effect that when he took to the plaintiff a memorandum, signed by the defendant, agreeing to purchase the house for a stated sum, the plaintiff said he would accept the offer provided the defendant paid for the electric light fittings, and that, upon this reply being communicated to the defendant, he assented thereto.—The County Court Judge for district No. 1 having given judgment in the plaintiff's favour for the full amount claimed:—*Held*, that, on the evidence, the plaintiff was entitled to recover only for the electric fittings, and not for the sashes, and the judgment must be reduced accordingly.—Per Russell, J., that, as the agreement signed by the defendant was not accepted by the plaintiff, and there was no memorandum in writing of the agreement actually entered into between the parties, the rule prohibiting the introduction of oral evidence to vary the terms of a writing had no application, and, as neither party had succeeded fully, there should be no costs.—Per Longley, J., that the storm sashes sued for would pass as fixtures. *Dorcy* v. *Gray*, 42 N. S. R. 259.

Vendor and purchaser—*Shop fittings—Gas and electric light fittings.*]—Shop fittings, consisting of shelving made in sections, each section being screwed to a bracket affixed to the wall of a building, the whole being readily removable without damage either to the fittings or the building, and gas and electric light fittings, consisting of chandeliers which were fastened by being screwed or attached in the ordinary way to the pipes or wires by which the gas and electric currents were respectively conveyed, and were removable by being unscrewed or detached without doing damage either to the chandeliers or the building, were placed in it by the owner of the freehold land on which it stood:—*Held*, that these articles became part of the land and passed by a conveyance of it to the defendants. *Bain* v. *Brand*, 1 App. Cas. 762; *Holland* v. *Hodgson*, L. R. 7 C. P. 328, *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, *Haggert* v. *Town of Brampton*, 28 S. C. R. 174, and *Argles* v. *McMath*, 26 O. R. at p. 248, followed. *Stack* v. *T. Eaton Co.*, 22 C. L. T. 322, 4 O. L. R. 335, 1 O. W. R. 511.

Wooden building erected *on lot by tenant—Right to remove — Injury to freehold.*] — Action to prevent removal of a building erected by defendant, tenant of plaintiffs. The building rested on rock, placed on the soil. The chimneys were supported by poles resting on rock. The front stoop supported on wooden posts, was formerly attached to a wooden block sidewalk:—*Held* to be a fixture. That it could be removed without materially injuring the freehold is immaterial. *Bing Kee* v. *Yick Chong*, 10 W. L. R. 110.

Wooden buildings seized *under fi. fa. goods—Claim of owner of lands to buildings as part of freehold — Annexation to freehold — Interpleader.*]—Interpleader issue to ascertain ownership of a house and stable:—*Held*, that as these merely rested on the land by their own weight, and were not considered part of the land, they are chattels liable to seizure under execution against goods. *Hamilton* v. *Chisholm*, 11 W. L. R. 134.

See Assessment and Taxes — Bills of Sale and Chattel Mortgages—Company — Contract — Covenant — Crown — Landlord and Tenant — Mortgage — Trespass — Railway.

FORCIBLE ENTRY.

See Criminal Law—Landlord and Tenant—Trespass—Trespass to Land.

FORECLOSURE.

See Limitation of Actions—Mortgage.

FOREIGN ACTION.

See Stay of Proceedings.

FOREIGN BONDS.

See Revenue.

FOREIGN CHATTEL MORTGAGE.

See Bills of Sale and Chattel Mortgages.

FOREIGN COMMISSION.

See Evidence.

FOREIGN COMPANY.

See Assessment and Taxes—Costs—Company — Discovery—Insurance—Process.

FOREIGN COMPANIES ORDINANCE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES—COMPANY.

FOREIGN CORPORATION.

See JUSTICE OF THE PEACE—WRIT OF SUMMONS.

FOREIGN COURT.

See ATTACHMENT OF DEBTS—WILL.

FOREIGN DIVORCE.

See HUSBAND AND WIFE.

FOREIGN FISHING BOAT.

See FISHERIES—SHIP.

FOREIGN FORUM.

See SALE OF GOODS.

FOREIGN JUDGMENT.

See JUDGMENT—PARTNERSHIP.

FOREIGN LANDS.

See JURISDICTION — SPECIFIC PERFORMANCE.

FOREIGN LANGUAGE.

See CRIMINAL LAW.

FOREIGN LAW.

See BILLS OF SALE AND CHATTEL MORTGAGES —CONFLICT OF LAWS—CONTRACT—DISTRIBUTION OF ESTATES—EXTRADITION—HUSBAND AND WIFE—INSURANCE—MARRIAGE—SALE OF GOODS.

FOREIGN PARTNERS.

See PENALTIES AND PENAL ACTIONS.

FOREIGN PATENT.

See PATENT FOR INVENTION.

FOREIGN TRUSTEE.

See TRUSTS AND TRUSTEES.

FOREIGN VESSEL.

See SHIP.

FOREIGN WILL.

See EXECUTORS AND ADMINISTRATORS.

FOREIGNER.

See ALIENS—CRIMINAL LAW—DEFAMATION —DISCONTINUANCE OF ACTION — PROCESS.

FORESHORE OF HARBOUR.

See CONSTITUTIONAL LAW.

FORFEITURE.

See ASSESSMENT AND TAXES—BAIL—COMPANY — CONTRACT — FISHERIES—HUSBAND AND WIFE—INSURANCE—INTOXICATING LIQUORS—LANDLORD AND TENANT—MINES AND MINERALS — MUNICIPAL CORPORATIONS — PATENT FOR INVENTION — PETITION — PARTNERSHIP —PLEDGE — SHIP—SOLICITOR—TIMBER —VENDOR AND PURCHASER.

FORGERY.

See BANKS AND BANKING—BILLS OF EXCHANGE AND PROMISSORY NOTES—CRIMINAL LAW.

FORTUNE TELLING.

See CRIMINAL LAW.

FORISFAMILIATION.

See INFANT.

FRACTION OF DAY.

See RAILWAY.

FRANCHISE.

See ASSESSMENT AND TAXES — CROWN — MUNICIPAL CORPORATIONS — STREET RAILWAYS.

FRANCHISE ACT.

See PARLIAMENTARY ELECTIONS.

FRAUD AND MISREPRESENTATION.

Action for damages for fraudulent representations inducing contract — Failure to prove actual fraud. *Scott* v. *Sprague's Mercantile Agency of Ontario, Limited*, 4 O. W. R. 454, 5 O. W. R. 237.

Action for deceit—*Pleading—Statement of claim—Allegation of misrepresentation as to future event.*]—In an action of deceit it is not sufficient for the plaintiff to allege a misrepresentation by the defendant as to something to take place in the future, as, for example, that a store to be leased by the plaintiff from the defendant would be vacant at a certain date; and if ,in such a case, the plaintiff's inability to get possession of the store at such date was caused by the defendant having given a prior lease to another party, the statement of claim should specifically allege the concealment of such prior lease as the ground of action. *Smythe* v. *Mills*, 7 W. L. R. 557, 17 Man. L. R. 349.

Action for deceit—*False representations — Agreement for sale — Compromise — Release — Notice.*]—P., living in Montreal, owned 15,000 shares in a Cobalt mining company, and D. of Ottawa, also a shareholder, was looking after his interests in respect to them. Being informed by D. that the mine was badly managed and the property of little value, P. signed an agreement to sell his stock at par which D. assigned to a third party. Later P., believing he had acted imprudently in signing the agreement, entered into negotiations with the assignee and a compromise was finally effected by which 3,000 shares of his stock were sold to the latter at par, and the remainder re-transferred to P. It turned out that the assignee and D. were acting in collusion to get possession of P.'s stock, and it having greatly increased in value he brought action against D. for damages:—*Held*, reversing the judgment of the Court of Appeal, 12 O. W. R. 824, and restoring that of a Divisional Court, 11 O. W. R. 127, which affirmed the verdict at the trial, 9 O. W. R. 380, that the said compromise having been effected when P. was ignorant of the real state of affairs, he was not bound by it, and was entitled to recover from D. the difference between par value and the price at the date of the compromise. *Pitt* v. *Dickson* (1909), 42 S. C. R. 478, 30 C. L. T. 170.

Action for deceit — Representations inducing plaintiffs to become shareholders in company formed to acquire timber limits—Estimate of value of timber — Fraudulent misrepresentation as to part—Plaintiffs not induced by the msirepresentations proved—Dismissal of action—Costs. *Piper* v. *Thompson*, 11 O. W. R. 690; affirmed 12 O. W. R. 1088.

Action for deceit — *Sale of interest in business.*]—Plaintiff's son and defendant conducted a store in partnership, the son having one-third interest by an agreement under seal. Defendant sold his interest in the business to plaintiff and his son for $4,000, they to assume liabilities, which, as is not unusual, turned out to be more than expected. The Court of Appeal holds that notwithstanding this agreement the plaintiff can, and as he did shew that he alone purchased defendant's two-thirds interest, consequently he was entitled to two-thirds of the total damage sustained in consequence of this false statement. The trial Judge held plaintiff was entitled to one-half not two-thirds, as by the agreement the plaintiff and his son were the purchasers. *Dickson* v. *Leroy*, 13 O. W. R. 147.

Action to set aside sale of business—*Representations by agent—Amount of business — Lease — Representations not relied on—Action dismissed — Costs.*]—Plaintiff brought action to set aside a sale of the Avenue Motion Picture Theatre, at Owen Sound, for an order requiring Mrs. Lizzie M. Buckley, who sold plaintiff the theatre, to reconvey to him some property at Welland, which he had given in exchange, or in the alternative, he asked for $2,000 damages. Plaintiff alleged that it had been represented to him that defendant had become a Christian Scientist and wanted to get her husband out of the theatrical business. Plaintiff alleged fraud and misrepresentation by defendants' agent Brownscombe: (1) with reference to the amount of business transacted in the theatre, viz., that there had been two or three shown per night to full houses; (2) that there were at least two good picture machines in said theatre; (3) (and this was more in the nature of a guarantee than a representation), that the landlord or owner of the building would give a lease with the ordinary statutory covenants for the balance of the five years.—Falconbridge, C.J.Q.B., *held*, that the plaintiff did not satisfy the onus of proof: That any representations made by Brownscombe, if in any respect inaccurate, were not fraudulently made, but innocently. Action dismissed with costs. *Skinner* v. *Buckley* (1910), 17 O. W. R. 446, 2 O. W. N. 257.

Cheque signed in blank and filled up for large sum — Procurement by fraud — Unsound mental condition of drawer—Gift —Confidential or fiduciary relationship. *Stacey* v. *Miller*, 10 O. W. R. 879.

Contract—Action to set aside—Purchase of interest in timber limits—Costs—Parties. *Yelland* v. *Irwin*, 2 O. W. R. 1045.

Contract—*False representations—Suppression of fact—Cancellation—Sale of goods.*] —The plaintiff's traveller obtained from the defendant an order for a quantity of gin, by falsely representing that the combine of large dealers in gin, by which the price of gin had been fixed at certain rates, was still in existence, and would continue to exist, and by suppressing the fact that the plaintiff and three other important members had left the combine, a fact which would have the effect of reducing prices:—*Held*, that the misrepresentation and suppression of facts were material, inasmuch as the defendant would not have bought at the price agreed on, if he had known the actual state of affairs, and that the defendant was justified in demanding the cancellation of the contract. *Letellier* v. *Lafortune*, 26 Que. S. C. 260.

Contract — *Representations subsequently made.*]—False and fraudulent representations made by a party to a contract after it has

been entered into, which had no influence in inducing it, cannot be deemed sufficient grounds for setting aside the contract, and recovering money paid pursuant thereto. *McNaughton* v. *Hudson*, 37 N. S. R. 191.

Contract—*Rescission—Mining lease.*] — The defendant, by falsely stating to the plaintiffs that he had obtained a lease of a similar mica property from another proprietor for $30 per ton on the mica extracted, which statement he supported by producing a pretended copy of the lease in his own writing, induced them to lease their mica property to him on the same terms. The plaintiffs would not have agreed to the lease but for the deceit practised:—*Held*, that the representation that the defendant had obtained a lease of a similar property for $30 per ton, being a principal consideration for entering into the contract, the plaintiffs were entitled, under Arts. 992 and 993, C. C., to obtain its resiliation. *Barnard* v. *Riendeau*, 31 S. C. R. 234, followed. *Doucet* v. *Clerez*, 23 Que. S. C. 107.

Conviction for — Fruit Marks Act — Possession of fruit for sale — Packages — "Faced or shewn surfaces." *Rex* v. *James*, 1 O. W. R. 520, 2 O. W. R. 342, 4 O. L. R. 537.

Crown patent — Tax sale—Evidence — Letters of deceased solicitor—Costs. *Beatty* v. *McConnell*, 5 O. W. R. 541, 6 O. W. R. 882, C. R., [1908] A. C. 166. Digested under ASSESSMENT AND TAXES.

Damages — *Loss of profits — Purchase of property — False statement — Resale at profit.*]—The only damages recoverable in an action of deceit based upon false representations inducing the plaintiff to purchase property are the difference between the price paid for the thing purchased and its real value, and when the plaintiff has sold the property at a profit, he can recover no damages, although he has failed to realise the profit he could reasonably have expected if the representations had been true. *Peek* v. *Derry*, 37 Ch. D. 541, 14 App. Cas. 337; *McConnel* v. *Wright*, [1903] 1 Ch. 546, and *Steele* v. *Pritchard*, 17 Man. L. R. 226, 7 W. L. R. 108, followed. *Rosen* v. *Lindsay*, 5 W. L. R. 546, 7 W. L. R. 115, 17 Man. L. R. 251.

Defence to action for insurance premium — *Evidence of mistaken belief.*]—One who has signed (without reading it) a document containing an engagement to take a policy of insurance and to pay the first premium, believing it, upon representations made to him by the person who obtained his signature, to be a request for information with regard to an insurance upon his life, may, in an action for the premium, prove by witnesses the mistake under the influence of which he signed. *Imperial Life Assurance Co.* v. *D'Aigneault*, 25 Que. S. C. 75.

Exchange of lands—*Misrepresentations relied on — Rescission of conveyances.*]—Action to rescind an agreement for exchange of plaintiff's city property for defendant's farm. Agreement held void, defendant having misrepresented farm, and plaintiff having relied on defendant's representations. *Thompson* v. *Pepper*, 11 W. L. R. 286.

Affirmed (1909), 12 W. L. R. 490.

Exchange of farm for stock of goods —*False and fraudulent representations as to the farm — Damages.*]—Plaintiff brought action to set aside an exchange of a farm for a stock of goods, on the ground that the defendant had made false and fraudulent representations as to the value of the farm, etc.: —*Held*, that defendant made the false and fraudulent representations charged as to the value and condition of his lands, crops and chattels and the quantities thereof, with the intention that they should be relied and acted upon by plaintiff's husband in order to effect the sale or exchange of the property for the Drayton business and property, and that plaintiff's husband did rely and act thereon, whereby he suffered great loss and damage. Judgment entered for plaintiff for $3,205.15, with costs, and dismissing the counterclaim with costs. *Clemens* v. *Compton* (1910), 15 O. W. R. 794.

Exchange of land for stock of goods —Plaintiff brought action to recover $1,000 damages for alleged false and fraudulent statements made by defendant in respect to certain lands in Muskoka, taken by plaintiff in exchange for a stock of general merchandise owned by him in Grand Valley. At the trial Britton, J., entered judgment for defendant, and dismissed the action with costs. Plaintiff's appeal therefrom was allowed by Divisional Court, as defendant had failed to satisfy the onus of clearing himself of the effect of his misstatements. Plaintiff given judgment for $300 and costs of appeal. *McCabe* v. *Bell* (1910), 15 O. W. R. 547, 1 O. W. N. 523.

Failure of evidence to establish — *Foreigners imperfectly acquainted with English—Execution of bond.*] — Action on a bond:—*Held*, that there was no fraud or misrepresentation, and that defendants were well aware of what they were signing. *Colwell* v. *Newfeld*, 11 W. L. R. 583.

False representation inducing plaintiff to purchase land—*Action for deceit— Honest belief in truth of statements—Reversal by Appellate Court of finding of fact of trial Judge — Damages — Amendment — New cause of action—Refusal of Appellate Court to allow.*]—In an action for damages for false and fraudulent representations made by the defendant M., a land agent, whereby the plaintiff was induced to purchase land from the defendant B., through the defendant M. as agent, the trial Judge (Johnstone, J.), found that the representations were made and were false and were believed and acted upon by the plaintiff, but that the defendant M. had an honest belief in the representations he made at the time that they were made, and dismissed the action.—The Court (Newlands, J., dissenting), differed from the judgment of Johnstone, J., as to the honest belief of the defendant M., holding that he had the means of knowledge in his possession and no reasonable grounds for his belief, and therefore they must be regarded as fraudulently made; and held the plaintiff entitled to succeed. *Derry* v. *Peek*, 14 App. Cas. 337, and *Angus* v. *Clif-*

ford, [1891] 2 Ch. 449, explained and followed:—*Held*, by the majority of the Court, that the finding of fact of the trial Judge was clearly wrong, and it was therefore the right and duty of the Court to reverse it, within the rule laid down in *Sénésac* v. *Central Vermont Rw. Co.*, 26 S. C. R. 641, and *Hayes* v. *Day*, 41 S. C. R. 134.—Damages assessed by the Court at the difference between what the plaintiff paid and what the land was found to be worth.—At the hearing of the appeal the plaintiff applied for leave to amend by setting up as an alternative claim that the defendant M. was an agent or employee of the plaintiff:—*Held*, that the application should be refused; the plaintiff should not be allowed, at any rate at that stage, to set up an entirely new and distinct cause of action arising out of an entirely different relationship from that set out in the original claim. *Swinfen* v. *Lord Chelmsford*, 22 L. J. Ex. 382, and *Connecticut Fire Insurance Co.* v. *Kavanagh*, [1892] A. C. 473, distinguished. *Davis* v. *Burt & McFarlane* (1910), 13 W. L. R. 534.

Inducement of contract — *Fraud of third person — Remedy — Damages.*] — Fraud practised by a third party, even when it produces in the mind of one of the contracting parties a mistake as to the nature of the contract, cannot be invoked by that party as a cause of nullity as against the person with whom he contracts. He has no remedy except against the author of the fraud for damages. Therefore, a person who, deceived by the fraudulent practices of a third person, signs a security when he believes that he is signing a contract of insurance, is bound to fulfil the obligations of it. *Imperial Life Assurance Co.* v. *Laliberté*, 29 Que. S. C. 183.

Lease of farm—*Representations of lessor as to condition—Evidence.*]—In an action for damages for false and fraudulent representations as alleged to have been made by defendant which induced plaintiffs to lease a farm, it was held that such representations had not been made out, but plaintiffs were allowed $40 with Division Court costs for some losses and inconvenience. Defendant allowed High Court costs. *Luck* v. *Rannie*, 13 O. W. R. 715.

Lease of land — Representations as to value and condition of land untrue in fact but made in good faith—Counterclaim for damages for deceit—Dismissal — Money demand—Items. *Booth* v. *Beechey* (N.W.T.), 5 W. L. R. 71.

Petition of right — *Fraud by Government official — Order addressed to no one to "pay bearer" amount of salary due from Government not an assignment unless it is shewn to have been intended as such.*] — Petitioner, a schoolmaster, under the usual trustees' certificate, became entitled to receive $44.50 from the Government. By 33 Vict. c. 12, the Governor-in-Council, after the Secretary of the Board of Education shall have furnished the Government with a list of teachers entitled to salaries, and the amounts together with all vouchers, shall cause treasury warrants to be issued payable to the Colonial Treasurer, to be by him applied towards paying the teachers, and that the clerk of the council should place the warrant in the treasurer's hands with a certified copy of the list, and that the clerk of the council should draw orders for the several amounts of the salaries on the treasurer, who should pay them when presented at his office. Instead of following the Act the Government or its officials gave McNeill, Secretary of the Board of Education, cheques on the treasurer payable to bearer, thus giving him control over the money whereby he was enabled to defraud both Government and individuals of large sums. In Bradley's case the cheque was given to McNeill on 5th September, although the order for payment was not made until the 9th. The trustees' certificate was dated in August and had an indorsement in McNeill's handwriting dated 5th September, as follows: "Pay John McNeill or order," and signed by Bradley. When Bradley came for his money McNeill instead of giving him a cheque filled up an order payable to bearer and addressed to no one and told him to go to Hayden who would give him his money, and if there was any discount he (McNeill) would pay it, and Hayden having charged $1.50 McNeill repaid it to Bradley. On the same day Bradley at McNeill's request signed his name to the trustees' certificate, but he could not remember if the indorsement "Pay to John McNeill or order" was there when he signed or not. In his evidence Bradley said he considered himself paid by McNeill. The action though in Bradley's name was really by Hayden, who claimed to be his assignee and therefore entitled to use his name. The defence of the Government was that the petitioner had received payment from McNeill, the official appointed to pay him, and that no assignment was made or intended to be made by him to Hayden, and the question was whether under the circumstances there was an assignment or not:—*Held*, Peters, J., that there was no assignment and that an order of the nature given was not an assignment unless shewn that it was intended to be such. —That this case was properly cognizable in equity and not in a Court of law. *Bradley* v. *R.* (1873), 1 P. E. I. R. 454.

President of incorporated company—*False statement of earnings to directors—Payment of dividends — Damages — Evidence — Credibility of witness — Statutory declaration.*]—In an action by an incorporated company to recover from the executors of the deceased president of the company damages alleged to have been suffered by the company by reason of false and fraudulent representations made by the deceased:—*Held*, upon the evidence, that the statement of approximate earnings laid before the directors of the company by the deceased on the 15th December, 1902, and the annual statement presented by him to the directors on the 27th January, 1903, and afterwards to the shareholders, were untrue to his knowledge, and that the earnings for 1902 were wilfully misrepresented by him in order that the directors might be induced to declare dividends which they would not have declared had they been made aware of the true earnings, and that the directors acted upon the misrepresentations made to them in declaring five per cent. half-yearly dividends in January and July, 1903.—*Held*, also, that the plaintiffs, the company, had suffered dam-

ages by reason of the payment of the dividends, notwithstanding that the payment was not made out of the actual fixed capital and was not *ultra vires* of the company; and notwithstanding that it was made to the persons who were then the shareholders of the company; the company having parted with sums of money which, but for the misrepresentations, would still have been at the company's credit.—Damages were assessed against the estate of the deceased in the sum of $34,500, made up by taking the amount of the misrepresentation at the end of December, 1902, to have been roundly $30,000, and adding three years' interest at five per cent.—It was urged by the defendants against the credibility of the principal witness for the plaintiffs, that having, at the instance of the plaintiffs, though before this action was brought or contemplated, and while the president was still alive, made a statutory declaration as to the truth of the facts which he afterwards deposed to at the trial, he was *in vinculis*, and was not free to vary from it except at the risk of a prosecution for perjury.—*Held*, that the taking of unnecessary statutory declarations is a practice which should be avoided, and in this case a simple signed statement would have been as effectual; but the witness was entitled to credit, against this objection, his testimony being given with fairness and candour, and no motive for falsehood being apparent. *Northern Navigation Co.* v. *Long*, 11 O. L. R. 230, 6 O. W. R. 982.

Promissory notes—*Value given by plaintiff for—Notes conditional on contract for sale of horse — Warranty of horse—"Good Ontario notes" — Breach of warranty of notes — Findings of jury.*]—Defendant induced plaintiff to purchase two promissory notes on the warranty that they were "good Ontario notes," when in fact they were not unconditional promises to pay but conditional that a horse for which they were given should fulfil the terms of a warranty respecting it given the maker of the notes by defendant. Jury found in favour of plaintiff, and Magee entered judgment accordingly.—Court of Appeal dismissed defendant's appeal therefrom. *Agar* v. *Hogate* (1910), 16 O. W. R. 564, 1 O. W. N. 972.

Purchase of fruit farm — *Representations by vendor.*] — Plaintiff in purchasing defendant's fruit farm relied on an advertisement and statement by defendant "that trees were clean—that is free from disease":—*Held*, that these representations were untrue and damages allowed. *Ullyot* v. *Roberts* (1909), 14 O. W. R. 210.

Purchase of property—False representations as to business—Findings on evidence—Representations of agents of vendor—Damages—Measure of. *Lamont* v. *Wenger*, 12 O. W. R. 481, 511.

Recovery of money paid under contract induced by fraud—Cancellation of contract — Jurisdiction of County Courts. *Yasne* v. *Kronson* (Man.), 7 W. L. R. 119.

Recovery of money paid under contract induced by fraud — *Rescission — Jurisdiction of County Courts — County Courts Act, s. 61 (b).*]—1. Without a rescission of a contract, there can be no recovery of amounts paid under it by one party on the ground of alleged misrepresentation by the other party inducing the contract.—2. County Courts in Manitoba have no jurisdiction to cancel contracts on the ground of fraud, as s-s. (*b*) of s. 61 of the County Courts Act, R. S. M. 1902 c. 38, which confers equitable jurisdiction when the subject of the action is "an equitable claim and demand of debt, account or breach of contract, or covenant or money demand, whether payable in money or otherwise," does not apply to an action for the cancellation of a contract. *Yasne* v. *Kronson*, 7 W. L. R. 119, 17 Man. L. R. 301.

Sale of farm—*Representations as to seed sown—Collateral contract as to seed to be sown in future — Misconduct.*]—Action for deceit. As no false or fraudulent misrepresentations were proved, action must fail. Plaintiff has not proved, with sufficient definiteness, that any damage can safely be estimated resulting from breach of contract, regarding seed to be sown. Action dismissed without prejudice to suit being brought for breach of contract, or to counterclaim if sued upon note. *Latus* v. *Beardsley*, 10 W. L. R. 653.

Sale of farm and horses—*Condition and value—Reliance of purchaser on representations of vendor—Action for deceit — Damages.*]—The plaintiff transferred to the defendant the stock in trade and goodwill of his business as a merchant, and received as consideration therefor a section of land, with the horses and implements thereon, and a sum of money. The plaintiff sued for damages for deceitful representations in regard to the land and the chattels:—*Held*, upon the evidence, that the transaction was not one in which the parties were equally ignorant of the conditions and value of what they were getting, and understood that they were taking chances and dealing at their peril; the plaintiff had never seen the land, and had no independent information about it; the defendant did make certain representations about it, and the plaintiff acted upon some of them at least.—The representations alleged were: (1) that the land was first-class farm land; (2) that it was all fit for cultivation; (3) that it was all good heavy soil, except 40 acres, which was rough, but first-class pasture land; (4) that, with the exception of wells, there was no water on the land.—*Held*, that the first and third representations were in regard to matters of opinion and were mere commendation, not justifying an inference of fraudulent intent; but the second and fourth representations were untrue and in regard to matters of such moment that they must be regarded as fraudulent:—*Held*, also that misrepresentations alleged as to the condition, age, and value of six horses upon the land, could not be regarded as proved; value is a matter of opinion; the plaintiff must have understood what their condition was; and, if their ages were misrepresented, it was hardly material, in view of all the circumstances.—Damages assessed for land not at present fit to be cultivated and for water on the land in excess of what was represented. *Strome* v. *Craig* (1910), 15 W. L. R. 197.

Sale of fruit farm — Advertisement — Representations of vendor as to condition of trees — Evidence — Untrue statements—Reliance of purchaser on—Damages. *Ullyot* v. *Roberts*, 14 O. W. R. 210.

Sale of horse.] — Plaintiff knowing the reputation of race horse H. bought him from defendants who shipped to plaintiff race horse B. Although knowing that he had not received H., plaintiff paid the notes he had given defendants. Plaintiff subsequently sold B., and was now given damages. He was not allowed damages for race money he might have won with A. or keeping B. training as these were too remote. *Perry* v. *Kidd* (1900), 12 W. L. R. 9.

Sale of hotel as going concern—*Deceit.*]—Plaintiff was induced to purchase an hotel on the strength of defendant's statement that the receipts were $900 monthly. After plaintiff purchased the receipts were only between $400 and $500 monthly. In an action for deceit, $1,500 damages were given, the defendant having known his statement as to monthly receipts was untrue. *Hand* v. *Rosen*, 9 W. L. R. 375.

Sale of hotel as going concern — False representations as to receipts and profits—Manufactured settlement—Action for deceit — Damages — Measure of — No loss shewn—Loss of estimated profits not an element of damage. *Rosen* v. *Lindsay* (Man.), 5 W. L. R. 546, 7 W. L. R. 115.

Sale of interest in chattels—*Representation as to price paid—Falsity—Intent to deceive—Caveat emptor—Fiduciary relationship.*]—The plaintiffs bought a half interest in a fishing boat and gear, and sought to recover back the purchase money from the defendant, on the ground that the defendant falsely represented that he had paid a certain sum for the boat, which amount was much larger than the actual amount paid by him:—*Held*, that the plaintiffs could not succeed in this action by shewing merely that such representation was made, and was false to the knowledge of the defendant when making it, and was made with a view to deceive. Representations by a vendor as to the price he paid for an article should be regarded as merely "dealer's talk." *Caveat emptor* applies.—Cases in relation to sales of property to companies distinguishable, on the ground of agency, or *quasi* agency, or fiduciary relations. *Young* v. *McMillan*, 40 N. S. R. 52.

Sale of land—*Action by purchaser to set aside.*]—Action to set aside a sale and conveyance of land on ground of fraud and for damages. Negotiations for sale were by correspondence. At trial plaintiff withdrew fraud charges, which was allowed, defendant opposing. Next it appeared that plaintiff had sold the land. Then plaintiff asked to have charges of fraud reinstated, which was refused:—*Held*, that as plaintiff, with knowledge of the representations, had sold the land, action must be dismissed. No costs to either party if defendant will not bring action of deceit. *Heatherly* v. *Knight* (1909), 14 O. W. R. 338. See S. C. 684.

Sale of land — Contract not in fact induced by misrepresentation if made—Contract previously made—Plaintiffs acquiring an interest — Deceit — Amendment — Evidence —New contract—Damages—Contract resulting in substantial profit. *Steele* v. *Pritchard* (Man.), 5 W. L. R. 263, 7 W. L. R. 108.

Sale of land—*Inducement—Evidence — New contract—Damages—Contract resulting in substantial profit.*]—On the 25th June, 1906, the defendants, acting as agents of the Ontario and Saskatchewan Land Corporation, gave the plaintiff S. an option in writing to purchase all the lands of the company in certain named townships, being about 48,000 acres, at $6.60 per acre, and took S.'s cheque for a deposit of $5,000 on account. There were not funds in the bank to pay the cheque, and the defendant urged S. to provide funds. S. then, at a meeting of the parties held on the 28th June, introduced his co-plaintiffs, P. and B., to the defendants. P. and B. were then induced to join S. in the purchase, and acquired a two-thirds interest in it, and funds were provided to make the $5,000 payment. The plaintiffs alleged that the defendants induced P. and B. to go into the purchase by representing at that meeting that the purchase included all the land that the company ever owned in the township mentioned, and that such representation was false, as some of the best lands had been previously sold. After discovering the mistake, the plaintiffs completed the purchase, and later disposed of the bulk of the lands at a substantial profit. The statement of claim was based on the contract of the 25th June and on the allegation that the defendants by fraudulent misrepresentations induced the three plaintiffs to enter into it, and damages were claimed, as in an action of deceit, for loss of the profits that would have been made if the plaintiffs had received the lands that the company had previously sold. The trial Judge found that the plaintiff S. had not been induced to enter into the purchase by any misrepresentations of the defendants, but found a verdict for the other plaintiffs against both defendants:—*Held*, on appeal, that, as the plaintiffs P. and B. had not made any independent contract with the defendants for the purchase of the lands in question, but had only acquired an interest with S. in the option which he had previously secured, their only remedy for the alleged false representation would be by an action of deceit, for that they had been thereby induced to enter into the agreement with S. for the acquisition of an interest with him in the option, to which action S. would not be a proper party, and that, as the issues and evidence in such an action might be widely different from those in the present action, an amendment of the pleadings setting up such new case, first asked for at the hearing of the appeal, should not be allowed, and that the action should be dismissed, without prejudice, however, to the right of P. and B., if so advised, to bring a new action on the grounds above indicated.—*Held*, also, *per* Phippen, J.A., that, after discovering the alleged fraud, the plaintiff might, if the facts they alleged were true, have sued the company for the return of their $5,000 deposit, or brought an action of deceit against the defendants, laying their damages at the amount paid out. Instead of that, however, they exercised their privilege of making a new contract directing the company to retain, as part of the purchase money thereunder, the $5,000 previously paid for the option. The plaintiffs, having

thus received back the only money from which they were parted by the alleged misrepresentation, cannot further recover by way of damages. It being admitted, further, that the plaintiffs suffered no loss by reason of their purchase, but made a substantial profit by the resale of the lands, they could recover no damages for having been induced to enter into the contract. *McConnell* v. *Wright*, [1903] 1 Ch. at p. 554, *Peek* v. *Derry*, 37 Ch. D. at p. 541, *Smith* v. *Bolles*, 132 U. S. R. 125, and *Sigafus* v. *Porter*, 179 U. S. R. 116, followed. *Steele* v. *Pritchard*, 5 W. L. R. 263, 7 W. L. R. 108, 17 Man. L. R. 226.

Sale of land—Material misrepresentation by vendor as to situation of land—Reliance of purchaser on statement—Action for purchase money — Defence — Rescission — False representation innocently made—Affirmance of contract — Promise to pay — Damages. *Wolfe* v. *McArthur* (Man.), 7 W. L. R. 124.

Sale of land—*Untrue representations by purchaser — Immateriality — Damage not directly resulting—Action to rescind.*]—A representation by the purchaser of land to the vendor that he was buying for himself, and not for a third party, to whom he knew the vendor would not sell, although false, is not a representation material to the contract or one resulting in any damage to the vendor, as its immediate and direct consequence; so that a sale which the vendor was induced to make by such false representation cannot be rescinded on the ground of fraud. *Bell* v. *Macklin*, 15 S. C. R. 576, followed. *Nicholson* v. *Peterson*, 8 W. L. R. 750, 18 Man. L. R. 106.

Sale of oil leases to syndicate—False representations as to value — Formation of company — Assignment of leases to — Secret profit — Promoters — Trustees — Agents —Account—Action by company—Measure of damages — Claim of individual members—Reservation of rights—Parties. *Alexandra Oil and Development Co.* v. *Cook*, 10 O. W. R. 781, 11 O. W. R. 1054.

Sale of property—False representations as to business—Findings on evidence — Dismissal of action—Suspicious circumstances—Costs. *Lamont* v. *Winger*, 10 O. W. R. 190, 883.

Sale of shares — Action for deceit — Cause of purchase. *Clark* v. *Gray*, 1 O. W. R. 370.

Sale of shares—Action to set aside — Fiduciary relationship. *Pickford* v. *Thompson*, 40 N. S. R. 632.

Sale of shares — *Company—Declaration of dividend—Inducement to take shares.*]—In an action of deceit against the defendant, the president of a steamship company, the plaintiff, who had taken some shares in the company, alleged that there had been a false representation, involved in the declaration of a dividend which the profits of the company did not warrant:—*Held*, that in order to succeed in such an action it must appear: (1) that the declaration of the dividend was false and dishonest, and not merely erroneous; (2) that it was made with the intent that it should be acted upon by such person as the plaintiff; (3) that the plaintiff was materially induced by it to become a shareholder. *Doyle* v. *Smith*, 40 N. S. R. 157.

Sale of shares — Deceit — Knowledge of vendor—Reliance of purchaser. *Burnett* v. *Nott*, 2 O. W. R. 201.

Sale of shares—Fraud of agent—Notice to company—Right to recover money paid. *Stokes* v. *Continental Life Ins. Co.*, 1 O. W. R. 640.

Sale of shares—Misrepresentations as to value—Damages—Reconveyance of land conveyed as part of consideration—Ratification —Election—Liability of principal for misrepresentations of agent—Costs. *Gardiner* v. *Bickley and Bennett*, (Man.), 2 W. L. R. 146.

Sale of shares—Untrue representations—Principal and agent—Contract—Settlement—Reservation of rights — Damages. *Pitt* v. *Dickson*, 9 O. W. R. 380.

Sale of stock-in-trade and business—*Purchaser buying on faith of vendor's statement—Falsity of knowledge of vendor.*]—In an action for deceit the amount of the yearly "turnover," the rate of profit and the money invested having been grossly misrepresented, judgment given for $750 damages. *McGregor* v. *Campbell*, 10 W. L. R. 326.

Affirmed 11 W. L. R. 153; 19 Man. R. 38.

Shares — *Sale of worthless — Insolvent company — Fraudulent declaration of dividend.*]—Defendant, managing director and secretary-treasurer of a company, fraudulently, was instrumental in having a dividend declared on the strength of which and by representing that the dividend had been earned, he induced the plaintiff to purchase more shares in the company:—*Held*, that defendant is liable to repay the plaintiff. *Gilmour* v. *Dalton* (1909), 14 O. W. R. 257.

Transfer of land as security for money lent—Action to cancel registration of transfer—Alleged promise not to register—Failure to prove promise. *Beere* v. *Northern Bank* (N.W.P.), 6 W. L. R. 642.

Transfer of land procured by — *Validity against subsequent purchasers for value without notice—Proof of bona fides—Onus — Estoppel.*]—If a person executes a transfer with a mind and intention to execute it, though his assent may have been obtained by fraud, he is estopped from denying its validity as against subsequent purchasers *bona fide* for value and without notice; but, when fraud has been established, the onus is upon such subsequent purchaser to establish that the transfer to him was *bona fide*, and the Court in determining whether such defence is established will take into consideration all the facts, and draw inferences therefrom as to whether or not the transaction was in fact *bona fide*. *Swanson* v. *Getsman*, 8 W. L. R. 762; *McInnis* v. *Getsman*, 1 Sask. L. R. 172.

Undue influence—*Husband and wife.*]—*Held*, upon the evidence in this case, that the transfer of property in question was executed by the husband under the undue influence and coercion of the wife, and without independent advice, and was rightly set aside. *Hopkins* v. *Hopkins*, 21 C. L. T. 14, 27 A. R. 658.

Undue influence — *Misrepresentation — Ratification.*]—The plaintiff in this action sought to set aside a transfer of land which the defendant had obtained from him by the exercise of what the Judge held to have been both fraud and undue influence, but the defendant contended that the plaintiff had, after the commencement of the action, compromised and settled it by signing the agreement referred to in the judgment:—*Held*, that the alleged ratification as well as the original transfer had been obtained by fraud and undue influence and that the transfer should be set aside with costs. *Bridgman* v. *Green*, 2 Ves. Sr. 627, and *Moxon* v. *Payne*, L. R. 8 Ch. 881, followed. *Atkinson* v. *Borland*, 14 Man. L. R. 205.

See ARREST—ASSESSMENT AND TAXES—BANKRUPTCY AND INSOLVENCY—BILLS OF EXCHANGE AND PROMISSORY NOTES—BILLS OF SALE AND CHATTEL MORTGAGES—COMPANY—CONTRACT — COSTS — COURTS—DISCOVERY—EVIDENCE — FAMILY ARRANGEMENT —INTERPLEADER — JUDGMENT — LANDLORD AND TENANT — LIQUOR LICENSES—MINES AND MINERALS—PARTNERSHIP—PLEADING—PRINCIPAL AND SURETY—SALE OF GOODS—SCHOOLS—TRUSTS AND TRUSTEES—VENDOR AND PURCHASER.

FRAUDULENT CONVERSION.

See CRIMINAL LAW.

FRAUDULENT CONVEYANCE.

See CANCELLATION OF INSTRUMENTS.

FRAUDULENT PACKING.

See CRIMINAL LAW.

FRAUDULENT PRACTICES.

See ELECTIONS.

FRAUDULENT PREFERENCE.

Judgment—*Attack on—Time.*]—A judgment, and the judicial hypothec thereby created upon the property of the debtor, while he is insolvent, and with the intention of obtaining a fraudulent preference over other creditors of the debtor, may be attacked within the time mentioned in Art. 1040, C. C. —2. A judgment is a judicial contract.—3. The time for contesting the fraudulent act of a debtor runs not only from the date of the distribution of his property, establishing his insolvency, but from the date of the knowledge of the fraud by the creditor, that is to say, from the prejudice which the fraudulent act causes him. *Banque Nationale* v. *Common*, 22 Que. S. C. 284.

Land purchased by debtor — *Patent issued to another—Evidence—Presumption.*]—The plaintiff claimed a declaration that a certain piece of land purchased from the Dominion Government in the name of the defendant J. was the property of his brother, the defendant R., and should be sold to realize the plaintiff's registered judgment against R. At the time of the purchase in 1888 R. was indebted to the plaintiff in a sum of over $1,800, and to another person for over $4,000, and it was shewn that J. had never paid anything on the land either for the purchase money or taxes, and had never received anything by way of rent or profits; also that the money for the first instalment had been advanced by another brother, that R. had paid the rest of the purchase money from the proceeds of the land, of which he had always enjoyed the use and occupation; and that the Crown patent for the property was issued to J. in 1892 without his having applied for it. The defendants at their examination for discovery before the trial swore that the whole transaction was *bona fide* and that R. was J.'s agent throughout in respect of the property, but R. was not called as a witness for the defence. J., also, in a letter to R. written in 1899, had referred to the property as "your land:"—*Held*, that the proper conclusion upon the whole evidence was that the land was really R.'s property and had been purchased and held in J.'s name for the purpose of preventing creditors from realising out of it, and that the plaintiff was entitled to the relief asked for. *Semble*, that when a defendant who is in Court does not give evidence to support his case, the Judge is entitled to make every reasonable presumption against him. *Barker* v. *Furlong*, [1891] 2 Ch. 172, followed. *Miller* v. *McCuaig*, 20 C. L. T. 27, 13 Man. L. R. 220.

Simulated sale of chattels—*Presumption—Pledge.*]—Although a sale of movable effects may be perfect without delivery, the want of *déplacement* gives rise to the presumption that the sale was simulated.—2. The laws of the province of Quebec do not permit chattel mortgages, and in a prominent degree refuse recognition of subterfuges whereby a creditor may secure advantages at the expense of his fellow-creditors.—3. Where it appears that a pretended deed of sale, without any delivery having taken place, is, in reality, an unlawful pledge of the movables affected, such deed will be annulled. *In re Goyer*, 21 Que. S. C. 502.

See BANKRUPTCY AND INSOLVENCY—TRIAL.

FRAUDULENT REMOVAL OF GOODS.

See CRIMINAL LAW—LANDLORD AND TENANT.

FRAUDULENT REPRESENTATIONS.

See VENDOR AND PURCHASER.

FRAUDULENT TRANSFER.

See BANKRUPTCY AND INSOLVENCY.

FREE GRANT AND HOMESTEADS ACT.

See TIMBER.

FREE GRANT LANDS.

See CROWN.

FREE LIBRARY.

See MUNICIPAL CORPORATIONS.

FREIGHT.

See CARRIERS—CROWN—SHIP.

FREIGHT RATES.

See CROWN.

FRENCH TITLE.

See CROWN LANDS.

FREQUENTING BAWDY HOUSE.

See CRIMINAL LAW.

FRIENDLY SOCIETY.

See INSURANCE.

FRUIT MARKS ACT.

See CRIMINAL LAW—SALE OF GOODS.

FRIVOLOUS ACTION.

See DISMISSAL OF ACTION.

FUGITIVE OFFENDERS ACT.

See CRIMINAL LAW.

FUNERAL EXPENSES.

Estate of deceased—*Liability of surviving spouse.*]—The expenses of burial are payable out of the estate of the deceased. Not being included among marriage obligations, the surviving husband or wife is not obliged to pay them. *La Société de Pompes Funèbres de Montreal* v. *Lefebvre*, 33 Que. S. C. 296.

See EXECUTORS AND ADMINISTRATORS — HUSBAND AND WIFE—WILL.

FURTHER DIRECTIONS.

See BANKRUPTCY AND INSOLVENCY.

FUTURE DAMAGES.

See DAMAGES.

FUTURE RIGHTS.

See APPEAL COURTS—HUSBAND AND WIFE.

GAMBLING.

See CRIMINAL LAW — LIQUOR LICENSES — PARTNERSHIP.

GAME LAWS.

Quebec statute—*Conviction—Non-existing district — Penalty — Fine — Payment to justice — Excessive costs — Distress—Imprisonment—Killing animals out of season—Several offences — One penalty — Quashing conviction — Forum — Superior Court — Action—Remedy by appeal.*]—A conviction containing the imposition of a penalty by a justice of the peace, by virtue of the "*Loi de la Chasse de Quebec*," made, according to its tenor, in a non-existing district, is void, *e.g.*, a conviction made in the "district of Abbittibi."—A direction in the conviction to pay the fine to the justice himself, to be applied according to law, when the statute under which the conviction is had declares that it belongs entirely to the prosecutor, is void. —An award in such a conviction of $14 costs is void, that sum exceeding what is allowed in the tariff under s. 871 of the Criminal Code.—An order in such a conviction to levy the amount of the fine, in default of payment, by way of seizure, and sale of the property of the accused, when the statute prescribes the sole alternative of imprisonment, is ground for avoiding the conviction.—The "*Loi de la Chasse de Québec*," in Arts. 1405 and 1410, in authorising the imposition of a fine upon any person found in possession of an animal or part of an animal killed out of season, does not create as many offences as there are animals or skins in the possession of such a person at one time. Therefore, one in whose possession are found 775 skins of beavers killed out of season, is guilty of only one offence, and incurs only a penalty of from $10 to $25, and his conviction for 775 offences with 775 penalties, is void.—The remedy by way of action in the Superior Court is available for the purpose of setting aside convictions by justices of the peace, by the application of Art. 50 C. P. C., and notwithstanding the appeal to another tribunal given by the statute under which the convictions are made. *Zimmerman* v. *Burwash*, 29 Que. S. C. 250.

R. S. Q. s. 1407 — "*Actually in possession*"—*Constructive possession—Time of offence.*]—The words "actually in possession" in s. 1407, R. S. Q. (Game Law of Quebec), do not signify manual or physical possession

or holding by the offender; they mean the legal possession which he has by himself or by his servants; and the word "actually" qualifies the possession in respect of time, meaning at the moment in which the offence is alleged to have been committed. *Revillon Prères* v. *Pagé*, 34 Que. S. C. 85.

See Fraudulent Conveyance—Husband and Wife—Limitation of Actions—Opposition—Parent and Child—Will.

GAMING.

Dealing in shares—*Broker—Payment of differences — Illegality — Criminal Code, s. 201.*]—The defendant instructed the plaintiffs to sell shares for him; the plaintiffs asked for cover, and the defendant paid $600; no time was fixed for delivery; the plaintiffs asked the defendant for more, as shares were rising, and finally called for $2,400, which the defendant refused to pay. The plaintiffs then, as they alleged, purchased the shares to satisfy their own liability, and sued for amount paid:—*Held*, that, as no stock was ever delivered or intended to be delivered, and as the intent was to make a profit from the fluctuations of the stock market, the transaction was illegal. *British Columbia Stock Exchange, Limited*, v. *Irving*, 8 B. C. R. 186.

Municipal by-law—*Ultra vires—Municipal Act—Gambling in private house—Conviction quashed.*]—Motion by defendant to quash his conviction by the police magistrate for the city of Toronto for allowing a game of chance to be played for money upon his premises, contrary to a by-law of the city, purporting to be founded on a clause in the Municipal Act empowering the municipality to pass by-laws "for suppressing gambling houses and for seizure and destroying faro banks, rouge et noir, roulette tables, and other devices for gambling found therein:" R. S. O. 1897 c. 223, s. 549 (4). The legislation pointed at houses where gaming or gambling was practised, and houses kept for such purpose. The inquiry in this case was not as to whether the place in question was a "gambling house," and there was no evidence to induce that conclusion. One instance was proved, or perhaps two, in which cards for gain had been played at the house, but that fell far short of what would be required to attach to it the character of a "gambling house:"—*Held*, the element of frequency at least was essential to make out that any place is a gambling house, and isolated instances on Sundays, when Jews or others come together in private houses to play cards, were not within the scope of this statute. The by-law far transcends the terms of the enabling statute, and assumes to make illegal that which was not in contemplation of the legislature as expressed in the statute. The conviction should be quashed because resting on an invalid by-law. *Rex* v. *Spegelman*, 5 O. W. R. 33, 9 O. L. R. 75.

Promissory note—*Indorsement—Club.*] — The defendants indorsed a promissory note made in favour of the plaintiffs, a club, by the manager of the club as security for a sum of money placed in the hands of the manager by the club for the purpose of promoting gambling:—*Held*, that the indorsement was void, and the plaintiffs could not recover upon it. *Le Club Canadien* v. *Jacotel*, 16 Que. S. C. 312.

Wager — *Illegality — Action to recover stake.*]—A deposit of money with a stakeholder to abide the result of a foot-race is not an illegal transaction under C. S. N. B. c. 87, s. 2, and no action will lie against the winner of the bet, who has received the money from the stake-holder after the decision of the event. *Seeley* v. *Dalton*, 36 N. B. R. 442.

See Bills and Notes—Broker—Constitutional Law—Contract—Criminal Law—Judgment.

GAMING HOUSE.

See Criminal Law—Trespass.

GAOL.

See Criminal Law.

GARANTIE.

Action en garantie — *Quasi-tort.*]—An action *en garantie* will lie even in a matter of tort or *quasi-tort*. *Marchand* v. *Dominion Transport Co.*, 7 Que. P. R. 133.

See Indemnity—Sale of Goods—Warranty.

GARBAGE.

See Municipal Corporations.

GARNISHMENT.

Attachment by garnishment — *Declaration of the garnishee—Filing documents—C. P. 686.*]—The garnishee is not obliged, when he makes his declaration, to file a document to which he refers, nor is he bound to dictate a copy of the document to the person receiving his declaration. *Savoie* v. *Drainville & Cote* (1910), 11 Que. P. R. 430.

Fire insurance money is not attachable by garnishee, under Alta. Rule 385, until amount of liability is ascertained. *Hartt* v. *Edmonton Laundry & Colonial Assurance Co.* (1909), 2 Alta. L. R. 130.

Judgment by default *against a garnishee after service at place of business—C. C. 79, C. P. 679.*]—A garnishee, domiciled in the province of Ontario, may be condemned, by default, although the service of the attachment in garnishment after judgment was only effected by serving a copy at the garnishee's place of business at Montreal. *Sperber* v. *Greenberg* (1910), 16 R. de J. 529.

Liquidator of defendant company is an interested person in moneys attached under Alta. Rule 386 and may move to set

aside a garnishee summons. *Hartt* v. *Edmonton Laundry & Colonial Assurce. Co.* (1909), 2 Alta. L. R. 130.

Non-appearance of a fire insurance co. to a garnishee summons, is not such an admission of liability as will convert the claim into a debt.—*Randall* v. *Lithgow*, 53 L. J. Q. B. 518, 12 A. B. D. 525, 50 L. T. 587, 32 W. R. 794, distinguished. *Hartt* v. *Edmonton Laundry & Colonial Assurce. Co.* (1909), 2 Alta. L. R. 130.

Order before judgment—*Rule 759.*]—The right under Rule 759 to attach debts before judgment is confined to cases where the amount of the plaintiff's claim can be definitely ascertained at the time the action is brought—to cases where there are actual debts due and owing to the plaintiff; and the Rule does not apply to cases of unliquidated damages, whether arising in tort or contract.—This action, which was for commissions earned and which would have been earned by the plaintiff under an agreement to sell goods for the defendants for 5 years, and for a share of the defendants' profits, the plaintiff alleging that the defendants had refused to carry out the agreement and expressed the intention of no longer carrying it out and discharged the plaintiff, was considered to be an action for damages for breach of the agreement and not within the Rule; and an attaching order was set aside.—*McIntyre* v. *Gibson*, 17 Man. L. R. 423, 8 W. L. R. 202, followed. *Hart* v. *Dubrule* (1910), 15 W. L. R. 602, Man. L. R.

Procedure — *Seizure by garnishment — Garnishee in possession of movables belonging to the judgment debtor—Condemnation to deposit or pay a sum of money as their value.*]—A garnishee who, upon a contestation of his declaration, is proved to have had in his possession, movables, the property of the judgment debtor, can only be condemned to surrender them to the officer of the Court for execution, and, in default to do so within a prescribed delay, to pay their value, or satisfy the judgment. A condemnation to deposit a sum of money, or to pay it to the seizing creditor, as the value of the movables, without the option of surrendering them, is illegal. *Fontaine* v. *Lamoureux* (1909), 19 K. B. (Que.) 421.

Summons—*Rule 384—Affidavit sworn before action begun.*]—Although, under Rule 384, a garnishee summons cannot issue until after an action has been begun, the affidavit upon which the summons is based may be sworn before the commencement of the action.—*Marcy* v. *Pierce*, 4 Terr. L. R. 186, followed.—The affidavit need not state the grounds of the deponent's belief; it is sufficient if it follows the Rule—the deponent swearing that, to the best of his information and belief, the proposed garnishee is indebted to the defendant.—*Salander* v. *Jensen*, 6 W. L. R. 401, not followed. *Stewart & Matthews Co.* v. *Ross* (1910), 15 W. L. R. 425, Sask. L. R.

Summons before judgment.]—Before judgment, the affidavit of one of the plaintiff's solicitors was filed, in which he swore that he had a full and personal knowledge of the matters deposed to, and that the two defendants, and each of them, were justly and truly indebted to the plaintiff in a named sum, being the amount due to the plaintiff for principal money and interest on a chattel mortgage, and that he (the deponent) was informed and verily believed that each of the proposed garnishees (named persons) was justly and truly indebted to the defendant M., and that each was within the jurisdiction of the Court. By the statement of claim the plaintiff alleged that each of the defendants covenanted to pay to the plaintiff, under a certain chattel mortgage, the amount mentioned in the affidavit:—*Held*, that the affidavit was sufficient in point of form to sustain garnishee summonses issued thereon; there was nothing in the Rules which required a præcipe to be filed; the requirements of Rule 384 were sufficiently complied with; Rule 295, which requires the grounds of belief to be stated in affidavits used on interlocutory motions, could have no application, because the affidavit was not for use on such a motion, and because Rule 384 itself only requires it to be "to the best of the deponent's belief," without more; and the words used expressed all that is expressed in those words.—*Held*, also, assuming that the liability of the defendants upon the covenant in the chattel mortgage was a joint one, that there was no reason why a debt due to one of two joint debtors might not be attached. — *MacDonald* v. *Tacquah Gold Mining Co.*, 13 Q. B. D. 535, and *Minger* v. *Anderson*, 1 Alta. L. R. 400, 8 W. L. R. 428, distinguished.—*Miller* v. *Mynn*, 1 E. & E. 1075, followed. *Nohren* v. *Auten & Markham* (1910), 15 W. L. R. 417, Alta. L. R.

See ATTACHMENT OF DEBTS — CONTRACT — COURTS — MUNICIPAL CORPORATIONS — NEGLIGENCE.

GAS COMPANY.

See COMPANY.

GAS INSPECTION ACT.

See CONTRACT.

GEESE.

See ANIMALS.

GENERAL AVERAGE.

See SHIP.

GIFT.

Assignment of right to Crown lands — *Notarial Act — Parent and child — Subsequent patent to donor — Rights of Donee — Want of Registration of Act — Sale of Timber — Right to payment — Apparent Owner.*]—By a notarial act the parents of a family of twelve living children assigned and

abandoned to one of their sons all the rights, privileges, and advantages resulting and belonging to them by virtue of an Act of the legislature assented to 2nd April, 1890, intituled an Act giving the privilege to the father and mother of a family of twelve living children, of a grant of 100 acres of public land. The notarial act recited that the assignment or abandonment was made gratuitously and out of parental love, and purported to give the son the right to enjoy and dispose of such rights and privileges, as owner thereof and in perpetuity, upon the charges, clauses, and conditions imposed by the statute:—*Held*, Casault, C.J., dissenting, that this act of donation granted to the donee the lot which the donors had claimed from the government, and to which afterwards the latter had given the donors a title of concession; and that it was not necessary to render the donee proprietor of such lot that the donor should make a new assignment. 2. That the acceptance of the gift appeared by the same act, and that the signature of the notary affixed to the act after that of the donee made the act of donation perfect, and it was not necessary that the donee should notify the donors of the perfecting of the act. 3. That the defendants, from whom the donee claimed the value of wood cut upon this lot, they being neither heirs, legatees, nor creditors of the donors, and not pretending to have any right in or to the lot, were not in a position to set up the want of registration of the act of donation. 4. That the defendants, if they paid the amount claimed to the donee, he having the apparent title, would be discharged as regards the heirs of the donors, if they should become entitled by virtue of the want of registration. 5. That the statute 53 V. c. 26 authorizes such a gift *inter vivos*. *Gélinas* v. *St. Maurice Lumber Co.*, 21 Que. S. C. 270.

Charge for maintenance—*Hypothec—Money value — Personal obligation—Maintenance undertaken by third person.*] — Where a gift is subject to a charge of lodging, food, clothing, and maintenance for a third person, the charge, having a money value, is equivalent to a *hypothec*, although its value is not specified in the instrument creating the charge.—2. A charge imposed on the donee and his legal representatives for lodging, food, clothing, and maintenance for one of his brothers, cannot be discharged by a third party, the beneficiary having an interest to see that it shall be fulfilled by the donee himself. *Pelletier* v. *Girard*, 34 Que. S. C. 318.

Cheque—*Not subject of donatio mortis causa — Death of drawer — Revocation of banker's authority to pay.*] — Divisional Court *held*, that a cheque is not a chose in action and is not the subject of *donatio mortis causa*: That the death of drawer of a cheque revokes the banker's authority to pay it.—*Hewitt* v. *Kay*, L. R. 6, Eq. 198.—*In re Beak's Estate*, L. R. 13, Eq. 489, and *In re Beaumont*, [1902] 1 Ch. 889, followed. *Re Bernard* (1911), 18 O. W. R. 525, 2 O. W. N. 716.

Condition — *Restraint on alienation — Construction — Contractual sale — Judicial sale.*]—A condition imposed in a deed of gift that the property given shall not be sold, seized or seizable for any consideration generally whatever, during the lifetime of the donees, applies to a judicial sale, and is not an obstacle to a contractual sale of such property. *Hamel* v. *Smith*, 31 Que. S. C. 298.

Conditional—*Judgment cancelling gift—Remedy of the hypothecary creditor—C. C. 2058.*]—The provision of Art. 1276 C. C. does not apply to a gift made to consorts common as to property by an ascendant of the wife, when the conditions there imposed make it equivalent to a sale. Hence, real estate given becomes community property, which the husband as head of the community may effectively hypothecate; and in the event of the gift being cancelled by a judgment, the creditor (mortgagee) may take an action in recognition of hypothec against the donor who has resumed possession of and holds the hypothecated property. The judgment cancelling the gift had no other effect than to restore the property to him in the state in which it was when the judgment was pronounced, and in any event, the judgment is not *res judicata* as against the creditor, who was not a party to the suit. *Lebrun* v. *Sevigny* (1910), 39 Que. S. C. 139.

Conditional gift inter vivos.]—The donor *inter vivos* who, in return for the property given, has obliged the donee, by a clause in the deed, to furnish the donor with lodging, food, clothing and other necessaries of life, has a right of action, in the event of life in common with the donee becoming impossible, to be authorised to live separate from the donee and to have converted into a money alimony the value of obligations provided for by the deed of gift. *Laplante* v. *Fontaine*, 37 Que. S. C. 128.

Conditions—*Acceptance —Third parties.*] —Whoever makes a gratuitous conveyance of property has a right to impose such conditions as he sees fit, provided that they be not contrary to law, and he has the right to impose such conditions not only upon the property gratuitously conveyed to him, but also upon any property in the hands of the person to whom the conveyance is made, and the acceptance of the gift by the donee gives full effect to the condition thus stipulated, in so far as it does not prejudice the rights then acquired by third parties. *Desjardins* v. *Michaud*, 8 Que. Q. B. 494.

Contemplation of marriage — *Breach by donee — Recovery of gift.*]—A man and woman were engaged to be married. The man had a claim against the woman for moneys advanced to her or expenued on her behalf, in respect of certain business transactions not connected with their contemplated marriage. The man gave the woman a receipt for the amount of his claim, but no money passed:—*Held*, upon the evidence that the man made the woman a present of the claim in view of the contemplated marriage, and it having been broken off by her act, that he was entitled to recover the amount of his claim. *Williamson* v. *Johnson*, 62 Vt. at p. 383, specially referred to. *Ryan* v. *Whelan*, 21 C. L. T. 406.

Death-bed donation — Recognition of services — Evidence — Onus of proof —

Fiduciary or confidential relationship—Claim for payment for services to deceased person. *Dixon* v. *Garbutt*, 11 O. W. R. 292, 623.

Deed — Mortgage—Fiduciary relationship —Undue influence — Pressure — Misrepresentation — Improvident contract—Voluntary gift — Insanity of donor—Promissory notes. *McGaffigan* v. *Ferguson*, 5 E. L. R. 105.

Deposit in bank—Parent and child—Improvidence. *Anthony* v. *Cummings*, 2 O. W. R. 647.

Donatio mortis causa—Bank deposit in names of donor and donee — Survivorship —Evidence. *St. Jean* v. *Danis*, 1 O. W. R. 790.

Donatio mortis causa — *Banker's pass book—Delivery of.*]—*Held*, that a banker's pass book given upon receipt of a deposit, which was numbered, and in which it was stipulated that the deposit would not be repaid without production of the pass book, is a good subject of *donatio mortis causa*. The book was contemporaneous with the debt, was delivered to the creditor, was essential to the proof of the contract, and the production of it essential before the money could be demanded. The delivery of such a pass book, in anticipation of death, operates as a transfer of the debt due by the bank in respect of the money or deposit, to take effect upon death. *Brown* v. *Toronto General Trusts Corporation*, 21 C. L. T. 28, 32 O. R. 319.

Donatio mortis causa — Deposit in savings bank—Bank book handed to donee—Executors and administrators—Bank entitled to have administrator joined in action by donee—Costs. *Adams* v. *Union Bank of Halifax*, 1 E. L. R. 317, 561.

Donatio mortis causa — *Deposit receipts — Cheques and orders — Delivery for beneficiaries — Corroboration — Construction of statute.*]—McD., being ill and not expecting to recover, requested his wife, his brother being present at the time, to get from his trunk a bank deposit receipt for $6,000, which he then handed to his brother, telling him that he wanted the money equally divided among his wife, brother, and a sister. The brother then, on his own suggestion or that of McD., drew out three cheques or orders for $2,000 each, payable out of the deposit receipt, to the respective beneficiaries, which McD. signed and returned to his brother, who handed to McD.'s wife the one payable to her and the receipt, and she placed them in the trunk from which she had taken the receipt. McD. died eight days afterwards:—*Held*, affirming the judgment in 35 N. S. R. 205, Sedgewick and Armour, JJ., dissenting, that this was a valid *donatio mortis causa* of the deposit receipt and the sum it represented, notwithstanding that there was a small amount for interest not specified in the gift. By R. S. N. S. 1900 c. 163, s. 35, an interested party in an action against the estate of a deceased person cannot succeed on the evidence of himself or his wife, or both, unless it is corroborated by other material evidence.—*Held*, that such evidence may be corroborated by circumstances or fair inferences from facts proved. The evidence of an additional witness is not essential. *McDonald* v. *McDonald*, 23 C. L. T. 135, 33 S. C. R. 145.

Donatio mortis causa — *Evidence — Delivery for safe-keeping.*]—A person on his death-bed handed to his wife, out of a satchel which he kept in a closet of his bedroom, $2,000 in bonds and $1,550 in cash, telling her to "take them and put them away; wrap them up and lock them up in your trunk." At the same time he handed to her a pocket book containing $150, saying that it was for present expenses. A few minutes later he handed to his business partner remaining contents of satchel, consisting of $1,000 belonging to the firm. Subsequently he made a will bequeathing to his wife $3,000, a horse, two carriages, and all his household effects; to his partner his interest in partnership property; to two grandnephews $500 each; and to nieces and nephews the residue of his estate. His private estate was worth about $8,000. When giving directions for the drafting of his will, on the amount of the legacies to his wife and grand-nephews being counted up, he said, "There is more than that":—*Held*, that there was not a *donatio mortis causa* to the wife, the deceased intending no more than a delivery for safe-keeping. *Eastern Trust Co.* v. *Jackson*, 26 C. L. T. 386, 3 N. B. Eq. 180.

Donatio mortis causa — Evidence — Corroboration. *O'Connor* v. *O'Connor*, 2 O. W. R. 737, 794, 5 O. W. R. 10, 701, 751.

Donatio mortis causa — Evidence — *Money and notes — Delivery of keys of box.*] — The defendant's father, a man of ninety-eight years of age, who had been living in her house, was taken suddenly ill, retired to his room and lay down on his bed, and while she was endeavouring to make him comfortable, he handed her a small wallet containing three keys, and said, "All the money and notes I have got are yours." One of the keys was that of a trunk in his room and another of a cash box (in which the money and notes were) in the trunk. There was evidence that he had a foreboding that it would be his last illness, and that he intended to give his property to the defendant. She retained the keys until his death. In an action by the administrators of his estate for the money and notes:—*Held*, that there was a good *donatio mortis causa*. *In re Mustapha, Mustapha* v. *Wedlake*, 8 Times L. R. 100, followed. *Charlton* v. *Brooke*, 23 C. L. T. 286, 6 O. L. R. 87, 2 O. W. R. 684.

Donatio mortis causa — *Future succession — Illegal consideration—Ratification by will—Power of executor—Seisin.*] — Judgment in 8 Que. Q. B. 511, affirmed. *Consumers' Cordage Co.* v. *Converse*, 30 S. C. R. 618.

Donatio mortis causa — *Mortgage.*]—The holder of two mortgages, while very ill and about to start on a journey for the benefit of his health, handed the mortgages and some title deeds to the defendant, telling her that they were for her and that he would execute an assignment of them to her if one were prepared and sent to him. The mortgagee died two months later, no assignment

having been executed by him, and one of the mortgages having been partly discharged by him:—*Held*, that there had not been a *donatio mortis causa* of the mortgages, but merely an incomplete and effective gift *inter vivos*, and that the mortgages formed part of the mortgagee's estate. *Wood* v. *Bradley*, 21 C. L. T. 107, 1 O. L. R. 118.

Donatio mortis causa — *Savings bank deposit book — Trust — Remedy in equity.*]—A deceased person in her last illness, and shortly before her death, handed to the defendant a government savings bank pass-book, in which was credited in the names of the defendant and the deceased a sum of money deposited in their names, and at the same time told the defendant to pay to the plaintiff $400 out of the bank, pay some debts owing by the deceased, and her funeral expenses; to which the defendant assented. The money on deposit belonged to the deceased, but could be withdrawn by the defendant on delivery up of the pass-book, whether before or after the deceased's death: —*Held*, (1) that the pass-book was a good subject of a *donatio mortis causa;* (2) that there was a valid *donatio mortis causa* constituted by trust, and enforceable in equity, in favour of the plaintiff. *Thorne* v. *Perry*, 21 C. L. T. 95, 2 N. B. Eq. R. 146. Affirmed, 35 N. B. R. 398.

Donatio mortis causa — *Savings bank deposit — Delivery of pass book—Evidence —Corroboration.*]—The money at the credit of a savings bank depositor may pass as a *donatio mortis causa* by the delivery of the savings bank book by the depositor to the donee with apt words of gift, the deposit being subject to the condition that no part of it can be withdrawn without the production of the book. Any evidence which is sufficient to prove any fact against the estate of a deceased person is sufficient to prove a *donatio mortis causa;* that is, any evidence which is believed and is corroborated as required by the statute may be acted upon. *Re Reid*, 23 C. L. T. 334, 6 O. L. R. 421, 2 O. W. R. 918.

Donatio mortis causa — *Solicitor and client — Absence of independent advice — Invalidity of gift — Corroboration.*]—*Held*, per Moss, C.J.O., and Garrow, J.A., that where, at the time of the making of an alleged *donatio mortis causa*, the relationship of solicitor and client existed between the parties, who were the only persons present at the time, no previous intimation of the intention to make the gift having been given to any one, nor any disinterested person called in, nor any advice or explanation of the nature of the proposed gift given to the deceased, such gift could not be supported; Maclennan, J.A., dissenting. Per Osler, J.A. —Apart from the question of confidential relationship, the plaintiff's testimony as a litigant making a claim upon the estate of a deceased person in respect of a matter occurring before the death, had not been corroborated by some other material evidence, as required by s. 10 of the Evidence Act. *Davis* v. *Walker*, 23 C. L. T. 83, 5 O. L. R. 173, 1 O. W. R. 1. 745.

Fund deposited with trust company in names of donees — *Executed trust.*]—Mrs. P. deposited with the plaintiffs $3,000 in the names of three of her relatives, the defendants, $1,000 for each, and obtained from the plaintiffs three documents acknowledging the receipt from each of the defendants of $1,000 "in trust for investment," and guaranteeing the payment of interest. Mrs. P. informed the three defendants of what she had done, saying that the money deposited was theirs and they could draw it. She, however, retained the receipts in her own possession, where they remained until her death, and did not inform the defendants of their existence. The cheques for the interest which accrued during Mrs. P.'s lifetime were made payable to the three defendants, but were indorsed by them in favour of Mrs. P., and were cashed by her for her own benefit:—*Held*, that there was a complete and executed trust created by Mrs. P., enforceable by the defendants, the *cestuis que trust*. *Toronto General Trusts Corporation* v. *Keyes*, 10 O. W. R. 86, 15 O. L. R. 30.

Gift inter vivos — *Trust deed of land — Revocation — Non-fulfilment of conditions— Failure to stipulate for right of revocation.*]—A gift *inter vivos* of immovable property, made in trust in the manner provided in chapter 4 A. of title II. of Book III. arts. 981*a* to 981*n*, C. C., intituled "Of Trusts," is subject to the general rules which govern gifts *inter vivos*, and, among them, to that of art. 816, C. C., respecting the revocation of gifts. Hence the right of revocation for non-fulfilment of the contractual obligations of the donee exists only when it has been stipulated in the deed of gift in trust. *Mathison* v. *Shepherd*, 35 Que. S. C. 29.

Intention — Incomplete gift — Loan of chattels — Detention — Replevin. *Jewish Colonization Assn.* v. *Baratz* (N.W.T.), 2 W. L. R. 97.

Inter vivos — *Promissory notes — Evidence.*]—The defendant, by representations that he had been presented by one M., deceased, with several promissory notes, as a gift, a few days before the death of M., induced the plaintiff to give him a new note for the balance due by the plaintiff to M. on the old notes alleged to have been given to the defendant. The notes in question were not indorsed by the deceased, and there was no evidence of the alleged gift apart from the defendant's statement. In an action by the plaintiff, asking that the note given by him to the defendant be delivered up to him:— *Held*, 1. That the evidence of the defendant was inadmissible to prove the fact of the donation alleged, the debt represented by the notes being a civil and not a commercial debt. 2. Even if the defendant's evidence were admissible, the words which he deposed as those which had been used by the deceased, viz., "ces billets, je te les donne au cas ou je mourrais," were not sufficient to establish a valid donation *inter vivos*. *Elkenberg* v. *Mousseau*, 19 Que. S. C. 289.

Marriage portion — *Renunciation of right to benefit from parent's estate — Heirship.*]—Under the old law, as under the Civil Code, it was possible, in a contract of marriage for the future wife, receiving a dowry from her father and mother, to re-

nounce her right to any benefit from their estates. 2. This right of *légitime* continued to exist in the province of Quebec until the date of the Civil Code, but it cannot, since the introduction of the unlimited power of disposing of property by will, be exercised to the prejudice of testamentary dispositions. 3. In order to have a right to *légitime*, the person claiming it must be an heir; to renounce *légitime* is to renounce right of succession. 4. The plaintiff, by a marriage contract made in January, 1853, having accepted certain gifts from her father and mother in lieu of her share in their future succession, thereby renounced in advance her right of succession to her father and mother, and it was held that she could not now claim anything from their estates, since she was not an heir. *Duval* v. *Fortin*, 23 Que. S. C. 392.

Moneys deposited in bank — *Terms of deposit receipt — Testamentary disposition —Costs.*]—Action by John R. Hill against the personal representative of his deceased father, William Hill, for a declaration that a certain deposit receipt and the moneys represented by it were the property of plaintiff and not part of the estate of his deceased father. William Hill, deceased, owned $400 on deposit in the Bank of Ottawa to his credit. He procured from the bank a deposit receipt for this amount "payable to William Hill and John R. Hill, his son, or either, or the survivor." The understanding between William Hill and his son was that it should remain subject to the father's control and disposition while living, and that whatever should be left at his death should then belong to the son. The father's request to the bank manager, upon which the deposit receipt issued, was "to fix the money so that his son John would get it when he was done with it." He told John himself that he wanted him to get the money when he (the father) was gone. He retained the deposit receipt intact in his own possession, and it was found amongst his papers at the time of his death. These facts are deposed to by the son John, the plaintiff:—*Held*, upon plaintiff's own evidence, that the purpose of William Hill, deceased, was to make a gift to his son, plaintiff, in its nature testamentary. As such it could only be made effectually by an instrument duly executed as a will. The father retaining exclusive control and disposing power over the $400 during his lifetime, the rights of the son were intended to arise only upon and after his father's death. This was in substance and in fact, a testamentary disposition of the money, and, as such, ineffectual. Action dismissed. Costs out of funds in question. *Hill* v. *Hill*, 5 O. W. R. 2, 25 C. L. T. 41, 8 O. L. R. 710.

Mortgage — *Deed — Confidential relationship — Undue influence — Pressure — Misrepresentation — Improvident contract — Voluntary gift — Insanity of grantor.*]—W. D. died in 1890, leaving real estate consisting of his homestead and lot A., all of which he left absolutely to his wife H. D., and appointed her and the defendant W. F. executors. In 1898 J. D., a son of W. D. and H. D., being indebted to the defendants W. F. and P. A., became insolvent and assigned to P. A. Nearly all the creditors, including W. F. and P. A., agreed to compromise at ten cents on the dollar, but J. D. made a secret agreement with W. F. and P. A. that they should be paid in full. By arrangement between J. D. and W. F. and P. A., W. F., for J. D., purchased the assets from P. A., as assignee, for $1,000, and for the securing W. F. the balance advanced and balance of his old debt against J. D., H. D. in 1899, being then about seventy-six years of age, without any independent advice, executed to W. F. a mortgage of lot A. for $822.90. W. F. gave J. D. a power of attorney to deal with these assets, who, in the name of W. F., sold and converted them into money to an amount greater than the mortgage. In December, 1899, J. D. arranged that his mother should sell to P. A. lot A. for $900, $200 of it to go on P. A.'s old account against J. D., and $400 by notes made by P. A. in favour of W. F., and which the latter took on his account against J. D. Both the mortgage and deed were written by J. D., and H. D. had no independent advice and had become of feeble intellect. In March, 1900, H. D. made a will leaving all her property to her son J. D. and his family. W. F. drew this will, was named in it as an executor, and had full knowledge of its contents. In December, 1902, J. D., being indebted to W. F. to the amount of $1,250.97, H. D., at the request of W. F. and J. D., gave a mortgage of the homestead to W. F. for $1,250.97 to secure that amount, which was shewn by the evidence to be the total sum due from J. D. to W. F. at that time. H. D. lived practically all the time with J. D., and he had great influence over her, which fact was well known to both W. F. and P. A.:—*Held*, that the first mortgage to W. F., made in March, 1899, was discharged and must be set aside, as obtained through undue influence and pressure on the part of J. D., and solely for his benefit, and on the ground of the mental weakness of the grantor, and that she had no independent advice; that P. A., as he knew the relation which J. D. occupied with regard to the grantor, and all the circumstances in connection with the transaction, stood in no better position than J. D. would stand, and was bound by and responsible for any acts committed by J. D., or omitted to be done by him.—*Held*, that the second mortgage to W. F., made in December, 1902, must be set aside, as obtained through undue influence and pressure on the part of J. D. and W. F., and solely for their own benefit; that W. F. had the same knowledge of all the facts as P. A., and was bound in the same way by the acts and omissions of J. D.; that the grantor had no independent advice, and was so deranged mentally as to be incapable of transacting business. *McGaffigan* v. *Ferguson*, 4 N. B. Eq. 12, 5 E. L. R. 105.

Mortis causa — *Delivery of key to third person.*]—To effect a *donatio mortis causa*, delivery to a third person for the use of the donee is sufficient, provided that such third person is not a mere trustee, agent, or servant of the donor. The assent of the donee, or even his knowledge of the delivery, is not requisite.—Delivery of the key of the desk containing the property constitutes an actual delivery, and transfers the possession of and

dominion over the same. Judgment in 32 N. S. R. 156 reversed. *Walker* v. *Foster*, 20 C. L. T. 196, 30 S. C. R. 299.

Mortis causa — *Ratification by will — Mortgage—Discharge by executor—Rights of legatee.*]—J. A. C., the father of the respondent, had sold land to A. W. M. and C. B. M. for the price (secured by lien *de bailleur de fonds*) of $150,000, of which $50,000 was payable to the respondent after the death of the vendor, who subsequently made a will by which he ratified such gift and delegation of payment. Messrs. M. were the executors of this will. The appellants having become owners of the land by virtue of a title which obliged them to pay the amount due to the respondent, the Messrs. M., in their capacity of executors, gave a discharge of this sum and of the mortgage which secured it. In an action by the respondent *en declaration d'hypothèque*, seeking to set aside the discharge given by the executors:—*Held*, that, even supposing that the delegation of payment stipulated in favour of the respondent upon the sale of the Messrs. M. was void as containing a *donatio mortis causa* by a deed *inter vivos*, that gift was validated by the subsequent will of J. A. C., and the debt in question passed to the respondent with its accessories and especially with the mortgage and the lien *de bailleur de fonds*.—2. Executors having seisin only for the purpose of executing the will, that is to say, for payment of debts and particular legacies, the Messrs. M. had not the power, in this case, to give a discharge to the appellants, there being nothing to shew that there was need of this sum for payment of the debts of the succession; on the contrary, one of the executors, the assignee of the other, had sold the land to the grantor of the appellants subject to the burden of paying the amount of the legacy to the respondent. *Consumers' Cordage Co.* v. *Converse*, 8 Que. Q. B. 511.

Movable property given by a father to his two sons are none the less made by particular title although they may constitute the whole of the donor's estate. *Taillefer* v. *Langevin* (1910), 39 Que. S. C. 274.

Obligation to lodge and board a life-annuitant (rentier) — *Obligations not fulfilled — Third party purchasing property —Conversion of the value of the life-rent into a sum of money—Inscription in law.*]—Upon an action taken at the suit of a life-annuitant, with a view of having converted into a payment in money his right to receive board and lodging from the defendant, who assumed an obligation to that effect, the plaintiff alleging that the defendant is not carrying out his contract with the plaintiff in a proper manner—the defendant cannot, by his plea to the action, allege that the defendant has boarded and lodged the plaintiff in the same manner as himself and the other members of his family, and in the same manner as he was boarded and lodged by his late mother and the predecessors in title of the defendant who were obliged in the same way. — Upon the inscription in law such allegations of the plea will be dismissed, for the reason that, even if they were true, they are not means of defence to the plaintiff's action.—The defendant may board and lodge himself and his family as he deems best, without there being any obligation on plaintiff's part to accept such a state of affairs, and, for the same reason, the way in which the predecessors in title of the defendant of the obligation may have treated the plaintiff cannot change or vary plaintiff's rights either for the present or for the future.—The life-annuitant who has the right to expect board and lodging from the debtor of the life-rent, is not obliged to remain content with the food which the debtor of the life-rent considers sufficient for himself and for his family, but he has the right to be given food suitable to his condition in life and within reasonable limits and such as would be expected by an ordinary boarder in the country.—When, for motives deemed sufficient by the Court, life in common has become impossible, the obligation of the debtor of the life-rent to suitably lodge and board the creditor of the life-rent may be put at a certain value by the Court and converted into a sum of money in spite of an offer on the part of the debtor of the life-rent to continue his obligation by boarding and lodging the plaintiff. *Henault* v. *Goulet* (1909), 16 R. de J. 282.

Obligations — *Payment of debts — Limitation of actions—Acknowledgment by donee —Interruption of prescription—Sale of goods to donor for common use—Remedy against donee—Contract—Sale.*]—Article 797, C. C., in declaring a universal donee personally liable for the totality of the debts of the donor, does not make the donor and donee joint and several debtor in respect of such debts. Therefore, an acknowledgment by promissory note subscribed by the donor, subsequently to the gift, of a debt due by him at the time of the gift, does not interrupt prescription as regards the donee.—The fact that the donor and donee live together does not give rise to any obligation on the part of the latter to pay the debts of the former. One who sells goods to the donor, even for the common use of the two, has therefore no recourse for the price against the donee.—When the property which is the subject of the gift represents the value of the charges imposed on the terms of the gift, it becomes a contract equivalent to a sale, and does not give rise to the obligation of Art. 797, C. C. *Barbe* v. *Ellard*, 15 Que. K. B. 526.

Parent and child — Bounty or bargain — Undue influence — Mental competence. *Thorndyke* v. *Thorndyke*, 1 O. W. R. 11.

Parent and child — Business relationship — Undue influence — Onus. *Fisher* v. *Fisher*, 1 O. W. R. 442.

Parent and child — Confidential relationship — Improvidence — Lack of independent advice — Reference — Account — Inquiries — Statute of Limitations — Costs. *Wendover* v. *Nicholson*, 2 O. W. R. 1108.

Parent and child — *Fiduciary relationship — Influence — Presumption — Onus—Absence of independent advice.*]—For fifteen years before his father's death the defendant managed his father's shop and his business generally, and did all his banking business

under a power of attorney. For eleven years before the death the defendant and his wife and children all lived with the father in a dwelling above the shop. The fullest authority was given to the son and the fullest trust reposed in him. After the death of the father at the age of 78, in September, 1898, the son claimed a sum of $20,000, represented by a bank deposit receipt dated 3rd June, 1898, payable to himself, which he alleged was a gift from his father to himself or his children. He obtained the deposit receipt by drawing a cheque for the amount in his own favour upon his father's account and signing it with his father's name, by virtue of the power of attorney. The father died intestate, leaving the defendant and two other children. The sum of $20,000 represented more than one-fourth of the value of the estate. The trial Judge found that the $20,000 was a gift to the defendant's children, and ordered it into Court for their benefit:—*Held*, reversing that judgment, that, on grounds of public policy, the presumption was that the gift, even though freely made, was the effect of the influence induced by the confidential relationship which existed, and the onus was on the defendant to shew that his father had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances; and nothing of the kind was shewn in the case. *Morley* v. *Loughoran*, [1893] 1 Ch. 736; *Rhodes* v. *Bate*, L. R. 1 Ch. 252, and *Liles* v. *Terry*, [1895] 2 Q. B. 679, followed. Evidence was given to the effect that the deposit receipt was taken in the defendant's name in lieu of a promissory note made by the father in 1895, which itself was a renewal of an earlier note made in favour of the son as a settlement for his children, and that both notes had been destroyed:—*Held*, that the notes, if they existed at all for the purpose alleged, were incomplete gifts, not binding upon the deceased or his estate. The father at the time the transaction was carried out in June, 1898, was not legally bound to pay his note; he was ill and old; and the only adviser to whom he had recourse was the defendant. Therefore that time, and not the time when the notes were said to have been given, was the time at which the gift must be taken to have been made, if at all, and at which the effect of the lack of independent advice was to be considered. *Trusts and Guarantee Co.* v. *Hart*, 20 C. L. T. 65, 31 O. R. 414.

Parent and child — *Fiduciary relationship—Undue influence—Principal and agent—Absence of independent advice.*]—In the case of a gift attacked on the ground of undue influence, something more must be shewn than the mere fact that the donee was the agent of the donor, and in the absence of proof of more the donee is not called upon to shew independent advice. The fact in this case of the donee being the son of the donor was held not to alter the principle applicable, the son being, as was found on the evidence, the agent and business manager of the father; and the gift in question, which was made to the son as trustee for his children in consideration of services rendered by the son, was upheld. Judgment in 31 O. R. 414, 20 C. L. T 65, reversed. *Trusts and Guarantee Co.* v. *Hart*, 21 C. L. T. 493, 2 O. L. R. 251.

Parent and child — Insurance policy—Indorsement—Undue influence — Failure of proof—Costs. *Holderness* v. *Patterson*, 3 O. W. R. 583.

Parol gift of chattel — *Evidence to establish—Delivery.*]—Actual delivery of the thing is a necessary ingredient of a valid parol gift, or, in other words, a gift is a transaction consisting of two contemporaneous acts, the giving and the acceptance, and these acts cannot be completed without an actual delivery of the subject of the gift.—In the circumstances of this case there was not a sufficient delivery of the chattel said to have been given away by the plaintiff.—*Irons* v. *Smallpiece*, 2 B. & Ald. 551, *Cochrane* v. *Moore*, 25 Q. B. D. 57, and *Re Bolin*, 136 N. Y. at p. 180, followed. *Hardy* v. *Atkinson*, 18 Man. L. R. 351, 9 W. L. R. 564.

Personal property — Death of donor — Action by administrator to recover from donee—Evidence. *McLorg* v. *Loppe*, 7 W. L. R. 833.

Possession — *Acceptance — Parent and child — Subsequent sale.*] — The plaintiff's father in his lifetime purchased a piano which, after delivery at his home, he gave to the plaintiff, then living with him. She accepted the gift, and it was afterwards treated as her property:—*Held*, following *Winter* v. *Winter*, 4 L. T. 639, and *Kilpin* v. *Ratley*, [1892] 1 Q. B. 583, that the title to the piano was complete in the plaintiff, and she was entitled to recover it from the defendant in spite of an alleged subsequent sale by the father to the latter. *Tellier* v. *Dujardin*, 16 Man. L. R. 423.

Promissory note — *Want of consideration—Promise to pay — Indorser — Action against maker.*] — *Semble*, that where the payee (deceased) on indorsing a promissory note for the accommodation of the maker promises without consideration to pay it, and the holder compels payment by the payee's estate, an action for the recovery of the amount lies by the estate against the maker. *Johnston* v. *Hazen*, *Re Woodford Claim*, 3 N. B. Eq. 341; *Hazen* v. *Woodford*, 2 E. L. R. 25.

Registration of deed.]—A gift of immovable property in 1849 and varied in 1850 was subject, quite apart from its registration, to its inscription in the books of the office of the Court of the district in which the property was situate, and it took effect only from the date of such inscription. Consequently, a sale by the donee of the property so given, before such inscription, is null and void and the purchaser cannot set up his title in opposition to those having hereditary rights to the property. *Taillefer* v. *Langevin* (1910), 39 Que. S. C. 274.

Replevin — *Concubinage — Partners — Pleading.*]—To an action for replevin of goods the subject of a gift, the defendant may plead that one of the donors was living in concubinage with the donee at the time of the gift.—2. The defendant will not be allowed to plead as against the donee that the gift is void because made by the donor in order to escape his creditors.—3. In replevying articles given by a partnership, it is not

necessary to make all the partners parties if a single one of them is detaining the articles in question.—4. The defendant cannot plead to a saisie-revendication that other creditors are claiming the right to the same articles.—5. *Preuve avant faire droit* will be ordered where the donor alleges that he has sold the articles replevied with the assent of the donee. *Rousseau* v. *Verdon*, 5 Que. P. R. 219.

Revocation — *Condition — Maintenance of donor.*]—A gift is not an onerous gift equivalent to a sale by a reason only that the donee is obliged to lodge, feed, warm, and maintain the donor.—2. A gift may be revoked on the ground of ingratitude when the donee, who is obliged to lodge, feed, warm, and maintain the donor, uses with regard to the donor base and insulting expressions and drives him from the house. *Rousseau* v. *Majeur*, 18 Que. S. C. 447.

Revocation — *Demand — Period of limitation—Bar to action—Pleading — Judicial notice.*]—The period of one year, counting from the breach imputed to the donee, during which a demand for revocation of a gift on the ground of ingratitude must be made, is peremptory, and the law forbids an action after such time has passed. Consequently, according to the terms of Art. 2188, C. C., the tribunal seised of such a demand must apply such prescription of its own motion if the defendant does not invoke it. *Farand* v. *Paulos*, 28 Que. S. C. 200.

Revocation — *Ingratitude — Arrest of donor by donee—Judgment in slander.*]—A donee, who causes to be imprisoned, under a judgment for damages for slander, one of the donors, an old man of 83 years of age and in bad health, thus separating him from his wife, the other donor, also ill, where the donors, who have given all the property they possess, have nothing to pay the damages except an alimentary pension, insasisable and hardly sufficient for their subsistence, which the donee allows them under the terms of the gift, is guilty of ingratitude which has the effect of revoking the gift. *Depatie* v. *Charbonneau*, 22 Que. S. C. 80.

Revocation — *Parties—Co-donee—Transfer of rights — Mortgage — Exception—Demurrer.*]—It is not necessary, in an action for the revocation of a gift on the ground of ingratitude, to bring before the Court as a party one of the donees who has since, as is alleged in the action, transferred all his rights to his co-donee, the defendant, in consideration of a mortgage upon the property the subject of the gift. The neglect to make a party of one whose presence before the Court is necessary affords grounds at the most of a dilatory exception, but does not cause, as a matter of law, the absolute rejection of the demand. *Jacob* v. *Klein*, 3 Que. P. R. 519.

Revocation of gift.]—A gift made in 1849 of immovable property, with substitution in favour of the donor's children, was irrevocable. Hence, a subsequent revocation of the gift and a deed of donation of the same property to others are absolutely null and void. *Taillefer* v. *Langevin* (1910), 39 Que. S. C. 274.

Savings bank deposit — *Instructions — Testamentary instrument — Survivorship — Duty of bank — Trustee.*] — M. deposited money in a bank and wrote to the manager of the bank as follows: "Please put the amount of my deposit, $674.89, in the savings department of your bank in such a way that I can draw it during my life, and after my death it can only be drawn by Mrs. B. E." The manager made the entry in the form of a credit to M. and Mrs. B. E., "payable to either or survivor:"—*Held*, that the legal rights must be decided, after the death of M., by what he instructed the manager to do; what he expressed in the letter was nothing more or less than a testament, and effect could not be given to it, in the absence of the formalities required by the Wills Act. It was not a *donatio mortis causa* nor a gift *inter vivos*. The delivery of the pass book to Mrs. B. E. did not alter the case. The bank was not a trustee for M. during his life and after his death for the defendant. *Spruce* v. *Edwards*, 25 C. L. T. 118.

Simulated donation—*Execution against donor—Opposition — Contestation by creditor—Claim arising after gift.*]—Where the donor does not intend to give and does not divest himself of the thing given, and the donee does not intend to receive the thing as a gift, there is no real donation, and Art. 1039, C. C., does not apply—this article applying only where there is a real contract, and not where the contract is simulated. The thing which is nominally given may be seized, therefore, as being still in the possession of the donor.—2. A person who only becomes a creditor subsequent to the execution and registration of a simulated deed of donation of movables by his debtor, may nevertheless allege and invoke the fact of simulation, in his contestation of an opposition, based on such pretended deed of donation, made to a seizure effected by the creditor. *Lighthall* v. *O'Brien*, 6 Que. S. C. 159, approved. *Sisenwain* v. *Roque*, 23 Que. S. C. 115.

Sum of money — *Equivocal possession—Evidence—Presumption—Claim by universal legatee after death of donor.*]—A universal legatee bringing an action for the recovery of a sum exceeding $50 from a person holding that sum and claiming it as a gift from the testator, may establish the precariousness of the possession by the aid of the ordinary simple presumptions, supplemented by oral testimony, when it is procurable, of the admission of the claimant that his possession has an equivocal character; for example, where the money at the time it was handed to him was placed by him in a receptacle belonging to the testator, but in the possession of the claimant, from which he did not remove it until after the death of the testator. *Saint-Sauveur* v. *Ouellette*, 33 Que. S. C. 330.

Undue influence —*Confidential relations —Evidence—Parent and child—Public policy—Principal and agent.*] — The principle that, where confidential relations exist between donor and donee, the gift is, on grounds of public policy, presumed to be the effect of those relations, which presumption can only be rebutted by shewing that the donor acted under independent advice, does not

apply so strongly to gifts from parent to child or from principal to agent. Thus, in case of a gift to the donor's son, for the benefit of the latter's children, when the son had for years acted as manager of his father's business, when he was the only child of the donor having issue, and when the donor, nine years before his death, had evidenced his intention of making the gift by signing a promissory note in favour of the son, by renewing it six years later, and by voluntarily paying it before he died, such presumption does not arise. Judgment of the Court of Appeal, 2 Q. L. R. 251, 21 C. L. T. 493, reversing that of a Divisional Court, 31 Q. R. 414, 20 C. L. T. 65, affirmed. *Trusts and Guarantee Co.* v. *Hart*, 23 C. L. T. 36, 32 S. C. R. 553.

Undue influence — Fiduciary relationship—Transaction between trustee and beneficiary. *Wright* v. *Kaye*, 2 E. L. R. 47.

Universal gift — *Liability for debts of donor—Several liability of both donor and donee—Prescription—Interruption—Acknowledgment by donor—To whom credit given.*] —The effect of Art. 797, C. C., in declaring an universal donee personally liable for the whole of the debts of the donor is to make them both jointly liable for such debts. Therefore, an acknowledgment by a promissory note signed by the donor subsequent to the gift interrupts the prescription of the debt as against the donee.—The vendor of goods and merchandise for the common use of a father and son, who live together, has the right to recover the price of them from the son, who has become the universal donee of the father, although the vendor has entered them in his books in the name of the father, according to the practice which he had adopted before the gift. *Ellard* v. *Barbe*, 29 Que. S. C. 165.

Universal gift inter vivos — *Liability of the donee for the debts of the donor at the time of the gift—C. C. 795, 796, 797, 798.*]—According to the provisions of Arts. 797 and 798, C. C., the universal donee by gift *inter vivos* is personally responsible for the debts due by the donor at the time of the gift, even if the gift be onerous. If the donee, however, is within the conditions provided for by Art. 798, C. C., he may release himself by rendering an account and abandoning everything received by him under the deed of gift. *Brown* v. *Robb*, 16 R. de J. 196.

Use of chattels during lifetime — *Possession — Prescription — Will—Legacy.*] —*Held*, that, even if family portraits passed under a donation, for the use of the respondent's wife, of furniture, pictures, paintings, engravings, etc., yet this donation, having effect only during her lifetime, lapsed at her death, and the appellant, as the special legatee of the portraits under the will of the donor, became entitled thereto.—2. The respondent, as one of the executors of the donor's will, having knowledge of the fact that the portraits were bequeathed to the appellant, had no possession which could serve for purposes of prescription. *Hart* v. *Hart*, 12 Que. K. B. 508.

See DOWER — EQUITABLE ASSIGNMENT—EXECUTION — FRAUD AND MISREPRESENTATION—FRAUDULENT CONVEYANCE—HUSBAND AND WIFE—LIMITATION OF ACTIONS—PARENT AND CHILD—PENSION ALIMENTAIRE—REGISTRY LAWS—TRUSTS AND TRUSTEES—WILL.

GOAT.

See ANIMALS.

GOLD COMMISSIONER.

Jurisdiction—Grant of water privileges —Water regulations — Construction—"Protest"—Mining recorder—Mining regulations —Appeal—Costs. *Graves* v. *McDonnell* (Y. T.), W. L. R.

See MINES AND MINERALS — WATER AND WATERCOURSES.

GOLD DUST.

See ATTACHMENT OF DEBTS.

GOODWILL.

See CONTRACT — COVENANT — ILLEGAL DISTRESS — PARTNERSHIP — RAILWAY — TRUSTS AND TRUSTEES.

GOVERNMENT RAILWAY.

See CROWN.

GOVERNMENT RETURNS.

See BANKS AND BANKING.

GRAIN EXCHANGE.

See BROKER.

GRAND JURY.

See CRIMINAL LAW—CONSTITUTIONAL LAW —MALICIOUS PROSECUTION AND ARREST.

GRAND TRUNK RAILWAY COMPANY.

See CRIMINAL LAW—MANDAMUS—RAILWAY.

GRAVEL.

DEED.

GREAT LAKES.

See CONSTITUTIONAL LAW.

GROSS NEGLIGENCE.

See WAY.

GUARANTEED INSURANCE.

See INSURANCE.

GUARANTY.

Action on — *Contract for one year — Extension of time given principal—Release of sureties.*]—Defendants signed guarantee for coal dealers for a prospective quantity of coal approximating 100,000 tons, to be handled during the year commencing April, 1907. The agreement stated that defendants would be responsible for "all coal" shipped. The evidence shewed that it was the usual custom of plaintiffs to make new contracts each year, also that all coal shipped in one month was paid for during the next month. In 1908 a change was made in the mode of payment, plaintiffs taking notes at 30 days instead of cheques, which continued to August, 1909,—Sutherland, J., *held* (16 O. W. R. 758, 1 O. W. N. 1102), that defendants were released, plaintiffs having given extension of time in principal, and that the contract should be limited to one year and to 100,000 tons, on the ground "that the surety is not to be charged beyond the precise terms of his engagement:" De Colyar, p. 41. Divisional Court affirmed above judgment. *Arlington* v. *Merricke*, 2 Wm. Saunders 415, followed. *Danby* v. *Coutts*, specially referred to. *Sanson* v. *Bell* (1809), 2 Camp. 39, head note, misleading. *Pittsburg-Westmoreland Coal Co.* v. *Jamieson & Williams* (1910), 17 O. W. R. 61, 2 O. W. N. 121.

Action on — Defence — Entered into by misrepresentation—Findings of jury—Judgment for plaintiff with costs. *Bank of Toronto* v. *Bier* (1911), 18 O. W. R. 844, 2 O. W. N. 897.

Action on — Defence of payment — Evidence — Receipt—Application of payment — Unsecured debt—Scope of guaranty—Subsequent supplies—Amount of liability—Reference—Costs. *Woods-Norris Limited* v. *Cobalt Nipigon Syndicate*, 12 O. W. R. 1135.

Application of payment — *Unsecured debt.*]—Action for $317 baiance of an advertising account. Defendant H. had guaranteed account of the company, his co-defendants, up to $3,000. The main dispute was over $500 which it was held company had paid on general account. Giving a guarantee for a fixed amount does not prevent the incurring of a debt beyond that unless the contrary is clearly expressed. The guarantee covered not past but future advertising. *Woods* v. *Cobalt*, 12 O. W. R. 1135.

Co-guarantors — *Liability.*] — A joint guarantee was given by McF. and C. for performance of a contract by C. Under this McF. paid a large amount in the United States, and now sued for contribution. Defendant had not been made a party to the proceedings in the United States. Defendant demanded full particulars:—*Held* (Peters, J.), that to render C. liable it must be shewn in this suit that McF. was legally bound to pay the money paid by him and that full particulars must be given. *McFarlane* v. *Calhoun* (1879), 2 P. E. I. R. 283.

Conditional promise to pay debt *of another—Formation of partnership—Assignment of money claim—Order for payment.*]—Action to recover from defendant W. upon an alleged guaranty:—*Held*, that as the document purporting to contain this guaranty was conditional on formation of a partnership, W. is not liable. *McDirmott* v. *Cook*, 13 O. W. R. 904.

Consideration — Novation — Statute of Frauds. *Bailey* v. *Gillies*, 1 O. W. R. 325, 4 O. L. R. 182.

Construction — Future liability. *St. Lawrence Steel and Wire Co.* v. *Leys*, 2 O. W. R. 624, 3 O. W. R. 80, 6 O. L. R. 235.

Continuing security — Death of guarantor—Liability of estate of guarantor — Power of executors to continue and extend guaranty—Variation in risk—Increase of indebtedness of principal debtor—Discharge of guarantor's estate—Statute of Limitations—Simple contract debt—Merger in specialty—Construction of agreements under seal. *Union Bank of Canada* v. *Clark*, 12 O. W. R. 532, 14 O. W. R. 298.

Duration of — *Promissory notes — Payment.*]—Where a guaranty given by the defendant to the plaintiff was, that, in consideration of his indorsement for one F. of certain promissory notes given by him for the purchase of a bankrupt stock, he, the defendant, would guarantee the due payment of such notes at maturity, provided he was not called upon to pay in all more than $2,000, the effect thereof was, that it was to continue in force to the full extent of $2,000 until the last of the notes was paid, and the defendant could not before such event relieve himself from liability by transmitting to the plaintiff $2,000 which he had received from F., being the proceeds of a portion of the stock. *Struthers* v. *Henry*, 21 C. L. T. 124, 32 O. R. 265.

Endorsed note.] — Plaintiff alleged that he had, under a mistake of fact, paid defendant company $240 on a note which he had endorsed "without recourse":—*Held*, that plaintiff had full knowledge of all the facts and had voluntarily paid the $240, and the action should be dismissed with costs. *Gordon* v. *Case Thresher Machine Co.* (1909), 15 O. W. R. 9.

Fidelity bond — Agent of insurance company—Advances to agent and premium not paid over—Construction of bond—Application to existing agreement between agent and company—Withholding from surety information as to material facts—Release. *Chicago Life Insurance Co.* v. *Duncombe*, 10 O. W. R. 425.

Fidelity bond — *Consideration — Seal — Employment of principal — Right of action against surety.*]—Action upon a fidelity bond:

—*Held*, that surety is liable on the bond, notwithstanding the contract between principal debtor and plaintiffs was not executed until after the execution of the bond. The surety cannot compel the plaintiff to sue the principal debtor first. *Great West* v. *Walker* (1909), 14 O. W. R. 95.

Fidelity bond — *Employer and employee—Bank officials—Duty and responsibility of—Teller's cash — Examination and checking of—Proximate cause—Expenses of following defaulter — Right to deduct from sum recovered—Indemnity—Subrogation.*]—The defendants, a guarantee company, gave the plaintiffs a bond whereby they agreed to indemnify the plaintiffs to the extent of $5,000 in the case of a paying teller, and of $6,000 in the case of an accountant of the bank, against "all and any pecuniary loss sustained by the plaintiffs directly occasioned by dishonesty or negligence or through disobedience of direct and positive instructions on the part of those persons in connection with their duties in the plaintiff's service . . . The bond also contained a provision whereby the defendants were exempted from liability for acts or omissions of any employee in pursuance of any instructions received by him from the employer or a superior officer, or for mere errors of judgment or *bona fide* mistake on the part of the employee—also a provision requiring the plaintiffs when required by the defendants, and at their cost, to assist them in every way in bringing to justice any employee for a criminal offence entailing loss upon the employer, and procuring the reimbursement to the defendants by the defaulting employee or his estate of any money paid by or recoverable from the defendants by reason of such defalcation. On a Saturday the teller stole from the plaintiffs a large sum of money, and absconded from Canada. The moneys were properly in his custody until the close of the day, when it was his duty to deposit them, along with the other moneys and securities in his possession, in the bank vault, having first submitted his cash to examination and checking by the accountant, whose duty it was to perform this office in the absence or by the direction of the manager. On the day in question the accountant certified to the correctness of the teller's statement, in which the stolen money was included. Its absence was discovered on the opening of the teller's cash-box on the following Monday, the teller having taken it with him when he left the bank on Saturday. No steps were taken by the defendants towards following or apprehending the teller, but the plaintiffs, without communication with the defendants, took active steps and finally succeeded in apprehending him and recovering from him a large part of the stolen money. In so doing they incurred expenses to a large amount, which they claimed to be entitled to deduct from the recovered money, and to hold the defendants responsible for the deficiency, after making such deduction, up to the amount in which the defendants were liable in respect of both officials:—*Held*, (1) that the loss of the money was "directly occasioned," not merely by the dishonesty of the teller, but also by the negligence of the accountant, and that the defendants were therefore liable under their bond in respect of both. *Bascendale* v. *Bennett*, 3 Q. B. D. 525., distinguished. —2. The contract between the parties was in effect, one of indemnity, and the plaintiffs were therefore entitled to deduct all such reasonable expenses as were incurred by them in recovering the money, from the amount recovered from the teller, and were only bound to account to the defendants for the surplus after such deduction.—Application of the doctrine of subrogation to guarantee insurance. *Hatch Mansfield & Co.* v. *Weingott*, 22 Times L. R. 306, followed. *Crown Bank* v. *London Guarantee & Accident Co.*, 1 O. W. R. 1070, 12 O. W. R. 349, 17 O. L. R. 95.

Fraud of creditor — Bill of sale—Extra-provincial company — Goods supplied debtor in excess of sum guaranteed. *Hency Co.* v. *Birmingham* (N.B.), 6 E. L. R. 385.

Joint and several contract — *Material alteration in instrument after execution by two of four guarantors—Release of all four guarantors — Husband and wife—Wife executing without independent advice—Absence of explanation — Fraud — Circumstances to put plaintiffs on enquiry—Non est factum.*]—Action on guaranty:—*Held*, that the guaranty was joint and several. A change was made in the document after T., one of the guarantors, signed, therefore she is discharged, and as it is joint and several, the others who signed after the change are also discharged.—*Held*, further (1) that T. had signed without any explanation at the request of her husband and is released; (2) that as to defendant M., the plaintiffs were negligent, and their suspicions should have been aroused that deception was practised on her. Action dismissed. *Canada Furniture Co.* v. *Stephenson* (1910), 12 W. L. R. 603.

Letters — *Construction—Ambiguity—Intention of parties — Consideration — Statute of Frauds.*]—The plaintiff wrote the following letter to the defendant: "Mr. W. R. Bailey, of Wolseley, has called upon us to-day and placed an order with us for confectionery stock. Mr. Bailey informs us that you are backing him up financially and asks us to write you to this effect. Please be good enough to let us know by return mail if you will hold yourself responsible for his account with us. We may state that Mr. Bailey has placed a very modest order with us, and thanking you in advance;" to which the defendant replied as follows: "Yours received to-day asking me about Mr. Bailey. Yes, he is honest, a good business man. I have backed him before and no trouble, I am willing to help him any time on his papers;" which letter was acknowledged by the plaintiffs in the following terms: "Your favour of February 15th is received. We thank you very much for your information, and beg to state that we hold a high opinion of Mr. Bailey, and as he mentioned to us that you were backing him up, it was for our own information instead of applying to our commercial agencies that we thought it better to write to you direct." The plaintiff alleged that the defendant thereby guaranteed Bailey's account and sued him for the recovery of the amount of such account:—*Held*, *per* Newlands and Johnstone, JJ., that in construing a contract in which the terms are at all ambiguous, such construction must be placed on the words as will make the act of the parties operative; and, in the present case, the defendant having answered

the plaintiff's letter in such a way as to lead a reasonable man to believe that he was guaranteeing Bailey's account, the document should be construed as an effective guarantee.—*Per* Prendergast and Lamont, JJ., that in construing such a contract all the circumstances must be taken into consideration, and in the circumstances of the present case, particularly in view of the plaintiff's last letter, the defendant's letter should not be construed as more than an offer to endorse the paper of Bailey.—*Held*, also, *per curiam*, that a memorandum guaranteeing the debt of another is sufficient to satisfy the Statute of Frauds, even if the consideration is not stated in writing.—Judgment in 1 Sask. L. R. 35, 7 W. L. R. 312, affirmed by a divided Court. *Laird* v. *Adams*, 1 Sask. L. R. 352, 7 W. L. R. 881.

Liability of surety — Guaranteeing purchase price of goods—Absence of writing—Agreement to indemnify against loss—Statute of Frauds—Failure to prove agreement—Liability of guarantor as purchaser. *Fraser* v. *Heaslip* (Man.), 4 W. L. R. 520.

Payment for goods supplied — Letter — Undertaking — Liability — Estoppel — Statute of Frauds — Interest of guarantor. *Harrison* v. *Copper and Turville*, 11 O. W. R. 817.

Promise to pay company's liabilities —*No consideration—No intention to become personally liable.*]—An action on an alleged promise in the nature of a guarantee by defendant to pay the amount of plaintiff's judgment against the Charles B. Lentz Lumber Company, if plaintiffs would withdraw their execution placed in the sheriff's hand against said company. At the trial plaintiffs were awarded judgment for the amount claimed, and costs:—*Held*, that all the circumstances indicated that it was far from the intention of a stranger, Milne, to shoulder personally the company's liability in any event.—Judgment at trial set aside and the action dismissed, with costs. *Young* v. *Milne* (1910), 15 O. W. R. 379, 20 O. L. R. 336.

Scope of—*Appropriation of payments — Security.*]—Security given for a time certain, as a guaranty of a debt overdue and of a credit to be opened, cannot be considered as a general guaranty and applicable to all the sales which are made to the debtor during the time covered by the guaranty; it must be restricted to the debt overdue and to the limited credit mentioned in the agreement; and the surety is entitled to appropriate against these two special debts the amounts paid by the debtor after the security is given. *Borgfield* v. *La Banque d'Hochelaga*, 28 Que. S. C. 344.

Simple guaranty — *Taking up the suit of another — Intervention.*]—The guarantor in a simple guarantee not being permitted to take up the cause of the warrantee cannot intervene to contest it in a suit against the latter. *Cf. Croteau* v. *Athabaska Water & Power Co.*, 30 S. C. R. 128. *Gingras* v. *Price Bros.* (1909), 36 Que. S. C. 512.

Written statement — Mercantile agency—Creditor not privy to—Statute of Frauds—Sale of Goods. *Harris* v. *Stevens*, 1 O. W. R. 109.

See BANKRUPTCY AND INSOLVENCY — BANKS AND BANKING — BILLS AND NOTES — COMPANY — COSTS — CONTRACT — CONTRIBUTION — HUSBAND AND WIFE — INSURANCE — LIS PENDENS — MORTGAGE — PAYMENT — PRINCIPAL AND SURETY—RECEIVER —SOLICITOR—TRESPASS TO LAND.

GUARDIAN.

Action on behalf of ward — *Disbursements—Action in formâ pauperis.*]—A tutor is not obliged to make disbursements out of his own money in an action begun on behalf of his ward; he will be allowed to proceed *in formâ pauperis* if the ward has not the necessary means. *Bell* v. *Montreal Lithographing Co.*, 2 Que. P. R. 90.

Costs—*Right to retain.*]—A guardian appointed by the Court has a lien and right of retention, from the time of the affixing of the official seal, for his costs as such guardian. *In re Watson and Trudeau*, 7 Que. P. R. 74.

Removal — *Action or petition.*] — Proceedings for the removal of a guardian ought to be by action and not by petition. *Ex p. McNicholl*, 7 Que. P. R. 50.

Socage — *Parent.*]—As a mother can now inherit from her children, she is no longer capable of acting as their guardian in socage. Guardianship in socage may be considered as gone into disuse, and it can hardly be said to exist in the province. *Hopper* v. *Steeves*, 34 N. B. R. 591.

See COURTS—EXECUTION—HUSBAND AND WIFE — INFANT — LUNATIC — MONEY IN COURT.

GUARDIAN AD LITEM.

Incapacity of defendants — No necessity for appointment—Rule 221. *Wilson* v. *Pringle*, 11 O. W. R. 210.

Petition for possession of effects—*Opposition not decided — C. P. 624.*] — A guardian not being considered as representing the goods seized as long as an opposition to their seizure is not decided, a petition on his behalf to obtain possession of them will not be granted. *Laverdure* v. *Guertin & Montplasir* (1910), 11 Que. P. R. 293.

HABEAS CORPUS.

Adjournment — *Expenses—Costs—Discretion—Leave to appeal.*]—When the officer or other person to whom a writ of *habeas corpus* is directed has obeyed it by bringing up the body and making his return, the Judge or Court may make an order for payment by the applicant of the expenses of such officer or person. Dodd's Case, 2 De G. & J. 510, followed. The costs of proceedings by *habeas*

corpus are governed by s. 119 of the Judicature Act, R. S. O. 1897, c. 51, and are therefore in the discretion of the Court or Judge. *Regina* v. *Jones*, [1894] 2 Q. B. 382, followed. Where, in obedience to a *habeas corpus*, the person to whom it was directed produced the body of an infant before a Judge in Chambers, and filed affidavits in answer to the writ, making his return thereto, and the applicant thereupon applied for an enlargement, which the Judge granted upon condition of the applicant paying to the respondent a sum for counsel fee and expenses, and the applicant appealed from the order embodying such condition to a Divisional Court, which dismissed the appeal, giving the applicant leave, however, to have her original application heard upon payment of the sum already ordered to be paid, and a further sum, the Court of Appeal refused the applicant leave to appeal from the order of the Divisional Court. *Re Weatherall*, 21 C. L. T. 256, 1 O. L. R. 542.

Affidavits—*Irregularity—Crown Rules — Costs.*]—On a motion for a *habeas corpus*, the preliminary objections were taken that the affidavits proposed to be read in support of the prisoner's discharge had not been served upon the interested party, that the affidavits filed were not endorsed with a memorandum stating on whose behalf they were filed, and that the affidavits had been interlined and corrections had been made therein which had not been initialled and rewritten in the margin by the commissioner: Crown Rules 15, 163, 17, 352, 348 and 463:—*Held*, that these Rules governed and the irregularities should not be condoned. The applicant must pay the costs of this application, but should have leave to renew his motion. *Re Hayes*, 21 C. L. T. 87.

Application for — *Forum.*]—An application in vacation for a rule *nisi* for a writ of *habeas corpus* should be made in Chambers. *Re Soy King*, 7 B. C. R. 291.

Application for — *Forum — Districts—Judges—Court of King's Bench—Consent.*]—A person deprived of his liberty, who wishes to obtain the issue of a writ of *habeas corpus*, must make his application for such writ to any Judge who may be in the district in which the prisoner is confined, and who is qualified and authorised to exercise his judicial functions therein.—2. If there be no Judge within the limits of such district, the application for a writ of *habeas corpus* may be made either to a Judge in any adjoining district, or to any Judge in the city of Montreal or in the city of Quebec, according as an appeal from the district where the applicant is confined would be brought to one or the other city.—3. The Court of King's Bench, appeal side, has original jurisdiction at Montreal or Quebec in matters of *habeas corpus* with respect to any person confined in a district from which appeals are brought to one or the other city; but a Judge of the Court of King's Bench has no jurisdiction to grant an order in Chambers in such matter, unless it be first established that there was no Judge within the limits of the district where the prisoner is confined, when the application was made to such Judge of the Court of King's Bench.—4. Where a Court or Judge is not vested with jurisdiction by law, the consent of the parties cannot confer jurisdiction. *Ex p. Tremblay*, 11 Que. K. B. 454.

Exhaustion of writ — *Infant.*]—Where, on the return day of a writ of *habeas corpus*, the respondent appeared, and brought before the Court the child the possession of whom was sought by the petitioner, and the cause was subsequently struck from the roll by the Judge before whom it was pending, without any ulterior day having been fixed for the consideration thereof, and without the respondent having been bound by recognizance to appear on any later day to abide the judgment of the Court, the writ is exhausted, and the respondent and child cannot be forced to appear before the Court without a new writ. *McGovern* v. *McGee*, 16 Que. S. C. 551.

Intervention — *Contestation — Irregularities in procedure.*]—The contestation of an intervention being a defence to such intervention, the petitioner for a *habeas corpus* may with his contestation, even at the hearing of the cause, and without having put his grounds in writing, point out and rely upon all the irregularities in the proceedings by which his liberty has been restrained. *Piché* v. *Garceau*, 7 Que. P. R. 331.

Jurisdiction — *County Court Judge—Liquor License Act—Conviction—Findings of fact—Review.*]—A Judge of a County Court has no jurisdiction to grant an order under the Habeas Corpus Act (Consolidated Statutes c. 41), unless the person applying is confined within the Judge's county. Where there is conflicting evidence in a case for selling liquor contrary to the Liquor License Act, 1896, the finding of the committing justice on questions of fact can not be reviewed on an application for an order in the nature of a *habeas corpus*. *Rex* v. *Wilson*, *Ex p. Irving*, 35 N. B. R. 461.

Petition for — *Territorial jurisdiction—Sentence of competent Court—Certiorari in aid.*]—The Judges of the Superior Court for the district or division within which a person is detained in custody are competent to entertain his petition for a *habeas corpus*.—The remedy by *habeas corpus* not being open to one who is detained in custody by virtue of the judgment or sentence of a competent Court, he cannot demand a writ of *certiorari* in aid to produce the record of the proceedings in which the judgment or sentence has been pronounced. *Ex p. Goldsberry*, 27 Que. S. C. 430.

Powers of Court on—*Infant—Custody—Husband and wife.*]—The writ of *habeas corpus* is a means of preventing all restraint and assuring individual liberty; when there is no restraint, there cannot be an order upon a writ of *habeas corpus*.—2. All that the Court can do upon a writ of *habeas corpus* is to ascertain if there is restraint, and, if there is, to put an end to it.—3. The Court may, according to the circumstances, regard as restraint the taking away and detention of a child under the age of reason, and the withdrawal of this child from the care of his parents; if the child is under the

age of reason, his being taken away from the care of his parents may be equivalent to restraint warranting the issue of a *habeas corpus*, and the right of the parents to have the care of their child, or the duty of the child to return to their care, may be equivalent to the desire to be set free and withdrawn from such restraint.—4. It is only in a case where the child is under restraint, or ought to be considered as being under restraint, and deprived of his liberty, that his return to his father should be ordered upon a writ of *habeas corpus*.—5. The Court would exceed its powers if, after having ascertained that there was no restraint, it should decide upon a contest between the parents for the custody of their children.—6. Although under Art. 243, C. C., the child should remain under the authority of his father until majority, it does not follow that the child should be considered as under restraint when he remains with the mother, she not residing with the father; if the child should be presumed to be under restraint from the fact alone that he draws himself from the paternal authority, he should be considered as under restraint until the age of 21 or until his emancipation.—7. Upon a writ of *habeas corpus* a mother living apart from her husband will not be ordered to restore her son aged seven, who has accompanied her voluntarily, and who wishes to remain with her, to the custody of the father. *Daoust* v. *Schiller*, 2 Que. P. R. 529.

Refusal — *Appeal—Right of — Amendment of conviction and warrant of commitment to cure defect.—"Wilfully."*]—The prisoner was convicted under s. 177 (b) of the Criminal Code, 1892, for an indecent exposure of his person, and sentenced to three months' imprisonment. Neither the conviction nor the warrant of commitment stated, although the evidence tended to shew, that the act had been done wilfully. He then applied for a writ of *habeas corpus*:—*Held, per* Mathers, J., following *Re Plunkett*, 1 Can. Crim. Cas. 365, that the prosecution should be permitted, on the hearing of the application, to substitute new conviction and warrant containing the omitted word; and, the substitution having been made, that the application should be refused, but without costs.—*Held*, also, by the full Court, that no appeal to the full Court lies in this province from the decision of a single Judge refusing a *habeas corpus* application, though a prisoner may make successive applications for the writ to one Judge after another, or he may make a direct application to the Court *en banc*. *Ex p. Woodhall*, 20 Q. B. D. 832, referred to. *Rex* v. *Barré*, 15 Man. L. R. 420, 2 W. L. R. 376.

See ALIENS, ARREST, COURTS, CRIMINAL LAW—DISMISSAL OF ACTION—EXTRADITION —IMMIGRATION ACT — INFANT — INTOXICATING LIQUORS — JUDGMENT DEBTOR — JUSTICE OF THE PEACE—LIQUOR LICENSES —LUNATIC—MILITARY LAW.

HABENDUM.

See DEED.

HAIL INSURANCE.

See INSURANCE.

HALF-BREED SCRIP.

See CONTRACT.

HANDWRITING.

See EVIDENCE.

HARBOUR.

See SHIP.

HARBOUR COMMISSIONERS.

Pilot — *Sentence to pay fine—Notice to pilot — Appearance and Defence—Excessive pilotage.*]—A sentence to pay a fine pronounced against a pilot by the Montreal Harbour Commissioners will not be quashed because the accused was not notified of the inquiry except by letter, if he appeared upon such notice and defended himself against the accusation. 2. The commissioners have no right to condemn a pilot because he has, in pursuance of an engagement with a line of packet boats, piloted more vessels than the commissioners allowed. *Auger* v. *Montreal Harbour Commissioners*, 3 Que. P. R. 553.

See CERTIORARI.

HAUNTED HOUSE.

See DEFAMATION.

HAWKERS.

See MUNICIPAL CORPORATIONS.

HAWKERS AND PEDLARS.

By-law regulating—*Prohibition of trade during certain hours — Reasonableness — Ultra vires — Vancouver Incorporation Act, c. 125, ss. 63, 66, 68, 116.*]—The city of Vancouver passed a by-law practically preventing pedlars from peddling any dairy produce (except milk) or garden or field produce within certain hours, and prevented any person, except a consumer, buying in the market before 10 o'clock in the morning. The defendant was convicted of an infraction of this by-law. On appeal conviction quashed as council had no power to restrict appellant in the lawful exercise of his business. It was also an interference with the right of a citizen to purchase in the most convenient market. *Rex* v. *Sang Chong*, 11 W. L. R. 231.

By-law regulating — *Provision requiring licensee to offer for sale "goods, wares or merchandise."*]—*Held*, that "goods, wares and merchandise" in by-law in question does not include "fish." *Rex* v. *Prosterman*, 11 W. L. R. 141.

By-law requiring license — *Agent for manufacturing company convicted under — Evidence — Onus — Bona fide — Municipal Act, 1903, s. 583 (14) as amended by 6 Edw. VII. c. 34, s. 26.*]—Defendant was convicted by a magistrate under a county by-law for selling stoves and ranges without a pedlar's license. Defendant set up defence that he was an agent of a manufacturing company, and came under the exception in Municipal Act, 1903, s. 583 (14). Magistrate found defendant a purchaser from the company and that the agreement with the company, produced at the trial, was not *bona fide*. On motion to quash conviction, *held*, that the by-law was valid and under 6 Edw. VII. c. 34, s. 26, the onus is upon the defendant to prove that he comes within the exception of the statute. There being no rule in Ontario law that a Judge or other trial tribunal must accredit any witness even though not contradicted, the motion was dismissed. *R.* v. *Coutts* (1884), 5 O. R. 644, especially referred to. *R.* v. *Van Norman* (1900), 14 O. W. R. 659, 1 O. W. N. 35; 19 O L. R. 447.

Samples or patterns of goods to be afterwards delivered — *Form of conviction.*]—The defendant was convicted under the Ordinance respecting Auctioneers, Hawkers and Pedlars, for "going from house to house offering for sale certain books to be afterwards delivered within the said province:"—*Held*, that the conviction was bad because it did not state that defendant was "carrying and exposing samples or patterns" of the goods in question. *Rex* v. *Wolf*, 6 Terr. L. R. 246, 4 W. L. R. 553.

See MUNICIPAL CORPORATIONS.

HEARSAY EVIDENCE.

See EVIDENCE.

HEIRS.

Right to share of money — *Partage.*]—An heir may, before any division of the estate, claim his share of a sum of money which falls by succession to him and his co-heirs. *Prévost* v. *Prévost*, 16 Que. S. C. 556.

See PARTIES—SUCCESSION—WILL.

HEIRS-AT-LAW.

See PARENT AND CHILD—PARTITION.

HENS.

See ANIMALS.

HERITIERS.

See WILLS.

HIGH COURT OF JUSTICE FOR ONTARIO.

See APPEAL — BILLS OF EXCHANGE AND PROMISSORY NOTES — COURTS—EXECUTORS AND ADMINISTRATORS—MINES AND MINERALS.

HIGH SCHOOLS.

See SCHOOLS.

HIGHWAY.

See INSURANCE—MUNICIPAL CORPORATIONS — NEGLIGENCE — NUISANCE — RAILWAY — STREET RAILWAYS — TREES — WAY.

HIRE OF CHATTELS.

Contract — *Condition — Breach — Nullity of lease — False representations — Patented articles.*] — A lessee of machines for making boots and shoes, who undertakes to use them only for making boots and shoes entirely completed with the machines of the lessor, and who is sued for violation of this undertaking, may set up in answer the nullity of the lease for false representations of the lessor that his machines are patented, whereas they are not so, or he has been deprived of the benefit of the patent. *United Shoe Machinery Co. of Canada* v. *Brunet*, 15 Que. K. B. 187.

Expiry of period of hiring — *Hirer retaining possession — Tacit renewal—Notice — Damages — Costs.*]—There can be no tacit renewal of a lease of movables. When the lessee remains in possession after the expiration of the period for which they were leased, the owner can at all times demand that such possession cease and that the movables be surrendered to him. Notice to the lessee, however, is required, failing which, he is not held to be in default, nor liable for damages of costs. *Monarch Manufacturing Co.* v. *Blouin*, 34 Que. S. C. 167.

Revendication — *Insurance—Supposed destruction by fire — Receipt of insurance moneys.*] — The owner of a chattel leased upon condition that the lessee will insure it for the benefit of the lessor, who receives the amount of the insurance after a fire in which it is supposed to have been destroyed, held to have thereby renounced his right of property in the chattel; and he cannot revendicate it subsequently from a third person, especially when he does not offer to reimburse the latter the price he has paid. *United Shoe Machinery Co.* v. *Caron*, 14 Que. K. B. 437.

See BAILMENT — FIXTURES — LANDLORD AND TENANT—TRESPASS TO GOODS.

HIRE RECEIPTS.

See BILLS OF SALE AND CHATTEL MORTGAGES—SALE OF GOODS.

HIRING.

See MASTER AND SERVANT.

HOLDER IN DUE COURSE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

HOLIDAYS.

See ATTACHMENT OF DEBTS—COURTS—DISMISSAL OF ACTION — LANDLORD AND TENANT.

HOLOGRAPH WILL.

See WILL.

HOMESTEAD.

British Columbia Land Act—*Holder of pre-emption record—Occupation — Non-compliance with requirements of Act—Hearing by commissioner—Notice—Waiver—Sections 13, 14, 16.*]—The 30 days' notice required by s. 13 of the British Columbia Land Act is for the benefit of the pre-emption holder, who can waive it, wholly or in part, if he so desires; and, if he does so, the Commissioner has jurisdiction to adjudicate and cancel the pre-emption record before the 30 days have elapsed. And *held*, that the pre-emption holder had waived the notice by requesting the Commissioner to give an earlier hearing and by attending thereon with counsel without objection.—The pre-emptor obtained his record on the 8th January, 1909, and was on the land for the first time thereafter on the 6th March, staying 3 days. He was there again in March, but for no length of time. He next went upon it for 2 nights in May, and again in July—for how long did not appear. After that he was absent from the land continuously to the date of hearing, the 15th February, 1910:—*Held*, that, in view of the spirit of all the sections of the Land Act dealing with pre-emptions, and especially ss. 14 and 16, it was impossible to hold that the Commissioner was wrong in finding that the pre-emption holder had not complied with the provisions of the Act as to occupation. *Re Haselwood* (1910), 15 W. L. R. 52.

Dominion Lands Act — *Agreement to assign interest before patent—Illegality.*]—1. Under s. 42 of the Dominion Lands Act, R. S. C. c. 54, as re-enacted by s. 5 of 60 & 61 V. c. 29 (D.), an agreement made by a homesteader, before issue of the patent and before procuring a certificate of recommendation for patent from the local agent to assign and transfer an interest in the homesteaded land to another person, though made in good faith and for an adequate consideration, is absolutely null and void, and cannot be enforced at the suit of such other person.—*Abell* v. *McLaren*, 13 Man. L. R. 463, not followed.—2. Since the case of *Aubert* v. *Maze*, 2 B. & P. 371, there has been no distinction between *malum prohibitum* and *malum in se* as to anything forbidden by statute.—*Cannan* v. *Bryce*, 3 B. & Ald. 179, and *Wetherell* v. *Jones*, 3 B. & Ad. 221, followed. *Cumming* v. *Cumming*, 15 Man. L. R. 640.

See ASSESSMENT AND TAXES—CONTRACT—DOMINION LANDS ACT — EXECUTION — FRAUDULENT CONVEYANCE — LAND TITLES ACT—MORTGAGE—RAILWAY.

HOMESTEAD EXEMPTION.

See ESTOPPEL—EXECUTION.

HOMESTEAD EXEMPTION ACT.

See EXEMPTION—REGISTRY LAWS.

HOMOLOGATION.

See WAY.

HORSE.

See ANIMALS.

HORSE RACING.

See GAMING.

HOSPITAL.

Action against, for damages for trespass and assault—Youth not of highest intelligence and subject to epileptic fits—Patient in public ward not paying for bare maintenance—Gave consent for operation for enlargement of throat—Parents not notified—No charge for operation — Overwhelming evidence of no irregularity and that operation was for benefit of plaintiff—Jury dismissed—Action dismissed with costs if exacted. *Booth* v. *Toronto General Hospital & Cameron* (1910), 17 O. W. R. 118.

See ASSESSMENT AND TAXES—MUNICIPAL CORPORATIONS—PLEADING—PUBLIC HEALTH.

HOTEL LICENSE.

See INTOXICATING LIQUORS.

HOTCHPOT.

See INFANT—WILL.

HOUSEBREAKING.

See CRIMINAL LAW.

HOUSE OF COMMONS.

See CONSTITUTIONAL LAW.

HOUSE OF ILL-FAME.

See CRIMINAL LAW.

HUSBAND AND WIFE.

1. ACTIONS BY AND AGAINST — PARTIES AND SERVICE, 1937.
2. ALIMONY — ALIMENTARY ALLOWANCES, 1952.
3. BREACH OF PROMISE OF MARRIAGE, 1963.
4. COMMUNITY, 1964.
5. DIVORCE AND SEPARATION, 1968.
6. LIABILITY OF ONE FOR CONTRACTS AND TORTS OF THE OTHER, 1985.
7. MARRIAGE CONTRACT, 1989.
8. MATRIMONIAL OFFENCES, 1997.
9. SEPARATE PROPERTY OF WIFE, 1998.
10. TRANSACTIONS BETWEEN HUSBAND AND WIFE, 2009.

1. ACTIONS BY AND AGAINST — PARTIES AND SERVICE.

Absent husband — *Service—Authorisation of wife as sole defendant.*]—When a husband who is absent is made a party to a cause for the purpose of assisting and authorising his wife, the defendant, and when it does not appear by the report of the bailiff that any attempt has been made to serve him in this province, a petition to a Judge for authorisation by the Court of the wife's being brought before the Court in the action, will be dismissed. *Credit Foncier Franco-Canadien* v. *Dufresne*, 4 Que. P. R. 244.

Action — *Parties—Joint liability.*] — An alimentary debt not being joint or indivisible, a person sued for such a debt cannot require another relative equally liable to be added as a party; but, in such a case, the defendant should be ordered to pay the half only of the alimentary allowances demanded. *Larochelle* v. *Lafleur*, 19 Que. S. C. 358.

Action against spinster — *Marriage before service of process—Motion to dismiss action—Addition of husband as party.*]—An action directed against a woman, described as a "*fille majeure*," will not be dismissed on exception to the form because, between the issuance and the service of the writ, the defendant contracted marriage, if the plaintiff was not made aware of her change of status.—The Court will, however, allow the plaintiff to call in the defendant's husband as a defendant, as head of the community. *Melloon* v. *Coffey*, 7 Que. P. R. 436.

Action against wife—*Appearance without authorisation—Remedy of plaintiff.*]—Where a female defendant, whose husband has been made a party to the suit, appears and files a plea without authorisation of her husband, the plaintiff may ask that she be authorised to *ester en justice*, and that the appearance and the plea already filed be rejected from the record. *Pichette* v. *Lavallée*, 9 Que. P. R. 241.

Action against wife — *Authorisation—Practice—Vacation.*] — The authorisation of a married woman to be a party to an action may be validly pronounced by a Judge of the Superior Court between the 30th June and the 1st September. *Edward* v. *Belleau*, 16 Que. K. B. 341.

Action against wife — *Authorisation—Service on husband.*] — A married woman, whose husband, made a party for the purpose of authorising her, has not been served, may have the action dismissed with costs upon exception to the form delivered by her after having been judicially authorised to appear before the Court.—2. The plaintiff in such a case will not be permitted afterwards to serve process in the action upon the husband so made a party. *Jarvis* v. *Allaire*, 5 Que. P. R. 316.

Action against wife — *Community of property—Absence of authorisation—Nullity—Amendment—Pleading to merits—Costs.*] —The default of authorisation of a wife by her husband, in a case in which it is necessary, imports a nullity which cannot be relieved against, and it follows that an action against a wife, common as to property, without the authorisation and assistance of her husband, is absolutely void; the plaintiff will not be allowed to amend the writ of declaration.—2. If a wife, common as to property, pleads to the merits without being authorised by her husband, the action will be dismissed, each party paying his and her own costs. *Martin* v. *Rankin*, 9 Que. P. R. 192.

Action against wife — *Exception — Authorisation of husband.*]—A married woman, separate as to goods and carrying on business as a public merchant, may, without being authorised by her husband, file in answer to the claim in an action a declinatory exception when an act of simple administration is in question. *Bernstein* v. *Synck*, 7 Que. P. R. 443.

Action against wife — *Exception on ground of want of authorisation—Necessity for authorisation to file exception.*]—A married woman, common as to property, who has appeared separately from her husband, who is also made a defendant and served, and who pleads by way of exception to the form that no authorisation has been obtained for bringing her before the Court, cannot, by such exception, unless authorised and assisted by her husband, plead and invoke such want of authority. *Boistioiti* v. *Bargdadi*, 8 Que. P. R. 44.

Action against wife — *Husband added to authorise wife—Default—Motion for authorisation of Court—Notice to husband.*]—Default of appearance by a husband made a defendant for the purpose of authorising his

wife *à ester en justice* is equivalent to a want of authorisation. In such a case it is not necessary to serve the husband with notice of a motion for an order of the Court authorising the wife. *Morissette* v. *Pouliot*, 9 Que. P. R. 334.

Action against wife — *Infant — Personal service of process—Service on guardian—Irregularity—Exception by defendant —Misnomer of defendant—Absence of prejudice — Other irregularities — Pleading— Marriage contract—Service of notice for authorisation — "Authoriser" — "Assister."*] —A married woman, though an infant, named as defendant to an action, must be personally served with process; if she is not, it is for her guardian to complain of the false service, and not for the defendant herself; if she does so, by exception to the form, it will be dismissed. — 2. The defendant, who is named "Marie Rose Eliza," is not prejudiced by being sued under the name of "Blanche," that being the name by which she signed her marriage contract.—3. The fact that the fiat mentions the name of a person as defendant, whereas the name does not appear in the writ of summons, is not an irregularity which causes prejudice. — 4. The guardian was not appointed until the 11th December, whereas the writ naming him as such was dated the 10th December:—*Held*, that there was no prejudice.—5. When the marriage contract of the defendant is filed, and it appears that she is separate as to property, it is not necessary to mention the fact specially in the declaration.—6. In the Quebec system of procedure, the husband may be served with notice *pour autoriser* his wife or *pour l'assister*, both words having the same meaning. *Gauvin* v. *Bélanger*, 10 Que. P. R. 225.

Action against wife — *Refusal of husband to authorise—Order of Court.*]—Where the husband refuses to authorise his wife *à ester en justice*, and files of record a declaration to that effect, the Court may grant such authorisation. *Lévesque* v. *Fortin*, 9 Que. P. R. 423.

Action against wife alone — *Proof of existence of husband—Admission.*]—If there is upon the record the extra-judicial admission of the defendant that she is a widow, whereas she has been sued alone and asserts that her husband is still living, she must give clear proof of his existence. *Lamarche* v. *Laprade*, 8 Que. P. R. 434.

Action by husband — *Slander of wife.*] —The husband being *dominus* of actions *mobilières* and *possessoires* of his wife, an action for damages for slander of a married woman subject to community of property must be brought by the husband alone, and the Court will not authorise the wife to bring such an action. *Gagnon* v. *Daigneault*, 8 Que. P. R. 32.

Action by husband and wife — *Community—Injury to wife—Action for damages —Wife improperly joined as plaintiff.*]—A married woman, common as to property, should not be joined with her husband as co-plaintiff in an action for damages for personal injuries sustained by her; the action is that of the husband alone, as the head of the community. *Morin* v. *Morin*, 9 Que. P. R. 221.

Action by husband for rent and damages — *Plea that wife is real lessor — Séparation de biens—Head of community— Future rights—Removal of action from Circuit Court.*]—A defendant, being sued for the sum of $20, to wit, $10 rent and $10 damages, pleaded that he rented the premises from the wife, separate as to property, of the plaintiff, and that the action should have been brought by her; he also demanded the removal of the cause from the Circuit Court to the Superior Court:—*Held*, that the defendant, pleading that he had leased the premises from the wife, without saying how and by virtue of what title she was separate as to property, would be bound in spite of such plea to pay his rent to the plaintiff, the head of the community.—Such defence does not involve the affecting of future rights in such a way as to authorise the removal of an action for $20 for rent and damages. *Clarke* v. *Wilson*, 7 Que. P. R. 422.

Action by widow — *Second marriage pendente lite — Legal community — Réprise d'instance—Right of action—Amendment.*]— The widow of a man who was injured, as alleged, by reason of the negligence of the defendants, and died from his injuries, brought an action against the defendants to recover damages for the death, suing as well on her own behalf as in her capacity of tutrix to her infant children, issue of her marriage with the deceased.—While the action was pending and before judgment on the merits, she married again, and became common as to property with her second husband, under the law respecting legal community, and she and her second husband were subsequently appointed joint tutors to the aforesaid infants. By the judgment of the Superior Court of Quebec the action was maintained, and the defendants were condemned to pay damages, $300 to the original plaintiff and $2,700 to herself and her husband as joint tutors to the children. This judgment was affirmed by the Court of Review. The defendants appealed to the Supreme Court of Canada, and there raised an objection not taken below, that the original plaintiff upon her second marriage was deprived of her right of action for the recovery of the damages claimed by her personally, and in respect to this part of the action there had been no *réprise d'instance*. The Supreme Court dismissed the appeal on the facts, and, of its own motion, under ss. 63 and 64 of the Supreme and Exchequer Courts Act, ordered that the record should be amended so as to shew that the $300 was payable to the husband and wife as *communs en bien*. *North Shore Power Co.* v. *Duguay*, 37 S. C. R. 624.

Action by wife — *Absentee husband — Authorisation by Court—Right of action— Inscription in law.*]—The right of a wife, common as to property, whose husband is absent, and who has been authorised by order of a Judge, to bring an action, cannot be challenged by way of exception to the form, but is the subject of an inscription in law. *Brazeau* v. *Lewitt*, 10 Que. P. R. 105.

Action by wife — *Authorisation — Validation of action begun without.*] — So long as judgment has not been given, the wife may demand and obtain, either from her

husband, or, on his refusal, from a competent judicial authority, an authorisation to *ester en justice*, for the purpose of validating her proceedings. *Jaslow* v. *Rosembloom*, 10 Que. P. R. 297.

Action by wife—*Authorisation by Judge pendente lite—Exception to form—Costs.*]—The authorisation of a Judge to a married woman to bring an action, given without proof of the husband's refusal to so authorise her, and without previous notice to him of her demand, is void. The wife may, however, in the course of the suit, before judgment has been pronounced, on proving the necessary facts and giving the necessary notices, obtain a valid judicial authorisation. An exception to the form founded on the above irregularity should be rejected, after the obtaining of the regular authorisation, but with costs against the plaintiff (the wife). *Englar* v. *Rosenbloom*, 35 Que. S. C. 428.

Action by wife — *Authorisation — Possession of land—Security for costs—Procuration—Defence—Petitory claim.*]—A married woman, common as to property, and living in Montreal, although her husband resides in the United States, and who has been authorised by the Court to sue in her own name for the assertion of a personal right in relation to her personal possession of an immovable, is not bound to give security for costs or to produce a power of attorney.—If the action is on disturbance and for repossession of an immovable, the defendant cannot, either personally by way of defence or through the introduction of a defendant in warranty, meet the same by a petitory claim. *Langlois* v. *St. Jean*, 9 Que. P. R. 77.

Action by wife — *Community — Damages for selling liquor to husband—Right of action.*]—An action brought by a wife against an hotel-keeper for selling liquor to her husband after prohibitive notice, is not an exercise of community rights, as the community has no claim against the defendant.— A wife *commune en biens* has an eventual right in the property of the community, and thus suffers damage from acts which diminish the community property. *Duclos* v. *Murray*, 9 Que. P. R. 325.

Action by wife — *Property of community—Revendication — Authorisation of husband—Exception to form.*]—Actions in respect of property of the community must be begun in the name of the husband exclusively; a *saisie-revendication* made, in such circumstances, by the wife, even authorised by her husband, will be dismissed upon exception to the form. *Marcotte* v. *Daoust*, 8 Que. P. R. 310.

Action by wife — *Position of husband—Judgment for separation of property — Default in execution—Exception to the form.*]—Where, in an action by a married woman, her husband is made a party only to authorise and assist her, conclusions demanding a judgment in favour of "the plaintiffs" must be interpreted as if they read "the plaintiff" only.—2. It is for a defendant who sets up default in the execution of a judgment ordering separation of property alleged by the plaintiff, to shew, upon his exception to the form, such default in execution. *Drolet* v. *Bélanger*, 5 Que. P. R. 312.

Action by wife — *Second marriage before dissolution of first—Authorisation of de facto husband.*] — A second marriage contracted in good faith, before the dissolution of the first, produces civil effects, and, until it is declared null, the wife cannot appear in judicial proceedings (*ester en justice*) without her *de facto* husband, or his authorisation. An action brought by her alone and unauthorised will therefore be dismissed on exception to the form. *Fitzallen* v. *Ricutard*, 27 Que. S. C. 296.

Action by wife on behalf of community — *Authorisation — Liability for costs.*]—A wife, common as to property, whose husband is absent, may be authorised to institute an action on behalf of the community, and, if it is dismissed, the property of the community will be liable for the costs incurred. *De Courcy* v. *David*, 33 Que. S. C. 174.

Action by wife separated from husband — *Want of authorisation by Court — Exception to form — Amendment—Costs.*]—An exception to the form is well founded where it demands the dismissal of an action begun by a woman, separate as to person, and not authorised by the Court. Nevertheless, if she asks it, she will be authorised by the Court to sue, on paying the costs of the exception to thee form occasioned by the want of authorisation. *O'Brien* v. *Clavel*, 9 Que. P. R. 217.

Action for injury to wife's reputation — *C. C. P. 174; C. C. 176.*]—A wife common as to property may institute in her own name an action in damages for injury done to her reputation.—When the husband is mentioned in the writ as authorising his wife, his joinder in the action is sufficient authorisation, without it being necessary to especially allege the authorisation. *Laforest* v. *Belanger*, 11 Que. P. R. 80.

Action for enticing, harbouring, and carnally knowing wife — *Evidence of wife to shew rape—Rejection — Proceeding instituted "in consequence of adultery."*]—In an action for enticing plaintiff's wife to desert him, and for wrongfully and carnally knowing her, against her will, the trial Judge rejected the evidence of the plaintiff's wife, which was tendered in support of the allegation that defendant had committed a rape upon her:—*Held*, following *Russell* v. *Dunn* (unreported), that the wife's evidence was properly rejected, she not being a competent witness in such a case.—An action of this kind is, in the words of R. S. N. S. c. 163, s. 36, a proceeding instituted "in consequence of adultery," even if the act complained of was accomplished by force. — Evidence of "harbouring," considered. *Corkum* v. *Corkum*, 40 N. S. R. 488.

Action of tort for personal injuries to wife—*Joinder of parties—Action by husband for loss of his wife's services—Joinder of causes of action—Common Law Procedure Act, 1852, s. 50 — English Order XVIII. Rule 4.*]—*Held, per* Stuart, J., that where a married woman sues in tort to recover damages for personal injuries, and not in respect of either her separate real or personal pro-

perty, it is not only proper to join the husband as a party plaintiff, but, if he is not joined, the defendant can insist upon the joinder, either by motion in Chambers or summarily at the trial of the action.—The husband has a right of action in himself alone for the loss of the services of his wife occasioned by such injury. The wife herself has no cause of action arising from such loss, and she cannot be joined as party plaintiff with the husband in such form of action.—The individual action of the husband for loss of services can be joined with the action of the husband and wife jointly for general damages for the injury suffered by the latter.—*Semble*, that the Common Law Procedure Act, 1852, s. 40, is in force in Alberta, and *quære*, whether English Order XVIII., Rule 4, is in force here or not. *Swan* v. *Canadian Northern Ry. Co.*, 1 Alta. L. R. 427, 8 W. L. R. 662, 9 W. L. R. 275.

Action to compel provision of maintenance — *Necessities—Relatives—Concurrent obligations—Parties—Infants—Tutrix.*]—An action for maintenance may be brought although the claimant, at the date of its institution, is in possession of a sum of money sufficient to supply his or her wants for a short time to come, *e.g.*, in this case, sufficient for about twelve months. It is not necessary that the claimant should wait until the money in hand is totally exhausted before instituting an action to have his right to maintenance determined.—2. The obligation of relatives by blood and relatives by alliance to furnish a maintenance is concurrent, and not successive. The father-in-law may, therefore, be condemned to contribute his proportion of the maintenance of a daughter-in-law, even where it appears that the father is equally able to furnish maintenance. (See 19 Que. S. C. 358.)—3. The mother is entitled to sue for aliment on behalf of her children, without being named tutrix to them. *Larochelle* v. *Lafleur*, 20 Que. S. C. 184.

Affidavit.] — A wife may swear to the affidavit required by Art. 208, C. P., in a proceeding taken in the name of her husband. *Godbart* v. *McPeak*, 20 Que. S. C. 294, 4 Que. P. R. 190.

Addition of wife—*Interest—Pleading—Defence — Action brought by procurement of third person — Irrelevancy.*] — Where a wife appears to have profited, with her husband, by a deed which is sought to be avoided, and the husband is sued alone, the Court will order, upon inscription in law, that the wife be joined as a defendant with her husband.—An allegation in the defence that the action was not brought by the free will of the plaintiff, but by the contrivance of a third person seeking to ruin the defendant for his own benefit, will be struck out as irrelevant. *Quintin* v. *Laramée*, 8 Que. P. R. 265.

Appeal by wife — *Necessity for authorisation by husband—Inscription — Setting aside.*]—A married woman, separate as to property, cannot appeal from a judgment rendered against her upon hypothecary claims, without the authorisation of her husband. An inscription of such a judgment for reveiew made by her alone will be rejected, on motion. *Renaud* v. *Lebeau*, 27 Que. S. C. 360.

Authorisation of wife — *Declaration of widowhood—Estoppel—Husband actually alive.*]—Want of authorisation of a wife under the control of her husband as a party to a suit is a nullity which nothing can cure, and of which all those who have any interest existing and actual may take advantage.—2. In this case, although the defendant passed for a widow, and although she had called herself a widow in certain deeds and writings, such action on her part did not modify her absolute incapacity to be a party to the suit without authorisation, where she swore that her husband was still alive, and the plaintiff had not proved that he was dead. Judgment in 21 Que. S. C. 566, reversed. *O'Malley* v. *Ryan*, 23 Que. S. C. 94.

Authorisation of wife — *Exceptions by wife.*]—A married woman can not take part in litigation, or take exception to a judgment and to the form, without authorisation. When her husband, duly called upon with her to *ester en justice*, does not appear, it is deemed a refusal of authorisation. In this case it was incumbent on the married woman defendant to have the authorisation granted by the Judge before presenting her exceptions. *Charbonneau* v. *Vendette*, 7 Que. P. R. 164.

Authorisation of wife — *Want of—Exception to form.*]—In an action by a married woman, separate as to property, who alleges that she is authorised by her husband, actual want of authorisation must be alleged by way of exception to the form, and an allegation to that effect contained in a defence will be set aside upon motion. *Comtois* v. *Sénecal*, 6 Que. P. R. 307.

Authorisation of wife — *Writ — Declaration.*]—If a married woman is sued as being authorised to be a party, it is not necessary that the authorisation appear upon the writ; it is sufficient if it is alleged in the declaration. *Derose* v. *Derose*, 25 Que. S. C. 273.

Authorisation of wife — *Pleading—Opposition — Swearing to — Proper officer—Costs against wife—Community—Res judicata.*]—It is not necessary to allege specially the authorisation given by a Judge to a married woman to be a party to a cause, if such authorisation appears somewhere in the proceedings for which such authorisation is required.—2. An opposition sworn to before the prothonotary of a district different from that in which such opposition is filed, is, nevertheless, sworn to before a competent officer: Art. 23 C. P.—3. Although costs have been incurred for the purpose of obtaining possession of real estate of a married woman, it does not follow that she should be obliged to pay them in any other quality than as common, when the judgment which has been pronounced against her for such costs has not determined in which quality she is obliged to pay them. Therefore, it cannot be set up, against an opposition alleging that the married woman is only obliged to pay such costs in her quality of common, that, in view of the judgment in the principal action in which she has been ordered to pay costs jointly and severally with her husband, there is *res judicata* as to her liability on this head, and a like ground of opposition will not be

rejected as frivolous upon a motion for that purpose. *Vidal* v. *Latulippe*, 21 Que. S. C. 219.

Community — *Wife as plaintiff—Possessory action — Authorisation.*] — A married woman, common as to property, may maintain a possessory action in regard to the property of the community; upon default of authorisation by the husband, judicial authorisation is necessary. *Langlois* v. *St. Jean*, 9 Que. P. R. 75.

Consent to wife carrying on business —*Effect of filing, as notice—Principal and agent — Undisclosed principal.*] — The mere fact of a married woman filing her husband's consent to her carrying on business in her own name will not enable her to recover as an undisclosed principal against a third party who has purchased goods from the husband, believing that he is dealing with the husband alone, and has credited the price of the goods on an account against the husband for goods sold and delivered. *Murray* v. *Lapierre*, 41 N. S. R. 122.

Consent to wife carrying on business —*Order of Judge.*]—Only the husband, and not a Judge, may authorise a married woman *à faire commerce*. *In re Spinelli*, 8 Que. P. R. 346.

Conservation of wife's personal property — *Intervention.*]—A wife contractually separate as to property may be a party to an action without the assistance or the authorisation of her husband, or of a Judge, when she seeks the administration and conservation of her personal property; therefore, she may alone intervene in a cause for the conservation of her personal property, such a proceeding being only an act of simple administration. *Beauchamp* v. *Beauchamp*, 4 Que. P. R. 400.

Defamation — *Wife suing alone.*]—A married woman common as to property assisted by her husband, or upon his refusal authorised by a Judge, has a personal right of action to protect her honour, and may bring, in her own name, an action for defamation. Such action does not belong solely to the husband as chief of the community, and an exception to the form based upon that ground will be dismissed with costs. *Girard* v. *Tremblay*, 6 Que. P. R. 63.

Defence — *Nullity of marriage—Malice —Preuve avant faire droit.*] — In an action for an account by an infant married woman, assisted by her husband, against her tutor, where the latter pleads, by exception to the form, the nullity of the marriage as contracted without consent, *preuve avant faire droit* will be ordered upon a reply to an exception alleging that such consent has been refused through malice and interest, and against the unanimous feeling of the family council. *Levy* v. *Levy*, 6 Que. P. R. 250.

Husband detaining wife's property— Action of detinue — Proof of demand and refusal — Evidence of conversion. *Lintner* v. *Lintner*, 2 O. W. R. 1117.

Husband separate as to property has a right of action against owner of an animal to recover damages he may suffer from an injury caused by it to his wife. *Caron* v. *Kleinberg* (1910), 39 Que. S. C. 121.

Interdiction of husband — *Petition by wife — Authorisation — Family council — Order of Judge.*]—Where a wife is seeking to have her husband interdicted, she must be authorised by order of a Judge; the decision of a family council cannot be considered as taking the place of such authorisation, the want of which results in a nullity which nothing can cure. *Barbier* v. *Arcand*, 9 Que. P. R. 332.

Joint action — *Defamation—Incidental demand.*]—The action as originally brought by the husband and wife complained merely of the defamation of the wife's character; an incidental demand afterwards added complained of words uttered on the same occasion imputing misdeeds to the husband at the instigation of his wife, which complaint had been by mistake omitted at first:— *Held*, that there was identity in the causes of action contained respectively in the two demands and connection between them.—2. The appellants, being common as to property, had both a cause of action in the two demands, and therefore the incidental demand was properly made by them under the provisions of Art. 215, C. C. P. *Charest* v. *Tessier*, 8 Que. Q. B. 500.

Joint action — *Goods sold — Amendment.*]—The plaintiff was described in the writ of summons as a public merchant, wife of F. A., adding the words "and the said A. to authorise his said wife." The action was for the price of goods sold in the course of the wife's business. The defendant demurred on the ground that, the plaintiff being *commune en biens*, the price of the goods was due to the community, and therefore the action should have been by the husband alone. After service of the demurrer, the plaintiff made a motion to amend the writ by adding "and the said F. A. also personally." This was granted on payment of costs. *Pleau* v. *Clément*, 3 Que. P. R. 406.

Joint defendants — *Appearance — Presumption.*]—A married woman made a defendant to an action jointly with her husband—joined for the purpose of authorising her—is presumed to be regularly before the Court if the parties have appeared by the same attorney and if no protest has been made by the husband. *Brousseau* v. *Déchene*, 17 Que. S. C. 350.

Joint defendants — *Service of process on — Bailiff's report.*] — Service upon a wife, *séparée de biens*, but not *séparée de corps*, of two copies of the writ of summons, one for herself as the principal defendant, and the other for her husband, made a defendant as tutor to the plaintiff's infant children, is sufficient and regular, and is not vitiated by the fact that the bailiff alleges in his report that he served both defendants. *Corbeil* v. *Beaudoin*, 4 Que. P. R. 44.

Joint defendants — *Slander by wife.*]— In an action for damages for slanderous words uttered by a married woman, the defendant's husband cannot be jointly condemned unless he is alleged to have become in any way responsible for his wife's statements, and the conclusions against him personally will be struck off on demurrer. *Camiré* v. *Bergeron*, 3 Que. P. R. 281.

Joint liability — Alternative liability — Election—Estoppel—Evidence—Leave to supply on appeal—Costs. *Matthews* v. *Weller*, 3 O. W. R. 316.

Libel by wife — *Liability of husband — Verdict for $10—Costs.*]—Action against a husband and wife for damages for a libel published by the wife. At the trial in Vancouver the jury returned a verdict in the plaintiff's favour for $10:—*Held*, by Martin, J., following *Seroka* v. *Kattenburg*, 17 Que. B. D. 177, that the husband was liable; and, also, that the costs should follow the event. *Mackenzie* v. *Cunningham*, 22 C. L. T. 43, 8 B. C. R. 206.

Marriage of woman pendente lite— *Rights of husband.*]—If, during the pendency of a suit a woman who is a party to the suit is married, with a settlement under which her property is to be separate from that of her husband, the husband may obtain leave to take part in the suit for the purpose of authorizing his wife, but not on his own behalf. *Toupin* v. *Boule*, 5 Que. P. R. 137.

Married woman — *Action against.*]—If a woman, although separate as to property and engaged in a business as a merchant, is sued without her husband having been cited to authorize it, the action will be dismissed. *Vanasse* v. *Bellefeuille*, 7 Que. P. R. 266.

Married woman sued as widow — *Exception to form.*]—An action against a boarding-house keeper, who was held out and declared herself to be a widow, will not be dismissed on an exception to the form, although the defendant is married and common as to property. *Normandin* v. *Desrochers*, 7 Que. P. R. 93.

Negligence — *Injury to wife.*]—An action for damages for injuries caused to a married woman, common as to property, must be brought by her husband alone, and the action will, upon demurrer, be dismissed as to the wife if she is made a plaintiff. *Major* v. *Paquet*, 6 Que. P. R. 20.

Opposition — *Act of administration — Necessity for authorization of wife — Dismissal of contestation — Reservation of rights.*]—An opposition *à fin de distraire* by the owner of an immovable to withdraw it from seizure, is not an act of administration, within the meaning of arts. 176 and 177, C. C. Therefore, a married woman cannot be brought before the Court in such a proceeding unless authorized by her husband or by order of a Judge.—A Court asked to pronounce upon a contestation of an opposition in such circumstances should simply dismiss it, reserving the rights of the parties. *Valiquet* v. *Stevens*, 31 Que. S. C. 183.

Opposition by wife — *Domicil of husband — Pleading.*]—The matrimonial status of husband and wife being established by the law of the domicil of the husband at the time of the marriage, the wife in asserting an opposition to a seizure must allege her husband's domicil, and no other, and, if she alleges another domicil in her reply to the contestation of her opposition, it will be struck out on motion. *Lemieux* v. *Lionais*, 7 Que. P. R. 341.

Protection order — *Affidavit — Information and belief—Denial.*]—Application for protection order under s. 17 of the Married Women's Property Act, by a married woman. The petition was verified by affidavit "to the best of my knowledge and belief." All the allegations in the petition were denied by an affidavit of the husband. The application was dismissed with costs. *Cochrane* v. *Cochrane*, 21 C. L. T. 87.

Recovery of damages for death of son — *Claim by both husband and wife — Community.*]—In the case of an action to recover damages for the death of a son, the damages and the action to recover them, are personal, and are part of the community of property; and the husband common as to goods has the right to bring such action as the head of the community. When two plaintiffs who sue jointly, designate themselves as husband and wife, without alleging separation as to property, they are presumed to be under a legal community as to property. There is nothing to prevent a husband and wife common as to property from bringing an action jointly concerning the property of the community. *St. Laurent* v. *Telephone Co. of Kamouraska*, 7 Que. P. R. 293.

Slander of wife — *Sole right of husband to sue.*]—In the case of community of goods, the husband has the sole right of action for recovery of damages for slander of his wife. 2. The wife cannot be joined with the husband in the institution of the action, even if the latter acts in his personal capacity and not solely to authorize her; and upon demurrer, the demand of the wife will be dismissed. *Caron* v. *Larivé*, 5 Que. P. R. 332.

Tort — *Personal injuries of wife.*] — A married woman common as to property may be joined with her husband in his claim as head of the community to damages, a part of which is based upon personal sufferings which she has endured. *Prévost* v. *Village of Ashuntic*, 24 Que. S. C. 408.

Wife — *Authorization — Counsel — Service.*]—When a married woman has not been authorized to *ester en justice*, where such authorization is necessary, she cannot choose a counsel, and a motion served upon said counsel, even after she has been judicially authorized, will be dismissed, but without costs. *Laverdière* v. *Drouin*, 8 Que. P. R. 207.

Wife separate as to property — *Marriage contract—Saisie-arrêt before judgment —Authorization.*]—Where a married woman is separate as to property, and it is stipulated by her marriage contract that she shall have the sole administration of her property, she may, without the authorization of her

husband, issue in her own name a *saisie-arrêt* before judgment, which is an *acte conservatoire*. *Cyr* v. *Allard*, 8 Que. P. R. 342.

Wife sued alone — *Absence of authorization—Nullity — Objection — Curing — Costs.*]—Proceedings taken against a wife under the control of her husband, before being authorized either by the husband or by the Court, are absolute nullities, and will be so declared upon demand even after *enquête* and at the argument. 2. Nevertheless, a demand of authorization of the defendant made by the plaintiff also at the argument should be granted. 3. No order can be made as to the costs of the proceedings of either party before such authorization. *Demers* v. *Dufresne*, 4 Que. P. R. 130.

Wife sued alone — *Authorisation by husband — How shewn.*]—In an order that a wife may be regarded as authorized by her husband as defendant to an action, it is not sufficient that he should have assisted during the trial by giving instructions to the attorney and by being present, but it is necessary that such authorization should appear on the record, or that the husband should be a party to the cause with his wife, without which he escapes the jurisdiction of the Court. *Thibaudeau* v. *Désilets*, 10 Que. Q. B. 183.

Wife sued alone — *Defamation—Service of process—Authorization of husband—Execution of judgment — Goods of community.*] — A wife *commune en biens*, defendant in an action, is not validly served with process unless copies of the writ and declaration are served upon her husband as well as upon her. Service at the conjugal domicil, made by leaving with the husband for the defendant a copy of the writ in which the husband is named "to authorize his wife," is insufficient and void. 2. In an action for damages for slander, against a wife under control of her husband, default of authorization of the wife, either by the husband or the Court, vitiates and renders void a judgment recovered against her.—3. The facts that the husband has received from the bailiff the copy of the writ and declaration intended for his wife, that he has chosen the advocate for the defence, and that he has been present at the hearing, do not constitute a sufficient authorization, and the husband has the right to maintain an opposition to the judgment against the wife in an action for damages being executed against the property of the community. *Thibaudeau* v. *Désilets*, 4 Que. P. R. 1.

Wife sued alone — *Money demand — Appearance by husband.*] — The defendant, a *marchande ublique*, was doing business authorized by her husband. An action was instituted against her for a claim arising out of her business, the writ being served upon her personally and not upon the husband. Both the defendant and her husband appeared by attorney on the return of the writ, but did not plead. On an inscription for judgment *ex parte*:—*Held*, that the husband should have been served with the writ, and not having been so served, judgment could not be rendered against the defendant. *Sicotte* v. *Roque*, 2 Que. P. R. 409.

Wife sued alone — *Promissory note — Exception.*]—A married woman, *séparée de biens*, may be sued alone, without her husband, upon a promissory note signed by her; and an exception to the form upon the ground that her husband was not made a party as authorising her, is not well founded. *Fraser* v. *Ogilvie*, 3 Que. P. R. 424, 546.

Wife sued alone — *Separation — Lunacy of husband—Contract of wife—Authorization—Curator—Act of commerce—Exception to form.*]—1. A wife who has obtained a judgment declaring her *séparée de biens*, but has not caused it to be executed, and has in a contract made by her described herself as a wife *séparée de biens*, without mentioning whether such separation is contractual or judicial, cannot set up that her contract is void by reason of the non-execution of such judgment. 2. The curator of the husband declared *interdit* has no capacity to authorize any act of the wife, and, consequently, is not a necessary party to an action against the wife. 3. When a husband is *interdit*, it is for the Court to authorize the wife, and such authorization may be given at any stage of the cause. 4. Keeping boarders is not an act of commerce necessitating marital authorization; and, even if it were, the absence of authorization would not be a ground of exception to the form. *Parizeau* v. *Huot*, 3 Que. P. R. 395.

Wife sued with husband as mis-en-cause — *Failure to serve husband — Authorisation of Court.*]—The plaintiff sued "Dame M. P. D. the wife, separate as to property, of F. J. B., and the said F. J. B., made a party to assist his said wife." Process in the action was served on the wife herself on the 15th November, 1901, at Quebec. It was not served on the husband. The action was entered in Court on the 21st November. On the same day the defendant alone, without the assistance of her husband, and without any authorization, appeared by her advocates. On the 23rd November, the plaintiff served those advocates with a notice of a petition, alleging that the husband had left the country not to return, that it was impossible to serve him, and praying that the Court would authorize the defendant to defend the present cause, which was an hypothecary action:—*Held*, that the wife not being able in such an action to defend without the assistance or the authorization of her husband, or the authorization of the Court, the plaintiff, who sued her as assisted by her husband, and who could not, because the husband had left the country, effect service upon him, should, before bringing the action, have obtained the authorization of the Court. Such authorization should be refused him in the case as it stood, because the wife was not regularly before the Court; and the service which had been made and the appearance which she had entered by her advocates were absolutely void. The question how a married woman may be authorized or served, discussed. *Crédit Foncier Franco-Canadien* v. *Dufresne*, 21 Que. S. C. 108.

Wife suing alone — *Account — Partition.*]—A married woman, common as to property, cannot bring an action for an account and *en partage* unless her husband be made a co-plaintiff with her in the suit. *Giroux* v. *Giroux*, 19 Que. S. C. 372.

Wife suing alone — *Authorisation — Trespass — Release.*]—A wife, common as to property, may, with the authorization of her husband, sue for trespass to her person, such a claim binding the community so that a release granted by the wife in the presence of her husband would be valid. *Laurin* v. *Desrochers*, 17 Que. S. C. 351.

Wife suing alone — *Death — Revivor —Curator — Appointment of—Intervention.*] —The plaintiff, a married woman *séparée de corps*, sought to set aside a sale of land made by her husband, alleging that she was the owner. She died while the action was pending, her succession was declared vacant, and the curator proceeded with the action. The husband intervened, demanding that the appointment of a curator should be set aside, the substitution of himself for the curator appointed, and his being put in possession of his wife's property. The curator opposed the intervention, first, because the husband was already a party to the suit as *mis en cause;* second, because the appointment of a curator can only be set aside in a direct action:—*Held*, without admitting that the intervention was well founded, that it could be set aside upon the grounds alleged. *Carrière* v. *Saint Pierre*, 3 Que. P. R. 299.

Wife suing alone—*Death of child by former marriage — Damages for—Costs.*]— An action for damages for the death of a child born of a former marriage should be brought by the second husband of the victim's mother, if she is *commune en biens* with her husband.—If objection to an action brought by the wife is taken by demurrer *ore tenus*, the action will be dismissed, but without costs of the hearing. *Lefebvre* v. *Dominion Wire Mfg. Co.*, 3 Que. P. R. 224.

Wife suing alone — *Dismissal of action —Petition of husband to set aside.*] — A husband, *commune en biens*, cannot proceed by way of petition to set aside a judgment dismissing the action of his wife on the ground of her incapacity to sue, which ground was raised *ore tenus*. *Lefebvre* v. *Dominion Wire Mfg. Co.*, 3 Que. P. R. 417.

Wife suing alone — *Personal services— Administrator — Notice — Corroboration.*] —A married woman has no right of action for nursing a person boarding with her and her husband, unless there has been a special agreement with her to pay her for such service; and in that case she should sue for it alone. *Young* v. *Ward*, 24 A. R. 147, distinguished.—The claim of a creditor against the estate of a deceased person, whose domicil was in Manitoba, is not barred in a Manitoba Court by failure to sue within six months after a notice under s. 31 of R. S. M. c. 146, repudiating the claim given by an administrator of such estate appointed by a foreign Court, though the letters of administration be afterwards re-sealed in Manitoba pursuant to the Surrogate Courts Act. Such a notice, to be effectual, must be given by the person who is at the time the duly appointed administrator of the estate in Manitoba.—Whilst the evidence of a claimant against the estate of a deceased person should be clear and convincing, and, if not corroborated, will not be readily acted on, there is no absolute rule of law requiring such corroboration in this Province. *In re Garnett*, 31 Ch. D. 1, and *In re Hodgson*, *ib.* 177, followed. *Doidge* v. *Mimms*, 20 C. L. T. 90, 13 Man. L. R. 48.

Wife's remedy against person inciting husband to drink and to ill-treat her.]—When a person incites her husband to drink and to ill-treat her, the wife common as to property has the right to an action in damages which she may institute, upon her husband's refusal to do so, with the authorisation of a Judge. Art. 1288 C. C., which gives to the husband the exercise of all his wife's movable or possessory actions, is merely permissive and does not deprive the wife of her right to herself institute, after being authorised, suits-at-law involving her interests, more particularly when they are exclusively personal to her. *Cote* v. *Richardson* (1903), 39 Que. S. C. 1.

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2. ALIMONY—ALIMENTARY ALLOWANCES.

Absence of evidence of improper conduct *by either husband or wife.*]—Plaintiff alleges abuse, temper, etc., on part of defendant. The young married couple had apparently an occasional tiff, but there was no pretence of any violence or improper conduct by either husband or wife:—*Held*, that the action was wholly unwarranted and should be dismissed. *Forster* v. *Forster* (1909), 14 O. W. R. 796, 1 O. W. N. 93.

Affirmed by Divisional Court. *Forster* v. *Forster*, 1 O. W. N. 419.

Action by wife — *Allowance for self and children.*]—A married woman is entitled to sue in her own name for an alimentary allowance for her own support and that of her minor children, although she has not been appointed tutrix to the children. *Gallagher* v. *McEnroe*, 17 Que. S. C. 204.

Action for — *Wife living under same roof as husband.*]—So long as a wife remains in her husband's house, though occupying a different bed, she is not entitled to alimony. *Forster* v. *Forster* (1909), 14 O. W. R. 796, specially referred to.—When a wife is living with her husband, if he gives her nothing but the shelter of his house, she is entitled to provide food and apparel for herself at his expense and he is bound to pay for them. *Debenham* v. *Melton* (1880), L. R. 5 Q. B. D. 394 at p. 398, followed. *Price* v. *Price* (1910), 16 O. W. R. 260, 21 O. L. R. 454, 1 O. W. N. 977.

Action for alimony tried at Sault Ste. Marie, 27th December, 1909. Britton, J., dismissed the action; the defendant to pay the cash disbursments actually and properly made by the plaintiff's solicitor. *Chesterfield* v. *Chesterfield* (1910), 1 O. W. N. 298.

Action for a reduction—*Must it be asked by action or petition?—Motion for a reduction pending suit—C. P. 117.*]—Plaintiff having elected to seek, by a common law action, a reduction of alimony fixed by a final judgment, cannot by motion ask for such reduction pending suit. *Price* v. *Price* (1910), 12 Que. P. R. 32.

Alimentary allowance — *Liability — Wife's grandmother.*]—A man is not obliged to furnish maintenance to the grandmother of his wife. *Deschênes* v. *Morin*, 35 Que. S. C. 95.

Circumstances justifying wife in leaving husband and living apart—Legal cruelty — Evidence — Income from wife's separate property—Receipt by husband with consent of wife—Right to account —Agreement for payment of weekly allowance — Real Property Limitations Act — Pleading — Account. *Willey* v. *Willey*, 9 W. L. R. 166.

Conduct of husband—*Wife leaving husband — Justification — Right to alimony.*] — A wife whose husband by his conduct makes their living together impossible has a right to leave the conjugal domicil and exact an alimony allowance without being obliged to have recourse to a demand for divorce or *séparation de corps*. To obtain alimony it is sufficient for her to establish that her husband does not provide for her a suitable dwelling place and is not in a position to guarantee her safety and dignity. *Gravel* v. *Lahoulière*, 14 Que. K. B. 385.

Contempt of Court.]—Judge in Chambers will not discharge a prisoner committed by Court of Gov. and Council for contempt in not paying alimony pursuant to decree. *Capell* v. *Capell* (1865), Pet. P. E. I. 183.

Costs in alimony action — Solicitor and client—Rule 800. *Mellor* v. *Mellor* (B.C.), 3 W. L. R. 34.

Cruelty — *Condonation. Reynolds* v. *Reynolds*, 6 O. W. R. 782.

Cruelty — *Condonation—Receipt by husband of income of wife's separate property — Action for arrears of annuity — Real Property Limitation Act, R. S. M. 1902 c. 100, ss. 18, 24—Charge on land by agreement substituted for former agreement—Interest.*]—The plaintiff and defendant married in 1887. In 1892 an action for alimony brought by the plaintiff was settled by the resumption of cohabitation and by the defendant agreeing to pay her $3 per week during her life, in addition to maintaining her according to his station in life. The parties lived together until April, 1908, and during all that period seemed on the whole to have got along fairly well together. The defendant's conduct towards the plaintiff was, according to the findings of fact, often morose and unkind, and he sometimes swore at her, and he displayed none of that sympathetic consideration for his wife which a husband ought to shew, but the only act of violence charged since the settlement of 1892 was one which had taken place in 1904 and had been provoked by the plaintiff, who was quick-tempered and irritable and often made no attempt to control either her language or her actions:—*Held*, that the plaintiff had not made out a case of legal cruelty, as defined by the decided cases, entitling her to live apart from her husband. *Russell* v. *Russell*, [1897] A. C. 395, followed. *Lovell* v. *Lovell*, 13 O. L. R. 569, distinguished. When a husband receives the income of his wife's separate estate and disburses it for the purpose of their joint establishment, he cannot be called on for an account, unless the wife can prove that he received it by way of loan. *Rice* v. *Rice*, 31 O. R. 59, and *Edward* v. *Cheyne*, 12 App. Cas. 385, followed. The agreement of 1892 made the payments of $3 per week a charge on the defendant's lands. In 1900, in order to permit him to raise a loan on the land so charged, the plaintiff gave him a quit claim deed, on the understanding that another agreement of similar tenor would at once be executed and registered after the mortgage. This was done, but nothing had ever been paid under either of these agreements:—*Held*, that, in the absence of a plea based on s. 24 of the Real Property Limitation Act, R. S. M. 1902 c. 100, the defendant was liable for the arrears of the annuity from the date of the first agreement, with interest, however, for the last six years only, the whole being a charge on the lands referred to. *Willey* v. *Willey*, 18 Man. L. R. 298, 9 W. L. R. 166.

Cruelty — *Evidence of — Amount of alimony allowed.—Bugg* v. *Bugg* (1910), 1 O. W. N. 939.

Cruelty — *Insufficient evidence of—Non-revival of prior condoned acts.*] — The Courts scrutinize very closely retaliatory acts of alleged violence and cruelty on the part of the husband arising out of the wife's headstrong and irritating conduct, and will refuse unless such acts are accompanied by intemperate and excessive violence to call them acts of cruelty, and so effective in reviving prior condoned acts of cruelty and misconduct. In 1895 the plaintiff and defendant, who prior thereto had been living together, were married, but thereafter only lived together at intervals, the plaintiff living apart from defendant, and carrying on what she called a hospital for pregnant women. In 1904, on the defendant insisting on it, the plaintiff returned to the defendant's house, everything going on satisfactorily until the plaintiff desired to carry on the alleged hospital business in the house, which the defendant refused to consent to. The plaintiff then rented a house for herself, and, during the defendant's temporary absence, stripped the defendant's house of nearly all the furniture, removing it to her own house. This greatly incensed the defendant, and on the plaintiff using foul and abusive language to him, he committed, as the plaintiff alleged, an aggravated assault on her, and by his conduct rendered it unsafe for her to live with him, and revived prior condoned acts of cruelty and misconduct:—*Held*, that the defendant's acts were not of such an excessive and intemperate a character as would render it unsafe for the plaintiff to live with him, and revive the prior condoned acts, for not only did it appear that the alleged assault was grossly exaggerated, but was brought on by the plaintiff herself, whose sole object was to goad the defendant into acts of violence which would justify an action for alimony. *Payne* v. *Payne*, 10 O. L. R. 742, 6 O. W. R. 428.

Cruelty — *Unfounded suspicions — Injury to health — Danger of life — Evidence —Custody of child.*]—Plaintiff brought action for alimony on grounds of alleged

cruelty, etc. Some three years before there had been a separation on account of defendant's cruelty, but these differences were adjusted and an agreement as to renewal of marital relations was made. Defendant renewed his acts of cruelty. At trial Clute, J., *held* defendant's conduct to amount to legal cruelty and gave plaintiff alimony at rate of $18 per month and the custody of their infant son Russell D., aged 14.—Divisional Court allowed defendant's appeal and dismissed plaintiff's action.—Court of Appeal reversed Divisional Court, 14 O. W. R. 226, and restored the judgment of Clute, J., 13 O. W. R. 599. Meredith, J.A., dissenting. *Cowie* v. *Cowie* (1910), 15 O. W. R. 767.

See 14 O. W. R. 575.

Cruelty not amounting to personal violence — Threats — Wife leaving husband — Justification — Condonation — Costs — Custody of infant child. *Lovell* v. *Lovell*, 5 O. W. R. 401, 640, 6 O. W. R. 621.

Desertion—*Offer to receive wife back — Bona fides.*]—In an action for alimony, on the ground of desertion, in order to give effect to the husband's offer and willingness to receive back his wife, the Court must be satisfied that it is made *bonâ fide*, and not merely set up to prevent the pronouncement of judgment against him. *Crothers* v. *Crothers*, 1 P. & D. 568, specially referred to. *Rae* v. *Rae*, 19 C. L. T. 34, 20 C. L. T. 64, 31 O. R. 321.

Desertion — *Offer to receive wife back —Bona fides.*]—The defendant in an action for alimony offered to "receive the plaintiff as his wife at any time when she is prepared to come and reside with and accept the home he is able to provide for her and conduct herself as a wife reasonably should;" but the trial Judge, being satisfied upon the evidence that desertion had been proved and that the defendant's offer was not honestly made, but solely for the purpose of avoiding a judgment for alimony:—*Held*, following *Rae* v. *Rae*, 31 O. R. 321, that such offer, under the circumstances, was not sufficient to defeat the plaintiff's claim. *Emes* v. *Emes*, 25 C. L. T. 19, 15 Man. L. R. 352.

Discharge — *Costs — C. P. 551.*]—Art. 551 C. P. provides that, in suits for alimentary allowances, no more costs can be allowed plaintiff than in an action for the monthly allowance granted, and is applicable to suits for a discharge from or a reduction of such maintenance. — These rules apply both to costs which plaintiff has the right to recover if his action is maintained and those of defending party if the action is dismissed or maintained in part only with costs against plaintiff. *Moreau* v. *Michaud* (1909), 17 R. L. n. s. 12.

Divorce—*Impotence.*] — Permanent alimony may be granted in a divorce suit where the wife has obtained a decree *nisi* for divorce on the ground of impotence. *Brown* v. *Brown*, 13 B. C. R. 73.

Divorce suit — *Evidence of husband.*]—In a suit for divorce and alimony the respondent, the husband, is not a competent witness on the question of alimony. *Norton* v. *Norton*, 23 C. L. T. 17.

Dower — *Bar — Adultery — Mens rea.*] —Claim by widow for dower. There was a voluntary separation. About nine years after the separation she went through the ceremony of marriage with another man. Hearing that this supposed marriage was illegal, she left her second husband, and never returned to him, but supported herself. Her first husband had remarried:—*Held*, that she was entitled to dower. *Phillips* v. *Phillips*, 6 E. L. R. 478.

Effect of altered circumstances of parties — *Alimony and conjugal duty of mutual support — Right to alimony from children of married person in distress.*] — Agreements respecting alimony between those to and from whom it is due, are subject to such modifications as the altered conditions in the circumstances of either party may require. The right to alimony from a consort arises from the conjugal duty of mutual support. Hence, a married person in distress must first claim assistance from his or her consort, and it is only the impossibility of the latter to provide it, that casts the obligation on the children. *Barry* v. *Barry* (1909), 38 Que. S. C. 124, 16 R. L. n. s. 92.

Exemption from seizure—*Gift under onerous title — C. P. 599; C. C. 1911.*] — An alimentary allowance created by a deed of gift under onerous title is seizable. *Biron* v. *Biron* (1910), 11 Que. P. R. 426.

Husband without means.]—A husband, who is not able to earn his own living and who has no income beyond what will barely support him, will not be ordered to pay an alimentary allowance to his wife. *Dupuis* v. *St. Mars*, 5 Que. P. R. 404.

Interim — *Wisconsin divorce — Financial ability to pay alimony.*]—Order made for $16 a month alimony from service of writ and $50 for interim disbursements. Defendant pleaded a Wisconsin divorce:—*Held*, that no effect could be given to it at this stage of the action. *Switzer* v. *Switzer* (1907), 10 O. W. R. 406, followed. *McCully* v. *McCully* (1909), 14 O. W. R. 788, 1 O. W. N. 95; affirmed, 14 O. W. R. 1012, 1 O. W. N. 187.

Interim alimony — *Action for separation — Desertion.*]—A wife, sued for *separation de corps*, who, without the authorization of the Court, has left the conjugal domicil has no right to an alimentary allowance from her husband pending the action. *Protain* v. *Prévost*, 23 Que. S. C. 8.

Interim alimony — *Adultery — Means* of support. *Cunningham* v. *Cunningham* (N.W.T.), 5 W. L. R. 514.

Interim alimony — Order for protection of wife — Indictment for non-support — Ability of wife to support herself — Small allowance—Disbursements. *Quinn* v. *Quinn*, 12 O. W. R. 203.

Interim alimony — Quantum — Evidence. *Diebert* v. *Diebert*, 7 W. L. R. 458.

Interim alimony and disbursements —Denial of valid marriage—Amount allowed. *Johnston* v. *Johnston*, 9 O. W. R. 217.

Interim alimony and disbursements —Leave to continue action *in forma pauperis*. *Morden* v. *Morden*, 11 O. W. R. 474.

Interim alimony and disbursements —Marriage admitted — Separation agreement — Adultery — Foreign divorce. *Switzer* v. *Switzer*, 10 O. W. R. 406.

Interim allowance — *Costs—Disbursements — Undertaking.*] — Notwithstanding the language of Rule 1144 — "only the amount of the cash disbursements actually and properly made by the plaintiff's solicitor"—an order may be made in an action for alimony for payment by the defendant to the plaintiff's solicitor of a sum to cover prospective witness fees, upon the undertaking of the solicitor to account for all sums not actually and properly disbursed. *Stevenson* v. *Stevenson*, 19 C. L. T. 392, 19 P. R. 48.

Interim allowance — *Deed of separation —Subsequent reconciliation — Desertion.*]— The parties were married on the 20th December, 1898. On the 20th May, 1899, the defendant deserted the plaintiff until the 25th June following, when he returned to her, but immediately after deserted her again and left her without any means of support. The defendant, in answer to a motion for interim alimony, relied on the fact that when he and the plaintiff separated in May, 1899, they joined in a deed of separation by which the defendant was to pay the plaintiff $100 on the 1st November, 1899, which the plaintiff agreed to accept and take in full satisfaction for her support and all alimony whatsoever during her coverture: — *Held*, that the plaintiff was entitled to interim alimony which, under the circumstances, should be $3 a week, with $20 for cash disbursements. Whether the deed, if the parties had continued to live apart after it was executed, would disentitle the plaintiff to the order for interim alimony, was a question that would require consideration, but the effect of the reconciliation was to put an end to the deed. *Brewster* v. *Brewster*, 20 C. L. T. 182.

Interim allowance — *Disbursements — Residence.*]—In an action *en séparation de corps et de biens* by a wife against the husband, which is contested, she has a right to require from him payment of interim alimony and disbursements in the cause. Wife also allowed to change the place of residence assigned to her at the beginning of the suit. *Keily* v. *Lavery*, 3 Que. P. R. 129.

Interim allowance — *Evidence—Contradictory affidavits — Interim disbursements —Speedy trial.*]—On motion for interim alimony, affidavits as to earning power of defendant being specially contradictory, order made for defendant to advance $30 for interim disbursements. Case to be set down on peremptory list. If this not acceptable usual order to be made. Amount of disbursements to be fixed. *Goldman* v. *Goldman*, 13 O. W. R. 672.

Interim allowance — *Petition for — Time.*]—A petition for interim alimony cannot be presented before the expiration of the time for filing the preliminary pleadings. *Christin* v. *Christin*, 3 Que. P. R. 387.

Interim allowance — *Petition for — Time—Residence of wife.*]—A petition by the wife for a provisional allowance, in an action for separation from bed and board, will not be granted until the wife's place of residence pending the suit has been fixed by the Court. *Lauzon* v. *Hébert*, 3 Que. P. R. 448.

Interim allowance—*Reduction.*]—Upon the application of the defendant, the husband, an order was made reducing the amount of interim alimony payable to the plaintiff, the wife, under a former order, upon shewing that the necessities of the wife had diminished. *Doudiet* v. *Hardman*, 2 Que. P. R. 447.

Interim and disbursements — *Amount to allow.*]—The amount of interim alimony which should be allowed does not depend on the husband's income; all that can reasonably be asked for is an income "suitable to her position" until the suit is heard. *Sykes* v. *Sykes* [1897] p. 306, and *Kettlewell* v. *Kettlewell* [1898], p. 138, followed. *Bugg* v. *Bugg* (1900), 14 O. W. R. 1014, 1 O. W. N. 210.

Interim and disbursements — Defendant pleaded an agreement of separation—Plaintiff swore that she never was paid anything and did not understand the agreement —Order granted for $6 a week and $30 for interim disbursements. *Atwood* v. *Atwood*, 15 P. R. 425, 16 P. R. 50, and *Lafrance* v. *Lafrance*, 18 P. R. 62, referred to. *Beatty* v. *Beatty* (1900), 14 O. W. R. 1093, 1 O. W. N. 243.

Interim disbursements—*Counsel fee — Undertaking—Practice.*]—Where the counsel to be engaged is not the solicitor for the plaintiff or his partner, it is proper that a counsel fee should be allowed to the plaintiff as part of her prospective disbursements to be paid by the defendant in an action for alimony; and in this case an order was made before the trial for payment of a fee of $40, upon the undertaking of the plaintiff's solicitor that he would not himself act as counsel at the trial, and that he would account for any portion of such sum of $40 not actually and properly disbursed by him for counsel fee.—*Gallagher* v. *Gallagher*, 17 P. R. 575, followed. *Cowie* v. *Cowie*, 12 O. W. R. 107, 229, 17 O. L. R. 44.

Interim disbursements — *Order for under Deserted Wives' Maintenance Act — R. S. O. (1897) c. 167.*]—Where plaintiff wife, within a week of the issue of the writ, obtained an order under the Deserted Wives' Maintenance Act, R. S. O. (1897), c. 167, for payment to her by defendant of $3 per week and $4.75 costs, the Master in Chambers dismissed a motion for interim alimony and disbursements, with costs. *Cowardine* v. *Cowardine* (1910), 16 O. W. R. 963, 2 O. W. N. 44.

Interim order — Application for—Affidavit—Irregularity — Direction to have resworn—Alleged insanity of plaintiff—Necessity for next friend — Merits of action—Chances of ultimate success — Discretion. *Thrower* v. *Thrower*, 3 O. W. R. 541.

Interim order — *Defendant without means.*]—An order for interim alimony will not be made against a defendant where it is not shewn that he has the means to comply with such an order, if made. *Pherril* v. *Pherril*, 24 C. L. T. 62, 6 O. L. R. 642, 2 O. W. R. 1096.

Interim order — Disbursements — Foreign defendant—No assets in jurisdiction—Provision for wife. *Mosher* v. *Mosher*, 4 O. W. R. 407.

Interim order — *Husband's offer to pay for necessaries.*]—It is not a sufficient answer to a motion for interim alimony where cruelty is alleged, that the husband has offered to allow the wife to get whatever is necessary for the house, in which both are living but not on friendly terms, and to pay for all such goods. *Snider* v. *Snider*, 11 P. R. 140, distinguished. *Lovell* v. *Lovell*, 5 O. W. R. 401, 640, followed. *Theakstone* v. *Theakstone*, 10 O. L. R. 386, 6. O. W. R. 400, 436.

Interim order—*Jurisdiction — Divorce.*] —The Supreme Court of British Columbia has jurisdiction to grant interim alimony pending an action for divorce. *Mellor* v. *Mellor*, 11 B. C. R. 327.

Interim order — *Petition.*]—A petition on the part of a wife for interim alimony during the progress of an action against her husband for alimony, will be granted. *Duckett* v. *Turgeon*, 7 Que. P. R. 457.

Interim order — Right to — Amount — Disbursements. *Lovell* v. *Lovell*, 5 O. W. R. 401, 640, 6 O. W. R. 621.

Interim order — *Time for applying — Commencement of allowance — Merits.*]—1. Under Rule 433 of the King's Bench Act, an application for interim alimony may be made as soon as the defence is filed or the time for filing one to the original statement of claim has elapsed.—2. Unless the statement of claim makes a demand for a specific sum by way of interim alimony, as contemplated by Rule 601 of the King's Bench Act, it should only be allowed from the date of the order, not from the commencement of the action.—3. The merits of the defence set up should not be looked into or considered on an application for interim alimony. *Foden* v. *Foden*, [1894] P. 307; *Campbell* v. *Campbell*, 6 P. R. 128, and *Keith* v. *Keith*, 7 P. R. 41, followed. *McArthur* v. *McArthur*, 15 Man. L. R. 151, 1 W. L. R. 1.

Judgment — *Liability of estate of husband—Costs.*]—The obligation to furnish an alimentary allowance is not transmissible to heirs as a debt of the estate of the person who was under obligation to furnish the allowance, even when such person has been adjudged to do so in his lifetime, in this case by a judgment pronounced in an action for separation begun by a married woman against her husband, which judgment required the husband to pay alimony to his wife during her life. In this case, also, the costs were divided, even the costs of the appeal, on account of the relationship of the parties and the fact that they had proceeded by way of joint factum under Arts. 509 *et seq.*, C. P. C. *Davidson* v. *Winteler*, 33 Que. K. B. 97.

Jurisdiction of Court to grant — *Grounds upon which granted—Adultery on part of wife—Bar.*]—The plaintiff sued the defendant to recover alimony on the grounds of desertion, cruelty, and adultery, and on the trial it was established that the defendant had been guilty of cruelty to the plaintiff and of desertion, and also of adultery, but whether before or after desertion did not clearly appear. It was also proved that the plaintiff after desertion had herself been guilty of adultery. By c. 29 of the Consolidated Ordinances of 1898, respecting actions for alimony, the Court has jurisdiction to grant alimony: (1) to any wife who would be entitled to alimony by the law of England; (2) to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto; and (3) to any wife whose husband refuses to support her without any sufficient cause under circumstances which would entitle her by the law of England to a decree for restitution of conjugal rights:—*Held*, that this has reference to the Imperial Act 20 & 21 V. c. 85, and the word "divorce" as used in the Ordinance has the meaning of "divorce" in the Imperial Act, i.e., *a vinculo matrimonii*. —2. That the plaintiff, having herself been guilty of adultery, would not be entitled under the law of England either to a judicial separation, a divorce, or a decree for restitution of conjugal rights, and therefore could not recover alimony.—Judgment in 6 Terr. L. R. 308, 6 W. L. R. 392, affirmed. *Lieb* v. *Lieb*, 1 Sask. L. R. 363, 7 W. L. R. 824.

Justification of wife leaving — Violence—Adultery—Misconduct of wife. *Falvey* v. *Falvey*, 2 O. W. R. 476, 832.

Legal cruelty.] — This was an alimony action. The trial Judge held that legal cruelty had not been shewn as construed in *Lovell* v. *Lovell*, 13 O. L. R. 569. Where the defendant had farmed the plaintiff's land and taken the income with her consent she is not entitled to an account. A previous alimony action had been settled in 1892 by defendant agreeing to pay $3 per week. Section 24 of Real Property Limitations Act not having been pleaded judgment was given for $3 per week from 1892. *Willey* v. *Willey*, 9 W. L. R. 166.

Lunatic wife—*Admission to asylum—Removal by relatives.*]—A husband on two occasions procured the release of his wife from the provincial lunatic asylum, where he had procured her admission as a lunatic. After her second release she grew worse, becoming violent and dangerous, and he again applied for her admission, which was refused, it being insisted that she would only be admitted as a warrant patient, whereupon he took proceedings under s. 12 of R. S. O. 1897 c. 317, which resulted in her being committed to gaol as a dangerous lunatic, whence she was transferred to the asylum. Her relatives then applied to the Lieutenant-Governor and obtained her release, and she went to live with them, and claimed alimony: —*Held*, that an action therefor would not lie. *Hill* v. *Hill*, 21 C. L. T. 525, 560, 2 O. L. R. 289, 541. Leave to appeal refused in *Hill* v. *Hill*, 22 C. L. T. 107, 3 O. L. R. 202.

Misconduct of wife before marriage —*Condonation — Property in chattels.*]—1. Unchastity before marriage and concealment of it from the husband until the birth of a child is not sufficient to make the marriage null and void or to disentitle the wife to alimony.—*Swift* v. *Kelly*, 3 Knapp 293, *Moss* v. *Moss*, [1897] P. 263, *Nelligan* v. *Nelligan*, 26 O. R. 8, and *Aldrich* v. *Aldrich*, 21 O. R. 447, followed.—2. Under s. 30 of the King's Bench Act, R. S. M. 1902, c. 40, a wife will be entitled to alimony if, by the law of England as it stood on the 15th July, 1870, she would have been entitled to a decree for the restitution of conjugal rights. By that law nothing but cruelty or adultery on the part of a wife after marriage would be a bar to an order for such restitution or entitle the husband to a judicial separation.—*Scott* v. *Scott*, 4 Sw. & Tr. 113, and *Russell* v. *Russell*, [1897] A. C. 395, followed.—3. Resumption of cohabitation is a necessary ingredient of condonation by the husband of any matrimonial offence committed by the wife, such as would prevent him from relying upon it as a defence to an alimony suit.—*Keats* v. *Keats*, 1 Sw. & Tr. 334, followed—4. A wife abandoned by her husband is entitled to the engagement ring which he had given her before marriage, unless she had absolutely surrendered it to him; but she is not, in ordinary circumstances, entitled to demand and recover possession of wedding presents given by friends of the husband at the time of the marriage. *A.* v. *A.*, 15 Man. L. R. 483, 3 W. L. R. 113.

Multiplication of actions.]—If a husband has sued his wife in separation from bed and board, and recovered by judgment in his favour, while a similar action by the wife is still pending, the latter, who has demanded a pension *alimentaire* in her action, will not be permitted to bring a new action for alimony, as she can obtain such alimony in the case already pending. *Hainault* v. *Béland*, 5 Que. P. R. 382.

Natural children recognised by their father are entitled to maintenance from him, and their mother, tutrix of the children, can recover it for them. *Picard* v. *Gadoury* (1909), 38 Que. S. C. 65.

Provisional alimentary allowance—*—Separation as to bed and board*—C. P. 594 (7); C. C. 175.]—The husband, defendant in a suit for separation as to bed and board, or even for alimentary allowance alone, is obliged to pay his wife an alimentary allowance during the pendency of the suit. *Lafleur* v. *Gagnon* (1910), 11 Que. P. R. 349.

Right to appeal.] — A wife separate as to property from her husband by marriage contract, whose action authorised by a Judge, in the Superior Court for alimentary allowance is dismissed, cannot inscribe the case in Review until she has been again authorised for that purpose. *Bourgelas* v. *Goulet*, 37 Que. S. C. 167.

Right to recover for natural child.] The mother of a natural child, although not its tutrix, has, in addition to her lying-in expenses, the right to recover for the child an alimentary allowance from its father. *Chevrier* v. *Dupreuil* (1910), 20 Que. K. B. 284.

Separation agreement — *Absence of consideration—Restitution of conjugal rights —Demand—Refusal.*]—*Held*, upon the evidence given in an action for alimony, that the plaintiff was the defendant's lawful wife; that an agreement for separation made between them was without consideration and void; that, the plaintiff's mental and physical condition being feeble, she could not be said to have left the defendant's home voluntarily; that she had subsequently asked to be reinstated in her rights, which the defendant had refused; and, therefore, she was entitled to alimony. *Ditch* v. *Ditch* (1911), 17 W. L. R. 108, Man. L. R. .

Separation from bed and board—*C. C. 175.*]—A married woman who by reason of her husband's ill-treatment, and by his misconduct, can no longer live in common with him, she may, however, sue him to recover alimentary allowance suitable to her means without instituting an action for separation as to property. *Lafleur* v. *Gagnon* (1910), 16 R. L. n. s. 398, 11 Que. P. R. 349.

Support of poor relations — *Son-in-law not liable under 14 Vic. cap. 7, to support wife's father.*]—An application to set aside an order of justices of the peace, made under the Act 14 Vic. cap. 7, for compelling persons to support their poor relations. The objection is that the order is made against a son-in-law, who it is contended is not liable under the Act:—*Held*, that the statute only provides for the support of natural parents. It does not oblige the maintenance of any relative who is out of the line of consanguinity. The son-in-law was therefore not liable to support his wife's father.—Rule for setting aside the justices' order in this case was made absolute. *Re Brenan* (1852), 1 P. E. I. R. 74.

Unsuccessful action — *Costs—Conduct of action.*]—Action for alimony dismissed: —*Held*, that defendant is not entitled to pay plaintiff's costs. He had paid the interim disbursements. Considering the plaintiff's examination for discovery and the facts in this case, it is not sufficient to say that the plaintiff's solicitors acted in this case as they would in any other. Costs refused. *Keizer* v. *Keizer* (1909), 12 W. L. R. 89.

Vexatious proceedings — Motion to dismiss action — *Res judicata* — Interim alimony—Offer of wife to return—*Bona fides. Morden* v. *Morden*, 11 O. W. R. 425.

Wife abused by husband, *mother-in-law and another member of the family.*]—Where husband, mother-in-law, and another member of the family continuously abused the wife in various ways, set out in the judgment, she was given permanent alimony at the rate of $10 per month. *D.* v. *D.* (1910), 15 O. W. R. 357.

Wife leaving husband — Justification —Cruelty — Condonation — Insanity of defendant — Foreign divorce — Divorce — Domicil — Amount of alimony — Reference. *Lofthouse* v. *Lofthouse*, 12 O. W. R. 140.

Wife leaving husband — *Justification — Cruelty — Evidence — Countercharge against wife — Jurisdiction of Court.*]—A

wife is entitled to a judicial separation and alimony when the husband has been guilty of legal cruelty, which is actual violence of such a character as to endanger personal health or safety, or of conduct causing a reasonable apprehension of such cruelty.—2. The Court may refuse alimony to the wife if she has herself been guilty of legal cruelty, or of acts which would justify the husband in leaving her, but may grant alimony in such cases if it should see fit so to do.—The jurisdiction of the Court in such cases discussed. *Patrick* v. *Patrick*, 7 W. L. R. 470, 1 Sask. L. R. 44.

Wife leaving husband — Justification —Cruelty — Offer to take wife back. *Hummel* v. *Hummel*, 11 O. W. R. 113, 605.

Wife leaving husband — *Justification — Legal cruelty — What constitutes — Acts affecting mental condition.*] — Legal cruelty, as regards the conjugal relationship, does not necessarily depend on physical acts or threats of violence, but may arise from acts or conduct operating entirely upon the mental condition of the aggrieved person.—Where, therefore, such a course of harsh conduct, treatment, and intimidation on the husband's part towards his wife, a woman of delicate constitution, created such mental distress as was sufficient to and did impair her health; and where his language of threats and menace, and his habitual demeanour, were such as to create a well founded apprehension that the wife would suffer worse and more injurious treatment and hardship if she did not submit implicitly and submissively to anything the husband might choose to say or do:—*Held*, that there was such matrimonial cruelty shewn as justified the wife leaving her husband, and entitled her to a judgment for alimony. Judgment of a Divisional Court, 11 O. L. R. 547, 7 O. W. R. 308, affirmed; Meredith, J.A., dissenting. *Lovell* v. *Lovell*, 8 O. W. R. 517, 13 O. L. R. 569.

Wife leaving husband — Misconduct—Cruelty — Justification — Antenuptial contract — Construction — Enforcement—Declaratory judgment. *Edgeworth* v. *Edgeworth*, 2 O. W. R. 404, 3 O. W. R. 71.

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3. Breach of Promise of Marriage.

Capias — *Damages.*]—The fact that a defendant sued for damages for breach of promise of marriage, has said to the plaintiff that he would go to the United States to get rid of her if she insisted that their marriage should take place within the time agreed upon, is not sufficient ground for the issuing of a *capias* against him, if there is nothing to shew that he intended to carry out his threat and defraud the plaintiff.—2. The failure to carry out a promise of marriage does not, of itself, make the promisor liable to damages, but it may become actionable, and afford ground for the application of Art. 1053, C. C. —3. When the breach is imputable to a fault, and real prejudice results from such fault, the action for damages does not arise from the validity of the intention to marry, but from the fact of the prejudice caused and the obligation imposed by the law upon the person who caused the prejudice, to atone for it.—4. The fact that the defendant has withdrawn *unreasonably* and without reason his promise of marriage gives rise to an action for damages, and the plaintiff is entitled to be indemnified for the loss of her employment, travelling expenses, and trousseau, and against injury arising from the difficulty of establishing herself for the future, having regard to the respective stations and means of the parties. *Walker* v. *Goldman*, 16 Que. S. C. 466.

Delictual fault — *Liability of parents of infant — Damages — Pleading.*]—A breach of promise to marry is a delictual, and not a contractual, fault, and liability for the consequences is the same as for those of a tort. When, therefore, the party committing it is a minor child, the parent incurs liability for it in the manner and under the conditions set forth in art. 1054, C. C.—The damages recoverable by the disappointed suitor properly include all expenses incurred on the strength of the promise of marriage, as well as the value of time lost.—The reiteration of allegations of fact, the expressions of opinions, and the setting out of irrelevant, if otherwise innocuous, matter, in a declaration, do not afford grounds of demurrer, but rather of exception to the form or of motion to reject. *Internoscia* v. *Bonelli*, 28 Que. S. C. 58.

Right of action — *Offer to fulfil contract.*]—The breach of a promise of marriage gives rise to an action for the recovery of damages against the party guilty of the breach, and the latter cannot discharge his liability by offering to fulfil his broken promise. *Boulet* v. *Goudreault*, 35 Que. S. C. 294.

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4. Community.

Action by — *Lunatic husband — Curator.*]—The action for damages for an injury sustained by a wife *commune en biens* belongs to the community, and can be maintained only by the husband, or, if he has been interdict for insanity, by his curator. *Sauriol* v. *Clermont*, 10 Que K. B. 294.

Action by — *Personal injuries to wife—Witness.*]—A wife, *commune*, may sue with her husband, to recover damages for personal injuries sustained by her, and in such an action has a right to be a witness on her own behalf. *Sullivan* v. *Town of Magog*, 18 Que. S. C. 107.

Action by —*Personal injuries to wife.*]—The right of action for damages for personal injuries sustained by a married woman, common as to property, belongs exclusively to her husband, and where she is joined in the action, she may be dismissed from the case on demurrer. *Troude* v. *Meldrum*, 20 Que. S. C. 531.

Action by — *Slander of wife — Defence in law.*]—Action for damages for verbal injuries, begun by a married woman, *commune en biens*, assisted by her husband:—*Held*, that the claim sued for belonged to the community. 2. That the husband alone could

begin an action for and in the name of the community. 3. That the objection should be taken by *défense en droit*, and not by exception to the form. *Goyette* v. *Brunelle*, 3 Que. P. R. 464.

Action by — *Wife as witness.*]—Where in an action pertaining to the community the wife is joined with her husband, the wife has no more right to testify in the cause than if the action had been instituted by the husband alone. *Dunfy* v. *Kelly*, 20 S. C. 231.

Action by husband to recover debt due to wife before marriage — *Pleading —Evidence.*]—A debt due to a woman before her marriage becomes due to her husband only in his capacity of head of the community, and therefore in an action brought by him to recover the amount from the debtor he must allege the marriage and the community of property which result from it. An action founded upon this obligation as if it had been contracted with the husband, and supported only by evidence of the creation of the obligation and of the marriage, will be dismissed. *Massicotte* v. *Pronovost*, 28 Que. S. C. 44.

Action by wife — *Authorisation by husband — Declaration—Personal property.*]—Article 1298, C. C., does not take away from a wife, common as to property, the right of exercising, with the authorisation of her husband, personal actions belonging to her. 2. It is necessary, however, that the declaration in such an action should make it appear that the personal property which she claims does not fall into the community. *Donohue* v. *Donohue*, 4 Que. P. R. 300.

Action by wife alone — *Tort —Refusal of husband to join.*]—A married woman, *commune en biens*, authorised *de justice* upon the refusal of her husband, may maintain an action in her own name alone to recover damages for injuries to her person and her honour by acts of violence of which she has been the victim. 2. Although the compensation which she obtains may be the property of the community, the principle of the action must chiefly be considered, and it has a character peculiarly related to her person and honour, which she has the right to protect even against her husband. *Baker* v. *Gingras*, 20 Que. S. C. 85.

Conservatory attachment — *Separation from bed and board—C. P. 955 1102; C. C. 204.*]—In an action in separation from bed and board, a conservatory attachment may issue for the purpose of securing to the wife her eventual rights in the community.—It is not necessary to allege and to establish by affidavit, for the purpose of obtaining such conservatory attachment, that the defendant is immediately about to leave the province of Quebec or that he is secreting his property with intent to defraud. *Lefebvre* v. *Benault* (1910), 12 Que. P. R. 45.

Death of one consort — *Continuation of community — Inventory — Prescription.*]—At the time of the dissolution of community by the death of one of the consorts in 1845, the common assets consisted of bare necessaries of small value and exempt from seizure. There was no inventory or *procès-verbal de carence* made, and, subsequently, the survivor contracted a second marriage. In an action by a child of the first marriage claiming a share in the continuation of community:—*Held*, that there was no necessity for an inventory of property of such insignificant value, and that failure to make an inventory or *procès-verbal de carence* did not, under the circumstances, effect a continuation of community. Judgment in 9 Que. Q. B. 44 reversed. *King* v. *McHendry*, 20 C. L. T. 373, 30 S. C. R. 450.

Debt due to wife — *Attachment — Affidavit.*] — An affidavit for an attachment, made in a cause in which the plaintiff is described as a married woman, without saying that she is *séparée de biens*, and stating that the defendant owes the plaintiff, personally, a sum there mentioned, is irregular, because the married woman is presumed to be *commune en biens*, when it is not said that she is *séparée de biens*, and the debt due to the married woman is a debt of the *communauté*, and hence of the husband. *Shorey* v. *Hamilton*, 2 Que. P. R. 374.

Execution of judgment—*Renunciation of community — Registration—Creditors of husband.*] — A judgment for separation of property is sufficiently executed by the declaration of the wife, given effect to by the judgment, that she has no rights or remedies to exercise against her husband, but the separation of property takes effect against third persons only from the time of the judgment, and the wife can only, as against them, set up her renunciation of the community from the time of the registration of such renunciation. Therefore, a contract made by a married woman, before the execution of the separation of property and the registration of her renunciation, is made for the benefit of the community, and sums due by virtue of such contract may be attached by the creditors of the husband. *Bérard* v. *Magnan*, 22 Que. S. C. 217.

Gift by husband to child — *Fraud on wife.*]—A gift of the property of the community made by the husband in favour of one of the children of the marriage cannot, whatever the advantages which the gift confers upon the child, even to the prejudice of the other children of the marriage, constitute a fraud as against the wife so as to enable her to claim that the gift shall be set aside as a nullity. *Jodoin* v. *Birtz*, 22 Que. S. C. 443.

Personal injuries — *Right of action — Pleading — Appeal.*]—The right of action for damages for personal injuries sustained by a married woman *commune de biens*, belongs exclusively to her husband, and she cannot sue for the recovery of such damages in her own name, even with the authorisation of her husband to bring the action.—Where it appears upon the face of the writ of summons and statement of claim that the plaintiff has no right of action, it is not necessary that objection should be taken by pleading *exception à la forme*. Absolute want of a legal right of action may be invoked by a defendant at any stage of a suit: — *Held*, also, not a mere question of procedure upon which the Court would hesitate to interfere. Judgment of the Court below, 3 Que. P. R.

1, 111, 15 Que. S. C. 380, 9 Que. Q. B. 367, affirmed on different grounds. *McFarren* v. *Montreal Park and Island R. W. Co.*, 20 C. L. T. 323, 373, 30 S. C. R. 310.

Plea of — *Exception to form.*] — Community between husband and wife, who are sued for damages, although it is a ground of defence upon the merits, may be pleaded by an exception to the form if it constitutes a good defence. *Shank* v. *Bourassa*, 4 Que. P. R. 287.

Pleading — *Particulars — Judgment — Estoppel.*]—Community of property between husband and wife is the general rule under the law of the province of Quebec, and separation of property the exception. Therefore, a party setting up a judicial separation of property must indicate in his pleading where and when the judgment for separation was rendered, and this under the penalty of being afterwards estopped from setting up such judgment. *Gravel* v. *Cardinal*, 5 Que. P. R. 165.

Promissory note — *Debt of community —Action against wife—Costs.*]—A married woman was sued upon two promissory notes. The writ of summons described her as a merchant carrying on business under a firm name. It was not, however, alleged by the plaintiff that the notes had been made for the purposes of the business, nor with the authorisation of her husband; and it was in fact established that the notes were given for a debt of the *communauté*:—*Held*, that the husband should have been sued alone.—This objection not having been raised by the plea, but only at the hearing, the defendant was allowed only such costs as she would have been entitled to under a judgment upon a confession of plea. *Perron* v. *Duguay*, 17 Que. S. C. 192.

Property of wife — *Possession of husband — Continuation after her decease — Acknowledgment — Interruption — Status of children — Proof of marriage.*] — The husband, common as to property, has not the useful possession of the property of the wife, although he has the enjoyment of it as head of the community. The profession which he continues to have after the death of his wife is equally precarious, since he cannot change the title of it.—An acknowledgment by the person in possession of the existence of a superior title in the course of his possession, is a cause of interruption.—The possession of the status of legitimate children renders it unnecessary to shew the act of celebration of the marriage of their deceased parents. *Descôteaux* v. *Descôteaux*, 33 Que. S. C. 269.

Right of wife's personal creditors.] —Community property cannot be taken in execution of a judgment against the wife alone when she was a party to the suit with the permission of the Court but without the authorisation of her husband. If the moneys realised from such illegal sale of community property (the sale is final as to the purchaser who has paid) are deposited in the office of the Court, the husband, as head of the community, has the sole right to obtain the money. The wife's personal creditors have no claim upon it. If disputes arise between them, upon their pretended claims, as to their respective rights of preference, they will be put out of Court, without costs. *Dorval* v. *Morin* (1911), 39 Que. S. C. 494.

Rights of wife — *Pleading—Demurrer.*] —A wife common as to property has no right of action to reclaim rights which belong to the community. 2. The proper procedure to have an action dismissed as regards her is by demurrer and not by exception to the form. *Desrouard* v. *Fortier*, 5 Que. P. R. 250.

Saisie gagerie conservatoire — *Affidavit—Service.*]—A *saisie gagerie conservatoire* issued by a married woman, common as to property, against the goods of the community, is governed by the ordinary procedure in matters of *saisie gagerie*, and the plaintiff is not bound to serve, within three days from the service of the writ and declaration, a copy of the affidavit filed by her for the purpose of issuing the writ of *saisie gagerie conservatoire*. *Chartier* v. *Larivière*, 8 Que. P. R. 131.

Saisie gagerie conservatoire — "*Movable effects*" — *Petition to quash.*] — The meaning of the words "*movable effects of the community*," in Arts. 204 and 205 of the Civil Code, is not limited to the furniture which furnishes the common domicil, but includes all the movable property which belongs to the community, of whatever nature it may be.—Whether a *saisie gagerie conservatoire* could have been made under the provisions of Art. 204, C. C. or not, if the same is justified by the provisions of law concerning the issue of writs of seizure before judgment, a petition to quash the *saisie gagerie* will be dismissed. *Lachapelle* v. *Gagné*, 8 Que. P. R. 18.

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5. Divorce and Separation.

Action by husband for separation— *Desertion of wife — Time — Return—Custody of child.*]—An action for separation for bed and board by the husband against his wife on the ground of desertion, will not lie if brought four days only after the departure of the wife, while she was ill.—The Court will then fix a delay within which the wife should return to her husband, and in the meantime no adjudication will be made for the custody of the child. *Tessier* v. *Bélanger*, 7 Que. P. R. 335.

Action by husband for separation— *Order for interim disbursements.*]—It is only in exceptional cases that a husband may demand a provisional order for costs in an action for separation; if he has need of money to obtain the services of a special agent to search for witnesses, or obtain information as to accusations brought against him, which he denies, or to get information about the facts. *Lecavalier* v. *Labelle*, 7 Que. P. R. 472.

Action by wife — *Authorisation to live apart—Obligation of husband to support — Alimony — Interim allowance — Vacation.*] —A husband is always under an obligation to provide for the subsistence of his wife, and

an authorisation given to her, in the case of an action *en séparation de corps*, to have a separate habitation from that of her husband, does not put an end to that obligation.—2. During long vacation a Judge has jurisdiction to fix the amount of provisional alimony to which a wife sued or suing *en séparation de corps* is entitled. *Prud'homme* v. *Goulet*, 9 Que. P. R. 397.

Action by wife — *Interim alimony — Liability of wife for debts — Parties.*] — Where a wife bringing an action against her husband for separation has obtained from the Court an interim alimony allowance, she is responsible for the debts which she contracts for her support. If an action is brought against her for a debt so contracted, she cannot by way of dilatory exception demand that her husband be added as a party. *Dandurand* v. *De Repentigny*, 10 Que. P. R. 125.

Action by wife — *Separation, contractual or judicial.*]—It is not necessary to allege in an action begun by a married woman, separate as to property, whether the separation is contractual or judicial. *Davignon* v. *Chevalier*, 8 Que. P. R. 104.

Action by wife against husband — *Authorisation of Judge — Vacation — Chambers — Adultery of husband — Custody of children — Family council—Order by Court of Appeal.*]—Art. 15, C. P., in forbidding Courts to sit between the 30th June and the 1st September, does not take away from the Judges their necessary and ordinary powers of authorisation, which may and should be exercised at any time, even during long vacation.—A Judge in Chambers may during vacation authorise a wife to sue her husband for separation of persons and property and to leave the conjugal domicil.—In the case of the adultery of the husband at the conjugal domicil, the Court will allow the wife (if she cannot bring up the children herself) to call a meeting of the family council to advise upon the care and custody of the children, and the Court will finally decide after receiving the advice of the relatives.—Such an order may be made *ex mero motu* by the Court of Appeal, if the order made by the Superior Court seems insufficient. *Edward* v. *Belleau*, 8 Que. P. R. 257.

Action by wife for separation de corps — *Pleading — Pleas attacking character of wife — Irrelevancy.*] — In an action by a wife for *séparation de corps*, the husband, the defendant, cannot plead: (a) that he cohabited with the plaintiff for several months before his marriage, and that he married her when she was with child; (b) that on the very morning of the marriage he saw in her bedroom a young man of shady reputation; and (c) that the plaintiff could give no satisfactory explanation of this occurrence; all these allegations are foreign to the action, and will be struck out on inscription in law. *Bolduc* v. *Archambault*, 10 Que. P. R. 143.

Action for — *Evidence of parties.*]—In an action for *séparation de corps* the husband and wife may be heard as witnesses, even in support of the action. *Talbot* v. *Guilmartin*, 10 Que. K. B. 564.

Action for — *Misnomer of wife—Wife separate as to property—Marriage contract —Exclusion from community — Exception to form.*]—A husband sued for separation from bed and board cannot object that all the prenomens of his wife are not set out, especially where the marriage contract and extract from the marriage register are filed, and where she uses the prenomen by which she is known, and which is mentioned in her petition *pour ester en justice*.—2. The fact that, a woman, suing for separation from bed and board, is described in the writ as separate as to property, whilst in the contract of marriage (which she has not alleged) exclusion from community is stipulated for, is not a ground for exception to the form. *Roy* v. *Quesnel*, 7 Que. P. R. 136.

Action for — *Particulars.*]—A wife suing for a separation from her husband will be ordered to give particulars shewing when and how her husband has seriously injured her, and in what way he has rendered an existence in answer impossible and insupportable by her; indicating in what circumstances or with what person he has held slanderous conversations charged against him, and in what circumstances he refused to answer when she spoke to him. *Melancon* v. *Bédard*, 4 Que. P. R. 147.

Action for — *Trial — Reconciliation — Preliminary hearing.*]—Where, in an action for *séparation de corps*, the parties have, with the assent of the Court, divided the hearing to allow one of the parties, who alleges a reconciliation, to prove the facts constituting it, reserving the right to prove the other facts alleged by the parties, after adjudication upon the reconciliation, the opposite party will not be permitted to reopen the hearing to prove facts having nothing to do with the reconciliation before adjudication by the Court upon this first question. *Christin* v. *Lafontaine*, 5 Que. P. R. 198.

Action for separation de corps — *Exception — Litispendence — Previous action — Intermediate reconciliation.*] — An exception of *litispendence* made by the defendant in an action for *séparation de corps*, upon the ground that a former action for separation is still pending, will not be maintained if there has been a reconciliation of the husband and wife since the commencement of the first action. *Delisle* v. *Dumesnil*, 9 Que. P. R. 29.

Adultery of husband — *Laches — Custody of children — Alimony—Costs.*]—The parties were married in 1876, and had several children. The respondent committed acts of adultery in 1891, and proceedings were brought against him under the Bastardy Act, but were unsuccessful. The petitioner was aware of the proceedings, but the Judge Ordinary found that the respondent persuaded the petitioner at the time that he was innocent. She continued to live with him until 1899, when, in consequence of his cruelty, she left him, taking her children with her. She thereupon instituted proceedings for the dissolution of the marriage, alleging cruelty and adultery at various times during the preceding ten years:—*Held*, that the petitioner was not guilty of laches; and there must be a dissolution of the marriage on the ground

of adultery; the petitioner to have the custody of the children, and the respondent to have access to them on terms to be settled: the sum to be paid by the respondent for alimony and for maintenance of the children to be settled by the Registrar; the petitioner to have the costs of the petition and action. *Baker* v. *Baker*, 21 C. L. T. 357.

Adultery of husband — *Laches — Custody of children.*]—The petitioner and respondent were married in 1886, and there were two children of the marriage. The respondent left Nova Scotia in 1889. He committed adultery before leaving Nova Scotia, but the petitioner did not become aware of it until shortly before instituting these proceedings:—*Held*, that the petitioner was not guilty of any laches; and a decree for the dissolution of the marriage must pass with costs; the petitioner to have the custody of the children. *Fraser* v. *Fraser*, 21 C. L. T. 356.

Adultery of plaintiff — *Cross-action — Pleading — Exception — Particulars.*] — In an action for *séparation de corps* the defendant cannot set up as a defence that it is the plaintiff who has been guilty of adultery and ask that, if a decree for *séparation de corps* is pronounced, it shall be against the plaintiff; that is the subject of a cross-action.—2. Such a defence should be attacked by way of exception to the form, and not by demurrer; and upon demurrer *preuve avant faire droit* will be ordered.—3. Upon demand of particulars of such allegations of adultery, and, as far as possible, the times when and places where such acts of adultery were committed. *Thessereau* v. *Robert*, 2 Que. P. R. 520.

Adultery of wife — *Damages against co-respondent — Method of assessment — Consent of co-respondent to assessment by trial Judge—Right of jury—20 & 21 V. c. 85, s. 33 (Imp.).*] — The petition for divorce claimed damages from the co-respondent. On application for directions it was ordered that the trial should be by Judge without a jury. It was practically a consent order. A divorce was decreed:—*Held*, that the co-respondent by his actions on application for directions submitted himself to the Court's arbitrament upon all matters in controversy in the pleadings and damages assessed. Section 33 above does not apply. *Williams* v. *Williams*, 11 W. L. R. 498.

Adultery of wife—*Previous separation.*] —*Held*, that where a husband separates from his wife on account of her intemperance, but makes no provision for her, thereby leaving her without any means of support, he is not entitled to a divorce on the ground of adultery committed by her after the separation. *Forrest* v. *Forrest and Morton*, 21 C. L. T. 219, 8 B. C. R. 19.

Agreement to live apart — Provision that wife shall have custody of infant child —Attempt to enforce—Illegal contract—Dismissal of action. *Barrett* v. *Barrett* (N. W. T.), 4 W. L. R. 7.

Alimentary allowance — *Authorisation of wife.*]—A wife who is not authorised to leave the conjugal domicil cannot demand an alimentary allowance, in the course of an action for *séparation de corps*. *Protain* v. *Prevost*, 5 Que. P. R. 103.

Alimentary allowance—*Rights of wife against relatives — Past debts.*]—A wife, common as to property, abandoned by her husband, who is absent in a foreign country, against whom she has begun an action for separation of the person, which is actually pending, may, her poverty being shewn, and with the authorisation of a Judge, claim against a relative or connection who is bound to provide her with support, an alimentary allowance for herself and her children.—2. A wife who, before an action in which she claims an alimentary allowance, has contracted debts in respect of the means of livelihood, may claim an alimentary allowance in respect of the past in order to pay such debts. *Girard* v. *Vincent*, 21 Que. S. C. 206.

Alimony — *Judgment — Inability of husband to pay — Annuity — Seizure or attachment.*]—An alimony allowance may be exacted only according to the measure of the ability of the person obliged to provide it. Therefore, a husband who is infirm and incapable of working for a living, who has been ordered by a judgment of *séparation de corps* to pay $4 a month to his wife, is not obliged to deduct that amount from a life annuity of $150, his sole resource, which is insufficient for his own support.—A life annuity granted on condition of *insaisissabilité* cannot be seized or attached for an alimentary debt due to a third person. *Dupuis* v. *Viau*, 30 Que. S. C. 391.

Appointment of referee — *Prescription.*]—An understanding between husband and wife to avoid the nomination of a referee in an action for *séparation de corps* and of property, is illegal. The right to name such a referee is prescribed only by 30 years' lapse of time. *Brière* v. *Marcotte*, 7 Que. P. R. 352.

Community — *Desertion of domicil by wife—Séparation de biens.*]—A wife subject to community of property who deserts the conjugal domicil, at which the husband declares himself ready to receive and maintain her, but who refuses to furnish her elsewhere with the necessaries of life, has ground for an action for separation of property. *Saultry* v. *Ferrel*, 31 Que. S. C. 59.

Conservatory attachment — *Affidavit for.*]—A wife *commune en biens* who sues for a *séparation de corps*, to obtain a conservatory attachment to which the law entitles her, ought to set out in her affidavit the facts which would entitle her to a *saisie-arrêt* before judgment or to a conservatory attachment. *Mongeau* v. *Trudeau*, 7 Que. P. R. 70.

Conservatory attachment — *Affidavit for.*]—In an action for separation from bed and board, an affidavit of the wife, who is separate as to property, that without the benefit of a conservatory attachment she will lose her recourse in respect of alimony and of the donations made by the marriage contract, is insufficient, and such seizure will be quashed on petition. *Gratton* v. *Desormiers*, 7 Que. P. R. 86.

Costs of defence.] — A woman sued *en séparation de corps* is not entitled to compel her husband to furnish her with the money necessary for her defence. *Privé* v. *Bradley*, 2 Que. P. R. 385.

Cruelty — *Condonation.*]—Where the husband had been guilty of cruelty, which had been condoned, but within the six months subsequent to the condonation had been guilty of violent and harsh treatment which would not originally of itself constitute a ground for separation, the Court granted a separation to the wife. *Town* v. *Town*, 7 B. C. R. 122.

Cruelty — *Consideration — Evidence — Pleading — Specific acts — Practice — Substitution service of petition.*]—A wife petitioned for a judicial separation from her husband on the ground of cruelty and attempted to establish her right by proving specific acts and a course of conduct amounting to cruelty. The parties were married in 1886 and had 6 children, and lived together until February, 1900, when they separated, but came together again after two months, shortly after which they again separated, and this petition was filed: — *Held*, that lack of harmony does not justify a judicial separation; there must be some substantial wrongdoing. The question of cruelty is one of fact, and is, whether the husband has so treated his wife as to inflict bodily injury upon her, or cause reasonable apprehension of suffering to her, physically or mentally. Here the petitioner had no substantial grievance, or at least none which she had not unequivocally condoned.—Striking his grown-up daughter, not in the presence of his wife, was not cruelty of the husband to the wife, within the meaning of the authorities. *Wilson* v. *Wilson*, 6 Moore P. C. 484, distinguished.—Recent cruelty set up at the trial, in refusing to supply medical attendance, was not specifically pleaded, and was not in fact proved.—On the whole nothing was established which would justify a decree for judicial separation.—Where the petitioner relies upon conduct amounting to cruelty, the petition should specifically set out a regular series of the acts relied on to establish the cruelty.—The greatest possible care should be taken to see that the proceedings are brought to the notice of the respondent.—Remarks upon looseness of practice in matrimonial causes, and especially in regard to service or substituted service of the petition. *Timms* v. *Timms* (1910), 13 W. L. R. 636. See 12 W. L. R. 529.

Custody of children awarded to wife —*Right of access of husband—Procedure to obtain.*]—Where a judgment granting *séparation de corps* has awarded the guardianship of the children to the wife, the husband may, by a simple petition, demand the right to see his children at the house of a third person, if this right cannot be effectively exercised at the abode of the wife. *Carroll* v. *Duchesnay*, 10 Que. P. R. 235.

Decree annulling marriage *on ground of impotence — Permanent alimony.*] — The wife had obtained a decree absolute annulling the marriage on account of husband's impotence. She now applied for permanent alimony. Application refused. *Brown* v. *Brown*, 10 W. L. R. 120.

Desertion — *Alimony.*]—The leaving of her husband's house by the wife and her refusal to return thither in spite of the requests of the husband, constitute a grave injury to the latter which gives him a right to demand *séparation de corps* and exempts him from liability for alimony. *Doyon* v. *Riopel*, 2 Que. P. R. 522, 17 Que. S. C. 488.

Discovery — *Affidavit of documents — Adultery.*]—In a petition for dissolution of marriage, the respondent applied for an affidavit of documents:—*Held*, that, on the respondent filing an affidavit shewing that discovery was not sought for the purpose of proving the adultery of the petitioner, but for the purpose of discovering documents relating to the matters in question, other than the misconduct of the petitioner, the discovery ought to be ordered. *Levy* v. *Levy*, 12 B. C. R. 99, 3 W. L. R. 514.

Dissolution of community — *Inventory —Referee—Costs.*] — The husband, defendant in an action brought by his wife, who has neglected to make an inventory of the property of the community at the time of its dissolution, will be ordered to pay the costs of a referee afterwards appointed, even where the plaintiff makes no claim. *Brière* v. *Marcotte*, 7 Que. P. R. 405.

Dissolution of community — *Judgment —Date of taking effect—Execution of judgment — Time for — Prescription.*] — The dissolution of the community of property between husband and wife resulting from a judgment of *separation de corps*, takes effect from the day of the service thereof. Therefore, the referee appointed to make an inventory and ascertain the assets of the dissolved community, must have regard to that date, and take no account of property subsequently acquired by either of the parties. —The execution of a judgment of *separation de corps*, as regards the separation of property which follows from it, may be had at any time until it has ceased to be in force by reason of a thirty years' prescription, the reconciliation of the parties, or other legal cause. *Brière* v. *Marcotte*, 29 Que. S. C. 301.

Domicil — *Jurisdiction — Animus mancendi — Wife's domicil — Wife's adultery.*] —Petition by a husband for divorce *a vinculo* on the ground of wife's adultery:—*Held*, that the petitioner is not domiciled in British Columbia. Residence alone is not sufficient for domicil. There must be the necessary *animus manendi*. The defendant resided in either New York or Boston. Petition dismissed. *Adams* v. *Adams*, 11 W. L. R. 358.

Ecclesiastical decree — *Effect of—Civil consequences — Community — Alimony — Custody of child — Maintenance — Costs of action.*]—In spite of an ecclesiastical decree declaring a marriage invalid on account of a relationship in the fourth degree between the contracting parties, in respect of which there has been no dispensation, the civil consequences of the marriage continue until a judgment of a civil Court declares it void. Therefore, pending a suit by the husband against the wife to have the marriage declared void, the husband and wife continue

to be regarded as such in their civil relations, the community stipulated for in the marriage contract continues to exist and the husband continues to be obliged to support his wife.—2. A child being born of such marriage after the canonical decree and after the husband and wife have ceased to live together, and such child being only a few months old, the wife, who naturally has the guardianship and care of the child, has a right, without being appointed guardian, to obtain from the husband, pending the suit, a proper provision for the child.—3. The wife has also the right to obtain from the husband alimony for herself pending the suit.—4. She has also the right to obtain from the husband, head of the community stipulated for in the marriage contract, a provision for her costs of a defence in good faith to the action. It is for the plaintiff, as head of the community, to defray all the expenses of the action both on his own part and on the part of the defence; such expenses are a charge upon the community. *Levesque* v. *Ouellet*, 22 Que. S. C. 181.

Effect of divorce not actually declared void.]—A woman who has obtained a divorce and has re-married, has no status as the widow of her first husband upon his death, so long as her divorce has not been declared void. *Fitz-Allan* v. *Ricutord*, 6 Que. P. R. 111.

Evidence — *Facts anterior to reconciliation.*]—Under Arts. 196 and 197 of the Civil Code, the plaintiff in an action for separation from bed and board is not entitled to adduce evidence regarding facts anterior to the last reconciliation between the consorts, without first having proved some fact which, if not of sufficient gravity alone to warrant a separation, should at least strongly support the demand therefor. *Corteau* v. *Skelly*, 20 Que. S. C. 216.

Execution of judgment — *Time — Inventory.*]—A married woman may, at any time before the death of her husband, cause to be executed a judgment to give effect to a decree for separation of property, unless she has been deprived of it by a judgment of the Superior Court. — The community having been dissolved on the day of the demand for separation, the property to be divided is that existing at that date, and it is the inventory of that property which must be homologated. *Brière* v. *Marcotte*, 7 Que. P. R. 376.

Foreign divorce — *Criminal conversation — Alienation of affections — Damages.*]—The plaintiff's wife separated from him with, as was found on the evidence, his consent, and after some years obtained a divorce from him not valid according to the law of this province. She then went through the ceremony of marriage with the defendant, and lived with him as his wife for some years before this action, which was brought to recover damages for criminal conversation and alienation of affections. The latter branch was abandoned at the trial, but on the former the jury allowed $5,000 damages, and judgment was entered for this sum:—*Held*, MacMahon, J., dissenting, that, notwithstanding the separation and the divorce, the action lay, but that the damages were grossly excessive, and on this ground, and on the ground of improper reception of evidence, a new trial was granted. *Per* MacMahon, J.—The separation and subsequent conduct amounted to an absolute abandonment of his wife by the plaintiff and were a bar to the action. Judgment of Anglin, J., 3 O. W. R. 561, reversed. *Milloy* v. *Wellington*, 24 C. L. T. 318, 3 O. W. R. 37, 561, 4 O. W. R. 82; 6 O. W. R. 437; *C.* v *D.*, 8 O. L. R. 308.

Foreign divorce — *Invalidity — Service on wife.*]—In a suit to declare void a marriage contracted by a woman who had obtained in the United States of America a divorce from her first husband upon the ground that such divorce is void, that question cannot be decided upon an exception to the form alleging that the service of process was illegal, and that the woman should have been served as the wife of the first husband. *Stephens* v. *Miller*, 5 Que. P. R. 397.

Grounds — *Insanity.*] — The fact that the husband is insane and unable to receive or provide for his wife is not a ground for separation from bed and board. *Deneen* v. *McLeod*, 5 Que. P. R. 391.

Husband's liability for wife's support.]—Anderson had married McLeod's sister. After marriage he and his wife lived for some months at his house, when becoming melancholy he left and went to another man's house, where he remained several months, leaving his wife at home. He took nothing away from his house, which he left well supplied, and he told his wife to remain there. She remained three or four months, and then went to live with her brother, the respondent, but her husband's house was always open to her. Respondent sued the appellant in the County Court for the wife's board and lodging, and recovered judgment for $150. From that judgment Anderson appealed: — *Held* (Hensley, J.), reversing the judgment of the County Court, that the husband was not liable. *Anderson* v. *McLeod* (1876), 2 P. E. I. 142.

Infant wife — *Guardian—Rights of husband.*]—Unless upon grounds adjudged to be valid, the husband of a minor emancipated by marriage should be named her guardian *ad litem*. 2. The right of a husband to the guardianship of his infant wife is a consequence of the respective duties of the spouses and their intimate relations. Such reasons cease to exist when, for example, the spouses are separated, and the wife is preparing to begin an action for *séparation de corps*. In such a case the husband loses all right to the guardianship of his wife. *Ex. p. Pauzé*, 3 Que. P. R. 570.

Interim costs and disbursements — *Order for — Incidental demand.*]—The allowance made to the wife pending an action for *séparation de corps* includes not only alimony but necessary costs to carry on the cause.—A demand for provision for costs may be made at any stage of the cause, even on appeal; it is not a new demand, but an accessory of the principal action. *Troismaisons* v. *Tellier*, 10 Que. P. R. 245.

Intervention by creditor of husband —*Jurisdiction in vacation.*]—The filing of an

intervention by a creditor of the husband in an action for separation as to property is equivalent to an appearance of the defendant, and ousts the Court of jurisdiction to try and adjudicate upon the same in vacation. *Goldstein* v. *Schwartz*, 7 Que. P. R. 221.

Judgment — *Execution — Third persons — Wife taking lease — Authorisation.*]—The non-execution of a judgment for *séparation de biens* does not deprive it of effect except against third persons, and does not prevent third persons from invoking it against the wife who has obtained it.—2. A married woman, *séparée de biens*, who keeps a boarding house, may, without the authorisation of her husband or of the Court, take a lease of a house to serve as a boarding house. *Parizeau* v. *Huot*, 19 Que. S. C. 379.

Judgment—*Execution — Time—Proceedings—Posting and entry of judgment—Effect of default.*]—All essential formalities having been accomplished, and in the absence of fraud the execution of a judgment for *séparation de biens* may be procured, or at least the proceedings to obtain it may begin at any time after the delay fixed by Art. 612, C. P., subject to the prescription enacted by Art. 2205, C. C.—By "*procédures aux fins d'obtenir le paiement des droits et reprises de la femme*" (Art. 1098, C. P.), is meant all that is done with the object of winding up the *communauté*, for example, an inventory, a compromise.—3. Failure to post up and enter the judgment for *séparation de biens* is a ground for setting aside the execution as regards third persons; it is not a ground as regards the parties to the suit, and it does not prevent the judgment from taking effect, as regards such parties, from the day of the demand. *Tourneur* v. *Drouin*, 3 Que. P. R. 169.

Judgment for separation de corps—*Effect as to dissolution of community—Default of execution — Right to allege.*]—The separation of property which follows upon a *séparation de corps*, is without effect if it has not been executed in the manner provided by Art. 1098, C. P.; and the inefficiency of a judgment to dissolve the community may be pleaded as well by the husband and wife as by their creditors. *Lafleur* v. *Morin*, 21 Que. S. C. 483.

Judgment not executed — *Effect of as to strangers—Contract of wife — Estoppel—Action — Non-authorisation.*] — The nullity of a judgment *en séparation de biens*, not executed, is absolute; and third parties even cannot succeed by virtue of the fact that the wife, in a contract made between her and them, described herself as judicially separated as to property. 2. Default of authorisation of a wife *commune en biens* makes service of process upon her absolutely void; such nullity is a matter of public policy and should be taken notice of by the Court in a case where the wife does not avail herself of it. Per Langelier, J.—An action brought against a wife, *commune en biens*, who has falsely represented herself in the contract upon which the action is based as *séparée de biens*, and has not pleaded the nullity of the service by way of exception to the form, will be dismissed, but without costs. *Leclaire* v. *Robert*, 3 Que. P. R. 549.

Jurisdiction of Supreme Court of British Columbia.]—The Supreme Court of British Columbia has jurisdiction to grant a decree of divorce between persons domiciled in that province and such jurisdiction may be exercised by a single Judge of that Court. *Sharpe* v. *Sharpe* (1877), 1 B. C. R. 25, and *Sheppard* v. *Sheppard* (1908), 13 B. C. R. 486, approved. Judgment of Mr. Justice Clement, 7 W. L. R. 29, 13 B. C. R. 281, at trial, reversed. *Watts* v. *Watts*, C. R., [1908] A. C. 511, 77 L. J. P. C. 121, [1908] A. C. 573, 24 T. L. R. 911, 99 L. T. R. 764.

Jurisdiction of Supreme Court of British Columbia — *Imperial Divorce and Matrimonial Causes Act, 1857—Introduction of English law into colonies.*]—The Divorce and Matrimonial Causes Act, 1857 (Imperial), is in force in British Columbia. *Watt* v. *Watt*, 13 B. C. R. 281, 7 W. L. R. 29, not followed. The introduction of English law into the colonies of British Columbia and Vancouver's Island, and as it is in force in the province of British Columbia, considered and reviewed. *Sheppard* v. *Sheppard*, 13 B. C. R. 486.

Liability of husband for debts of wife—*Allowance — Absence of authority.*]—A married woman who is separated in fact from her husband, and who receives from him an allowance for her needs, cannot bind him for her personal expenses, particularly where they are not of the nature of alimentary supplies. In such a case, the furnisher of supplies has himself to blame if he does not make inquiry into her condition, or does not require from her an express marital authorization. *Morgan* v. *Vibert*, 29 Que. S. C. 297.

Liability of husband for debts of wife — *Public trader—Loan — False representations — Judgment of separation — Revocation — Power of Court.*]—A wife, common as to property, who is a public trader and as such procures a loan by means of false representations, binds her husband to the payment of the debt. When, under such circumstances, the wife obtains a judgment of separation as to property from her husband, renounces the community, and the report of the *practicien* is homologated, the Court adjudicating on the suit of the lender, has power, so far as may be necessary to give effect to its judgment, to revoke the judgment in separation, the renunciation to the community, and the homologation of the report of the *practicien*. *Samson* v. *Pelletier*, 28 Que. S. C. 394.

Lunatic husband—*Authorisation of wife to proceed against curator.*]—The plaintiff, common as to property with her husband, alleged that they had been married in 1882, and had been living apart since the year 1884, and that since that time she had supported herself by her own work; that he had recently been interdicted for insanity; and that his curator had obtained a judgment for $3,500 damages for personal injuries suffered by the husband before the

date of interdiction. She asked that she be authorised to *enter en justice*, in an action against the curator in his quality, for *separation de corps et de biens* from her husband: —*Held*, that the inability of a husband interdicted for insanity to receive or provide for his wife is not a ground to support an action by the wife for separation from bed and board, and no legal grounds were alleged for a judicial authorization of the wife to bring such action against the husband's curator. *Dencen* v. *McLeod*, 21 Que. S. C. 54.

Maladministration of husband.] — Where the dissipation of the husband or his maladministration of the revenues of his wife's property renders it impossible to provide for the needs of his wife and children, or even make it seem probable that it will become impossible if his management continues, there is ground for decreeing *séparation de biens*, although the *corpus* of the wife's estate is not really in peril. *Kavanagh* v. *McCrory*, 3 Que. P. R. 45.

Marriage of lunatic—*Action for declaration of nullity of marriage—Jurisdiction of H. C. J.*]—Clute, J., *held*, that H. C. J. for Ont. has no authority to declare a marriage void *(ab initio)*, upon the ground that one of the parties was of unsound mind, and, therefore, incapable of entering into the contract of marriage, at the time the ceremony was performed. *Caine* v. *Birmen* (1911), 18 O. W. R. 627, 2 O. W. N. 796, O. L. R. .

Marriage of plaintiff to brother of deceased husband — *Action to declare marriage void — Defendant absent — No personal service on defendant — Service by publication — No sufficient evidence of relationship — Jurisdiction — Grounds insufficient—Ontario Judicature Act, s. 55 (5).*]—Plaintiff brought an action against her husband, Robert May, for a declaratory judgment under s. 55, s.-s. 5, of the Judicature Act, that the marriage of the parties at Toronto on 1st July, 1893, was null and void. The action was undefended. Defendant was not personally served with writ of summons nor statement of claim. There was nothing to indicate that he had any knowledge whatever of the proceedings taken against him by plaintiff. At date of marriage now attacked, plaintiff was the widow of William May, to whom she was married at Glasgow in 1870. She alleged that defendant was a brother of her first husband, and that in procuring the license for the marriage at Toronto, he made affidavit that plaintiff was a spinster. The license, which was in evidence, described plaintiff as a widow.—Latchford, J., *held*, that even if proper service of the writ had been effected, the plaintiff was an unreliable witness upon whose uncorroborated evidence, a judgment declaring her marriage with the defendant void, should not be given. Action dismissed. *May* v. *May* (1910), 16 O. W. R. 1006; 2 O. W. N. 68.

Marriage to brother of deceased husband—*Action to declare marriage void —Defendant absent—No personal service on defendant — Service by publication — No sufficient evidence of relationship—Want of corroboration—Jurisdiction of H. C. J. for Ont.—Grounds insufficient—7 Edw. VII. c. 23, s. 8—Is it constitutional?*]—Divisional Court *held*, that the High Court of Justice for Ontario has no jurisdiction to declare invalid a marriage within the prohibited degrees of consanguinity.—*Hodgins* v. *McNeil* (1862), 9 Gr. 305, approved.—*Lawless* v. *Chamberlain* (1889), 18 O. R. 296, distinguished.—*Quære*, Is 7 Edw. VII. (O.) c. 23, s. 8, constitutional?—*Held*, that above Act does not apply to such cases as this, even if constitutional.—Judgment of Latchford, J., 16 O. W. R. 1006, 2 O. W. N. 68, affirmed. *May* v. *May* (1910), 18 O. W. R. 515, 2 O. W. N. 413, 22 O. L. R. 559.

Motion by wife for payment of disbursements—*C. P. 89, 594, par. 7; C. C. 169, 202.*]—In an action in separation from bed and board, the wife must be allowed a certain amount for the necessary disbursements. But if the husband is unable to pay, the wife must then be allowed to plead *in forma pauperis;* she being later granted sufficient money for the summoning and transporting of her witnesses. *Moisan* v. *Bilodeau*, 11 Que. P. R. 248.

Necessaries — *Implied authority.*] — A married woman separated *de facto* and living apart from her husband and in receipt from him of a monthly allowance sufficient for her support, has no implied authority to bind him for purchases of clothing. *Morgan* v. *Vibert*, 15 Que. K. B. 407.

Non-support of wife — *Defence—Misconduct.*]—In an action *en séparation de corps* begun by the wife on account of the refusal of the husband to support her, her misconduct before marriage or since does not constitute a ground of defence. *Pilsik* v. *Numiziński*, 16 Que. S. C. 231.

Nullity of marriage — *Impotence.*] — Where consummation of the marriage is, on the part of the husband, a practical impossibility, the wife is entitled to a decree of nullity of marriage. *P. (otherwise C.)* v. *P.*, 11 B. C. R. 369.

Petition — *Recrimination—Trial.*] — It is no answer to a petition for a writ in separation from bed and board for the husband to allege that his wife is keeping a disorderly house, etc., etc.; every consort is entitled to take such action, and questions of mutual recrimination must be left to the merits of the trial. *Arcand* v. *Charruau*, 8 Que. P. R. 25.

Petition by husband—*Infidelity of wife —Husband leading an immoral life — Discretionary power of Court.*]—Husband and wife had separated. She committed adultery after the separation. He led an immoral life. The Court in its discretion refused husband's petition for divorce. *A.* v. *A. and K.*, 10 W. L. R. 77.

Petition by wife for judicial separation — *Cruelty — Residence within jurisdiction at commencement of suit — Cruelty committed outside — Continuation within—Apprehension of future cruelty — Jurisdiction.*] — The petitioner, owing to acts of cruelty and misconduct, left her husband in Montreal, where the parties were domiciled,

and came to British Columbia, bringing her child of the marriage, a girl of eight years, with her. The husband followed and commenced proceedings in British Columbia for the custody of the child. While in British Columbia he renewed the acts of cruelty, and, apprehensive of further cruelty, the wife commenced proceedings for a judicial separation. He opposed the suit, on the ground that there was not jurisdiction in the Court, inasmuch as he was not domiciled or resident in British Columbia:—*Held*, that the husband had established sufficient residence to give the Court jurisdiction to entertain the suit. *Jamieson* v. *Jamieson*, 14 B. C. R. 59, 9 W. L. R. 419.

Petition by wife for judicial separation — Husband domiciled out of province—Jurisdiction. *Jamieson* v. *Jamieson*, 9 W. L. R. 419.

Petition by wife for judicial separation—*Practice — Divorce rules — Ex parte motion for directions as to trial, husband not appearing in answer to citation—Absence of affidavit denying collusion — Necessity for filing citation with certificate and affidavit of service.*]—A wife had filed a petition for divorce, but her affidavit filed therewith did not state that there was no collusion or connivance between her and her husband. The husband was served personally with the citation but did not appear. On motion for directions as to trial no order made, affidavit being insufficient. Petitioner must begin *de novo*. *Timms* v. *Timms* (1909), 12 W. L. R. 529. See 13 W. L. R. 636.

Petition by wife for judicial separation — *Husband domiciled out of province—Motion by husband to set aside a citation and petition for judicial separation.*]—The parties were married in Winnipeg, but immediately thereafter went to reside in Montreal, the husband's domicil. There is one child. Owing to cruelty and misconduct plaintiff left her husband and went to reside permanently in Vancouver. About a month after the husband followed and started proceedings to recover custody of child, and committed further acts of cruelty:—*Held*, that the husband's temporary residence is sufficient to give the British Columbia Court jurisdiction. *Jamieson* v. *Jamieson*, 9 W. L. R. 419.

Petition for dissolution of marriage —*Necessity for signature by petitioner.*]—Petition for dissolution of marriage must be signed by petitioner, not by his solicitor, unless leave has been obtained from the Court permitting latter to sign. *Plowman* v. *Plowman*, 10 W. L. R. 20.

Petition for leave to sue — *Vague allegations.*]—The Court, before granting to the wife an authorization to sue for separation from bed and board, may require her to specify the acts of cruelty committed by the defendant and the particular insults which she pretends were uttered. *Alary* v. *Phillips*, 16 Que. S. C. 905.

Pleading — *Misconduct — Alimony — Custody of children.*]—In an action by the wife for separation from bed and board, the plaintiff also asked for an alimentary allowance and the care of children; the husband pleaded admitting some of the acts alleged in the declaration, but denied the motive alleged, and asserted that the acts in question were caused by the misconduct of the plaintiff herself:—*Held*, that, although the plaintiff's misconduct might not be an answer to the claim for separation, yet it would affect her right to the care of the children and to an alimentary allowance; and a demurrer to the plea for misconduct was overruled. *Courteau* v. *Skelly*, 20 Que. S. C. 215.

Providing residence for wife — *Conjugal domicil.*]—In an action for separation, personal and as to property, brought by a wife against her husband, the Judge may, according to circumstances, in place of allotting to the wife a provisional residence outside the conjugal domicil, authorize her to remain in such domicil, and order the husband to leave it. *Hébert* v. *Michaud*, 4 Que. P. R. 297.

Provisional alimentary allowance — *Vacation.*]—A Judge has no jurisdiction in vacation to order the payment of a provisional alimentary allowance in an action for *séparation de corps*. *Currie* v. *Cunin*, 5 Que. P. R. 56.

Reconciliation — *Subsequent cruelty — Pleading.*]—A mere general allegation as to deceit or force in regard to a reconciliation which took place between consorts, or as to subsequent ill-usage, is not sufficient to justify proceedings in separation from bed and board within a few days of the reconciliation. *Beauchamp* v. *Leduc*, 7 Que. P. R. 91.

Reconciliation — *Taxable costs payable by community — Authorisation — Extra services.*]—The costs incurred by the wife, in an action for separation from bed and board, for the purpose of realising her share of the community, having been authorised by the Court, can and must be levied upon the assets of the community, and the husband must pay them if proceedings are stopped at his request. 2. When a woman is authorised to sue her husband for separation from bed and board, she is only authorised to bind herself for the taxable costs in the said action; the extra services which she may require from her lawyer must be considered as requested by her without authorisation. *Hannan* v. *Cooke*, 10 Que. P. R. 159, 18 Que. K. B. 127.

Reference — *Powers of referee—Report —Community of property — Will—Intention —Provision that wife should not benefit — Provision against seizure and attachment—Public policy.*]—A referee, appointed by the Court with the object of determining the wife's share in the property (if any such property existed) as belonging to the community of property between her husband and herself, in a case arising as a sequel to a judgment of separation from bed and board, for adjudication upon an application for confirmation of his report, ought to limit himself to giving in his report a complete and detailed statement of all the property belonging to the husband and wife, without taking upon himself to decide whether such property is included in the community of

property or not, this being a question for the Judge alone to decide on the presentation of the report for confirmation. Where a report of a referee stated that certain property should be excluded from the community, and judgment was given directing the referee to amend his report by inserting therein a complete and detailed list of this property so that it might form part of the community property, such judgment does not constitute *chose jugée* when the report so amended is presented afresh to the Court for final adjudication and confirmation. In ascertaining the intention of a testator on the interpretation of a will, regard should be had to the particular circumstances which may have influenced him, and to the impression by which he sought to convey his meaning. The following clause in a will, "I wish it to be well and clearly understood that . . . the said movable and immovable properties may not in any manner be liable for the support and maintenance of N. T. S., divorced wife of the said D. A. C., my son," is not contrary to public policy or good morals, as having the effect of protecting a husband from providing for the necessities of his wife while he is provided with maintenance and the other necessaries of life, the words "support and maintenance" aforesaid being interpreted in a wider sense than would be those of "alimentary allowance." Property thus devised or bequeathed to the husband ought to be considered as property *de communauté*. A clause in a will, "I wish it to be well and clearly understood that the property, movable and immovable, real and personal, hereby devised, is so devised under the express condition that said property, movable and immovable, real and personal, cannot be liable nor seized nor sold for debts now contracted and to be contracted," makes the income of the property devised as free from seizure or attachment as the property itself, although the testator did not add that they were made "*à titre d'aliments.*" *Stewart* v. *Cairns*, 27 Que. S. C. 1.

Renunciation of community — *Formalities—Authorization.*] — The wife's renunciation of the community, in an action *en séparation de biens*, should be made at the record office or before a notary, and a renunciation made before a commissioner of the Superior Court is void and of no effect. 2. A wife authorized by a Judge to sue her husband *en séparation de biens*, does not need a fresh authorisation to renounce the community. *Trudeau* v. *Labossière*, 4 Que. P. R. 46.

Renunciation of community — *Registration — Absence de droits et reprises.*]— The neglect to register the wife's renunciation of community, upon a judicial separation of property, does not affect the validity of the judgment for separation. 2. In order that the absence of rights and remedies of the wife against the husband may exempt her from causing the judgment for separation to be executed, it is not sufficient that such judgment does not grant any rights and remedies to the wife, but it is necessary that the absence of such rights and remedies should be stated by the referee's report or by a declaration of the wife. *Mailloux* v. *Drolet*, 18 Que. S. C. 567.

Residence of wife—*Discretionary power of Judge.*]—Art. 195 C. C., like Art. 298 C. N., gives the Judge discretionary power to allow the wife suing for separation from bed and board, to reside temporarily in a foreign country, if circumstances justify it. *Jones* v. *Warman* (1910), 39 Que. S. C. 174.

Residence of wife pendente lite — *Conjugal domicil — Community — Exclusion of husband.*]—In an action for *séparation de corps* brought by a wife against her husband, the plaintiff must allege that she is separate as to property to be authorized to dwell *pendente lite* in the conjugal domicil, and thus force her husband to quit it. The husband, head of the community, has the enjoyment of the property of the wife, including the house and furniture; he cannot be deprived of this right by the institution of an action for *séparation de corps*. *Gagnier* v. *Lasablonnière*, 8 Que. P. R. 37.

Resumption of cohabitation — *Presumption of condonation — Cruelty.*] — A separation of husband and wife, followed by their resuming life together, presumes the condonation of past offences, but the continuation of the life together after cruelty does not give rise to this same presumption. *Labelle* v. *Lecavalier*, 16 Que. K. B. 261.

Right of husband to aliment.] — A merchant sued for *séparation de corps*, may claim from his wife an alimentary pension if the latter has been put in possession of the business from which the former obtained his means of subsistence. *Joly* v. *Garneau*, 5 Que. P. R. 137.

Right of the wife to costs *for suit or defence — Alimony.*]—A wife, plaintiff or defendant, in a suit for divorce has a right to make her husband advance her the necessary means to pay the costs of suit or defence. It ought to be taken account of in the amount of alimony provided for in Art. 202 C. C., but nothing prevents her from making a special demand for a provision *ad litem*, when the alimony is insufficient. *Desroismaisons* v. *Tellier*, 35 Que. S. C. 501.

Rule nisi — *Judgment in a husband's favour against his wife — Partial execution of the judgment — Petition for a rule — C. P. 834.*]—A rule will not issue against a wife ordered to receive her husband into the conjugal domicil when she has started to comply with the order by allowing him to occupy a room in the domicil. It is by a petition for a rule *nisi*, and not by direct action, that the husband should seek to force his wife to obey the order of the Court which commanded her to permit her husband to live in the conjugal domicil. *Robinson* v. *Gore*, 11 Que P. R. 179.

Separation as to bed and board — *Cross-demand based upon different reasons— Statement of facts subsequent to the principal action—C. P. 217, 1100; C. C. 187, 188, 189.*]—In an action for separation as to bed and board, based upon ill-usage, and taken by a wife against her husband, the latter can make a cross-demand for separation from bed and board based upon the adultery of the wife. In such cross-demand, the husband

can allege facts subsequent in date to the facts alleged in the principal action. *Ingham* v. *Ingham*, 11 Que. P. R. 197.

Separation from bed and board — *Care of the children — C. P. 1190, 1101; C. C. 200.*]—The wife defendant in an action in separation from bed and board is entitled to the care of a child, one year old, and whom she has nursed and cared for until shortly before the institution of the action, especially if she resides with her father and shews that the child will be well cared for. But the husband will be given the provisional care of a child, four years old, who is not so dependent upon a mother's care and affection. *Poitras* v. *Lafrance* (1909), 10 Que. P. R. 362.

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6. Liability of One for Contracts and Torts of the Other.

Contract of wife for husband — *Invalidity — Firm name — Presumption.*] — When a wife, separate as to property, who has, by request of her husband, registered a declaration to the effect that she is carrying on business under a certain firm name, contracts obligations for her husband under such firm name, such obligations are absolutely void, according to Art. 1301, C. C. 2. The facts that she has derived no personal advantage from the business carried on under such firm name, and that the business has chiefly served to pay the debts of her husband, make a strong presumption that she has carried it on for her husband, and that she has contracted for him. 3. She cannot engage her property for the purpose of guaranteeing the obligations of her husband. *Honan* v. *Duckett*, 19 Que. S. C. 418.

Debts of husband — *Contract of wife to pay — Invalidity — Stranger.*]—A contract by a married woman *séparée de biens*, to pay the debts of her husband, is void, even where the wife declares to the creditor that she is borrowing to pay her own debts, which the lender believes. Such a contract is an absolute nullity, and the nullity of it may be invoked by a third party, the holder of an immovable mortgaged to guarantee such obligation. Judgment of Court of Review, Q. R. 13 S. C. 129, reversed. *Globenski* v. *Boucher*, 10 Que. K. B. 318, 321.

Debts of husband before dissolution of community — *Obligation by wife—Nullity — Public policy.*] — Judgment of the Superior Court in review, 6 Rev. Jur. 13, affirming judgment in 15 Que. S. C. 445, affirmed for the reasons given in the Courts below. *Bastien* v. *Filiatrault*, 31 S. C. R. 129.

Debts of wife — *Costs—Application of husband for custody of children.*]—Where a wife leaves her husband without justification, she is not entitled against him to her costs of unsuccessfully resisting his application by *habeas corpus* for the custody of the children of the marriage. *In re McPhalen*, 10 B. C. R. 40.

Debts of wife — *Necessaries.*]—A debt for clothing is of an alimentary nature, and the onus is upon the defendant to prove that the clothing was not ordinary or necessary, or that the price was too high for his means. *Ricker* v. *Arnton*, 2 Que. P. R. 569.

Debts of wife before marriage — *Married Women's Property Act — Property acquired from wife — Evidence — Deductions.*]—The Married Woman's Property Act, R. S. N. S. 1900 c. 112, s. 25, makes a husband liable for the debts of his wife contracted by her before marriage "to the extent of all property whatsoever belonging to the wife which he has acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him" in respect to any such debts, etc. In an action against the defendant R. for goods supplied to his wife before marriage, evidence was given by the plaintiff's solicitor to shew that on the examination of the wife before a commissioner, the defendant R. was present and stated, among other things, that he had received from his wife three promissory notes, for amounts and due at dates which he mentioned:—*Held*, that the evidence was not admissible, the best evidence being that taken down by the commissioner, and which he was required to return to the Court. 2. That there was nothing in the evidence to bring the notes referred to within the language "property belonging to the wife" which the defendant has "acquired or become entitled to" through the wife, or to discharge the burden resting upon the plaintiff to shew acquisition or title by or in the husband.—*Semble*, where money was received and payments made by the husband, that the plaintiff would have to shew a balance remaining in his hands, and that he could not put in one side of the transaction without the other. *Bauld* v. *Reid*, 36 N. S. R. 127.

Debts of wife before marriage—*Property of wife received by husband — Necessaries — Extinguishment of debt by marriage.*]—In an action against a husband and wife for goods supplied to the wife before and after marriage, the evidence shewed that, at the time of marriage, the wife had a separate estate, which she still held, and the only evidence upon which the claim against the husband was founded was that after marriage he cut some timber upon the wife's property, which was sold and the proceeds used to purchase supplies for household purposes:—*Held*, that this did not constitute an acquiring or becoming entitled to property from or through the wife within the Married Women's Property Act, R. S. N. S. 1900 c. 112, s. 25; and that the debt due from the wife to the husband before marriage was extinguished by the marriage. *Lockett* v. *Cress*, 2 E. L. R. 3, 8 E. L. R. 99, 41 N. S. R. 400.

Goods ordered through wife — *Acknowledgment — Domicil — Change.*] — Assuming that the defendant and wife were separated as to property, the fact that the household linen goods in question were purchased on the credit of the husband and for him, although charged in an existing account against the wife, was sufficiently established by proof of his knowledge of the transaction throughout, his personal visit to the vendor, his furnishing a sketch of his own family crest to be embroidered on the linen, by his

promise to pay for the goods on arrival, and by a letter to the vendor's attorneys in which he stated that he had authorized the insurance of the goods at his own expense, and further said, "I do not see why I should be called upon to pay him (the vendor) until I have received the goods and checked them off before a linen expert, etc." 2. Change of domicil from Montreal to New York is not legally established by the fact that a person born in Montreal, and having his domicil there, went to New York and married there, and subsequently lived in New York State for a time with his mother-in-law, and at a hotel, and then in a furnished house in New Jersey. There must be actual residence in the place selected, coupled with the intention of the person to make it the seat of his principal establishment: Art. 80, C. C. *Calcutt* v. *Tiffin*, 23 Que. S. C. 175.

Goods supplied for household use — *Liability of wife — Presumption — Agency — Evidence.*]—When goods are ordered by a married woman living with her husband, for use in the household, the presumption of law is that the wife is acting as the agent of her husband, and such presumption is not displaced by the fact that the merchant kept the account in the name of the wife and rendered statements of it from time to time to her instead of to her husband. *Paquin* v. *Beauclerk*, [1906] A. C. 160, distinguished. *Vopni* v. *Bell*, 8 W. L. R. 205, 17 Man. L. R. 417.

Sale of goods — *Authority of wife to sell husband's goods — Re-purchase by husband — Acquiescence.*]—A husband, sued for the price of a stove, will not be allowed to set up in his defence that the stove always belonged to him and that the sale which his wife assumed to make of it in order to obtain drink was void, unless he can prove that he could not have prevented the sale. 2. The fact that the husband offered a certain sum of money for the re-purchase of the stove shews acquiescence in the sale made by his wife. *Beaulieu* v. *Paquet*, 6 Que. P. R. 68.

Sale of goods to wife — *Community — Action by husband to set aside sale — Recovery of moneys paid — Set-off — Use of goods — Deterioration.*] — To an action brought by a husband, where there is community of property, to set aside the sale of a piano made to his wife, and for repayment of sums paid on account, the vendor may plead that such sums are offset by the value of the use of the piano and the deterioration which it has suffered. *Norris* v. *Mason and Risch Piano Co.*, 9 Que. P. R. 64.

Services rendered to wife — *Costs — Negotiations resulting in reconciliation — Liability of community.*]—Charges for professional services rendered to a wife who obtained judgment against her husband for *séparation de corps*, in negotiations instituted by the husband and which ended in a reconciliation, are a debt of the community, and may be recovered in an action against the husband as head of the community. *Hannan* v. *Cooke*, 18 Que. K. B. 127, 10 Que. P. R. 159.

Tort of both — *Slander — Action against both — Liability of husband — Business carried on by both.*]—The wife of the defendant managed and worked his cheese factory. With the object of taking away customers from the plaintiff, who was in the same business, she stated that he gave bad measure, and did so in the presence of her husband, who made the same statement. The plaintiff brought, on account of these statements, an action for damages against the husband and wife, but without conclusion against the latter:—*Held*, that the husband is responsible for the acts of his wife during the tacit execution of the duties he has intrusted her with, and therefore for the damages which she has caused by uttering injurious words against some person, even if no special conclusions have been taken against her by the action. *Dubuc* v. *Trottier*, 19 Que. S. C. 202.

Tort of husband — *Keeping vicious dog —Separate property of wife.*] — A wife, separate as to property, is liable for damages caused by a vicious dog belonging to her husband, and harboured at the common domicil which is her private property, particularly when it is proved that the dog was so harboured not only without any objection or protest on her part, but with her full consent and approval, notwithstanding that she had full knowledge of the dangerous character of the dog. *Hugron* v. *Statton*, 18 Que. S. C. 200.

Tort of wife.]—*Held*, affirming the judgment of Street, J., that a husband is still liable for the torts of his wife if the marriage took place before the 1st July, 1884. The provisions of the Married Women's Property Act, 1884, 47 V. c. 19 (O.), applicable to persons married before that date, do not relieve him from liability. *Earle* v. *Kingscote*, [1900] 2 Ch. 585, applied and followed. *Amer* v. *Rogers*, 31 C. P. 195, overruled. *Lee* v. *Hopkins*, 20 O. R. 596, approved. *Travis* v. *Hales*, 24 C. L. T. 12, 6 O. L. R. 574, 2 O. W. R. 509, 1037.

Torts of wife — *Community — Participation — Defamation.*]—A husband in general is not responsible for the *torts* or *quasi-torts* committed by his wife, nor is the community responsible for them. 2. There is no exception to this rule except when the husband has acted as his wife's accomplice or has participated in the *tort* or *quasi-tort* by having aided, ordered, or authorized her. 3. In this case (slander), the husband having ordered his wife to be silent and to go into the house as soon as he understood what she was saying, there was no fault or complicity on his part, and therefore, no responsibility of the husband or of the community for the wrong committed by the wife. *Fortier* v. *Demers*, 21 Que. S. C. 543.

Wife as surety — *Debt assumed by husband.*]—*Held*, affirming the decision in Q. R. 15 S. C. 115, that a wife (*séparée de biens*) cannot become surety for the debt of a third person after such debt has become that of her husband—who in this case had continued the business of the third person and assumed all his obligations—such an obligation being presumed to be contracted for the husband; but the fact that the hus-

band had thus assumed the obligations of the third person did not affect a prior security which the wife had given for the benefit of this third person. *Mullin* v. *Mullarky*, 8 Que. B. 411.

Wife pledging credit of husband — *Necessaries — Admissions — Evidence.*]— An admission of a sale of goods for more than $50 by a merchant to one who is not a merchant, cannot be proved by witnesses, if it is not proved that the goods were delivered in whole or in part. 2. In the absence of a special mandate to his wife, a husband is not responsible for purchases made by her unless they are for things necessary for his family, such as provisions, clothes, etc. 3. Even when goods so purchased by the wife for the needs of the family are in question, the husband is not bound by the admissions of his wife as to the purchase, unless such admissions have been made in the course of the purchase. *Pichette* v. *Morrisette*, 25 Que. S. C. 46.

Wife's authority to pledge husband's credit — Implied authority — Principal and agent — Presumption — Rebuttal — Necessaries — Estoppel. *Clayton* v. *London*, 3 W. L. R. 463.

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7. Marriage Contract.

After-acquired goods — *Donatio mortis causâ.*] — A clause of an ante-nuptial contract by which the future husband gives to the future wife all the furniture in the matrimonial domicil, including what may be acquired by the husband during the marriage, such gift becoming void in case of the pre-decease of the wife, constitutes a gift *mortis causâ*, and confers on the wife the actual property only in the goods which the husband possessed at the time of the marriage. *Newman* v. *Despocas*, 17 Que. S. C. 477.

After-acquired property — *Contestation of opposition—Donatio mortis causa.*]— A gift to the wife of all the household furniture in the dwelling-house of the husband and wife is a gift of property present and future, which is not a gift *mortis causa*, but which takes effect at any time, and there is nothing illegal or immoral about it.—2. It may be alleged in answer to the contestation of an opposition, based upon such a gift, that certain of the effects were bought by the husband after the marriage for his wife to replace like effects which had been sold, this answer being an explanation of an allegation of the opposition raised by the contestation. *Allan* v. *Trihey*, 5 Que. P. R. 298, 24 Que. S. C. 12.

After-acquired property — *Donatio mortis causa — Separation—Replevin—Parties.*]—A marriage contract stipulated that "all the furniture which should be brought at any time into the dwelling-house of the future husband and wife, by either one of them, should belong to the future wife." A *séparation de corps* having been adjudged between the husband and wife, the wife, accompanied by her father, went to the house of the husband, and removed the furniture, which she alleged belonged to her by virtue of the clause above quoted, and this furniture was transferred to the house of her father, where she lived. The husband replevied the furniture in an action brought against the father and daughter:—*Held*, that the clause quoted constituted a gift of future property, *mortis causa*, and, therefore, the furniture remained the property of the husband until his death. That, in the circumstances, the husband was right in bringing his action against both his wife and her father. *Goyette* v. *Leclerc*, 23 Que. S. C. 542.

Ante-nuptial contract — *Specific performance — Will—"Voluntarily"—Executor —Costs.*]—A woman, in consideration of a man marrying her, promised him that she would make him her sole heir; he married her, and after marriage, in acknowledgment of the ante-nuptial contract, she signed a writing stating "I voluntarily promised . . before and after marriage that I would make him my sole heir . . . by virtue of this contract he is my sole heir." She died having (after the acknowledgment) disposed of her estate by will to the exclusion of her husband:—*Held*, that the ante-nuptial agreement was a binding contract on the part of the woman to leave by will her property to her husband, and should be specifically performed; and that "voluntarily" in the acknowledgment meant "of her own free will." —*Held*, also, on the facts, that the executor named in the will acted reasonably in defending the action and resisting the appeal, and was therefore entitled to charge the estate for his costs. *Raser* v. *McQuade*, 11 B. C. R. 161.

Community — *Stipulation for usufruct of survivor—Registration.*]—A contract of marriage provided that there should be universal community, and also stipulated a donation to the surviving consort of the usufruct, during life, of all property existing at the dissolution of the community by the death of the consort dying first. Nothing existed in the community, at the date of its dissolution, that would not have formed part of it by mere operation of law:—*Held*, that the stipulation, in such marriage contract, of usufruct in favour of the surviving consort, although described as a donation, is not a donation but a marriage covenant, and is not subject to the formality of registration. Art. 1411 C. C. *Huot* v. *Bienvenu*, 21 Que. S. C. 341.

Construction—"*Meubles et effets mobiliers*"—*Money in bank.*]—Unless the context clearly indicates the contrary, the words "*meubles et effets mobiliers*" in a marriage contract comprise money deposited in a bank. *Sabourin* v. *Montreal City and District Savings Bank*, 21 Que. S. C. 391.

Construction — *Stipulation of dower — Claim by children—Renunciation of succession.*]—A stipulation of dower in a marriage contract executed before the Civil Code came into force, of a sum *une fois payée et sans retour*, meant that, if children were born of the marriage, the wife, in case of survival, should have the usufruct and the children the ownership of the dower-money.—2. Children, in order to claim their dower, are not bound to renounce the succession of their

father, when it has devolved by his will on a universal legatee, who has accepted it. *Kirkpatrick* v. *Birks*, 14 Que. K. B. 287.

Donation a cause de mort — *Creditors of husband.*]—A gift to the wife in a marriage contract, "of all the furniture and furnishings which the expected husband will have in his dwelling at the time of his death," is a gift of goods in the future, and, therefore, made *à cause de mort*. This grant takes effect only on the death of the husband, and in his lifetime the wife has no right to the goods granted; she has no title to prevent the seizure and sale thereof at the suit of the creditors of the husband. *Dorval* v. *Préfontaine*, 14 Que. K. B. 80.

Donation of chattels — *Time of taking effect—Death of husband — Rights of creditors in lifetime.*]—A clause in a marriage contract providing that, "In consideration of the honest and sincere affection which the intended husband bears towards the intended wife, he makes a donation to her of all his furniture, furnishings, and movable effects to be actually found in his dwelling house, and also of all such furniture, furnishings, and movable effects which the intended husband may in the future have in his dwelling house," does not amount to a gift in favour of the donee taking effect in the lifetime of the donor, but should be considered a gift "*à cause de mort*," which would take effect only at the death of the husband, and, as a consequence, the goods thus given, becoming the property of the wife only at the death of the husband, can be seized and sold to satisfy a judgment against the latter. *Préfontaine* v. *Dorval*, 26 Que. S. C. 301.

Douaire préfix une fois paye et sans retour — *Civil Code—Interest of wife—Interest of children.*]—A clause in a marriage contract, made before the coming into force of the Civil Code, by which the husband gives his wife the sum of $4,000, *douaire préfix une fois payé et sans retour*, interpreted according to the law prior to the Code, does not import a departure from the well established principle underlying dower, of usufruct in the wife and property in the children; and therefore the children have a vested proprietary interest in the dower and become entitled to claim it on the death of the parents. *Birks* v. *Kirkpatrick*, 27 Que. S. C. 51.

Gift — *Gain de survie — Seizure by creditors of husband—Contractual gift of chattels—Registration — Wedding presents.*] — A gift of property made to a wife by a marriage contract as *gain de survie*, takes effect only at the death of the husband. During the life of the husband the wife has no right to the property nor status to oppose a seizure thereof made by the creditors of the husband. *Dorval* v. *Préfontaine*, 14 Que. Q. B. 80, referred to.—A contractual gift of movable property, not followed by an actual handing over to the donee of the public possession, must be the subject of registration.—Wedding presents are regarded as made to the future wife and are her property when it becomes a question of separating the goods of the husband and wife. *Proulx* v. *Klineberg*, 30 Que. S. C. 1.

Gift during coverture — Seizure by execution creditor. *Shuttleworth* v. *McGillivray*, 2 O. W. R. 250, 5 O. L. R. 536.

Gift of household furniture—*To be delivered at a future indeterminate time—Oral testimony of the delivery.*]—The clause in a marriage contract whereby the husband, by gift *inter vivos*, gives to his future wife household furniture of a specified value, and binds himself to deliver it to her as his means, from time to time, will permit, is legal, and subsequent delivery of the movable effects, in execution of the gift, may be established by oral testimony. The further condition in the same clause of the marriage contract that, upon death of his wife, the furniture and effects so given will revert to the husband, does not impair the exclusive right of ownership enjoyed by the wife during her lifetime. *Lusher* v. *Decary* (1911), 39 Que. S. C. 469.

Gift of movables and money — *Survivorship — Gift inter vivos — Condition — Predecease of wife — Return to husband.*]—A stipulation, under the heading "by way of settlement," in a marriage contract, drawn up in the English language, by which, after a gift of movables, the intending husband makes a gift to the intended wife of a sum "to be had and taken by her . . Sarah Fox . . from and out of the most available cash assets of the estate of him, the said Carl Schiller, at any time upon her first demand and as her own property, to have and to hold both of said donations and settlement unto her. . provided always that she survive him, for, in case she should predecease him, said settlement and said donation shall return and belong to him by title of reversion," does not constitute a *gain de survie*, but a gift *inter vivos* to take effect upon the property of the husband whenever the wife chooses, subject to the condition, in the event of her predecease, of the return of the movables and money to the surviving husband. *Fox* v. *Lamarche*, 16 Que. K. B. 83.

Gift to wife — *Contemplation of death—Creditors.*]—A clause in a marriage contract, stipulating that all household effects and furniture which shall at any time be brought into the conjugal domicil by either of the consorts shall belong to the wife, is neither a gift of present property, nor a gift of future property made in contemplation of death permissible in a marriage contract, but purports to be a gift of future property *inter vivos*, and is illegal and of no effect. Moreover, such stipulation is void inasmuch as it would enable the husband to confer benefits upon his wife during the marriage, contrary to the terms of Art. 1265, C. C. The husband has, therefore, a right, notwithstanding such clause, to oppose the seizure, by a judgment creditor of his wife, of articles of furniture acquired by him after the marriage and brought into the common domicil. Judgment in 16 Que. S. C. 273 reversed. *Desrochers* v. *Roy*, 18 Que. S. C. 70.

Gift to wife — *Expenditure in purchase of land—Deed—Notice—Registration—Rights of mortgagee — Rights of children of marriage.*] — The husband by the marriage contract promised to expend, within five years, $7,000, which he gave to his wife (separate as to property), in the purchase of an im-

movable in the name of the wife, but in which she should have only the usufruct, and the children the property. After the marriage, the wife, with the authorisation of her husband, bought an immovable in her own name. There was nothing either in the deed of sale, nor in any other writing, which shewed that this purchase was made with the money of the husband, or with the sum given in the marriage contract; on the contrary, everything shewed that it was the wife who was purchasing for herself and with her own money, and so the matter appeared at the registry office. Afterwards the wife borrowed money from the plaintiff, and, with the authorisation of her husband, hypothecated the immovable as her absolute property to the plaintiff. The plaintiff having caused the immovable to be seized under his execution against the wife, her children claimed it by virtue of the marriage contract, and they proved orally that the intention of the husband and wife, at the time of the purchase, was to make it in order to conform to the contract of marriage, and that the husband had himself furnished the purchase money in fulfilment of the contract:—*Held*, that the claim of the children could not, upon such testimony, prevail against the plaintiff; that, in order to prevail against him, the deed of sale or some other registered deed should have mentioned that the purchase was made with the sum given by the husband to the wife; that the plaintiff, in consequence, had the right to cause the whole of the immovable to be sold as the property of the wife. *Gaudreau* v. *Tetu*, 20 Que. S. C. 402.

Gift to wife — *Future payment—Insolvency of husband—Ranking on estate—Registration—Creditors—Loan by wife.*]—In a marriage contract the giving by the future husband to his future wife of a sum of money which she "shall have and take, when it shall please her, *sur les plus clairs et apparent biens* of the future husband," is lawful when such gift has been made without fraud, when the husband was not insolvent at the time of the contract, and when the debt of the creditor contesting the gift did not exist at such time, and the wife can claim such sum at the time of the subsequent insolvency of the husband and rank therefor with the other creditors of the husband upon the estate. 2. The marriage contract may be set up in opposition to the subsequent creditors of the husband, if it has been registered at the place where the husband and wife had their domicil at the time it was entered into, even when it has not been registered until later at the place where the bankruptcy has been declared. 3. A contract of loan between husband and wife is valid, and the wife can claim the sum lent against the estate of the husband equally with the other creditors. *In re Denis and Kent*, 18 Que. S. C. 436.

Gift to wife — *Insolvency of husband—Dower—Renunciation of—Hypothec—Registration.*]—A gift in a marriage contract by the intending husband to his intended wife, of the furniture and household effects garnishing the common domicil, is deemed to be by gratuitous title, and is invalid as against a creditor of the husband, donor, who was insolvent at the time of the marriage. 2. Dower, whether customary or conventional, is not a gift but a debt, and is by onerous title. This rule applies to conventional dower even when it exceeds the customary dower which it replaces. 3. Renunciations to dower are to be very strictly construed in favour of the wife; and even where, as in the present case, the marriage contract contains what purports to be a renunciation to dower, whether customary or prefix, the stipulation of a life rent payable to the wife, which rent is expressly stated to be in lieu of dower, is in effect a stipulation of conventional dower, and is governed by the same rules which govern dower. Such stipulation cannot, therefore, be set aside by a creditor without proving knowledge by the wife of her husband's insolvency at the date of the marriage. 4. The wife has no legal hypothec to secure the payment of conventional dower, and the registration of a mere notice, as provided for legal hypothec, without description of the property affected, does not charge the husband's property with a hypothec in favour of the wife. *Turgeon* v. *Shannon*, 20 Que. S. C. 135.

Marriage agreement — *Promise to provide for plaintiff if she would marry adopted son—Instrument in writing—Forgery of — Neglect to bring action on during lifetime of donor—Donor had provided for plaintiff by deed inter vivos.*]—An action was brought against the executrix of M. H. in the year 1854, upon the following document:—"On demand, I will pay at any time to Miss M. J. if she will marry my adopted son, A. T. H., £1,500, currency. Three Rivers, 14th August, 1840. M. H." The declaration alleged that this promise was the ground which induced the plaintiff (formerly M. J.), to marry M. H.'s son, A. T. H. The defence to the action was that this instrument was a forgery. Upon the evidence it appeared that no claim had been made by the plaintiff for principal or interest during the lifetime of M. H., nor was it shewn how the instrument came into the plaintiff's possession, nor did the plaintiff in any way account for not enforcing the demand during the lifetime of M. H. It further appeared that M. H. had, in two letters written about the date of the alleged note, promised to provide for the plaintiff and any family she might have, and had, by a deed of donation *inter vivos*, provided for his son, A. T. H., and the plaintiff and their family.—*Held*, (reversing the judgment of the Court of Queen's Bench in Lower Canada), that, without deciding that the instrument was a forgery sufficient appeared from the facts to lead to the conclusion that M. H. had provided for the plaintiff by the deed of donation in satisfaction of the promise made to her, which inference, coupled with the fact of the plaintiff not claiming, or bringing the action in M. H.'s lifetime, or accounting for the custody of the instrument, afforded strong proof of satisfaction by the deed of donation for any promise made by M. H. Whether the evidence of cousins-german to a party in the cause is by the law of Lower Canada admissible? The Courts in Canada examined witnesses, and compared the handwriting of the instrument sued upon, with the handwriting of two other documents put in evidence and admitted to be genuine. In such circumstances the Judicial Committee upon petition for that purpose, ordered the Court in Canada to transmit to the originals for the purpose of inspection and comparison at the

hearing of the appeal from the judgment of the Court in Lower Canada. *McCarthy* v. *Judah* (1858), C. R. 2 A. C. 407.

Marriage contract—*Quebec law—Money payable to wife after death of husband — Right of wife to rank as creditor upon insolvent estate of deceased husband—Policy of insurance —Construction of marriage contract — Consideration — Renunciation of dower.*]—The plaintiff claimed, as widow of Edward O'Reilly, to rank as a creditor in the sum of $25,000 in the distribution of the assets of said O'Reilly's estate, under a certain marriage contract entered into between plaintiff and the said O'Reilly prior to their marriage, and dated 22nd June, 1889. Upon the application of defendants, executors of the last will of Edward O'Reilly, it was ordered by Anglin, J., that parties proceed to the trial of an issue whether the said marriage contract entitled the plaintiff to rank as a creditor in the distribution of the assets, and whether the plaintiff was entitled to the proceeds of a certain policy of insurance for $3,000. At the trial Britton, J., (12 O. W. R. 688), found the first issue in favour of plaintiff and the second in favour of the creditors.—Divisional Court (13 O. W. R. 967) affirmed Britton, J., and dismissed the creditors' appeal with costs.—Court of Appeal affirmed Divisional Court (Meredith, J.A., dissenting). *O'Reilly* v. *O'Reilly* (1910), 16 O. W. R. 75, 21 O. L. R. 201.

Marriage settlement — *Gift—Registration—Time—Creditors—Action to set aside transaction—Parties.*]—A gift of property by husband to wife by way of marriage settlement must be registered. 2. The registration of a gift after the time allowed cannot be set up against creditors who have become such in the interval. 3. Several creditors may join together in an action to set aside a transaction as fraudulent. *McDougall Co.* v. *Boisvert*, 24 Que. S. C. 162.

Payment of sum in lieu of dower—*Survival—Rights of heirs-at-law—Gift inter vivos—Condition.*]—A covenant in a contract of marriage that "the husband, in consideration of the renunciation of legal dower by the wife and of the love and affection he has for her, gives her a sum of money, to be taken from the clear assets of his estate, provided that she survive him, payable immediately after his death, monthly or otherwise as she may require, as a marriage portion in lieu of dower," with a further covenant that "if the wife predeceases the husband, without issue, or, having had issue, such issue having predeceased herself, her heirs shall have no right to the sum, which shall vest in him, the husband, *à titre de reversion*," is not a stipulation or prefixed or conventional dower, nor a gift or gratuitous disposition, but a synallagmatical agreement or bargain that the husband shall pay the sum in consideration of the renunciation by the wife of her dower rights. Hence, in the event of the predecease of the wife leaving children, issue of the marriage, and of such children being her heirs-at-law, she having died intestate, they have the right to be paid the sum out of their father's estate, not by right of dower (*à titre de douairiers*) but as the representatives of their mother. They are not bound, therefore, as a condition precedent to the recovery of the sum, to renounce the succession of their father, or any benefit accruing to them under his will.—Even in the view that the above marriage covenant is gratuitous or a gift, it is a donation *inter vivos* and not *mortis causa*, nor is it subject to a suspensive condition that the donee survive the donor. *Hogan* v. *Eadie*, 30 Que. S. C. 402.

Place of celebration — *Foreign law.*]—In the absence of an express or tacit agreement to the contrary, the legal consequences of a marriage, as regards matrimonial contracts, are determined according to the law of the place where the marriage was celebrated. *Peters* v. *City of Quebec, City of Quebec* v. *Peters*, 33 Que. S. C. 361.

Pre-nuptial contract in Quebec—Law of Quebec — Community of property — Land situate in Ontario — Will — Distribution of proceeds of sale—Heirs of wife—Heirs of husband—Judgment—Petition to set aside—Reference—Costs. *Cadieux* v. *Rouleau*, 10 O. W. R. 1103.

Transfer of husband's property before marriage — *Intent to defeat claim of wife—Husband continuing in possession till death — Testamentary character of deed — Registration—Evidence—Conversations with deceased — Fraud on wife.*]—A., shortly before his marriage to the plaintiff, transferred nearly all his property to the defendant for the purpose of preventing the plaintiff from having any portion of his estate in the event of his death. The defendant took the title to the property with knowledge of A.'s purpose. A. died about two months after his marriage. A., notwithstanding the transfer, continued in possession of the real estate and personalty until his death:—*Held*, that the wife was not entitled to relief against the transfers made by A. during the treaty of marriage.—*Held*, further, that there being nothing on the face of either of the transfers, and no clear proof otherwise, to indicate that its operation was to be suspended until the maker's death, the documents could not be regarded as testamentary.—The fact of registration is almost conclusive against the testamentary character of an instrument.—Conversations with A. in respect to the transfers were admissible, not to cut down the transfers, but to shew the state of the deceased's mind thereto and the design of himself and the defendant in the transaction. American and English authorities reviewed. *Archibald* v. *Archibald*, 40 N. S. R. 406.

Universal community — *Don mutuel—Registration.*]—A marriage contract contained a clause whereby the contracting parties made to each other a mutual gift of all the property which might belong to the one who should die first, "*en jouir en usufruit sa vie durant à so caution juratoire et gardant viduité.*" The only property affected belonged to the community:—*Held*, that the donation was within Art. 1411, C. C., and did not require registration, as the clause was divisible, and the stipulation as to universal community merely a marriage covenant, and not subject to the rules and formalities applicable to gifts. Judgments in 21 Que. S. C. 341 and 12 K. B. 44, affirmed. *Huot* v. *Bienvenu*, 33 S. C. R. 370.

8. Matrimonial Offences.

Adultery of wife — *Mourning.*] — The mourning equipment of the wife is part of her portion as survivor, and a wife who has been adjudged guilty of adultery cannot recover the value of such mourning (*deuil*) from the heirs of her husband. *Bradley* v. *Ménard*, 18 Que. S. C. 382.

Alienation of husband's affections — *Action for — Summary dismissal.*] — The plaintiff sued another woman for alienating her husband's affections, committing adultery with him, and inducing him to leave the plaintiff and go to a foreign country, whereby she was deprived of his support and services and of the statutory right to proceed against him for non-support:—*Held*, following *Lellis* v. *Lambert*, 24 A. R. 653, that the action would not lie; and a summary order was made under Rules 259-261 striking out the statement of claim as disclosing no reasonable cause of action, and dismissing the action. *Lawry* v. *Tuckett-Lawry*, 2 O. L. R. 162.

Alienation of husband's affections — *Adultery of husband — Damages — Married Women's Property Act.*]—Neither at common law, nor under the Married Women's Property Act, will an action lie by a married woman against another woman to recover damages for alienation of her husband's affections, and for committing adultery with him. *Lellis* v. *Lambert* (1897), 24 A. R. 653, followed. Judgment of Divisional Court affirmed. *Weston* v. *Perry* (1899), 14 O. W. R. 956, 1 O. W. N. 155.

Alienation of wife's affections — *Plea —Ill-treatment of husband.*]—A defendant sued for damages by the plaintiff for having alienated the affections of his wife, cannot plead that the plaintiff had already lost her affections by the ill-treatment to which he submitted her. *Cormier* v. *Bousquet*, 9 Que. P. R. 25.

Criminal conversation — *Damages — Limitation of actions.*] — The Statute of Limitations is not a bar to an action for criminal conversation where the adulterous intercourse between the defendant and the plaintiff's wife has continued to a period within six years from the time the action is brought:—*Quære*, Does the statute only begin to run when the adulterous intercourse ceases, or is the plaintiff only entitled to damages for intercourse within six years preceding the action? Judgment in 27 A. R. 703, 21 C. L. T. 19, affirmed. *Bailey* v. *King*, 21 C. L. T. 399, 31 S. C. R. 338.

Criminal conversation — *Abandonment —Separation—Hearsay evidence—Damages.*] —Appeal by the defendant and cross-appeal by the plaintiff from the judgment of a Divisional Court reported 8 O. L. R. 308. The appeal was dismissed on the ground that the evidence did not shew such abandonment by the plaintiff of his wife as deprived him of his right of action, and the cross-appeal on the ground of improper reception of evidence at the trial and excessive damages. *Patterson* v. *McGregor*, 28 U. C. R. 280, observed upon. *C.* v. *D.*, 12 O. L. R. 24; *S. C. sub nom. Milloy* v. *Wellington*, 7 O. W. R. 298, 862.

See also 9 O. W. R. 749, 10 O. W. R. 573.

9. Separate Property of Wife.

Absence of independent advice — *Guaranty by wife.*] — The plaintiff, a married woman, sought to set aside certain instruments of guaranty, agreements and transfers of property with and to the defendant bank mainly on the ground, no fraud being alleged, that she had no independent advice. The trial Judge dismissed the action, and the Court of Appeal being equally divided the appeal was dismissed. *Stuart* v. *Montreal*, 12 O. W. R. 958.

Abandonment of one claim — *Proceedings with the other — Allegations required—Notice.*]—In an action for separation from bed and board and as to property the plaintiff may abandon her claim for separation from bed and board and proceed with that for separation of goods only, provided always that the allegations in the action and the conclusions to be drawn therefrom be stated in a manner to justify the latter claim, and that the notice required, in cases of separation of goods, to be given in the newspapers, has been given. *Rielle* v. *Dubreuil*, 7 Que. P. R. 66.

Action by wife against husband — *Promissory note — Endorsement—Contract.*] —In 1882 the respondent made a promissory note for $10,000 in favour of J. L., payable on demand. This note was endorsed by the payee to her sister, the maker's wife. In 1899 an action was brought on the note by the endorsee against her husband, the maker, which, at the trial was dismissed on the ground that the Married Women's Property Act did not authorise such an action: 19 C. L. T. 326. On appeal to the Court *en banc* the Judges were equally divided in opinion, and the judgment at the trial stood affirmed: 20 C. L. T. 136, 32 N. S. R. 1. By R. S. N. S., 5th ser., c. 94, a married woman in Nova Scotia holds her separate personal property, not reduced into possession by her husband, as if she were a *feme sole*, and the Act of 1898, c. 22, gives her the same civil remedies against every person, including her husband, as an unmarried woman has:—*Held*, reversing the judgment, that the note sued on was personal property of the wife not reduced into possession, and the action could be maintained under the above Acts by the wife against her husband. *Michaels* v. *Michaels*, 20 C. L. T. 450, 30 S. C. R. 547.

Action relating to separate estate — *Parties — Next friend.*]—Husband and wife should not be joined as co-plaintiffs in a suit relating to the wife's separate property. The suit should be in the name of the wife's next friend, or, since the Married Women's Property Act, 58 V. c. 24 (N.B.), it may be in the wife's name. *Cronkhite* v. *Miller*, 2 N. B. R. 51.

Administration by wife—*Agent's commission.*]—Although a wife, *séparée de biens*, can by herself do all acts and make all contracts which concern the administration of her property, she cannot, without the authority of her husband, validly contract to give a commission to an agent who shall effect a sale of her immovable property, such a contract not being an act of administration. *Bourdon* v. *Bourdeau*, 18 Que. S. C. 136.

Administration of wife's property by husband — *Warrant of administration — Alienation by husband—Replevin by wife.*] —A wife, separate as to property, may replevy her goods without the authorisation of her husband.—2. A warrant of administration given by a wife, separate as to property, to her husband, does not give him the right to alienate the goods.—3. The husband, although he may be, in certain cases, the administrator of the property of his wife, separate as to property, has no right to alienate them without an express warrant. *Beaulac* v. *Lupien*, 23 Que. S. C. 88.

Animals seized under execution against husband — *Claim by wife — Acts of ownership by husband — Animals kept on farm of husband — Interpleader — Evidence — Estoppel.*] — The plaintiff, the wife of the execution debtor, claimed horses and cattle seized by the sheriff on the debtor's farm under the defendants' execution. Upon the trial of an interpleader issue it appeared that the plaintiff had money of her own before her marriage, and that with that money she, after her marriage, bought cattle; part of the increase of these cattle she exchanged for other cattle and for horses, and in that way acquired the animals seized. The evidence shewed certain isolated instances of dealings by the husband with some of the animals; amongst others, that he placed a chattel mortgage upon some of them with his wife's consent:—*Held*, reversing the judgment of a County Court Judge, that the plaintiff was entitled to succeed in the issue. —*Per* Richards, J.A., that the plaintiff's consent to some of the animals being chattel-mortgaged was no estoppel as against any one but the mortgagee.—*Per* Cameron, J.A., that the acts of interference by the husband were to some extent inconsistent with the wife's ownership, but were not sufficient to divest that ownership. *Haffner* v. *McDermott*, an unreported decision of the King's Bench, approved. *Simpson* v. *Dominion Bank* (1910), 13 W. L. R. 1.

Business carried on by husband in name of wife — Stock in trade seized by execution creditors of husband — Married Women's Property Act — Construction — Earnings of married woman—Investment in land — "Property" — Profit of business — Burden of proof — Evidence — Stock paid for largely by husband's money—Interpleader issue. *Douglas* v. *Fraser* (Man.), 6 W. L. R. 244.

Business of husband — *Transfer of assets to wife — Conduct of business — Investment of wife's money.*] — A. carried on a dray and trucking business, and becoming financially embarrassed, gave a bill of sale of his horses and trucks to S. for $750, payable in one year. A few months after the giving of the bill of sale, S., with A.'s consent, sold the property at auction and bought it in. After the sale the whole of the property remained on A.'s premises and in his or his wife's possession for some years. Subsequently the wife of A. filed the usual certificate and consent, but the business continued as before, except that S. sold the property covered by the bill of sale to the wife of A. for $750, and she paid him $250 of her own money on account, and gradually paid him other sums out of the earnings of the business. The business was conducted in the wife's name, the husband, however, superintending it, and some of his debts were paid out of its earnings:—*Held*, that the facts in evidence deprived the business of its separate character, and that even the investment of the wife's money did not enable her to claim the business as her separate property. *Adams* v. *Archibald*, 40 N. S. R. 84.

Chattels — *Domicil — Married Women's Property Ordinance, N. W. T.—Construction —Constitutional law — N. W. T. Act.*] — Whether a husband and his wife are living together or apart, her domicil in legal contemplation follows his. Where, therefore, a man domiciled in the Territories, married in Ontario a woman domiciled there, and thereafter they resided in the Territories, it was held, that as to furniture belonging to the wife, brought by her to the Territories, the question whether it passed to the husband *jure mariti* or was the wife's separate property, depended upon the law of the Territories.—Ordinance No. 16 of 1889, enacted: "A married woman shall in respect of her personal property, have all the rights and be subject to all the liabilities of a *feme sole*, and may alienate and by will or otherwise deal with personal property as if she were unmarried:"—*Held*, that this Ordinance referred only to such property of a married woman as was covered by the provisions of the N. W. T. Act, R. S. C. 1886, c. 50, ss. 36-40. *Conger* v. *Kennedy*, 2 Terr. L. R. 186, reversed 28 S. C. R. 397.

Contract — *Pleading — Proof of separate estate.*]—In an action against a married woman on a contract, it is not necessary under the Married Women's Property Act of 1895 (N.B.), to allege on the record, or prove on the trial as a fact, that either at the time the contract was made, or at the time the action was commenced, she had or was possessed of separate property. *Johnson* v. *Jack, Johnson* v. *Bank of Nova Scotia*, 34 N. B. R. 492.

Conveyance — *Security — Device to defraud creditors—Knowledge of grantee—Evidence.*]—Where a conveyance by a married woman of alleged separate property is attacked as a device to defraud creditors, the attacking party is not entitled to succeed, where there has been valuable consideration for the security given, by shewing that ultimately the business was judicially declared to be a device to defraud creditors, and also that the party obtaining the security was a relative and had some knowledge of the business in question, and knew that the husband was employed in it. In order to set aside such conveyance, it must be clearly shewn that the grantee had knowledge of the "device" at the time the security was given. *Hartlen* v. *Adams*, 40 N. S. R. 96.

Co-sureties for debt of stranger — *Liability of wife—Absence of fraud—Findings of trial Judge—Demeanour of witnesses —Appeal.*] — A married woman, when contracting otherwise than for the benefit of her husband, has all the capacity of a *feme sole* to bind her separate estate, and there can be no ground for presuming that the husband abused the confidence of his wife by exercis-

ing undue marital influence for the benefit of a stranger.—*Cox* v. *Adams*, 35 S. C. R. 393, distinguished.—And, in the circumstances of this case, where the defendants, husband and wife, became sureties for the debt of a third person, and it was found by the trial Judge that the wife became co-surety with full knowledge of the nature of the obligation which she undertook and without anything in the nature of fraud, misrepresentation, or undue influence, she was *held* liable to the creditors, the plaintiffs, no circumstances being proved which would relieve the principal debtor from liability. — There was evidence that threats were used to induce the wife to guarantee the debt, but the trial Judge found, upon consideration of the conduct and demeanour of the witnesses, that no such threats were made:—*Held*, that the Court could not, upon conflicting evidence, reverse this finding.—Judgment of Riddell, J., affirmed. *Sawyer-Massey Co.* v. *Hodgson*, 18 O. L. R. 333, 13 O. W. R. 980.

Deed of married woman — *Absence of formal authorisation of husband—Art. 177, C. C.—"Concours du mari"—Absolute nullity—Vendee invoking.*] — The "concurrence of the husband" in the deed required by Art. 177, C. C., to render valid the alienation of her property by a married woman, must be understood in the common and ordinary sense of the words. Therefore, a deed of sale of land executed by a married woman alone, although her husband, who is in the next room with only a thin partition between the rooms, has heard all that passed, is void. The deed being absolutely void and not merely voidable, all those who have an actual interest may take advantage of the nullity, among others, those to whom the sale was made. *Fournier* v. *Grégoire*, 30 Que. S. C. 527.

Deed to wife—*Non-authorisation of husband — Petitory action — Prescription.*] — *Quære:* Is a deed of sale of lands in Quebec to a married woman, without the authorisation of her husband, sufficient to support a petitory action? Would such a deed be null for defect of form and insufficient, under Art. 2254, C. C., to serve as the ground for a prescription by ten years' possession? *Chalifour* v. *Parent*, 21 C. L. T. 332, 31 S. C. R. 224.

Domicil — *Change — Law of foreign state — Presumption—Evidence—Ownership of goods.*]—The mutual rights of a husband and wife, as to personal property of each at the time of their marriage, are governed by the law of the matrimonial domicil, and are not affected by a subsequent change of domicil. — Where the law of a foreign State (Ohio) has not been proved, the Court in this province is justified in assuming, in the absence of special circumstances, that the common law prevails in that foreign State. — *Prima facie*, goods in the actual possession of the wife of an execution debtor are the goods of the latter; a wife, in order to prove that the goods are her separate property, must shew facts that will displace the presumption involved in this rule. *Pink* v. *Perlin & Co.*, 40 N. S. R. 260.

Earnings of wife — Separate property —Business carried on by wife with assistance of husband—North-West Territories Act —Married Women's Property Ordinance—Insolvency of husband—Fraudulent scheme to defeat creditors—Judgment against husband —Execution against property standing in name of wife. *Fraser* v. *Kirkpatrick* (N.W. P.), 5 W. L. R. 581.

Estate of deceased wife — *Liability for funeral expenses.*] — A husband is liable for the funeral expenses of his wife, and cannot claim indemnity therefor out of her separate estate. *Constantinides* v. *Welsh*, 15 N. E. Rep. 631, not followed. *In re Sea*, 11 B. C. R. 324, 1 W. L. R. 460.

Execution against goods of husband —*Seizure of crop grown on farm of wife—Claim by wife—Farming operations carried on by her—Interpleader issue.*]—Where a crop is grown on land owned by a married woman, and both herself and her husband reside upon that land, the crop, being the product of her land, *prima facie* belongs to her, and it can only be held to be the husband's when it is shewn that he carried on the farming operations as head of the family or as tenant of the land.—And *held*, on the evidence in this case, that the farm was that of the wife, and the farm operations were conducted by her; that her husband had no part in the conduct of the business or the management of the farm; and that the crop, therefore, belonged to the wife, and was not eligible under the executions of creditors of the husband. *Moose Mountain Lumber & Hardware Co.* v. *Hunter* (1910), 13 W. L. R. 561, 3 Sask. L. R. 89.

Funeral expenses.] — Under the circumstances of this case, the separate estate of a married woman was made liable for her funeral expenses. *In re Gibbons*, 19 C. L. T. 346, 31 O. R. 252.

Joint purchase of land by wife and another person — *Possession — Principal and agent—Account — Agency of husband—Partnership.*]—Where a person purchases immovable property jointly with a married woman, and leaves her in possession of it, the relation of principal and agent is not thereby established between them. So, if the husband of the joint purchaser assumes the administration of the property, he is solely responsible as agent, and no action to account as such lies against the wife:—*Quære*, would an action *pro socio* lie against her? *Marson* v. *Martin*, 28 Que. S. C. 539.

Joint sureties *for debt of third parties—Liability of wife — Lack of independent advice.*] — The defendant's husband and wife were guarantors for L. of the price of a machine purchased by L. from plaintiffs:—*Held*, that *Cox* v. *Adams* and *Stuart* v. *Bank of Montreal* do not apply here, the wife being not a guarantor for her husband, but for a third party. The husband had no proprietary interest in the machine. Judgment against defendants. *Sawyer-Massey Co.* v. *Hodgson*, 13 O. W. R. 980.

Judgment against married woman— *Payable out of separate estate—Proceeds of insurance policy on life of husband—Trust in favour of wife.*]—The defendant judgment debtor was named as sole beneficiary in the contract of insurance upon the life of her husband, and s. 159 of the Insurance Act, R.

S. O. 1897 c. 103, in such cases enacts that "such contract shall (subject to the right of the assured to apportion or alter as hereinafter enacted) create a trust in favour of the said beneficiary or beneficiaries, according to the intent so expressed or declared; and, so long as any object of the trust remains, the money payable under the contract shall not be subject to the control of the assured," etc.: —*Held*, the effect of this section was to create a statutory trust of the money payable under the policy in favour of the wife without restraint upon anticipation, but subject to be defeated upon the happening of either of two contingencies, the wife predeceasing her husband, or the revocation of her appointment as beneficiary and appointment of a child or children in her place as beneficiary under s. 160 of the Insurance Act. Neither of these contingencies happened, and upon the death of the husband, the absolute right to the money became vested in the wife. Her original interest in the trust was separate property within the contemplation of the Married Women's Property Act, and it necessarily follows that the fruits of the trust must also be regarded as separate property, and as such liable to satisfy the judgment obtained by plaintiffs. *Doull* v. *Doelle*, 4 O. W. R. 525, 5 O. W. R. 238, 253, 413, 6 O. W. R. 39, 10 O. L. R. 411.

Judgment against wife for non-appearance to writ—Application to set aside —Imperial and provincial (P.E.I.) Married Women's Property Acts. *Wright* v. *Sherren*, 4 E. L. R. 153.

Land acquired by wife — Separate property—Seizure of crops by execution creditor of husband—Work done by husband on land. *Harvey* v. *Silzer* (N.W.T.), 1 W. L. R. 360.

Liability for debts of husband —*Execution of judgment — Registry laws—Real Property Act—Married Woman's Act, R. S. M. 1892 c. 95—Conveyance during coverture.*] —Where land was transferred, as a gift, to a married woman by her husband, during the time that the Married Woman's Act, R. S. M. 1892 c. 95, was in force, the husband being then solvent, and a certificate of title therefor issued in her name under the provisions of the Manitoba Real Property Act:—*Held*, that the beneficial as well as the legal interest in the land vested in her for her separate use, and neither the land nor its proceeds could be taken in execution for debts of the husband subsequently incurred, notwithstanding the provisions of s. 2 of the Married Woman's Act respecting property received by a married woman from her husband during coverture.—Judgment of the Court of Appeal for Manitoba in *Douglas* v. *Fraser*, 17 Man. L. R. 439, 7 W. L. R. 584 (see *post*, 4), reversing judgment of Mathers, J., 6 W. L. R. 244, affirmed. *Fraser* v. *Douglas*, 40 S. C. R. 384.

Marriage before 1859—Right of wife to dispose by will of property acquired after marriage. *Jordan* v. *Frogley*, 8 O. W. R. 265.

Marriage celebrated in Rhode Island —*Sale — Property of others — Document of title—Storage receipt—C. C. 1487, 1745.*]—A woman married according to the laws of the State of Rhode Island, U.S.A., is separate as to property in the province of Quebec.—A receipt given by the proprietor of a warehouse for household furniture stored therein is not a document of title within the meaning of the law and Art. 1745 C. C., and the property therein cannot be transferred by endorsement. —A husband has no right to sell the household furniture and effects, the property of his wife separate as to property, without his wife's authorisation. *St. George* v. *Lareau & Rochon* (1910), 16 R. L. n. s. 226.

Married Woman's Property Act (B.C.)—Summary application for delivery up of title deeds—Land Registry Act Amendment Act (B.C.), 1905, s. 46. *Re Mellor* (B.C.), 2 W. L. R. 17.

Married Woman's Property Act —Separate business—Notice—Action by wife —Debt due by husband—Set-off—Principal and agent. *Hirtle* v. *King* (N.S.), 6 E. L. R. 573.

Married Woman's Property Act, 1895—*Mortgage by married woman prior to—Purchaser—Consent of husband — Acknowledgment—Ejectment — Presumption — Evidence.*]—A purchaser under a mortgage of the property of a married woman, executed by her while living with her husband prior to the Married Woman's Property Act of 1895, 58 V. c. 24, not appearing to have been executed with the consent of her husband, and not acknowledged as the statute requires, can not maintain ejectment against the mortgagor.—In the absence of any evidence to the contrary, it will be presumed that a married woman is living with her husband. *Everett* v. *Everett*, 38 N. B. R. 390, 4 E. L. R. 517.

Married woman's separate property —Acknowledgment of execution of deed under 24 V. c. 18—Not necessary since Married Woman's Property Act, 1903—Lower acknowledgment before interested party. *McLeod* v. *Craswell*, 4 E. L. R. 535.

Mortgage by wife to secure loan to husband — *Nullity—Consequent nullity of Security — Principal and surety—Status of surety to invoke nullity.*]—A hypothec given by a married woman upon personal property to secure the payment of a loan made to her husband, in order to enable the latter to make a composition with his creditors, among whom is the lender, is null and void, being in contravention of Art. 1301, C. C.—2. Such nullity being absolute and *d'ordre public*, involves the nullity of everything which is attached to it; and in this case, the security given to guarantee the obligation of the wife is a subsidiary obligation, depending upon the existence of the principal obligation, and consequently the nullity of the principal obligation necessarily involves the nullity of the security.—3. An obligation prohibited by law is not a natural obligation, and it cannot be the subject of security.—4. Such nullity, being *d'ordre public*, is inherent in the debt; it is an infirmity in the debt which the surety may invoke as well as the wife herself. *Sutherland* v. *Bérard*, 13 Que. K. B. 128.

Mortgage for benefit of husband — *Burden of proof.*]—By the true construction of Art. 1301 of the Civil Code of Lower Can-

ada, a wife's mortgage of her separate property is void, both as to the debt contracted and as to the disposition, if it is in any way for her husband's purposes. Ignorance on the part of the lender that the money was borrowed for the husband's purposes is of no avail, and the burden is on him to prove that it was not so borrowed. *Judgment in Trust and Loan Co.* v. *Kerouack*, 12 Que. K. B. 281, affirmed. *Trust and Loan Co. of Canada* v. *Gauthier*, [1904] A. C. 94.

Mortgage given by wife *to secure husband's debt — Wife acting without independent advice.*]—Plaintiffs agreed to advance $4,000 to the male defendant if his wife joined in executing a promissory note and give as collateral security a mortgage on her house. Mortgage held void as given on importunity of husband and without independent advice. *Euclid Avenue Trusts Co.* v. *Hohs*, 13 O. W. R. 1050.

N. S. Married Women's Property Act *—Separate business—Debt due by husband—Set-off—Principal and agent.*]—Action for board of horse. Defendant did not know that plaintiff, a married woman, carried on business, but supposed it was conducted by her husband, who was indebted to him on an accommodation endorsement of the firm of which her husband was a partner. That firm failed and defendant made no claim on the estate because he had agreed with the husband that his horse should be boarded at the stable: — *Held*, that plaintiff cannot recover without the note being set-off. The filing of the husband's consent to his wife's doing business did not help plaintiff in this case. *Hirtle* v. *King*, 6 E. L. R. 573.

Nullity of obligation of a married woman, separated as to property, for her husband's debts — *A first illegal promissory note — Illegality of a renewal note signed by the husband pretending to act as his wife's attorney.*]—C. C. 1301. A husband, attorney for his wife separate as to property, exceeds the powers of his mandate when he signs, in the name of his wife, a renewal of a promissory note, when the original note had been also signed without the knowledge of the wife for a debt of the husband. *Deserres* v. *Fortier*, 16 R. de J. 236.

Obligations undertaken for husband *—Promissory notes — Burden of proof—Presumption.*]—Although the obligation of the wife who is separate as to property, when she binds herself with her husband, is not null if the obligation be for her own business and profit, the burden of proof is on the creditor to establish that it was for her business and profit, and in the absence of such proof the presumption is that she bound herself for her husband. 2. The wife separate as to property will not be condemned on promissory notes signed by her, which were either renewals of notes made and signed by her husband alone, or which were given for goods furnished on the husband's order, and charged to him in the books of the creditor. *McClatchie* v. *Gilbert*, 24 Que. S. C. 387.

Ownership of goods in business carried on in wife's name—*Married Woman's Property Act, R. S. M. 1902, c. 106, s. 2 (b) — Profits — Earnings.*]—1. The proceeds of the sale by the husband of a parcel of real estate owned by the wife, though they came into the husband's hands prior to the 21st May, 1900, when it was enacted that all property standing in the name of a married woman on that date should be deemed to be her property until the contrary is shewn, and although the land had been conveyed to her by the husband during coverture, belonged to the wife; for, apart from s. 21 of R. S. M. 1892, c. 95, which provided that a man might make a valid conveyance or transfer of land to his wife without the intervention of a trustee, a husband may make a gift of property to his wife, which property, if the gift be completed, will in equity be considered as her separate property, provided that the husband is at the time in a position financially to make the gift, and does not do it with any intention of defrauding his creditors. *Kent* v. *Kent*, 19 A. R. 352.—2. The profits made in the fur business started with such proceeds and carried on from the first in the wife's name, though managed chiefly by the husband (all the goods required for the business having been sold to her and on her credit only, as the husband had unsatisfied judgments against him), belonged to the wife, and so did all goods purchased out of such profits and put into such business.—*Dominion Loan, etc., Co.* v. *Kilroy*, 14 O. R. 468, followed.—*Ady* v. *Harris*, 9 Man. L. R. 127, and other "farm" cases distinguished.—3. Such profits are protected for the married woman by the definition of the word "property" in s.-s. (*b*) of s. 2 of R. S. M. 1902, c. 106, as meaning "any real or personal property of every kind and description, whether acquired before or after the commencement of this Act, and shall include the rents, issues, and profits of any such real or personal property, and by s. 5 of the same Act; and such protection is not taken away by the further clause in s.-s. (*b*) reading—"and includes also . . . . all wages, earnings, money, and property gained or acquired by a married woman in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, and in which her husband has no proprietary interest," although it was admitted that the business was not carried on by the wife separately from her husband. The word "profits" as used in those sections should be held to cover gains arising from a combination of skill or work with the earning property or capital, as well as those arising only from investments without such combination. Judgment of Mathers, J., 6 W. L. R. 244, reversed. *Douglas* v. *Fraser*, 7 W. L. R. 584, 17 Man. L. R. 439. Affirmed, 40 S. C. R. 584, *ante* 1.

Personal property — *Jus disponendi — Matrimonial domicil — Conflict of laws.*]—The law of the matrimonial domicil regulates the rights of the husband and wife as to the movable property of either of them:—*Held*, therefore, where the matrimonial domicil was Ontario, that personal property which by the law of Ontario was the separate property of the wife, remained such on the removal of the parties to the Territories; and furthermore was subject to the provisions of the Ordinances of the Territorial Legislature, subsequently passed, relating to the personal property of married women. *Brooks* v. *Brooks*, 2 Terr. L. R. 289.

Purchases by husband in names of wife and daughter — *Advances—Account by mandatory before action—Gifts.*]—The appellant, after his wife's death, sued his daughter to recover moneys which he alleged that he had advanced to purchase properties in Quebec to which she was entitled either in her own right or under his wife's will:—*Held*, on the evidence, that he had failed to establish his claim. *Quære*, whether advances made as his wife's mandatory in charge of her estate could be recovered in a suit brought before he had rendered an account of rents and moneys received in that character as well as disbursements.—*Quære*, also, if the advances were in the nature of gifts, whether those gifts were valid by the Quebec law or by s. 6, C. C. P. *Eddy* v. *Eddy*, [1900] A. C. 299.

Purchase of land by married woman —*Declaration of trust in favour of infant children — Absence of authorisation of husband —Nullity—Acceptance by guardian of infants —Claims of registered incumbrances.*]—A declaration by a married woman, guardian of her infant children, that an immovable sold to her was bought with their money and is their property, is equivalent to an alienation, and, if made without the authorisation of her husband, is radically void. It is also without effect as regards the claims of encumbrancers upon the immovable, duly registered, notwithstanding the acceptance of it for the minors by a guardian authorised by the Judge on the advice of a family council. *Martin* v. *Hébert and Tourneur*, 35 Que. S. C. 148.

Rents and profits — *Sale of land — Necessity for concurrence of husband.*]—A married woman married before the commencement of the Married Women's Property Act, 58 V. c. 24, is entitled under s. 4 (1) to the rents and profits of her real estate during her life, but may not, without the concurrence of her husband, dispose of her real estate so as to deprive the husband of his tenancy by the curtesy. *Debury* v. *Debury*, 21 C. L. T. 510, 2 N. Eq. R. 278.

Sale of — *Payment of husband's debt — Nullity — Reimbursement of purchaser.*]—A married woman, separate as to property, may sell one of her immovables to pay the debt of her husband—in this case to secure the liberation of her husband then under arrest at the suit of one of his creditors—and such sale does not fall under the prohibition of Art. 1301, C. C.—2. In any event, even if the wife could assert the nullity of the sale, she could succeed in the action only upon offering to reimburse the purchaser the amount which he has paid her, over and above the price of sale, to extinguish her personal debt. *De Kerouack* v. *Gauthier*, 20 Que. S. C. 320.

Security for husband's debt — *Undue influence of husband — Wife relieving husband's financial distress — Duty of solicitor acting for wife—Wife's right to relief in equity.*]—Plaintiff, a confirmed invalid, acting in passive obedience to her husband's directions, having no means of forming independent judgment, surrendered to defendant bank all her extensive estate real and personal, for the purpose of relieving her husband's financial distress. The solicitor who acted in all or most of the transactions, was solicitor for the defendant bank and also for the husband. Plaintiff brought action, against defendant bank, to set aside the above transactions.—Privy Council *held*, that in transactions between husband and wife the burden of proving undue influence lies upon those who allege it. — *Nedby* v. *Nedby*, 21 L. J. Ch. 446, 5 De G. & Sm. 377, approved.—That in transactions between husband and wife the husband's solicitor owes a duty to the wife, where her interests are concerned, to advise her and place her position and the consequences of what she is doing fully and plainly before her. If she rejects his intervention, he ought to insist upon the wife being separately advised.—*Held*, further, that the above transactions could not stand, the wife being in fact wholly under the husband's influence and the solicitor in a position in which he could not advise her fairly.—*Cox* v. *Adams* (1904), 35 S. C. R. 393, disapproved, in so far as it held that no transaction between husband and wife could be upheld unless it was shewn that the wife had had independent advice.—Judgment of Supreme Court of Canada, 41 S. C. R. 516, affirmed, judgment of Court of Appeal for Ontario, 17 O. L. R. 436, 12 O. W. R. 958, and of Mabee, J., at trial, 10 O. W. R. 10, 32, set aside. *Bank of Montreal* v. *Stuart*, C. R., [1911] A. C. 1, 80 L. J. P. C. 75, [1911] A. C. 120, 27 T. L. R. 117, 103 L. T. R. 641, 31 C. L. T. 185.

Separate business — *Consent of husband—Certificate—Place of doing business.*]—Under the provisions of R. S. N. S., 5th ser., c. 94, s. 53, when a married woman does, or proposes to do, business on her separate account, in addition to filing her husband's consent thereto, she is to record a certificate in writing setting forth her name and that of her husband, the nature of the business, and the place where it is, or is proposed to be carried on, and giving, "if practicable," the street and the number on the street; and where the nature of the business, or the place where it is carried on, is changed, a new certificate shall be filed accordingly. The plaintiff, who carried on business as a grocer in a city, under a license from her husband, enabling her to carry on such business, filed a certificate giving the particulars required by the Act, except as to the street and the number on the street, as to which it was set out that it was not practicable to do so, as the premises had not yet been selected. Goods claimed by the plaintiff as her separate property having been levied upon by the defendant, as sheriff of the county, under a writ of execution for the husband's debt:—*Held*, that it was incumbent upon the plaintiff to select the premises before filing her certificate, the provision being intended to apply not only to towns having streets named and numbered, but to towns which had not streets so named and numbered:—*Held*, also, that the words "the place" meant the place in the city, town, or municipality where it was proposed to do the business, and that where the place was changed a new certificate must be recorded. *Pearce* v. *Archibald*, 34 N. S. R. 543.

Separate estate of wife — *Restraint on alienation—Power to dispose of by will.*]—Where a restraint on alienation is imposed

in connection with the property of a married woman, no conveyance or contract can prevail to deprive her of such property, but the restraint does not extend beyond such transactions as would have the effect of transmitting that property in her lifetime. It does not, therefore, apply to the provisions of her will. *Borden* v. *James*, 40 N. S. R. 48.

Separation of property — *Judgment—Intervention of creditor.*]—A creditor may intervene in an action for separation of matrimonial property, even after the pronouncing of judgment granting the separation. *Gauthier* v. *Gendron*, 9 Que. P. R. 252.

Settlement — *Creditor of husband.*] — The claimant was married in England. By her marriage settlement, there were settled upon her, to her separate use, certain moneys over which she was given a power of appointment; she exercised the power by appointing a part to her own separate use. This was paid or sent to her in the Territories. With it she bought farm stock, which was used on her farm; but it was found as a fact that it was the husband who carried on the farming operations. In the absence of evidence that the husband had constituted himself a trustee for the wife:—*Held*, that the farm stock had become the husband's property, notwithstanding the settlement or the provisions of the N. W. T. Act. *Brittlebank* v. *Gray-Jones*, 1 T. L. R. 70.

Sheriff's sale — *Purchase by husband—Folle enchère.*]—A husband, *séparé en biens*, may validly purchase at a sheriff's sale an immovable belonging to his wife; and, if he fails to pay the price, the usual proceedings for resale may be taken against him. *Buchanan* v. *O'Brien*, 18 Que. S. C. 343.

Wife cannot bring action *without the consent of her husband — Asking the consent of the Court. C. P. 78; C. C. 176, 178, 183.*]—A wife holds her property in common (with her husband); she being neither a trader nor a shop keeper, cannot bring an action without the consent and support of her husband; the Court grants her this permission only in case of the refusal or incapacity of her husband. *O'Rourke* v. *Robertson* (1909), 10 Que. P. R. 342.

Wife common as to property *and judicially authorised to recover damages on account of false arrest; right of the husband as chief of community of property.*]—Wife common as to property, even judicially authorised, has no right of action to recover damages suffered by her on account of having been falsely arrested; such a claim, if it exists, being a movable debt, belongs to the community, and can be recovered by husband only as chief of said community. *Braceau* v. *Levitt* (1910), 16 Que. R. de J. 307.

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10. TRANSACTIONS BETWEEN HUSBAND AND WIFE.

Abandonment of wife — *Replevin of household goods.*]—In a *saisie-revendication* the plaintiff will not be put in possession of the goods seized when it appears that they are in the possession of the intervenant, his wife, whom he has abandoned, and that the place where the effects are is the domicil of the husband and wife, where the intervenant lives with her children. *Beauchamp* v. *Beauchamp*, 5 Que. P. R. 307.

Action by husband against wife.]—In an action by a husband against his wife for a declaration that certain real and personal property claimed by both parties, belonged to him, and for an injunction to restrain his wife from disposing of the same:—*Held*, that a husband can sue his wife in respect of both real and personal property as if she were a *feme sole*. *Semble*, the law in the Territories is practically the same as that in England as to suits between husband and wife, except that in the Territories one may sue the other in respect of torts, while in England this is not so. *England* v. *England*, 5 Terr. L. R. 204.

Action by husband against wife's executor—Moneys of husband deposited in bank in name of wife—Claim for recovery—Corroboration — Set-off — Funeral and other expenses—Costs. *Leggatt* v. *Quigley*, 11 O. W. R. 735.

Action by wife against husband for necessaries supplied to children. *Park* v. *Park* (B.C.), 3 W. L. R. 281.

Agreement between husband and wife—*Changes made in clauses of their marriage contract.*]—An agreement between husband and wife, which changes certain clauses in their marriage contract, even if made in the course of a settlement to put an end to an action for separation as to bed and board, is null. *Odell & Gregory* (1910), 19 Que. K. B. 364.

Ante-nuptial marriage contract — *Public policy.*]—Before plaintiff, who was a widow, married defendant, an ante-nuptial contract was made between the parties which, among other things, provided that if they ceased to cohabit, the trust property should be sold, the proceeds to be divided equally between them. Plaintiff having left her husband brought this action to enforce said contract. Action dismissed, the contract being against public policy. *Nelson* v. *Nelson* (1909), 12 W. L. R. 150.

Business carried on by husband in firm name.]—B. Brothers made an assignment for the benefit of their creditors. With the exempt goods a new business was started under the name of B. Brothers and Co. The wife of one member of the old firm now claimed that it was her business, and that her husband managed it for her. The new name was never registered. She put no money in the business nor took any part in it. In an interpleader issue it was held that execution creditors of her husband were entitled to hold these goods under their execution. *Burton* v. *Merchants Bank* (1909), 12 W. L. R. 239, 3 Sask. L. R. 111.

Business carried on by husband in his own name alleged to be property of wife — Seizure of plant and stock of business under execution against husband—

Claim by wife — Interpleader issue — Evidence—Married woman's separate estate — Statutes. *Davison* v. *Schwartz* (Y.T.), 7 W. L. R. 338, 8 W. L. R. 359.

Business of wife — *Services of husband —Implied contract to remunerate—Creditor of husband—Attachment of supposed salary.*] —There is nothing to prevent a husband from giving his time and his services gratuitously for the benefit of a business carried on by his wife. From his so doing the relation of creditor and debtor does not arise, and the creditors of the husband have no right to attach money in the hands of the wife as due to the husband for his services. *Frank* v. *Lafrance and Riopelle*, 32 Que. S. C. 438.

Business of wife carried on in name of husband — *Judgment against husband — Seizure of business assets — Estoppel.*]—A married woman who, without registration, for years carries on business under the name of her husband, whom she allows to hire employees and to deal with them and the public as if he were the owner of her establishment, who allows a suit to be brought and judgment to be recovered against him by an employee for damages caused by an injury for which she is liable, is estopped from opposing the seizure, under such judgment, of the movables in the establishment in question. *Cuillerier* v. *Roy*, 30 Que. S. C. 321.

Contract of wife with husband — *Nullity — Creditor — Notice.*]—A contract whereby a wife separate as to property binds herself with her husband, is, as regards her, a nullity, and the party who knowingly acquires such an obligation cannot claim to be a creditor in good faith. *Dagneau* v. *Decarie*, 8 Que. P. R. 141.

Conveyance before marriage — *Fraud on marital rights—Testamentary dispositions —Wills Act.*]— The plaintiff was engaged to be married to J. C. A. in November, 1900. The marriage took place on the 4th December, 1901. The husband died on the 26th January, 1902. In August, 1901, the deceased secretly executed a conveyance of all his real estate to the defendant, and this conveyance was not recorded until a few days before the marriage. Late in November, 1901, the deceased also assigned his securities to the defendant. The plaintiff had no knowledge of these conveyances at the time of the marriage, and only learned definitely about them after her husband's death. She thereupon brought an action to have the instruments set aside, (1) as having been made in fraud of her marital rights, and (2) as not having complied with the provisions of the Wills Act. The trial Judge found that the transfers were made with the distinct object of preventing the plaintiff from enjoying any portion of her husband's estate after his death, and that the deceased wilfully concealed from his intended wife before and after their marriage the fact that he had stripped himself of his property. The Judge decided, however, that the instruments were not testamentary, and that the plaintiff was not entitled to the relief claimed; — *Held*, that conversations with the deceased were admissible, not to derogate from the transfers, but to shew the design of the deceased. Under English law the wife is not entitled to relief against conveyances made in fraud of her marital rights, though the rule is different in the United States. There was nothing to indicate that the operation of the instruments was to be suspended until the grantor's death. *Archibald* v. *Archibald*, 23 C. L. T. 121.

Conveyance of equity in real estate by husband to wife — Implied trust — Subsequent assignment by husband for benefit of creditors—Sale by mortgagee—Wife entitled to surplus as against assignee. *Smith* v. *Wambolt*, 2 E. L. R. 271.

Creditor of husband taking security from wife — Independent advice — Onus. *Vanluven* v. *Scott*, 3 O. W. R. 11.

Crops grown on wife's land — *Seizure under execution against husband—Farming operations carried on by wife — Status of married woman—Married Woman's Property Act.*]—The sheriff seized a quantity of wheat grown on land the property of the claimant, a married woman, under executions against her husband. The latter was a farmer and owned a quarter section adjoining that of the claimant. It appeared in evidence that the claimant carried on the farming operations on her own land, hiring the necessary help, and that she purchased the seed grain personally. She consulted her husband in regard to the working of the farm, and he assisted in working the place; but it was shewn that the men hired by her did more work for the husband on his farm than was done by him on the claimant's farm. On trial of an interpleader issue to determine the ownership of the grain:—*Held*, that as, under the Married Woman's Property Act (c. 19 of 1907), the claimant was entitled to hold and deal with real and personal property as if she were a *feme sole*, and as it was not shewn that the husband was carrying on farming operations on her land as head of the household or lessee, she was entitled to the crop grown on her land. *Lindsay* v. *Morrow*, 1 Sask. L. R. 516, 9 W. L. R. 619.

Custody of children — *Renunciation by father—Illegality of contract—Public policy.*] —An agreement between a husband and wife whereby the former contracts himself out of his right to the custody of the children of the marriage, is against the policy of the law, and will not be enforced. *Barrett* v. *Barrett*, 4 W. L. R. 7, 6 Terr. L. R. 274.

Debt — *Interest—Prescription.*] — Notwithstanding Art. 2233, C. C., the prescription of five years (Arts. 2250, 2267, C. C.), applies to the interest upon a debt between husband and wife. *Picard* v. *L'Hopital Général de Québec*, 26 Que. S. C. 159.

Dower — *Dispensing with release—Husband and wife living apart—Alimony—Release.*]—A husband whose wife has been living apart from him for two years, and who for valuable consideration has released and discharged him from all claims for alimony present and future, is not entitled, under s. 12 of R. S. O. 1897, c. 164, to an order dispensing with the concurrence of his wife to bar dower in a conveyance, for, although barred by contract from claiming, she cannot be said to be living apart "under such

circumstances as by law disentitle her to alimony." *Re Tolhurst*, 12 O. L. R. 45, 7 O. W. R. 780.

Dower — *Judgment recovered before marriage.*] — This was an action to recover dower. J. D. C. was seized in fee of the land. In 1832, M. B. recovered a judgment against him. In 1846, he married plaintiff. In 1850, the land was sold under the judgment and bought by S., who conveyed to defendant. J. D. C. afterwards died and plaintiff, as his widow, brought this action for dower, contending that the judgment did not create such a lien on the lands as to prevent her right of dower attaching: —*Held*, Peters and Hensley, JJ., that the judgment created a lien, even by the Common Law of P. E. Island, and that the dower did not attach. *Cantelo* v. *Beales* (1880), 2 P. E. I. R. 292.

Execution against husband—*Business carried on in wife's name—Simulation.*] — The opposant, the wife of the defendant, had registered a notice that she was carrying on business as a decorative artist (which was the defendant's business) under the firm name of F. E. M. & Co., and in this capacity she maintained an opposition to a seizure of goods at the place where the business was carried on. It was proved that at the time of the registration the opposant had no money and that she had since acquired none by her own work, and that the goods seized had been bought with the moneys earned by the work of the defendant, who carried on the business under a power of attorney from his wife:—*Held*, that the alleged firm was simply a *prête-nom* for the defendant, who was the true owner of the goods seized, and that the opposition should be dismissed. *Décary* v. *Meloche*, 21 Que. S. C. 486.

Execution against husband — *Opposition by wife — Usufruct — Marriage contract — Subsequently acquired goods—Evidence.*]—A wife, being the usufructuary of the furniture of a house, has a right to make an opposition to the sale of the furniture where it is demanded by the creditors of the husband.—2. This usufruct ceases, however, with the disappearance of the goods, and does not extend to furniture bought in renewal of that which was subject to the usufruct and has been worn out by use.—3. An opposition to the sale of a piano, which the opposant alleges was given to her, will be dismissed if the evidence shews that the piano was bought by the husband of the opposant, who gave her in payment therefor an old piano, and that the opposant lent to her husband the money necessary to pay the difference in price.—4. It is for the opposant, who alleges that she has bought goods of which she claims the possession, to prove that the money which went to pay for such goods was her own; if she has mixed money which came to her from her relatives with that coming from her husband, she cannot maintain that the goods are not the property of her husband. *Walker* v. *Massey*, 5 Que. P. R. 369.

Gift by contract of marriage — *Furniture—Husband and wife—C. C. 755, 756, 777, 1257.*]—1. A gift made by a husband to his future wife in a contract of marriage in the following terms: "The sum of $2,500 which he promises and obliges himself to pay to the future wife within ten years from this date by providing furniture and other movables to that extent for the use and ornamentation of their common domicil; it being expressly agreed that the future husband will be liberated from this obligation to the extent of the value of such furniture and other household effects as he may require and place in the common domicil of the parties. All and every the articles of household furniture and other movable effects which may be acquired by the future husband for use in or for the ornamentation of the common domicil of the parties in addition to and over and above the said sum of two thousand five hundred dollars. The sum of five thousand dollars, unto the future wife, as her absolute property, subject to this condition, that should she predecease the future husband the said gifts shall return to the future husband and be his absolute property, without the heirs of the future wife having any rights therein or claim thereto," does not create in favour of the wife, as to the furniture and movables acquired by the husband, anything else than a gift of future property in contemplation of death.—2. The furniture and movable effects in question remain the property of the husband until his death. *Von Eberts* v. *Allan* (1910), 16 R. L., n.s. (Que.) 308.

Gift from husband — *Change of possession — Execution creditor — Seizure in conjugal domicil.*]—Interpleader issue. The defendant purchased certain pictures, and, bringing them home, handed them to his wife, telling her he gave them to her. She had one framed in a frame given her by her mother; and all three were hung up in the house occupied by her and her husband. Some six or seven years afterwards an execution creditor of the defendant caused the sheriff to levy on these pictures:—*Held*, that since the Married Woman's Property Act, 1884, R. S. O. 1897, c. 163, s. 3, a married woman is under no disability as to receiving and holding personal as well as real property by direct gift or transfer from her husband; and in this case the subsequent possession of the pictures was the wife's although the house was occupied by her husband and herself:—*Held*, also, that the effect of s.-s. 4 of s. 5 of R. S. O. 1897, c. 163, whereby it is enacted that a married woman married since 4th March, 1889, may hold her property free from the debts or control of her husband, "but this sub-section shall not extend to any property received by a married woman from her husband during coverture," is not to make property received by the wife from the husband during marriage liable to the husband's debts. This sub-section must be read in connection with s. 3, s.-s. 1, and a wife is placed precisely in the position of a *feme sole* with regard to property transferred to her by her husband during coverture; and therefore she can hold the property against his creditors unless the transfer is made for the purpose of defeating them; and there was no evidence of such purpose here. *Shuttleworth* v. *McGilliveray*, 23 C. L. T. 153, 5 O. L. R. 536, 2 O. W. R. 250.

Gratuitous services by insolvent husband — *Rights of creditors—Attachment of debts.*]—An insolvent husband may lawfully give his services gratuitously to his wife, separate as to property, for the carrying on

of her business, and his creditors have no right to claim from her, by garnishment, the value of such services. Cf. *Frank* v. *Lafranc and Riopelle*, Q. R. 32 S. C. 438. *Excelsior Life Insurance Co.* v. *Désy and Couts*, 35 Que. S. C. 232.

Husband's authority — *Consorts' residence—Domicil of fact established by wife alone—Husband's right to be admitted and to live therein—Husband's remedy when wife refuses to allow him to live with her.*]—The consort's residence is subject to the provisions of the law contained in Arts. 173, 174 and 175 C. C., from which the husband's authority springs. Paragraph 1 of Art. 83 C. C. which prescribes one domicil for the consorts applies equally to a domicil of fact and to the legal domicil. Hence, the wife separate as to property who, in her husband's absence, opens and conducts a boarding-house, where she has her domicil of fact, thereby establishes a domicil for her husband, who, upon his return, has the right to live there with her, and, in the event of her refusal, to enter and live there with force.—In addition, the husband, in case the wife refuses to submit has a remedy by action to have it declared that his wife has lost and forfeited all her rights to gifts of movable and immovable property provided for in the marriage contract and have her condemned to pay him the value thereof. *Robinson* v. *Gore* (1909), 38 Que. S. C. 97.

Judgment against husband—*Property standing in name of wife — Fraudulent scheme—Fraud on creditors—Liquor license—Asset—Action to set aside fraudulent conveyance—Parties — Judgment debtor—Trustee—Cestuis que trust — Gift — Evidence — Earnings in business—False representations—Action brought against wrong person—Depositions on examination of judgment debtor — Admissibility.*]—Where a conveyance is attacked as fraudulent under 13 Eliz. c. 5, it must be shewn that debt of the grantor was in existence at the time of the conveyance, or that a scheme had then been entered into to defraud possible subsequent creditors. A license, under the Liquor License Ordinance, is not an asset available to creditors, and the fact that it stood in the name of the husband (the grantor), while the property and business was in the name of the wife, is not a badge of fraud.—To constitute a fraudulent scheme on creditors, the debts anticipated must be such as would probably arise out of the conduct of the business.—*Semble*, (*a*) that in an action to set aside a fraudulent conveyance the grantor is a necessary party; (*b*) that in an action to declare a party a trustee for another person the *cestui que trust* is a necessary party:—*Held*, that, in the absence of fraud, a husband can make a valid gift or gifts to his wife, from time to time, of the earnings and profits of a business afterwards claimed by the wife as her separate estate, although the husband may have been allowed to interfere in the management of the business.—*Held*, that an action is not maintainable based on alleged false representations whereby a person is induced to sue the wrong defendant, and, for the time being, to forego his remedy against the party really liable. There is no precedent for such an action.—*Held*, that an examination of a judgment debtor under Rule 380 cannot be given in evidence against a third party (even an alleged transferee from the judgment debtor), who was not present, and had no opportunity of cross-examining, notwithstanding s.-s. (3). *Clinton* v. *Sellars*, 7 W. L. R. 615, 1 Alta. L. R. 135.

Land purchased by husband — Conveyance taken in name of wife — Gift or settlement—Intention — Evidence—Improvidence—Undue influence—Want of independent advice—Reformation of conveyance — Intention of settlor—Life estate. *Jarvis* v. *Jarvis*, 8 O. W. R. 902, 10 O. W. R. 831.

Lease of husband's property *made by wife—Action by wife for rent—Amendment on trial by joining husband as plaintiff — Jurisdiction to make amendment—Practice.*]—Action by wife for rent and for goods sold and delivered. At trial it appeared that real and personal property belonged to her husband then living:—*Held*, on appeal, that there was no power under P. E. I. C. L. P. Act to add husband as a plaintiff and nonsuit entered. *Mooney* v. *McDonald*, 7 E. L. R. 221.

Loan inter se — *Bona fides—Prohibition of Art. 1265, C. C.—Husband acting as agent of wife—Rights and remedies.*]—The prohibition of Art. 1265, C. C., against a husband or wife during the marriage advantaging the other by an act *inter vivos* forbids every transaction whereby one advantages or enriches the other to his or her own detriment, or to the decrease of his or her estate, but it does not hinder one from borrowing money from the other in good faith, and a loan so made imports a valid contract to repay the sum borrowed.—2. The fact that one of them has lent money to the other, in the absence of evidence indicating fraud, cannot taint the transaction with fraud as having been made in contravention of the prohibition of Art. 1265.—3. The law does not forbid the husband to act gratuitously as the agent of his wife, separate as to property, in the purchase and sale by her of immovables or in the management of her immovables, and purchases so made, when they are true and actual, and do not withdraw anything from the property of the husband to his detriment or that of his creditors, do not come under the prohibition of Art. 1265.—4. If the husband or wife has illegally benefited the other during the marriage, what has been so given may be recovered; if it is an immovable that has been given, it may be retaken; but when it is money, the husband or wife and his or her heirs and assigns have against the other, or his or her heirs only an action for restitution of the sum given. *Dery* v. *Paradis*, 21 C. L. T. 47, 10 Que. K. B. 227.

Loan or gift—*Statute of Limitations — Executors and administrators—Right of retainer—Devolution of Estates Act.*]—In 1876 Mary Starr advanced by way of loan or gift to her husband the purchase money of certain land, which was accordingly conveyed to him. On his death in 1893 he devised the land to Mary Starr and one of his sons in equal shares. In 1901 she obtained an order for partition or sale of so much of the land as had been theretofore sold, and a sale of such residue of the land being made, she filed a claim upon the proceeds as a creditor for the amount originally advanced by her to purchase the land as above mentioned:—*Held*, that, even assuming that such money

had been advanced by her by way of loan, her claim was barred by Statute of Limitations. There is no reason why the Statute of Limitations should not be applied to a claim by a wife against her husband to recover a loan from him, in the same way as if she was not his wife.—*Held*, also, that, though she was executrix under the will of her husband, she had no longer any right of retainer in respect of her alleged debt, inasmuch as by her own acts, that is, first by registering no claim within the twelve months allowed for this purpose, and then treating the property as vested in the defendants, the heirs of her co-devisee, who had previously died, she put the assets out of her own possession and control. *In re Starr, Starr* v. *Starr* 21 C. L. T. 592, 2 O. L. R. 762.

Loan to wife — *Benefit of husband — Hypothecation of wife's property—Void contract—Duty of lender to see to application.*]—Where a loan is obtained by a married woman separated as to property from her husband, with hypothecation of her real estate, it is sufficient to shew that the money, although handed to her in the form of a cheque payable to her order, was not used by her, but was given to her husband, in order to bring the contract within the prohibition of Art. 1301, C. C.—2. The law does not require that the person from whom a wife obtains a loan should know that it is for the benefit and use of her husband. It is for the lender to exercise proper caution, and to see to the due employment of the money for the purposes of the wife. Even in the case of a deception by the wife, as to the use to which the money is to be applied, the contract of loan is nevertheless null. *Trust and Loan Co.* v. *Kerouack*, 12 Que K. B. 281.

Loan to wife — *Benefit of husband — Security by sale of land with right of redemption—Void contract—Knowledge of lender.*]—A loan contracted by a wife separate as to property—the security for the loan being given in the form of a sale with right of redemption of her immovable property, instead of in the form of a hypothecation—is null and void as contrary to the prohibition contained in Art. 1301, C. C., where the proceeds of such loan are to be used, with the knowledge of the lender, for the exclusive benefit of the husband. Judgment in Q. R. 20 S. C. 320, reversed. *Kerouack* v. *Gauthier*, 12 Que. K. B. 295.

Moneys advanced by husband to enable wife to purchase land — *Resulting trust—Evidence—Sale by wife—Notice by husband to purchaser—Payment to wife after notice—Recovery by husband—Lien of wife for moneys of her own used in purchasing property.*]—In an action by a husband against his wife for a declaration of trust, the evidence shewed that the wife had received from the husband the money for the purchase of a homestead, the conveyance of which was taken in the wife's name. A purchaser from her received notice that she was not a widow, and, notwithstanding that, before completing the agreement for sale, he received notice from the husband's solicitors warning him, he did complete it:—*Held*, that there was a resulting trust in favour of the husband. — A purchaser, in the foregoing circumstances, proceeded to anticipate the agreement for sale by accepting an immediate conveyance:—*Held*, that the plaintiff should recover from the purchaser the amount of purchase money which he had paid to secure such immediate conveyance. *Dudgeon* v. *Dudgeon and Parsons*, 6 W. L. R. 346, 13 B. C. R. 179.

Moneys borrowed on insurance policy on life of husband of which wife is beneficiary — Separate property of wife—Business of wife—Interest of husband—Moneys derived from business — Execution against husband as member of partnership—Property liable to satisfy execution—Declaratory judgment—Inquiry—Reference—Costs. *Hagaboom* v. *Hill*, 8 O. W. R. 352, 815, 979.

Moneys paid for release of inchoate right to dower — *C. S. N. B. c. 78, s. 4 (2)—Fraud on husband's creditors—Intent.*]—Money paid to a wife by her husband to secure her execution of a mortgage of lands of which she is dowable, under an agreement that she is to receive half of the money advanced, is not money received by the wife from her husband during coverture, within the meaning of the qualifying part of s.-s. 2 of s. 4 of c. 78, C. S. N. B. 1903, and if it is an honest and *bona fide* transaction, entered into in good faith, cannot be impeached as a fraud against the husband's creditors. *Cormier* v. *Arsineau*, 3 E. L. R. 203, 38 N. B. R. 44.

Promissory note — *Obligation by wife with husband.*]—A promissory note made by a wife to the order of her husband, and indorsed by him, is not, in the absence of any evidence that the note was signed by the wife for her husband, a contravention of Art. 1301, C. C., as constituting an obligation contracted by the wife with her husband. *Dupuis* v. *McTavish*, 21 Que. S. C. 455.

Promissory note signed by wife *at husband's request—Absence of fraud—Husband acting as agent for bank—Absence of independent advice.*]—Action upon a promissory note made by husband and wife:—*Held*, that husband as agent of bank obtained wife's signature, who had no independent advice. Action dismissed as against wife. *La Banque National* v. *Usher*, 13 O. W. R. 896.

Promissory notes — Transfer of, by husband to wife—Scheme to defeat creditors — Evidence — Declaration that notes exigible under judgment against husband. *Shaw* v. *Dennison* (Man.), 10 W. L. R. 304.

Prospective gift of money by husband to wife — *Attachment by judgment creditor of wife.*]—It is essential to a gift *inter vivos* that the donor should actually divest himself of his ownership in the thing given; and the following clause in a marriage contract does not constitute such gift:—"*En considération dudit futur mariage ledit futur époux fait don à ladite future épouse d'une somme de $800 courant, à prendre sur ses biens les plus apparents, et avant tout autre créancier.*" And such sum cannot be attached in the hands of the husband under a writ of *saisie-arrêt* issued by a creditor upon a judgment against the wife. *Pagé* v. *Beauchamp*, 20 Que S. C. 220.

Purchase of land — *Gift—Presumption — Surrender of leases — Merger — Lien.*]—Freehold property and leaseholds, the reversion in which was vested in the plaintiff's wife by devisee under her father's will, were

purchased by the plaintiff in 1893, while acting as manager of her landed estates, with his own money. The freehold property was conveyed by the vendor to the plaintiff's wife by his directions, and the surrender of leases was to the plaintiff and wife. Under the law at that date a husband was entitled to the rents and profits of his wife's real estate. By s. 4 (1) of the Married Women's Property Act, 1895 (N.B.), real estate belonging to a married woman, not acquired from her husband, is held and may be disposed of by her as a *feme sole*:—*Held*, that the presumption that a purchase by a husband in the name of his wife is intended to be a gift to her was not rebutted by the evidence in the case.—2. That the wife could not alienate the freehold estates so acquired from her husband, at least during his lifetime.—3. That on the purchase of the leases the estate under them merged in the freehold of the wife, and that she could dispose of the whole estate without the husband's consent, and free of any equity in him for repayment of the purchase or money expended by him in making repairs to the property. *De Bury* v. *De Bury*, 22 C. L. T. 184, 2 N. B. R. 348, 36 N. B. R. 57.

Purchase by wife—Presumption as to title. *Thereau* v. *Sabine*, 1 E. L. R. 100.

Purchase in wife's name — *Gift.*] — Where property purchased by a husband as a home for himself and wife was, by his direction, conveyed to her, so that the title might be in her in case of his death, it was held that a gift was intended, to take effect upon his death if she should survive him. *Evans* v. *Evans*, 26 C. L. T. 386, 3 N. B. Eq. 216.

Purchase of land with husband's money *in wife's name—Gift or trust—Circumstances rebutting presumption of gift.*]—Action for a declaration that defendants, heirs-at-law of A., are trustees of certain lands for plaintiffs, children of the husband of A. by his second wife. It was so declared as the land in question, although the deed had been taken in A.'s name, was paid for with the husband's money. Sale ordered as more beneficial than partition. *Henderson* v. *Henderson*, 7 E. L. R. 218.

Savings deposit.]—Where a husband deposits money with a savings company and caused an account to be opened in the names of himself and his wife jointly, "to be drawn by either or in the event of the death of either to be drawn by the survivor," and it appeared by her evidence, uncontradicted, that money of hers went into the account and that both drew from it indiscriminately:—*Held*, that she was entitled as survivor to the whole fund. *In re Ryan*, 20 C. L. T. 426, 32 O. R. 224.

Separation as to property — *Loan of money by wife to husband—Deposit as security for obligation—Bank simulated deeds—Nullity—Oral evidence—Action—Parties.*]—The delivery to the husband, by his wife, separate as to property, of a cheque, the proceeds of which he deposits in a bank, as collateral security for paper discounted by the bank, is a valid loan, and does not violate the prohibition of Art. 1301, C. C., that the wife shall not bind herself, with or on behalf of her husband, otherwise than on behalf of the community.—The nature of the operation and its validity are not affected by the following declaration, written on the back of the cheque by the manager of the bank: "To guarantee the payment of a draft of $1,027 on Linaburg O. K., this cheque will be valid only as far as Linaburg shall not pay the whole draft, or shall demand a reduction, or shall make a reclamation after having sold the hay."—2. A simulated deed is void and non-existent. Oral evidence is admissible to establish that a sale of land by a husband to the father of his wife and one to her by the heirs of her deceased father, in reality disguise a voluntary transfer by the husband to the wife in violation of Art. 1265, C. C.—3. These deeds may be adjudged void in an action to which the husband and wife are parties, and it is not necessary that the representatives of the wife's deceased father should be brought in. *Augé* v. *La Banque D'Hochelaga*, 34 Que. S. C. 481.

Separation as to property — *Marriage contract—Gift to wife—Earnings—Savings.*]—A wife separate as to property, the donee under the marriage contract of a sum of money payable by her husband on demand, who, for a number of years, receives all his earnings, out of which she is proved to have saved and appropriated an amount exceeding that of the gift, has no further claim therefor upon him or his estate. Any savings, the result of her thrift, economy, and good management, belong to the husband, and can in no manner be the property of the wife, as earnings or otherwise. *Bruneau* v. *Lefaivre*, 34 Que. S. C. 173.

Transfer of promissory notes *by husband to wife—Scheme to defeat creditors.*]—Plaintiffs having judgment against the defendant husband, seized under *fi. fa.* certain promissory notes given by M. to the husband but the renewals were to the defendant's wife. *Held*, that the notes were the husband's, his evidence being uncorroborated, and the property for which they were given, being his. *Shaw* v. *Dennison*, 10 W. L. R. 304.

HYDRAULIC LEASE.

See MINES AND MINERALS.

HYDRAULIC REGULATIONS.

See MINES AND MINERALS.

HYDRAULIC WORK.

See WATER AND WATERCOURSES.

HYDRO-ELECTRIC POWER COMMISSION.

See CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—PLEADING.

HYPOTHEC.

See GIFT — LIEN — MORTGAGE — REGISTRY LAWS—VENDOR AND PURCHASER.

HYPOTHECATION.

See BANKS AND BANKING.

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